Case No: C3/2013/0443

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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
MR JUSTICE BARLING
[2012] CAT 20

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 17th February 2014

Before :

LADY JUSTICE ARDEN
LORD JUSTICE AIKENS
and
LORD JUSTICE VOS

- -

Between :

British Telecommunicatons PLC	**Appellant**
- and -	
Office of Communications, British Sky Broadcasting Ltd, The Football Association Premier League, Virgin Media Inc	**Respondents**

- -

(Transcript of the Handed Down Judgment of
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- -

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Judgment

Lord Justice Aikens :

I. Synopsis

1. There are two issues in this appeal, which concerns Pay TV. The first is whether the Office of Communications ("Ofcom") has jurisdiction under ***section 316*** of the ***Communications Act 2003*** ("the CA 2003") to impose conditions in broadcasting licences of British Sky Broadcasting Limited ("Sky") if, as Ofcom found, "practices" of Sky relating to Pay TV made it appropriate to impose them to ensure "fair and effective competition". The second is whether the Competition Appeal Tribunal ("the CAT") erred in law in the way it disposed of some of the issues that were before it on an appeal from a Statement by Ofcom concerning "practices" of Sky which had led Ofcom to impose conditions in Sky's broadcasting licences.

2. Live television broadcasting of major sporting events such as Premier League football matches is big business. Sky had (at the time with which we are concerned) obtained the right to broadcast live many of these attractive events. It broadcast them to consumers on what OFCOM defined as "core premium sports channels" or "CPSCs" through Sky's own Pay TV network, which is a "digital satellite" broadcast system which now reaches nearly 10 million homes in the UK. There are other companies, such as British Telecommunications PLC ("BT") and Virgin Media, who are competitors to Sky in the "retail" market to provide Pay TV to consumers. Their Pay TV services are available through "Digital Terrestrial Television" or DTT (the successor to the old terrestrial analogue TV), "Digital Cable" TV and by "Internet Protocol Television" ("IPTV") which streams programmes to televisions using internet protocol. These competitors can be called "retailers" of Pay TV for the present purpose. Sky has always been prepared to *retail* (for a fee) the CPSCs on these competitors' platforms (known as 'self-retail').

3. Ofcom regulates Pay TV broadcasting, including aspects of competition. From 2007 Ofcom undertook three rounds of consultation on the issue of whether Sky, which Ofcom concluded had "market power" in the supply of CPSCs, was restricting the *wholesale* supply of CPSCs to other Pay TV providers (ie those who retailed the channels to consumers) in a manner that was prejudicial to "fair and effective competition" in the Pay TV market.

4. Having concluded its investigation and consultations, Ofcom, as regulator, produced a "Pay TV Statement" ("the Statement") of over 500 pages dated 31 March 2010. Ofcom's principal conclusion was that Sky had a "practice" which consisted of a "strong reluctance" to negotiate wholesale deals for CPSCs with retailers, except where there had been a prospect of regulatory intervention if it had not done so.[1] The reason for this, Ofcom concluded, was that Sky was acting over and above purely short-term commercial interests, in order to maintain two "strategic objectives". Ofcom identified these as being: (1) to protect Sky's retail business on its own satellite platform; and (2) to reduce the risk of stronger competition from rival retailers to be able to bid for "content rights", viz. the right to broadcast premium events such as the Premier League matches, which Ofcom identified as a potent

[1] Para 7.191 of the Statement. Ofcom said that this prospect had led Sky to supply to cable firms such as Virgin Media, although that was restricted to "standard definition" versions of the relevant channels.

factor giving Sky its "market power" in this sector. Ofcom concluded that Sky's practice, which Ofcom characterised as a deliberate denial of wholesale access to CPSCs by retailers, was prejudicial to "fair and effective competition" in the Pay TV market.

5. Ofcom also reached a second conclusion. This was that, to the limited extent that Sky would enter any discussion as to the wholesale pricing for CPSCs, it would be only on the basis of the price that Sky currently set to Virgin Media for the latter's right to use Sky's CPSCs and other premium channels such as movie channels. This price is known as the "rate-card" price. Ofcom found that Sky's practice was that it would countenance discounts based on the percentage of a particular retailer's customers (ie. consumers) who would subscribe to Sky's CPSCs via that particular retailer. This is known as the "rate of platform penetration". Ofcom apparently concluded that, at moderate levels of platform penetration, the price on offer from Sky would not have enabled another retailer of the CPSCs via DTT to compete with Sky's rates to consumers. Moreover, if there was a high level of platform penetration in respect of a particular retailer there would be a high risk that this would turn that retailer effectively into a "pure reseller" of Sky's content. This would be likely to reduce incentives to innovate and so be an impediment to competition.

6. As a consequence of its findings as to Sky's practices, Ofcom declared in the Statement that, pursuant to ***section 316*** of the ***CA 2003***, it would exercise its statutory right to impose a term in the broadcasting licences of Sky in respect of the CPSCs such that it must offer to wholesale its CPSCs to retailers. In the case of "standard definition" versions, Ofcom decided that Sky must offer the CPSCs at a fixed "wholesale must-offer" price, (a "WMO"), as set by Ofcom. These prices were also determined in the Statement. This was the first time that Ofcom had exercised its jurisdiction under ***section 316*** of the CA 2003.

7. Sky challenged the decision of Ofcom that it had jurisdiction under ***section 316*** of the CA 2003 to impose these licence conditions. Sky also challenged the conclusion of fact in the Statement that it had a practice of deliberately restricting the supply of CPSCs to retailers on account of the two "strategic objectives" identified by Ofcom in the Statement. The right of appeal to the CAT of a person affected by a decision of Ofcom to exercise any of its "Broadcasting Act powers", (which include the power to impose conditions on a Broadcasting Act licence), is given by ***section 317(6)*** of the CA 2003. This case was the first appeal to the CAT on Ofcom's exercise of its ***section 316*** powers. The CAT received much factual and expert evidence in a hearing that took place over 39 days between 9 May and 15 July 2011. The CAT judgment ("the judgment"), which was handed down on 8 August 2012, runs to 330 pages. The CAT allowed Sky's appeal on the "merits" of Ofcom's principal conclusion. But it rejected Sky's case that Ofcom had no jurisdiction under ***section 316*** to impose the WMO condition in Sky's broadcasting licence. Sky pursues this latter issue, which I will call the "jurisdiction issue," in a cross-appeal before us. In this it was supported by the Football Association Premier League ("FAPL").

8. There is a right of appeal from the CAT to the Court of Appeal on a point of law, by virtue of ***section 196*** of the CA 2003. Lewison LJ gave limited permission to BT to appeal the CAT decision. He rejected the application for permission based on the CAT's reversal of Ofcom's principal conclusion on the facts. But he permitted BT to argue a point concerning the CAT's determination on Ofcom's conclusion, which was

on whether retailers could compete with Sky on the basis of Sky's offer to *wholesale* its CPSCs at the rate-card price and, if so, on what terms. The CAT had dealt with this conclusion only shortly, at [821] of the judgment, which I will set out below. In short, the CAT said that, in the light of its conclusion on the first and (in its view) principal issue, viz. that Ofcom was wrong to conclude that Sky was refusing to negotiate wholesale agreements with retailers in order to safeguard its two strategic objectives, it was unnecessary for the CAT to deal with the second issue on any competition issues concerning rate-card prices and discounts to them. The argument of BT on appeal, supported by Ofcom, is that the CAT erred as a matter of law in failing to deal with this issue, which BT and Ofcom say is free-standing. The failure to deal with it means that the judgment is incomplete because it did not decide whether Ofcom's conclusion on the rate-card and penetration discount issues was correct, nor with the question of whether that conclusion (even if correct) would, in itself, have been sufficient to justify the imposition of the WMO in the licence condition. I will call this "the rate-card issue" for short.

9. As already noted, Sky obtained cross-appealed on the jurisdiction issue, which is a point on the construction of ***section 316*** of the CA 2003, although it also involves looking at other sections of the CA 2003 and the terms of the ***Audiovisual Media Services Directive*** of the EU.

10. The appeal and cross-appeal are the first to arise out of Ofcom exercising powers under ***section 316*** of the CA 2003. The appeal hearing before us took place on 5 and 6 December 2013. Counsel were admirably succinct in their oral presentations, which supplemented the full written submissions already made. We reserved judgment.

11. My conclusions are that Sky and FAPL's challenge to Ofcom's jurisdiction should be dismissed, but that BT and Ofcom's appeal on the judgment of the CAT should be allowed. I set out my reasoning below.

II. The Pay TV industry and the statutory framework

12. **Pay TV:** Annex A of the CAT judgment contains a detailed description of the evolution of Pay TV in the UK and the structure of the industry. For the purposes of the appeals I think the following explanation is sufficient. By 2010 DTT was well on the way to replacing analogue terrestrial services of TV in the UK.[2] Digital material has been broadcast by satellite since 1998. Digital satellite is now the most widely used Pay TV platform in the UK and had reached 9.5 million homes by 2009. Virgin Media is the main cable Pay TV provider in the UK, doing so on a retail basis. IPTV technology is used by BT, amongst others, to provide Pay TV - eg. for its Sports Channels.

13. There are four separate but related levels within the TV broadcasting industry as it affects the UK. First, there are companies that produce "the content" such as TV programmes and films. These producers will, generally, hold the rights to broadcast the content of those programmes. At the relevant time Sky held the right to broadcast the content of such major sports events as Premier League football. Secondly, there are the companies who provide wholesale channel services to enable the content to be

[2] It did so by 2013.

transmitted via electronic means. Amongst those who provide these channel services are Sky, BBC and ITV. Thirdly, there are the wholesale platform service providers, who provide the wholesale means to broadcast the channels, ie. by means of Digital Satellite (eg Sky) or by cable (eg Virgin Media) or by IPTV (eg BT). Lastly, there are the retail service providers, who provide to consumers both access to platforms (such as satellite or cable) and also access to content. At the time with which we are concerned Sky was the largest retail provider of Pay TV in the UK. Others included Virgin Media, BT and Talk Talk TV.

14. Sky is represented at all four levels and so is "vertically integrated" in the industry. This, together with the width of its activity at each of the four levels of the industry, is what gives Sky its "market power" in the market for Pay TV. Ofcom's conclusion that Sky had this "market power" was not in issue on the appeal.

15. **The Statutory framework.** Ofcom was established by the ***Office of Communications Act 2002***. The CA 2003 transferred various functions that had been exercised by the Independent Television Commission ("ITC") to Ofcom. Pursuant to ***sections 1, 2*** and ***Schedule 1*** of the CA 2003, the function of granting or awarding licences under ***Part 1*** of the ***Broadcasting Act 1990*** ("BA 1990") in relation to independent television services and ***Part 1*** of the ***Broadcasting Act 1996*** ("BA 1996") in relation to digital television broadcasts, was transferred from the ITC to Ofcom. Further, the ITC's functions under those Parts of the two Acts in relation to applications for licences under either of those provisions were all transferred to Ofcom. This had the consequence that the duty of the ITC to discharge its functions under Part 1 of the BA 1990 as respects the licensing of television services in a manner that the ITC considered was best calculated "to ensure fair and effective competition in the provision of [television services] and services connected with them"[3] was also transferred to Ofcom.

16. Under ***section 3(1)*** of the BA 1990, as amended, the licences that Ofcom can authorise under Part 1 of that Act have to be in writing and will continue in force for such period as is provided in the licence. Under ***section 3(2)*** of the BA 1990, as amended, any licence granted by Ofcom in relation to independent television services may be granted "for the provision of such services as is specified in the licence or for the provision of a service of such a description as is so specified". It is important to note that, under ***section 4(1)(a)*****,** a licence may include "such conditions as appear to Ofcom to be appropriate having regard to any duties which are or may be imposed [on Ofcom] or on the licence holder, by or under this Act, [the BA 1996] or [the CA 2003]". There are parallel provisions in the BA 1996. By ***section 13(1)*** of the ***Broadcasting Act 1990*** ("BA 1990") it is an offence for any person to provide any "regulated television service" without being authorised to do so by a licence issued under Part 1 of the BA 1990.

17. Under ***section 3(1)(b)*** of the CA 2003 it is one of the principal duties of Ofcom in carrying out its functions that it "further the interests of consumers in relevant markets, where appropriate by promoting competition". The things which, by virtue of ***section 3(1),*** Ofcom is required to secure in carrying out its functions include, under ***section 3(2)(c)*** and ***(d),*** securing the availability throughout the UK of a wide

[3] ***Section 3(2)(ii)*** of the BA 1990.

range of TV services and the maintenance of a "sufficient plurality of providers" of TV services.

18. ***Section 211*** of the CA 2003, which is in ***Part 3,*** headed ***"Television and Radio Services etc", Chapter 2*** headed ***"Regulatory Structure for Independent Television Services",*** states that it is the function of Ofcom to regulate certain services in accordance with the terms of that Act, the BA 1990 and the BA 1996. These services include, by ***section 211(2)(b),*** "television licensable content services that are provided by persons under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services ["AMS"] Directive".[4] The term "television licensable content service" ("TLCS") is defined in ***section 232(1)*** and ***(2)*** of the CA 2003. Under ***section 232(1)*** a TLCS means any service that falls within ***section 232(2)*** and "…insofar as it is provided with a view to its availability for reception by members of the public being secured by…" broadcasting the service by satellite or by an electronic communications network. ***Section 232(2)*** states that a TLCS falls within the definition insofar as it is "(a)…provided [whether in digital or analogue form] as a service that is to be made available for reception by members of the public" and the service "(b) consists of or has as its principal purpose the provision of television programmes or electronic programme guides, or both". ***Section 361(1)*** of the CA 2003 defines the services that are to be taken for the purposes of this Part of the CA 2003 as including those that are "available for reception by members of the public". Broadly, the service is included if it is made available for reception or is made available for reception in an intelligible form, not only to persons who subscribe to the service or who otherwise request its service, but is also "a service the facility of subscribing to which, or of otherwise requesting its provision, is offered or made available to members of the public".

19. It was common ground before the CAT and before us that Sky holds TLCS licences under Part 1 of the BA 1990 for the satellite and cable distribution of the CPSCs and that Sky holds a licence under the BA 1996 for the broadcast of those channels on DTT. It was therefore common ground that the licensed services that Sky provided in the present case are TLCSs within ***section 211(2)(b)*** of the CA 2003, but no more.[5]

20. ***Section 316(1)*** to ***(4)*** of the CA 2003 sets out Ofcom's jurisdiction in relation to competition matters. It is central to the jurisdiction issue so I will set it out in full here.

> "**316 Conditions relating to competition matters**
>
> (1) The regulatory regime for every licensed service includes the conditions (if any) that OFCOM consider

[4] The AMS Directive is relevant to the argument on the "jurisdiction" issue and I will refer to it in more detail below. The AMS Directive is defined in ***section 405(1)*** of the CA, as amended, as Directive 2010/13/EU, which entered into force on 5 May 2010. That Directive codified existing EU legislation: viz. Directive 89/552/EEC, as amended by Directives 97/36/EC and 2007/65/EC. At the time of the Statement it was, technically, Directive 89/552/EEC as amended that applied. But that was replaced 6 weeks later by Directive 2010/13/EU and nothing turns on this change.

[5] §3.8 of the Statement also said that "Sky holds television licensable content service licenses under the BA 1990 for its premium sports and movies channel". That statement was not challenged before us, but the statement in the same paragraph that these channels are "licensed channels" for the purposes of ***section 316*** of the CA 2003 obviously is challenged.

appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services.

(2) Those conditions must include the conditions (if any) that OFCOM consider appropriate for securing that the provider of the service does not—

(a) enter into or maintain any arrangements, or

(b) engage in any practice,

which OFCOM consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services.

(3) A condition imposed under this section may require a licence holder to comply with one or both of the following—

(a) a code for the time being approved by OFCOM for the purposes of the conditions; and

(b) directions given to him by OFCOM for those purposes.

(4) In this section—

"connected services", in relation to licensed services, means the provision of programmes for inclusion in licensed services and any other services provided for purposes connected with, or with the provision of, licensed services; and

"licensed service" means a service licensed by a Broadcasting Act licence."

21. In Appendix One to this judgment I have set out the relevant provisions of the BA 1990 as amended and the CA 2003 to which I have referred above.

III. The Sky licences

22. As already noted, Mr James Flynn QC for Sky confirmed that Sky's relevant licences were licences under ***section 4(1)*** of the BA 1990 and the equivalent section in the BA 1996, viz ***section 12(1)***. We were shown the terms of one licence, although it was without the Annex which sets out the description of the services for which the licence had been given. In the definition section the licence states that "television licensable content services" has the meaning given to it in ***section 232*** of the CA 2003. In Part 2 of the licence, entitled General Conditions, clause 2 is headed "Provision of television licensable content services by the Licensee". Clause 2(1) provides:

> "The Licensee is hereby authorised to provide the Licensed Services specified in the Annex from the Commencement Date for so long as the Licence remains in force".

23. Clause 14(1)(a) stipulates that the Licensee shall:

> "not enter into or maintain any arrangement or engage in any practice, which is prejudicial to fair and effective competition in the provision of licensed services or connected services".

24. Clause 14(3) states that "licensed services" and "connected services" are to have the meaning given to them in ***section 316(4)*** of the CA 2003. Article 14A of the Licence we were shown then sets out the terms of the "Wholesale Must-Offer" that was inserted following the Ofcom Statement.

IV. Ofcom's findings in the Pay TV Statement in some more detail.

25. The Statement is divided into 12 Sections. On the rate-card issue, much time was spent in the hearing before us in analysing precisely what the Statement did or did not find. It is therefore necessary to consider in more detail the Ofcom findings in Section 5 ("Sports market definition and market power"), Section 7 ("Competition Issues"), Section 9 ("Remedies") and Section 10 ("Wholesale must-offer terms").

26. In Section 5 of the Statement Ofcom noted that Sky had a high market share (80%+) of the wholesale supply of CPSCs.[6] The key characteristic of the CPSCs, Ofcom found, was that they contained a large amount of live coverage of the most attractive high-quality sporting events shown regularly throughout the year, particularly football and cricket. These were not readily available elsewhere, eg on "Free to Air" ("FTA") television, such as is provided by the BBC or ITV in their DTT services.[7] Sky's market share was a strong indicator of "market power" in the wholesale and retail of packages that include CPSCs. Ofcom identified two reasons for Sky's strong market power as compared with others in the Pay TV market. First, other Pay TV retailers had little if any countervailing buyer power when seeking wholesale access to Sky's channels. Secondly, because Sky had been so successful in bidding for key contents rights, especially Premier League rights.[8]

27. Having concluded that Sky did have "market power" in the wholesale supply of CPSCs, Ofcom also concluded that Sky had the ability to act in a manner which was prejudicial to "fair and effective" competition. The particular competition concern of Ofcom, which it dealt with in detail in Section 7 of the Statement, related to the "…unavailability of Sky's channels to third parties at an appropriate wholesale price (either because Sky does not supply those channels or because the wholesale price is unduly high) and to the high wholesale and retail prices charged for Sky's channels".[9] For Sky to have the ability to act in a manner which was prejudicial to fair and effective competition it would have to have "market power" in the wholesale supply

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[6] Summary at §5.8

[7] Summary at §5.7

[8] Summary §5.9 and at §5.380

[9] §5.380

of those channels.[10] But Ofcom went further and concluded that Sky possessed a "dominant position" at the wholesale level.[11]

28. The summary of Ofcom's conclusions on Competition Issues in Section 7 of the Statement is, first, that Ofcom's "key concern" was the "restriction of supply of Sky's Core Premium channels" to other retailers and that this was "prejudicial to fair and effective competition".[12] But Ofcom went on to say that it had "other concerns" about, amongst other things, the high prices for Sky's Core Premium channels. Ofcom concluded that Sky's Core Premium channels were "not currently available widely on a wholesale basis"; they were only available to cable operators such as Virgin Media.[13] Later in Section 7, Ofcom expanded on its conclusions as to Sky's approach to negotiations upon a request for wholesale supply of Core Premium channels. Ofcom found that Sky avoided explicit refusals to negotiate wholesale supply terms, but instead consistently responded with counter-offers to retail its channels on behalf of other retailers. "Sky's position has been that it would be unwilling to enter into a wholesale deal unless it could be shown that it would be better off than under a retail arrangement".[14]

29. Ofcom's explanation for Sky's reluctance was that there were two "strategic incentives" for Sky to restrict wholesale supply, which the Statement sets out at §7.180-182. First, the restriction gave Sky "…the ability to manage competition between retailers on different platforms, in order to protect the position of Sky's own satellite platform", and, secondly, it enabled Sky to prevent "…rival retailers from establishing a strong retail presence, which, as well as being a threat in the retail market, could strengthen their position in bidding for content rights".[15] So Sky only offered to wholesale its Core Premium channels to third parties when "…there has been a prospect of regulatory intervention if it did not do so…".[16]

30. Section 7 then has two important paragraphs at §7.192 and 193. First, Ofcom stated that insofar as Sky was prepared to enter into any discussion on wholesale pricing, this centred on the prices which Sky currently set for Virgin Media "via the rate-card". "None of the negotiations which we [ie Ofcom] reviewed have led to Sky offering prices below the rate-card for its Core Premium channels".[17] §7.193 then states:

> "We do not believe it to be a reasonable expectation for retailers other than Sky to be prepared to pay the rate-card price for Sky's Core Premium channels, as these prices would not allow them to compete effectively. This is shown by our pricing analysis as set out in Section 10. A plausible competitor would not be able to generate a return which would cover its costs of capital over a 10-year period plus a terminal

[10] §5.380
[11] §5.383
[12] §7.1
[13] §7.4
[14] §7.64-65.
[15] §7.181.
[16] §7.191
[17] §7.191.

> value if paying the current rate-card price. The rate-card prices are close to what we would expect under an ex post margin squeeze test[18] – ie assuming Sky's own scale. No entrant would have Sky's scale; nor would we expect it to be able to reach Sky's scale, given Sky's current subscriber numbers relative to the likely number of total pay TV households in the UK."

31. Ofcom returned to the issue of wholesale pricing later in Section 7. At §7.290 it noted that the high wholesale prices that Virgin Media paid to Sky for its premium channels limited Virgin Media's incentive and ability to compete effectively with Sky in selling those channels and that this contributed to Virgin Media's low penetration of premium subscribers. Then at the end of Section 7, Ofcom concluded that Sky's returns have been significantly above its cost of capital for several years and that those returns were concentrated in its wholesale business. Whilst this could be justified historically by the risks taken in early years, "on a forward looking basis, …Sky's prices are likely to be above those required as a reward for historic risk taking".[19]

32. Section 9 deals with the WMO remedy that Ofcom decided to impose as a condition in Sky's broadcasting licence for its relevant Pay TV channels. Ofcom believed that this condition would "bring about greater choice and innovation, to the benefit of consumers". At §9.8 Ofcom noted that under ***section 317*** of the CA 2003, it was obliged to consider whether it would be more appropriate to proceed under the ***Competition Act 1998*** before proceeding to impose a condition on the broadcasting licence under ***section 316.*** Ofcom decided that "it would not be more appropriate to proceed under the ***Competition Act 1998*** because of the need for a comprehensive solution to a general problem affecting the relevant markets".[20]

33. From §9.74 onwards Ofcom explained why putting a licence condition into the broadcasting licences for the Sky channels concerned would, in its view, solve the "competition issues" that arose from the restricted distribution of CPSCs and other core channels. At §9.91 there is a sub-heading "Sky was prepared to commit to wholesaling to other retailers". The Statement then set out a short account of attempts since late 2007 to see if Sky could provide various commitments to Ofcom in order to end the investigation and consultation on Pay TV that it was then carrying out. At §9.93 the Statement noted that Sky was willing to make a commitment to supply its Sports 1 and premium movie channels "on a wholesale basis for retail to residential subscribers", subject to certain criteria. At §9.94, the Statement commented that the fact that Sky was prepared to commit to wholesaling its channels to other retailers "…shows that a wholesale supply obligation is not an extreme requirement or one which departs dramatically from the normal workings of commercial dealings between companies".

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[18] Broadly, an ex post margin squeeze test establishes whether the price set by the dominant (vertically integrated) supplier for the sale of its "upstream" product (here Sky's CPSCs) to third parties is sufficient to cover the supplier's own costs when selling it downstream, but would be too high for it to be possible for third parties to buy the product at that price for them to sell-on downstream profitably.

[19] §7.366

[20] Summary at §9.8

34. The Statement then said, at §9.96, that the main reason that agreement could not be reached with Sky at the time was the issue of price. The Statement recorded that Sky insisted that "the baseline wholesale prices" for those channels had to be those applicable to Virgin Media and "this was not something it was willing to discuss" so that this proved to be a "material constraint" on the scope of the discussions. However, the Statement does note, at §9.97, that Sky was willing to provide a discount based on "the incremental subscribers above specified levels of platform penetration".

35. At §9.98 the Statement recorded Ofcom's conclusion that Sky's pricing proposal was "…not likely to address our competition concerns with the degree of certainty that was required" to enable it to consider accepting undertakings from Sky in lieu of a reference to the Competition Commission. The statement gave two reasons for this which are important in the context of this appeal. First, it said that the price reductions on offer "at moderate levels of platform penetration" would not enable a retailer on DTT to compete with Sky, given that all retailers operated on a much smaller scale than Sky. Secondly, retailers other than Sky would have had a "strong incentive to achieve very high levels of platform penetration for Sky's content" to benefit from any Sky prices that would be competitive for them. But there was then a "high risk" that this would effectively make those competitors "pure resellers of Sky's content". The consequence would be that those retailers would have a strong incentive not to introduce other content on their platforms (thereby reducing the Sky platform penetration) unless it could somehow compensate for the lost Sky discount. Ofcom concluded that this would be likely to reduce incentives to innovate.

36. At §9.99 the Statement noted that there were some other outstanding issues at the time the negotiations between Sky and Ofcom broke down. Then at §9.100 the Statement concluded that the Sky offer at the time "might have delivered some benefits to consumers" but Ofcom was "not confident" that it would have enabled effective competition, either between DTT based platforms or between DTT and other platform technologies. Therefore Ofcom did not accept Sky's proposed commitments because it did not consider that they would "provide a comprehensive solution to our competition concerns and their adverse effects on consumers".

37. The heading before §9.104 is "Inability to address concerns relating to the level of pricing". At §9.105 Ofcom acknowledged that its primary concern was the restricted distribution of the Core Premium channels. But, it continued: "…the level of Sky's wholesale and retail pricing is also prejudicial to fair and effective competition, which is to the detriment of consumers…". Again, that statement is important in the context of this appeal. At §9.129 of the Statement Ofcom explained why it had concluded it was necessary to determine some conditions of supply within the WMO, in particular, the price. It did so in order to prevent a remedy (with no prescribed price) from being ineffective. The Statement gave two reasons: first, evidence of previous commercial negotiations with Sky suggested that they tended to end in stalemate. Secondly, any rates agreed would be "closely based on the current rate-card" and, if so, Ofcom did not believe that would enable competitors to build a viable business, so providing competition to Sky. The Statement makes the same point again at §9.232, §9.238 and §9.249.

38. Section 10 explained the method by which Ofcom had calculated the actual prices for the various CPSCs.[21] Its stated aim is to arrive at a wholesale price that an efficient retailer, on a sustainable scale, could afford to pay given efficient retail costs and the need to earn a return, whilst at the same time matching Sky's retail prices.[22] The aim of the remedy was to ensure "fair and effective competition" which allows for competitors who operate on a smaller scale than Sky. But the approach was also designed "to avoid the costs of market entry by firms that are either inefficient or unable to achieve sustainable scale".[23] In determining the appropriate wholesale prices, Ofcom's aim was of "ensuring sustainable long-term entry" into this market.[24]

V. Sky's appeal to the CAT and the CAT judgment

39. **Sky's Notice of Appeal.**

Sky appealed the Statement and its ruling. In its Amended Notice of Appeal Sky characterised Ofcom's decision as being one to bring Sky's assets (in the form of the CPSCs) under "intrusive price regulation" in order to facilitate Ofcom's view of how the Pay TV market should develop "and in particular to facilitate the entry of a retailer of Pay TV content on DTT". It described this as "quasi-nationalisation" and a position that was "seriously out of line with accepted best regulatory practice".[25] Sky alleged that it was "price, rather than the availability of wholesale deals" that was at the heart of Ofcom's desire to regulate the market as it proposed.[26] In Section 4 of the Amended Notice of Appeal, Sky referred to Ofcom's "view" that the rate-card price, which was the basis for negotiations for wholesale supply to other potential retailers, would not allow them to compete effectively with Sky.[27] At paragraph 4.18, Sky disputed this assertion. Sky said that it was clear that "DTT entry" was perfectly viable at wholesale prices at the rate-card rate or higher. At paragraph 4.102-4.110, under the heading "Rate-card pricing", Sky put forward its reasons for arguing that there was nothing unreasonable in Sky taking the rate-card as the basis for a commercial deal in negotiations with potential counterparties. Sky argued that there was therefore "no support provided for Ofcom's theory that Sky is seeking to favour its own platform by taking an unreasonable line on pricing so as to prevent agreement being reached".[28] In Section 5, under the heading "F. Mandated wholesale supply of CPSC at extended retail minus prices", at paragraph 5.62 Sky asserts that Ofcom's argument for setting prices was based on its conclusion that negotiations would default to the cable rate-card price and that this would not ensure fair and effective competition. Sky's Notice said that Ofcom had concluded that the rate-card prices were set "….so as to comply with the OFT's margin squeeze test, on the basis of Sky's retail costs and a new entrant would…not be able to replicate them on its smaller scale".[29] At Section 5G, in paragraph 5.108, Sky alleged that the "only

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[21] The proposed prices are also set out at §9.98.
[22] Summary at §10.2
[23] Summary at §10.3
[24] §10.63.
[25] Amended Notice of Appeal: Overview paras 1.16 – 1.17.
[26] Para 1.28 of the Amended Notice of Appeal.
[27] Para 4.5, referring to §7.5 of the Statement.
[28] Para 4.110 of the Amended Notice of Appeal.
[29] Sky referred to §10.52-65 and §10.171-183 of the Statement.

consideration" relied on by Ofcom for setting a price "aside from the issue of the appropriate rate (which is addressed above) is that in the absence of setting a price there will be a protracted period of negotiation. However, Ofcom's analysis of this issue is flawed and does not support setting a price as proportionate".

40. In its written submissions for this appeal, Ofcom noted that Sky did not contend in its Notice of Appeal that Ofcom's competition concern regarding price was misplaced by reason of the availability of penetration discounts. It said that there was no argument before the CAT on the specific question of whether penetration discounts would be compatible with "fair and efficient" competition. It also said that there was therefore nothing before the CAT with regard to Ofcom's findings in the Statement that the penetration discounts that Sky had been prepared to offer to Ofcom would not provide a solution to Ofcom's competition concerns.[30]

41. **Ofcom's Defence.**

Ofcom served a Defence. Under the heading "Sky's criticism of Ofcom's decision to set a price" at paragraph 469, Ofcom referred to paragraph 5.108 of Sky's Notice of Appeal. Ofcom alleged that Sky had misstated Ofcom's justification for setting prices, which was not merely that there would otherwise be protracted negotiations "but also that the negotiations would be likely to lead to rate-card prices which would not ensure fair and effective competition" and cited §9.238 of the Statement. Ofcom expanded on this at paragraph 474 where it said that it was Ofcom's view that "rival retailers would not be able to compete effectively with Sky at these prices and that a WMO remedy on these terms would not ensure fair and effective competition". Ofcom asserted that it was therefore no answer for Sky to observe that negotiations could be concluded speedily so long as retailers were prepared to accept rate-card prices. Ofcom addressed Sky's criticisms of Ofcom's methodology for determining the price for the WMO remedy in detail at paragraphs 477 and following of its Defence.

42. **The CAT judgment ("the judgment").**

The CAT dealt with the jurisdiction issue in Section V of the judgment. At [87] it recorded the argument of Sky and the FAPL that Ofcom had acted with a view to securing "fair and effective competition" in the provision of services at a *retail* level as between Sky and competing retailers; that *retail* services were neither "licensed services" nor "connected services" for the purposes of ***section 316*** of the CA 2003; therefore, as Ofcom's powers under ***section 316*** related only to competition in the provision of "licensed services" and "connected services", Ofcom had acted outside its jurisdiction. Effectively, the same arguments, put more elaborately and attractively than this summary, were made to us by Mr James Flynn QC on behalf of Sky and Miss Helen Davies QC on behalf of FAPL.

43. The judgment noted, at [89], that as far as the Statement was concerned, the supply of CPSCs, whether at a wholesale or retail level, constituted a "licensed service" as opposed to a "connected service". It also noted, however, that the *leitmotif* of the

[30] See §9.98 of the Statement.

Statement was Ofcom's finding that Sky's practices adversely affected competition in supply of CPSCs at the retail level.[31]

44. The judgment said that to describe the legislation as "tortuous" would be an understatement.[32] I agree. It is positively labyrinthine. But the CAT reached the clear conclusion that, for the purposes of ***section 316,*** competition in the provision of Sky's CPSCs is not confined to their provision at the wholesale level to other Pay TV retailers but included competition in their provision at the retail level to end users.[33] It also referred (at [109]) to what it called the "broad terms" in which ***section 316*** is framed.

45. Before the CAT (and before us), Ofcom advanced the alternative argument that the retail of CPSCs was the provision of "connected services" within the meaning of ***section 316(4).*** The CAT rejected this submission.[34]

46. Section VI of the judgment dealt with Sky's challenge to the findings on which Ofcom's competition concerns were based. The judgment pointed out that Ofcom had to identify a "practice" of Sky which was (in Ofcom's view) prejudicial to "fair and effective competition in the licensed service in question", and which therefore had to be prevented. The judgment stated that although there were several "practices" of Sky with which Ofcom was concerned, the CAT viewed Ofcom's "key concern" as being Sky's practice of limiting its wholesale distribution of its premium channels. At [159] of the judgment there are extensive quotations from §1.6, and §1.24-§1.27 of the statement to support this characterisation of Ofcom's "key concern". At [160] the judgment recognised that Ofcom had a number of "other concerns", which included "the price at which Sky wholesales the CPSCs to [Virgin Media] – the rate card price". The judgment then quoted from §1.28 to §1.30 of the Statement, which includes the passage at §1.30 where Ofcom summarised its conclusion that insofar as Sky entered into discussions about wholesale pricing of CPSCs with another retailer, the discussion centred on the rate-card price.

47. The judgment reiterated, at [161], that "the core concern" as perceived by Ofcom could be summarised as "Sky's deliberate denial of wholesale access to its CPSCs to other retailers or platforms, and its preference for absence from a platform rather than wholesaling";[35] adding that to the extent that Sky was prepared to wholesale, it was at prices which Ofcom considered to be unacceptable or unfavourable. The judgment recorded that Sky challenged almost every aspect of Ofcom's concerns.

48. Section VI of the judgment then analysed the evidence that the CAT had received on what it called Ofcom's "key concern", viz. its conclusion that Sky had deliberately limited the distribution of its core premium channels at the wholesale level to

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[31] See [91], referring to §1.6 and §1.24 of the Statement.

[32] [102].

[33] [102].

[34] At [111] to [118].

[35] At [27] of the judgment, in the Summary Section 1, where the same "core competition concern" is described, footnote 14 states that the finding in the Statement that Sky would prefer to be entirely absent from retailers' platforms rather than give them wholesale access had been described in the CAT hearing by leading counsel for Ofcom as "the crucial finding of fact" in the Statement. This was relied upon before us by the appellants.

safeguard its two "strategic incentives". In particular the judgment examined the evidence before the CAT about the course of the commercial negotiations that had taken place between Sky and other Pay TV competitors such as Top Up TV, BT, Orange and Virgin Media and also Sky's motives.

49. The conclusion of the judgment, as summarised at [28], is that Ofcom had "to a significant extent, misinterpreted the evidence of these negotiations, which does not support Ofcom's conclusion". The CAT found that "a significant number of Ofcom's pivotal findings of fact in the Statement" were inconsistent with the evidence. The judgment concluded that the evidence before it showed that Sky did, on the whole, engage constructively in negotiations. Moreover, it found that counterparties did not always do so and also used "regulatory gaming" in the negotiations to a considerable extent. The judgment concluded that Ofcom's findings as to the reasons for the ultimate abandonment of the negotiations about wholesaling Sky's CPSCs and the attribution of a significant responsibility to Sky were "inconsistent with the evidence".[36] The judgment concluded that, in any event, "Sky had no theological objection to wholesale supply of premium channels" and was, in principle, "willing to do so wherever self-retail [was] not open to it".[37] The judgment further concluded that, on the evidence, Ofcom's competition concerns relating to the prices for existing wholesale supply of CPSCs to Virgin Media and the non-supply to the cable companies of certain new services were also unfounded.[38]

50. Part F of Section VI of the judgment is headed: "Competition concerns relating to [Virgin Media] and its corporate predecessors: terms of wholesale supply – rate card prices". Under the sub-heading "The Tribunal's general conclusions on [Virgin Media's] incentives and ability to compete effectively at rate-card prices" the judgment concluded that the rate-card price had not been shown to obstruct (or contribute to the obstruction of) fair and effective competition by Virgin Media.[39]

51. The next sub-heading is "Miscellaneous points relating to prices". This part of the judgment deals with two topics. The first is Sky's challenge to Ofcom's finding in the Statement that Sky's wholesale and retail prices in question were appreciably above competitive levels. The judgment noted that Ofcom had not responded to Sky's evidence challenging these findings, at least on wholesale prices, but the CAT nevertheless decided not to make any determination on it. This was, partly, because it had already concluded that the rate-card prices were not an obstacle to the effective competition of Virgin Media.[40]

52. The next sub-heading is "Other retailers". In [820] the judgment recorded that leading counsel for Ofcom had argued (albeit in the context of a jurisdictional point) that Sky's offer to supply the likes of BT only at the rate-card prices amounted "in substance to a finding of constructive refusal to supply". The judgment continued with paragraph [821], which is at the centre of the appeal on the rate-card issue. It stated:

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[36] As summarised at [29].
[37] As summarised at [30]: see also [828].
[38] As summarised at [32].
[39] [810].
[40] [819]

> "We recognise that other retailers, and in particular BT, claim that they would not be able to compete effectively on the basis of Sky's rate card price. We have not found it necessary or appropriate to reach any specific conclusion about this. Although in negotiations between Sky and BT, Sky was insistent that wholesale prices of CPSCs should be based on the rate card prices, we have found that Sky was open to agreeing discounts from those prices, referable to penetration rates achieved by the retailer. We also found that the negotiations with BT were very significantly affected by the ongoing Pay TV review, and by the prospect of Ofcom imposing a regulatory price lower than the rate card. In these circumstances, when a favourable outcome of the Pay TV review appeared imminent, BT indicated that it was prepared to agree to wholesale supply at the rate card price provided that that agreed price would be changed in due course to reflect the regulatory price. In the event the regulatory outcome preceded the finalisation of the agreement with BT. There was therefore no negotiation on price between Sky and BT which was unclouded by likely regulatory action, and there is no way of knowing what the result of a genuinely commercial negotiation would have been. The same applies to negotiations with other retailers, actual or potential. The negotiations with TUTV and Orange did not founder because of the rate card price, but for other reasons, as discussed at length earlier in this judgment."

53. At Section G, the CAT set out its conclusions on Sky's challenge to Ofcom's competition concerns. At [825] the CAT reiterated its conclusion that Ofcom's "core competition concern" was unfounded. It defined that "core concern" as being the fact that Sky had deliberately withheld from other retailers wholesale supply of its premium channels, "preferring to be entirely absent from those retailers' platforms [rather] than to give them wholesale access",[41] acting on "strategic incentives". At [828], the CAT stated that the evidence before it showed that Sky had "no theological objection" to wholesale supply of its premium channels and was indeed willing to wholesale.

54. At [829], the CAT said that "given these conclusions" there was no need for it to "…resolve the issues debated before us at some length as to the plausibility or otherwise as a matter of economic theory of the alleged strategic incentives on which Sky was said by Ofcom to be acting in its conduct of the various negotiations". But the CAT concluded anyway that, on the evidence, Sky was "acting for ordinary profit/revenue-maximising commercial motives" and that it could not be inferred from the material before it that "the alleged incentives were conditioning Sky's conduct".

55. At [830] the CAT referred to "Ofcom's other competition concerns" and identified those as relating "specifically to the terms of existing wholesale supply of the premium channels to [Virgin Media] and the supply to that company of certain new services". The CAT concluded that those concerns were unfounded. Then at [831]

[41] This is the same phraseology used at [27] of the judgment. At fn 934, the CAT comments again (as it had in fn 14) that Ofcom's leading counsel had described this as "the crucial finding of fact" in the Statement.

the CAT stated that, given the nature and extent of its disagreement with Ofcom's assessment of the facts, it was not necessary "in general" to consider whether, on the basis of Ofcom's findings, "Sky's alleged conduct in regard to each competition concern would have been such as to prejudice fair and effective competition in the retail supply of the CPSCs." But at [832] the CAT did identify and deal with two specific areas, viz. the supply of interactive services and the rate-card prices paid by Virgin Media. It concluded that Ofcom's decision on the issue of prejudice to fair and effective competition was wrong in respect of both areas. Neither that paragraph nor the others in this section deal with Ofcom's "competition concern" raised by rate-card prices and penetration discounts generally.

56. In the CAT's order of 6 March 2013, it allowed Sky's appeals. It ordered that the Pay TV Decision be remitted to Ofcom with directions to withdraw it within 7 days and to remove the WMO remedy condition from the relevant Sky licences within 7 days. However, that order has been suspended since then.[42]

VI. The arguments of the parties on the appeal (the rate-card issue) and cross-appeal (the jurisdiction issue).

57. Although the rate-card issue was argued first by the parties on the appeal, I think it is more logical to start with the jurisdiction issue. If Ofcom did not have jurisdiction to impose the conditions in Sky's licences, then that is the end of the matter.

58. **Jurisdiction issue: arguments of Sky and FAPL.** As already noted, Mr Flynn QC for Sky and Miss Davies QC for FAPL both accepted that the services provided by Sky pursuant to the licences granted under the BAs 1990 and 1996 are "television licensable content services" or TLCSs within the descriptions in ***section 232 (2)(a)*** or ***(b)*** of the CA 2003.[43] However, Mr Flynn and Miss Davies argued that on the wording of ***section 232(1)*** and ***(2)*** the activity that requires a BA 1990 or 1996 licence and the activity which is a TLCS is that of providing the *content service* comprising television programmes or electronic programme guides (EPGs), insofar as those programmes or EPGs are provided "with a view to" their "availability of reception by members of the public" (***section 232(1)***), or insofar as they are provided as a service "that is to be made available for reception by members of the public" (***section 232(2)(a)***). Indeed it was common ground before us that the actual "downstream" activities of making TLCS programmes or EPGs available to the public via one or more platforms could be carried out either by the entity that provided the TLCSs themselves or by another and that that activity, of itself, did not require such a BA licence.

59. Mr Flynn and Miss Davies then pointed out that ***section 211(1)*** and ***(2)(b)*** of the CA 2003 stipulate that the relevant services that Ofcom is to regulate (in accordance with the CA 2003 and the BAs 1990 and 1996) are "television licensable content services that are provided by persons under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive".[44] As stated in footnote 4

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[42] See Order of Lewison LJ dated 1 May 2013.

[43] Both also acknowledged that it is an offence under ***section 13(1)*** of the BA 1990 for any person to provide any "relevant regulated television service" without being authorised to do so by a licence from Ofcom under either the BA 1990 or the BA 1996.

[44] The wording quoted is that of ***CA 2003 s.211(2)(b).***

above, the AMS Directive is Directive 2010/13/EU, which codifies previous Directives. Mr Flynn and Miss Davies noted that under these Directives, Member States are required to ensure that "all audiovisual media services transmitted by media service providers" under their jurisdiction "comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State": ***Article 2(1).*** Mr Flynn and Miss Davies submitted that the definitions of "media service provider", "audiovisual media services", "editorial responsibility" and "television broadcasting" in ***Article 1(a), (b), (c), (d)*** and ***(e)*** of the AMS Directive made it clear that ***Article 2(1)*** is to be applied to the "upstream" activity, ie. the creation of the content, rather than the "downstream" activity of distributing the content to the public. Mr Flynn and Miss Davies referred us to the very recent decision of the Court of Justice of the European Union ("CJEU") in ***UPC Nederland BV v Gemeente Hilversum***[45] where the court emphasised, at [41], that various EU directives concerning the provision of media services, including the AMS Directive, make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of that content, which does not. The judgment continues, in the same paragraph:

> "Content and transmission are covered by different measures which pursue their own specific objectives, without referring to customers of the services supplied or to the structure of the transmission costs charged to them".

60. Mr Flynn and Miss Davies submitted that this distinction is reflected in the wording of ***section 232*** of the CA 2003 which draws the same distinction between the activity of producing content (ie the TLCS activity) and the broadcast and distribution of that content. They submitted that this distinction is also made clear by ***section 362(2)*** of the CA 2003, which stipulates that the only person who is to be treated as providing a TLCS (amongst other services) for the purpose of Part 3 of the CA 2003 (which includes ***section 316)*** is "the person with general control over which programmes and other services and facilities are comprised in the service…".

61. Mr Flynn and Miss Davies argued that it therefore followed that the entity that provides the service of making a TLCS available to the public, whether at "wholesale" or "retail" level and by whatever platform means, does not, in undertaking that activity, thereby "provide" a TLCS within ***section 232(1)*** of the CA 2003. That activity therefore does not fall within ***section 211(2)(b)*** of the CA 2003, so it must fall outside those "services" which it is Ofcom's function to regulate pursuant to ***section 211(1)*** of the CA 2003. It further followed, they said, that this activity could not be a "relevant regulated television service" within ***section 13(1A)*** of the BA 1990 so that Sky would not require a licence under that section of the BA 1990 (or the equivalent in the BA 1996) to undertake *that activity*, which must include both the "wholesale" and "retail" provision of Sky's TLCSs to other distributors of those TLCSs to the public. Accordingly, the words "…in the provision of licensed services or connected services" in ***section 316(1)*** could not include the activity of providing the TLCSs to other distributors of them to the public, whether at the "wholesale" or "retail" level, because by virtue of ***section 316(4),*** a "licensed service" means "a service licensed by a Broadcasting Act licence".

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[45] ***Case C-518/11.*** Judgment was delivered on 7 November 2013.

Therefore, "the regulatory regime" of "licensed services" set up by ***section 316(1),*** giving Ofcom the power to make conditions "to ensure fair and effective competition in the provision of licensed services or connected services", did not include the activity in respect of which Ofcom purported to impose conditions: viz the "wholesale" provision of the TLCSs comprised in the CPSCs.

62. **Jurisdiction issue: arguments of Ofcom and BT.** Miss Dinah Rose QC, for Ofcom, led the submissions on the jurisdiction issue and Mr Jon Turner QC made supplementary submissions on the issue on behalf of BT. Miss Rose reminded the court of the history of the legislation in the 1990s, which had resulted from the government White Paper "Broadcasting in the 1990s, Competition, Choice and Quality". That showed that issues of competition had always been important.[46] The legislative predecessor of ***section 316*** of the CA 2003 was ***section 2(2)(a)(ii)*** of the BA 1990, by which Ofcom's predecessor (the Independent Television Commission) had a duty to discharge its functions under Parts I and II of that Act in a manner which it considered best calculated "to ensure fair and effective competition in the provision of [television and other] services and services connected with them". Miss Rose then referred to ***sections 3(2), 4(1)(a), 13(1)*** and ***13(1A)*** of the BA 1990 in its current form and, in particular, to the use of the word "provision" and "provides" in ***section 4(1)(a)*** and ***13(1).*** Miss Rose argued that the "provision" of the television service for which a licence has been granted under the BA 1990 could not refer only to the content of the service, bearing in mind that the object of the exercise is that the content will be broadcast (or "provided") to the public or a part of it.

63. In the submission of Miss Rose, ***section 316*** imposed on Ofcom a duty to regulate competition over all aspects of the provision of "licensed services" to the public. ***Section 232*** defined TLCSs in two ways. First, the service must fall within those described in ***section 232(2),*** but, secondly, such services had to be "provided with a view to [their] availability for reception to members of the public…" by various means. This indicated that the section is concerned with the whole process. Miss Rose submitted that this was reinforced by the definition of "available for reception to members of the public" found in ***section 361(1)*** of the CA 2003 and also ***section 405(5)(a)*** and ***(b),*** which defined a "consumer" in terms of someone to whom a "service" is "provided, made available or supplied or who arranges for the service to be so provided".

64. As for section ***362(2),*** Miss Rose submitted that its sole purpose was to identify the person who is required to have a broadcasting licence under the BA. That section did not attempt to identify which *acts* constituted "the provision" of the services. If the ambit of ***section 316*** were limited in the manner urged by Sky and FAPL then it would severely constrain Ofcom's ability to deal with competition issues to those concerning assembly of the content and could not deal with the competition problem of "vertical integration" in the industry. There was no coherent policy reason for such a restriction.

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[46] At §2.6 of the summary of the White Paper it had concluded that there "should always be vigilance against uncompetitive practices and market distortion". It recommended that there should be "a greater separation between the various functions which make up broadcasting and have in the past been carried out by one organisation. These include programme production, channel packaging and retailing and transmission or delivery".

65. Miss Rose submitted that the terms of the AMS Directive provided no assistance on the scope of ***section 316.*** The Directive was concerned solely with services under the editorial control of someone and ***section 316*** was not drafted to implement that or any previous equivalent EU Directives.

66. Mr Turner made additional points in support of Miss Rose's submissions.

67. **The rate-card issue: arguments of BT and Ofcom.** Mr Turner for BT led the arguments on this issue. He submitted that the CAT erred in deciding that it did not need to deal more fully than it did at [821] with Ofcom's conclusion that it must impose on Sky a WMO obligation at set prices, which must be below the cable rate-card price in the interests of fair and effective competition in the Pay TV market. The two findings made by the CAT at [821], viz. (a) that Sky was open to agreeing discounts on the rate-card prices based on penetration rates achieved by the retailer and (b) that there was no way of knowing what prices would have been agreed as a result of genuinely commercial negotiations, failed to deal with Ofcom's economic arguments for justifying regulatory intervention on pricing. Ofcom's view that the penetration rate discount mechanism would itself give rise to competition concerns was not recognised or dealt with by the CAT in its judgment. The failure to deal with these issues constituted an error of law.

68. Mr Turner said that the issue of pricing, (and the cable rate-card price in particular), was before the CAT and that evidence and submissions were made on it.[47] He accepted that the CAT had dealt with Ofcom's competition concerns relating to Virgin Media and the rate card prices for wholesale supply to it in Section F of the judgment. The CAT had reached the conclusion that the rate card price to Virgin Media did not contribute to the obstruction of fair and effective competition of Sky by Virgin Media with regard to cable Pay TV.[48] But the CAT failed to make any findings on Ofcom's conclusion on the effect on the Pay TV market generally of Sky's insistence on rate-card prices and discounting by reference to penetration rates. Mr Turner submitted that the CAT made a further error of law in its statement at [821] that there was no way of knowing what the result of genuinely commercial negotiations (between Sky and others such as BT) might have been in the absence of "likely regulatory action". He submitted that the test, under ***section 316,*** was not what might have happened, but whether Ofcom was correct in concluding that Sky would continue to offer rate-card prices in such a way that there would not be "fair and effective competition".

69. Miss Rose emphasised that the issue of whether the rate-card price offered by Sky was enough to provide "fair and effective competition" was a "key issue" before the CAT and that there was much evidence on the topic.[49] Miss Rose pointed out that Sky had not argued before the CAT that Ofcom's competition concerns were

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[47] In addition to Sky's Notice of Appeal, already referred to, Mr Turner referred to Ofcom's Defence, paras 469, 474 and 476 where submissions in defence of Ofcom's decision to set a price were made and to the exchange in Miss Rose's closing oral submissions to the CAT on Day 30 page 49, in which Barling J acknowledged that he had "not taken on board, perhaps, the free-standing nature of the allegation in relation to the rate-card price", although Miss Rose accepted it was a "supporting point".

[48] [810] of the judgment.

[49] Miss Rose pointed out at fn 4 of her written submissions that 18 expert reports or statements were relevant (in whole or part) to the issue of the level of price fixed under the WMO and cross-examination of the experts on this topic took 7 days before the CAT.

misplaced because of the availability of the penetration discount offered by Sky. The two conclusions of the CAT in [821] could not be supported. As to the first, viz. that Sky was willing to consider penetration discounts: (1) there was nothing before the CAT to challenge Ofcom's findings that the penetration discounts which Sky had been prepared to offer Ofcom in the (eventually abortive) negotiations would not provide a solution to Ofcom's competition concerns. (2) There was no evidence from Sky that the levels of discount that Sky would offer in commercial negotiations (if there had been any) would have been materially different from those offered to Ofcom; the evidence of Sky to the CAT was that it was broadly the same.[50] (3) If the negotiations had been coloured by the regulatory background, then Sky's offer in them could not be good evidence of what would have been offered in a purely commercial context. (4) The CAT did not undertake the analysis needed to come to a conclusion that Ofcom had been wrong in its conclusion that penetration discounts could not be safely relied on to counter Ofcom's competition concerns over the standard rate-card price, particularly on a prospective efficient new entrant to the Pay TV market.

70. As to the second conclusion, viz. uncertainty as to the outcome of "genuinely commercial negotiations", the fact that Sky might have been prepared to offer terms by genuine negotiation was not a proper basis on which to overturn Ofcom's finding that the WMO remedy was needed to ensure "fair and effective" competition in this area. To do that the CAT had to deal with the evidence on this issue and it did not.

71. **The rate-card issue: arguments of Sky and FAPL.** Mr Flynn submitted first, that, upon a correct analysis of the Ofcom Statement, it is clear that Ofcom's competition concerns about rate-card prices generally (as opposed to Virgin Media's position) and Sky's offer of penetration discounts arose in the context of the eventually abortive negotiations between Ofcom and Sky. BT's appeal therefore proceeded on a false premise. Secondly, the Statement did not say that Ofcom had a self-standing concern over the rate-card and penetration discount rates. Thirdly, neither BT nor Ofcom argued before the CAT that Sky's practice in offering penetration discounts was a competition concern which itself justified Ofcom's intervention with the WMO remedy. If it had been, Sky would have adduced evidence on the issue.

72. Miss Davies submitted that the findings in Ofcom's Statement focused on the two "practices"[51] of Sky which, on Ofcom's findings, necessitated a WMO remedy. These "practices" were: (a) Sky's deliberate withholding of CPSCs for wholesale distribution; and (b) Sky's unwillingness to offer any discount to the rate-card price for the CPSCs. Ofcom's concern was not that the structure of penetration discounts was itself contrary to "fair and effective" competition in the Pay TV market. The second "practice" is identified at §7.192 of the Statement, which does not assert problems with penetration discounts. Therefore, once the CAT had concluded that Ofcom was wrong to find that Sky was unwilling to engage in negotiations as to wholesale supply at all and that Sky was, in fact, willing to negotiate discounts on the rate-card price, that was all that the CAT needed to deal with. The CAT found that Sky would be prepared to negotiate a lower figure but it could not be said what that would be in commercial negotiations. In Miss Davies' submission, it was

[50] Miss Rose relied on the third witness statement of Mr Darcey paras 364-8.

[51] The word used in ***section 316(2)(b)*** of the CA 2003.

important to put Section 9 of the Statement in its proper context. This was Ofcom's analysis of how it arrived at the WMO price; it was not demonstrating a "practice" which gave rise to a competition concern.

VII. The Jurisdiction Issue: analysis and conclusion.

73. The argument of Sky and FAPL is, effectively, that if ***section 316*** of the CA 2003 is construed in its statutory context (including the background of the AMS Directive), Ofcom's powers to regulate competition do not extend to the activity of providing TLCSs to the public, whether at the wholesale or the retail level. I have concluded that this is too restrictive a construction of ***section 316*** and that the CAT was correct to hold that Ofcom had jurisdiction to make the WMO condition that it did.

74. The first point is that the AMS Directive is a red herring; it is of no help in deciding the correct construction of ***section 316*** of the CA 2003. It is concerned with what Member States must do to ensure that "media service providers" in their jurisdiction comply with the rules of law applicable to AMSs that are intended for the public in that state. So it is concerned with those who produce content. It is not concerned with issues of competition, either concerning content or concerning the distribution of content to consumers. ***Section 316*** was not passed pursuant to the AMS Directive or its predecessors.

75. Next, section ***316*** must, obviously, be construed in its statutory context. It is unfortunate, to say the least, that in order to arrive at a conclusion about the scope of Ofcom's power to regulate competition with regard to television broadcasts it is necessary to examine and construe so many sections in different parts of the CA 2003 and also to take account of the Broadcasting Acts as well. It is a chase through a labyrinth. However, as that chase has to be done, I note, first, that one of Ofcom's principal duties in carrying out its functions is "to further the interest of consumers in relevant markets, where appropriate by competition."[52] One of those "relevant markets" must be Pay TV, which is within the scope of the things which Ofcom is required to secure under ***section 3(2)*** of the CA 2003, which include "the availability throughout the UK of a wide range of television and radio services…". Of course, under ***section 211*** Ofcom is to regulate TLCSs, on which see further below. Ofcom can only further the interests of consumers by examining the market that affects TLCSs, which must include the issue of the availability of TLCSs on various television platforms and services and at what prices.

76. The second contextual point is that ***section 211*** requires that Ofcom "regulate" the services identified in that section. TLCSs are identified in ***section 211(2)(b)*** as being one of those services. I would accept the argument of Mr Flynn and Miss Davies that ***section 232*** of the CA 2003 draws a distinction between the production of content, viz. TLCSs, and the broadcast and distribution of that content. But that does not narrow the scope of Ofcom's obligation under ***section 211(1)*** to "regulate" TLCSs. That obligation is put broadly. Nor does the point on ***section 232*** deal with the issue of the scope of Ofcom's regulatory jurisdiction given by ***section 316.***

77. The third contextual point is that ***section 232*** makes it clear that, for the purposes of that Part of the CA 2003, a TLCS refers to such a service that is "provided with a

[52] ***Section 3(1)(b)*** of the CA 2003.

view to its availability for reception by the public". In other words, it is vital that, to be within the definition, the TLCS is created with the intention that it can be viewed by the public through either a satellite broadcast or an electronic communications network. But this just serves to emphasise again that everything is leading towards the TLCS being broadcast to the public. That point is reinforced by the terms of ***section 361*** of the CA 2003.

78. The fourth contextual point is ***section 362.*** This is the most powerful weapon that Sky and the FAPL used to support their argument that ***section 316*** does not extend to the wholesale or retail distribution of TLCSs, but only to competition as to the "content", because of the definition of "provision" in ***section 362(1)*** and ***(2).*** But on analysis this section does not help their argument. It concentrates on the question of which person "provides" the TLCS itself, that is, who provides the "content". The answer is: the person "with general control over which programmes and other services and facilities are comprised in the service". But the section is not at all concerned with who then enables that service to be broadcast onwards to the public, nor with the issue of whether Ofcom has jurisdiction over any competition issues that arise in relation to the distribution of the TLCS.

79. So I come back to examine ***section 316*** in this statutory context, bearing also in mind the statutory history of that section, which Miss Rose emphasised. "Licensed services" in ***section 316(1)*** means the services licensed by a BA licence (***section 316(4)***). BA licences relate to the content of the services. The types of service that can be the subject of a BA licence include TLCSs. So when determining the scope of Ofcom's jurisdiction to impose conditions in such licences, the fundamental question is: what is the scope of the words "*in the provision of"* licensed services? Given that it is Ofcom's statutory duty to promote the interests of consumers in relevant markets and given that one of those relevant markets must be Pay TV (because that market is the subject of regulation under the CA 2003) then it must follow, in my view, that the words *"in the provision of"* must be widely construed and must mean "in the provision of the relevant service to the public". That will embrace the provision by the "provider" of the TLCSs to other broadcasters and to the public on both wholesale and retail bases.

80. Accordingly, in my view, Ofcom had jurisdiction under ***section 316*** to impose the WMO condition in Sky's BA licences. I therefore do not need to deal with Ofcom's fall-back argument on "connected services".

VIII. The rate-card issue: analysis and conclusion.

81. In order to deal with this issue, I think that it is necessary to consider the following:

(1) What precisely did Ofcom conclude in the Statement concerning rate-card prices and penetration discounts issues?

(2) What (if anything) should the CAT have considered concerning the rate-card prices and penetration discounts issues on Sky's appeal to it?

(3) Did the CAT consider rate-card prices and penetration discounts as being "competition concerns" of Ofcom?

(4) What should the CAT have considered on this in the light of Ofcom's conclusions concerning its "competition concerns" relating to the rate-card price and penetration discounts?

(5) Were the CAT's reasons for not dealing further with the rate-card and penetration discount issues adequate?

(6) If the CAT erred are these "errors of law" which entitle this court to interfere with the CAT's order and, if so, how?

82. **(1) What precisely did Ofcom conclude in the Statement concerning rate-card prices and penetration discounts?**

I have already attempted to summarise Ofcom's findings in the Statement. In Section 7 of the Statement Ofcom identifies its "key concern" concerning competition and stated in §7.2 that it has other competition concerns, although at that stage the rate-card price as such and penetration discounts are not specifically identified. However, Ofcom's concern about the price at which Sky might be prepared to offer the CPSCs to other broadcasters at the wholesale level is clearly identified at §7.192-193. At §7.263 Ofcom concludes that Sky set the rate-card price charged to Virgin Media at just below a price which would constitute a "margin squeeze" abuse. Ofcom returned to the "Pricing of Core Premium channels" at §7.349. At §7.357 it stated that Sky's performance suggests that it has benefited from "barriers to entry" to the market. Effectively, Ofcom stated at §7.365-366 that one of these "barriers" is the price for its Core Premium channels.

83. In Section 9 of the Statement, in the course of discussing why there had to be a WMO remedy solution to Ofcom's competition concerns as opposed to a negotiated solution, Ofcom again highlighted Sky's refusal to discuss the rate-card price level, save in the context of penetration discounts: §9.96-97. Ofcom concluded "at the time" of those negotiations that price-reduction based on penetration discounts would not meet Ofcom's competition concerns for the reasons it set out at §9.98 and §9.100. It said in terms at §9.105 that the level of Sky's wholesale and retail pricing is also prejudicial to fair and effective competition. At §9.129 Ofcom stated that it believed that the current cable rate-card rate would not allow competitors to Sky to build a viable business and "it would not have addressed the detriment we have identified". In Section 10 Ofcom explained why it had adopted the wholesale prices it proposes for the Standard Definition version of Sky's CPSCs. §10.63 stated that its approach was aimed at ensuring "sustainable long-term entry" of competitors to Sky, albeit not on Sky's scale.

84. The following is clear from all these statements. First, Ofcom concluded that insofar as Sky might be prepared to offer the CPSCs on a wholesale basis to other broadcasters, the basis for doing so would be the rate-card price. Secondly, the only reductions Sky would offer would be discounts on the basis of platform penetration by the wholesale buyer, but that in itself produced a competition concern. Thirdly, both the rate-card price itself and the proposed basis of discounts were "competition concerns" of Ofcom because they would not allow other competitors to build a viable business in this market. Although the Ofcom statement does not expressly use the statutory terminology, Ofcom's phraseology in the Statement is only consistent with a conclusion by it that these were "practices" of Sky that Ofcom considered were

prejudicial to "fair and effective" competition in the Pay TV market, within the meaning of ***section 316(2)*** of the CA 2003. Fourthly, because of these conclusions, it was necessary for Ofcom to set actual prices for the WMO remedy, in relation to the provision of SD versions of the CPSCs.

85. **(2) What should the CAT have considered concerning the rate-card price and penetration discount issues on Sky's appeal?**

An appeal to the CAT under ***section 317(6)*** of the CA 2003 requires that it decide the appeal "on the merits and by reference to the grounds of appeal set out in the notice of appeal": ***section 195(2)*** of the CA 2003. In the judgment the CAT considered what this meant in practice, in the light of a number of authorities.[53] It noted that the present appeals were concerned, to a large extent, with Ofcom's findings of fact, particularly in respect of negotiations with other potential retailers for the supply of CPSCs.

86. In relation to Ofcom's findings of fact, the CAT concluded, at [76], that its own jurisdiction was as follows:

> "It is clear (and appears to be common ground) that in a case such as this the Tribunal has jurisdiction to assess and find the facts in so far as they are relevant to the grounds of appeal, and must do so in the light of the admissible material that is before it. If, having evaluated the evidence, the Tribunal finds that a material finding of fact made by Ofcom is wrong, then it must so hold and proceed accordingly. Although a finding of fact obviously involves an evaluation of the evidence, this is not an exercise of discretion, and there is no margin of appreciation (as that notion is generally understood in this context) in relation to such findings, any more than for decisions on points of law."

87. The CAT then considered its jurisdiction to review Ofcom's exercise of judgment on whether a particular "practice"[54] of Sky precluded "fair and effective competition" (under ***section 316***) or whether Ofcom should exercise its judgment to impose a licence condition such as the WMO condition. The CAT considered a number of authorities and concluded, at [84]:

> "having regard to the parties' submissions and the authorities to which our attention was drawn, we consider that the following principles should inform our approach to disputed questions upon which Ofcom has exercised a judgment of the kind under discussion:

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[53] See [74] of the judgment.

[54] The word used in ***section 316(2)(b)*** of the CA 2003. "Those conditions must include the conditions (if any) that Ofcom consider appropriate for securing that the provider of the service does not…(b) engage in any practice…which Ofcom consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services".

(a) Since the Tribunal is exercising a jurisdiction "on the merits", its assessment is not limited to the classic heads of judicial review, and in particular it is not restricted to an investigation of whether Ofcom's determination of the particular issue was what is known as *Wednesbury* unreasonable or irrational or outside the range of reasonable responses.

(b) Rather the Tribunal is called upon to consider whether, in the light of the grounds of appeal and the evidence before it, the determination was wrong. For this purpose it is not sufficient for the Tribunal simply to conclude that it would have reached a different decision had it been the designated decision-maker.

(c) In considering whether the regulator's decision on the specific issue is wrong, the Tribunal should consider the decision carefully, and attach due weight to it, and to the reasons underlying it. This follows not least from the fact that this is an appeal from an administrative decision not a *de novo* rehearing of the matter, and from the fact that Parliament has chosen to place responsibility for making the decision on Ofcom.

(d) When considering how much weight to place upon those matters, the specific language of section 316 to which we have referred, and the duration and intensity of the investigation carried out by Ofcom as a specialist regulator, are clearly important factors, along with the nature of the particular issue and decision, the fullness and clarity of the reasoning and the evidence given on appeal. Whether or not it is helpful to encapsulate the appropriate approach in the proposition that Ofcom enjoys a margin of appreciation on issues which entail the exercise of its judgment, the fact is that the Tribunal should apply appropriate restraint and should not interfere with Ofcom's exercise of a judgment unless satisfied that it was wrong."

88. Neither of these statements of principle was in dispute before us. I would endorse them. It follows that when the CAT was considering this appeal from Ofcom, it had to undertake three exercises. First the CAT had to ensure that it had correctly analysed and understood the extent of both the findings of fact that Ofcom had made in its Statement and also the full basis on which Ofcom had exercised a judgment to impose conditions in the exercise of its jurisdiction under ***section 316.*** Secondly, the CAT had to ensure that it had grasped the nature and extent of the challenge being made to Ofcom's findings and the exercise of its judgment. Thirdly, the CAT had to ensure, when making its own findings of fact on a particular aspect of the Ofcom Statement that had been challenged, that it worked out fully the impact that any different conclusions of fact it made would have on all the relevant conclusions made

in Ofcom's Statement (as correctly analysed), both as to Ofcom's findings of fact and as to the exercise of its judgment in imposing the remedy it did.

89. Effectively, the case of BT and Ofcom on this appeal is that the CAT failed properly to carry out those three exercises and so erred in law. Mr Flynn and Miss Davies were prepared to accept that if the CAT had made such failures then this would amount to an error of law for the purposes of ***section 196*** of the CA 2003**,** so as to be capable of being challenged in this court.

90. **(3) Did the CAT consider the rate-card price and penetration discount issues as being "competition concerns" of Ofcom?**

On my analysis, the CAT's first task in this case was to ensure it understood the full scope of all Ofcom's "competition concerns" as set out in the Statement and which I have attempted to summarise both in Section IV above and, in relation to the rate-card prices and penetration discounts, in [82] to [84] above. However, in the Introduction and Summary of the Judgment, at [22], the CAT identified Ofcom's "core competition concern" as being the fact that Sky deliberately withheld from other retailers the wholesale supply of its premium channels. Although the CAT did identify "Ofcom's other competition concerns" at [32], these did not include Ofcom's finding that Sky's insistence on the rate-card price and discounts by reference to platform penetration was one of Ofcom's competition concerns. There is no reference to these matters being part of Ofcom's competition concerns in the CAT's "Summary of the Statement" at [52] of the Judgment. In Section VI of the Judgment, at [159] the CAT identifies again Ofcom's "key concern" and at [160] it refers to "other concerns" of Ofcom, but these are said to relate to Virgin Media and they do not include the rate-card price and penetration discount concerns, although the CAT does quote §1.30 of the Statement which identifies the rate-card price concern. At [161] the CAT does record Ofcom's conclusion that "…To the extent that Sky is prepared to wholesale, this is at prices which Ofcom considers to be unacceptable or unfavourable". At [192] the Judgment records Mr Darcey's evidence (for Sky) about the negotiations between Sky and Ofcom and notes that Ofcom had expressed concern about "the wholesale pricing structure". The Judgment then goes on to set out its findings on the various negotiations and whether Ofcom's conclusion that Sky had deliberately refused to negotiate was correct.

91. In the CAT's detailed analysis of the negotiations that took place between Sky and its potential competitors for the retailing of the CPSCs, it does refer to the factual issue of whether Sky offered discounts on the rate-card price. Thus at [319] and [322] the CAT finds that, in negotiations with BT, Sky was prepared to negotiate discounts on the rate-card price by reference to penetration levels on the BT platform. However, there is no analysis of the issue of whether, if Sky demanded the rate-card price for the wholesale supply of the CPSCs to new entrant competitors (or others) even with penetration discounts, Ofcom was correct to conclude that this would still impede "fair and effective competition" in the Pay TV market.

92. There is an analysis of the effect of the rate-card price and discounts on the competition between Sky and Virgin Media's digital cable TV service. At [810] the CAT concluded that the rate-card price did not obstruct fair and effective competition by Virgin Media. But the broader issue of the possible competition effect of the rate-

card price and penetration discounts in relation to other potential competitors, including new entrants, is not discussed.

93. Next is the all important paragraph [821], which I have already set out at [52] above. In short, the paragraph records BT's complaint that it could not compete effectively at the rate-card price, finds that Sky was prepared to agree discounts based on penetration rates achieved by the retailer and notes that there had been no negotiation between BT and Sky "unclouded by likely regulatory action". The CAT concluded that it was neither necessary nor appropriate to reach any specific conclusion on the topic of BT's claim that it could not compete at rate-card prices. It gives, very shortly, two reasons why it was unnecessary to consider that matter further. The paragraph does not refer to Ofcom's competition concern of the effect of penetration discounts as set out at §9.98 of the Statement. Nor is there any further paragraph in the judgment which returns to this topic.[55]

94. **(4) What *should* the CAT have considered in the light of Ofcom's conclusions on its "competition concern" relating to the rate-card price and penetration discounts?**

The CAT had to deal with Sky's appeal "on the merits" of Ofcom's conclusions on what its competition concerns were and why those had led it to setting the WMO remedy and to setting specific prices for wholesaling the CPSCs to competitors of Sky in the standard definition versions. On my analysis, there can be no doubt that the rate-card price and penetration discount issues were part of Ofcom's competition concerns, even if they were not its "key" concern. The issues of rate-card price and penetration discounts were before the CAT on the parties' Notice of Appeal and Defence. As already noted, there were 18 reports or statements relevant to the level of price fixed by the WMO remedy before the CAT. The fact that the CAT stated, at [821] of the judgment, that it did not find it necessary or appropriate to consider the rate-card price issue demonstrates that these were live issues before the tribunal at the hearing.

95. The CAT's conclusion that Ofcom was wrong, on the facts, to find that Sky was not prepared to negotiate for the wholesale of the CPSCs left open the issue of the price at which these channels could or would be supplied wholesale to competitors. Even though at [821] the CAT found, albeit in very general terms only, that Sky was open to agreeing discounts with competitors from the rate-card prices for the purpose of wholesale supply "referable to penetration rates achieved by the retailer", the CAT does not indicate what those prices might have been or, more importantly, what their effect might have been on competition. Indeed it emphasised that there was no way of knowing what the outcome of genuine commercial negotiations might be and regarded this as a good reason for it being unnecessary to make further conclusions on this issue. But the very fact that the CAT did not find what actual prices might have been agreed meant that it could not conclude whether or not the prices that might have been agreed would have impeded "fair and effective" competition.

96. Thus, in my view, the CAT has not dealt with Ofcom's finding that the rate-card price is, in itself, an impediment to "fair and effective" competition. Furthermore,

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[55] As already noted, at [832] the judgment deals with the supply of rate-card prices paid by Virgin Media, but it does not deal with the general rate-card/penetration discount "competition concern" of Ofcom.

the CAT did not address at all the issue of whether Ofcom was right to conclude that the penetration discount method of lowering the price for the wholesale supply of CPSCs to competitors by Sky raised a "competition concern". Ofcom had spelt out its view clearly at §9.98. The fact that this conclusion appeared in the Section of the Statement headed "Remedies" cannot, in my view, detract from it being a clear finding by Ofcom that this was a "competition concern", as is stated at the outset of §9.98. There is nothing in the judgment that deals with Ofcom's statement in that paragraph. Nor is there anything in the judgment that explains why, even assuming that finding stood, there was no requirement for the imposition of the WMO prices that Ofcom proposed.

97. I accept, of course, that if the position is that Sky was prepared to negotiate for the wholesale supply of CPSCs and it was prepared to negotiate the price, then the fact that the discounts would have been based on penetration levels *may not*, of itself, have been sufficient of an independent "competition concern" to lead Ofcom to the conclusion that it had to impose a WMO remedy or some other remedy. But, in the absence of any analysis of this issue by the CAT in the judgment it is unclear whether there could be an independent "competition concern" based on the effect of penetration discounts or what the effect of that concern might be. Therefore, because the effect of these "competition concerns" is not dealt with by the CAT in the judgment, it is unknown whether there would still be any need for the WMO remedy or whether the CAT was correct to set it aside.

98. **(5) Were the reasons given by the CAT for not needing to deal further with the rate-card price and/or penetration discount issues adequate?**

Two reasons were given in [821]. In my view neither was satisfactory. First, as noted above, the CAT did not perform any analysis of what the discounts "referable to penetration rates achieved by the retailer" would have been. So, even assuming such discounts would have been available, the CAT did not and could not have made any conclusion on whether those discounts would not have given rise to any competition concern.

99. The second reason, viz. that there was no way of knowing what the outcome of "genuine commercial negotiations" would have been in the absence of likely regulatory action, is equally unsatisfactory. If such an outcome was unknown, then it cannot be said that this must remove the basis for a competition concern. The CAT therefore lacked any solid foundation for holding that Ofcom's concern on rate-card prices and penetration discounts was unsound. The CAT could only do so if it had analysed and reached conclusions on the expert evidence and submissions on price, penetration discounts and competition which, we understand, were before it.

100. **(6) Are these errors of law entitling this court to interfere with the CAT's order and, if so, how?**

In summary: (1) I am quite satisfied that in the judgment the CAT misconstrued the Statement by failing to appreciate the importance of Ofcom's conclusion that the rate-card price and the effect of the penetration discounts that were proposed by Sky themselves gave rise to "competition concerns". (2) This issue was before the CAT as is clear from the Notice of Appeal and Defence. Moreover, Miss Rose had made it clear during her submissions to the CAT that this was a separate, if supporting point,

that Ofcom was making.[56] (3) Therefore, even if the "crucial finding of fact" was that Sky deliberately withheld wholesale supply of its premium channels, Ofcom had found this independent competition concern and that it had to be dealt with by the CAT on appeal. (4) The failure of the CAT correctly to interpret the Statement or to deal with the rate-card price and penetration discount issues has the consequence that it is unclear whether, despite the findings of fact that the CAT has made in favour of Sky, there remain significant, independent, competition concerns based on the rate-card price and penetration discount, as found by Ofcom in the Statement. (5) The reasons that the CAT gave for not considering that matter further were inadequate.

101. In my view these amount to errors of law which must mean that the judgment cannot be upheld, for two reasons. First, the CAT has thereby failed to deal with the appeal to it "on the merits". Secondly, its conclusion and order that the WMO remedy must be set aside was based on an incomplete set of conclusions. It had not adequately considered whether that remedy was justified on the basis of Ofcom's "competition concerns" arising out of the rate-card price and the penetration discounts. The only way in which this error can satisfactorily be dealt with is for the order of the CAT of 6 March 2013 to be set aside and for the matter to be remitted to the CAT for further consideration, findings and conclusions.

IX. Disposal

102. For these reasons I would allow BT and Ofcom's appeal on the rate-card issue, but dismiss Sky and FAPL's cross-appeal on the jurisdiction issue. I would propose that the matter be remitted to the CAT for further consideration in order that further findings and conclusions may be made in the light of this judgment.

X. Postscript

103. I have read the judgments of Arden and Vos LJJ. I agree with their additional remarks.

Lord Justice Vos:

104. I agree with the reasoning and conclusions of Aikens LJ, save on one matter of emphasis to which I refer below. I also agree with Arden LJ's judgment that I have been able to see in draft. I add a few words of my own because of the importance of the case and because we are differing from the CAT on the rate-card issue. I gratefully adopt the abbreviations that Aikens LJ has used.

Jurisdiction

105. The main question that the CAT had to consider as to Ofcom's jurisdiction was the meaning of the words "in the provision of licensed services" in sections 316(1) and 316(2) of the CA 2003.

106. In the course of argument, emphasis was placed by Sky and FAPL on two matters that I would wish to say something briefly about.

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[56] See transcript of the exchange between Miss Rose and Barling J on Day 30 page 49 noted at footnote [47] above.

107. First, it was suggested that the CA 2003 implemented the AMS Directive and that section 211(2)(b) of the CA 2003 defined Ofcom's licensing jurisdiction by reference to the AMS Directive, so that section 316 of the CA 2003 must be interpreted by reference to the terms of the AMS Directive. Aikens LJ has described the AMS Directive as a "red herring" and I agree, but I should explain in a little more detail why I thought that this was the case.

108. The AMS Directive, and its predecessor the Television Without Frontiers Directive (89/552/EEC) are and were concerned with the regulation of the production of content, whilst the Framework Directive (2002/21/EC) addresses the transmission of content (see paragraph 41 of the CJEU decision in UPC Nederland BV v. Gemeente Hilversum (Case C-518/11) 7th November 2013). This distinction gives no clue, in my judgment, as to the proper meaning of section 316 of the CA 2003, which is concerned with the UK regime for ensuring fair and effective competition in the provision of licensed services.

109. The CA 2003 is divided into 6 parts, 4 of which have some relevance for these purposes. Part 1 concerns the "Functions of Ofcom", Part 2 concerns "Networks, Services and the Radio Spectrum", Part 3 (in which the relevant provisions for our purposes are found) concerns "Television and Radio Services", and Part 5 concerns "Competition in Communications Markets".

110. The Framework Directive and the 6 EU requirements imported by Article 8 (including the requirement to promote competition) are expressly mentioned in section 4 of the CA 2003 (in Part 1) in connection with certain specific functions of Ofcom, not including those in relation to television services in Part 3 of the 2003 Act. Section 3(1)(b) of the 2003 Act, however, refers to Ofcom's general duties that include the duty "to further the interests of consumers in relevant markets, where appropriate by promoting competition". Section 3(2)(c) requires Ofcom to secure the availability throughout the UK of a wide range of television services.

111. Part 2 of the 2003 Act concerns "electronic communications networks", but contains no dedicated competition provisions. Part 3 then contains the competition provisions that Aikens LJ has referred to in detail.

112. The reference to the AMS Directive in section 211(2)(b) of the CA 2003 is contained in the first section in Chapter 2 of Part 3 headed "Regulatory Structure for Independent Television Services". The reference, as it seems to me, is merely intended to indicate that Ofcom's function is to regulate television licensable content services provided by persons "*under the jurisdiction of the United Kingdom for the purposes of the [AMS Directive]*". In other words, the reference to the AMS Directive defines the persons who are under the UK's regulatory jurisdiction as opposed to being under the regulatory jurisdiction of some other Member State (see Article 2 of the AMS Directive, which explains which Member States are responsible for which media service providers). Thus, the express reference to the AMS Directive in the context of Ofcom's regulatory powers has nothing to do with the ambit of those powers.

113. One can, nonetheless, gain some insight into the intended breadth of section 316 from its location in Chapter 4 of Part 3 of the 2003 Act under the heading: "Regulatory

Provisions". It is within Part 3 which concerns all aspects of the provision of television and radio services.

114. The second connected question upon which I would wish to say something concerns the definition of the word "provision" in sections 362(1) and (2) of the CA 2003. Those sections provide that the person to be treated as "providing" the service is the person with general control over which programmes are comprised in the service (i.e. the chooser of the content), and the word "provision" and cognate expressions are to be construed accordingly. Aikens LJ has described this provision as Sky's and FAPL's "most powerful weapon", but concluded that section 362 was concentrating on the question of which person "provided" the content, so that it did not avail them, because it was not concerned with who then enables that content to be broadcast to the public.

115. The high point of Sky's argument is that, because of section 362, one should read section 316 as being concerned only with competition between the persons responsible for the choice of content in relation to licensed services. But that is not what either of section 316(1) or 316(2) says. They refer to competition "in the provision of licensed services", not competition between the providers of licensed services. Even if the definition in section 362 directs the reader of the word "provision" to the persons responsible for content, licensed services have to be provided to somebody. The remainder of the competition provisions in the CA 2003 make it clear that Ofcom is to be concerned with the interests of consumers and the provision of television services to members of the public. It would be odd if section 316 were concerned only with competition between providers of content, when the remainder of the CA 2003 makes clear that Ofcom is to have broader more comprehensive duties and concerns.

116. In my judgment, therefore, it is clear that section 316 is not limited in the way Sky and FAPL suggest. It allows Ofcom to impose conditions so as to ensure fair and effective competition in the wholesale and retail provision of licensed services to consumers generally.

117. In the light of this conclusion, I agree with Aikens LJ that there is no need to go on to consider whether Sky's provision of CPSCs at the retail level would, in addition or in the alternative, amount to the provision of a "*connected service*" under section 316(4) of the CA 2003.

The rate-card and penetration issues

118. Aikens LJ says at paragraph 97 of his judgment that he accepts that, if Sky was in fact prepared to negotiate for the wholesale supply and the price of CPSCs, then the fact that only penetration discounts were offered might not have been a sufficient independent competition concern to lead Ofcom to impose a WMO or other remedy. Whilst I agree that it is possible to imagine situations in which this could be the case, it does not, in my judgment, seem to be a likely outcome. I say this because Ofcom's Statement expressly deals with the point, and because Ofcom's concern was, as Mr Jon Turner QC counsel for BT submitted, not to protect BT or Virgin Media, but to protect new entrants to allow them to come in to compete. That was what led to the WMO remedy.

119. Paragraphs 9.97 and 9.98 of the Statement make clear that Ofcom thought that penetration discounts did not address their competition concerns, because they did not enable a retailer to compete with Sky at the likely low levels of penetration that could in practice be achieved, and because such penetration discounts provided the perverse incentive of forcing competitors to go all out to sell Sky's content, and thereby to become purely resellers of that content.

120. These points also reinforce Aikens LJ's conclusion as to the inadequacy of the reasons that the CAT gave for not dealing with Ofcom's rate-card price concern. The penetration rate discount potentially offered by Sky was not an answer to Ofcom's concern that Sky was only offering wholesale supply of CPSCs at rate-card prices, it was an additional free-standing competition concern that the CAT needed to deal with on the evidence before it. Moreover, Ofcom's rate-card concern was not answered by the CAT's findings on the actual negotiations between Sky and BT, or indeed between Sky and TUTV or Orange. Ofcom thought that the facts that Sky (i) offered rate-card prices and (ii) was prepared only to contemplate discounts based on penetration rates, each raised their own competition concerns. The fact that actual negotiations had taken a particular course due to possible regulatory action was nothing to the point. In my judgment, the CAT should have addressed each of Ofcom's competition concerns in detail.

Disposal

121. For these reasons, I agree with the course proposed by Aikens LJ.

Lady Justice Arden:

122. I am indebted to Lord Justice Aikens for his careful and comprehensive analysis of this appeal. I adopt his definitions.

123. I, too, am satisfied, for the reasons very fully explored by Aikens LJ that the CAT erred in law in not addressing the totality of the competition concerns identified by Ofcom in the Pay TV Statement. Ofcom was concerned that the prices offered by Sky would not bring about competition in the long term. It was not solely concerned with Sky's obstructive behaviour, as alleged by Ofcom, or with its negotiations with particular established market participants. It was also concerned about new entrants to the market, and about ensuring wider consumer choice.

124. On the question of jurisdiction, the issue is whether Ofcom's section 316 powers extend to regulating wholesaler-to-retailer agreements as well as retailer-to-subscriber agreements. Sky and FAPL contend that those powers are restricted to agreements for transmission to subscribers. But the former agreements may impact on prices offered to consumers of Pay TV services. Sky's business is vertically integrated, ie it makes programmes and has valuable exclusive rights to broadcast premium sport events, as well as providing transmission services. It is, therefore, in a very strong market position to extract high prices from wholesalers, and the consumer is therefore vulnerable to the risk of consequent market distortion. There would be a major gap in competition law if Ofcom's section 316 powers did not extend to regulating wholesaler-to-retailer transmission services for this purpose.

125. The relevant wording of section 316 is “in the provision of licensed services or connected services". It is common ground that licensed services are TLCSs, which are defined in section 232, and the issue is whether they are “provided with a view to its availability for reception by members of the public” for the purposes of that section when supplied from wholesaler to retailer.

126. In my judgment, these words are clearly wide enough to cover supply of transmission services for the purpose of onward supply to the public. It is true that the EU regulatory framework distinguishes between content and transmission. That framework, however, does not pre-empt Parliament from enacting greater regulation against distortion of competition in the domestic market. As noted, it would be odd if there were such a gap as I have described. In my judgment, there is no such gap: the words “with a view to” in section 232 are wide enough to cover the services which are provided from wholesaler-to-retailer to enable the recipient to on sell to consumers.

127. In any event, if that were not the meaning of section 316, the services sold by wholesaler to wholesaler would in my judgment fall within the ordinary meaning of the words used by Parliament in the definition of “connected services” in section 316(4).

128. The jurisprudence of the CJEU on the EU regulatory framework to be found in *UPC Nederland BV v Gemeente Hilversum* (Case C-518/11), and confirmed in the recent opinion of Advocate General Kokott in *UPC DTH Sàrl v Nemzeti Média- és Hírközlési Hatóság Elnökhelyettese* (C-475/12), draws a distinction between content and transmission services. Both cases concern the supply of transmission services to the consumer. However, the jurisprudence does not make the further distinction on which Sky and FAPL must establish, namely, that for an agreement to be regulated it can only be an agreement between the supplier of transmission services and a subscriber. According to Advocate General Kokott, a subscriber service was a conditional access agreement and within the regulatory framework for transmission services because it was an associated service.

129. With these further points, I agree with the judgments of Aikens and Vos LJJ and agree with the order that Aikens LJ proposes.

Appendix

Broadcasting Act 1990 (as amended)

3 Licences under Part I

(1) Any licence granted by OFCOM under this Part shall be in writing and (subject to the provisions of this Part) shall continue in force for such period as is provided, in relation to a licence of the kind in question, by the relevant provision of Chapter 2 or 5 of this Part or section 235 of the Communications Act 2003.

(2) A licence may be so granted for the provision of such a service as is specified in the licence or for the provision of a service of such a description as is so specified.

(3) OFCOM—

(a) shall not grant a licence to any person unless they are satisfied that he is a fit and proper person to hold it; and

(b) shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a licence, that person does not remain the holder of the licence;

(3A) Where OFCOM are not satisfied that a BBC company which has applied for a licence is a fit and proper person to hold it, they shall, before refusing the application, notify the Secretary of State that they are not so satisfied.

(4) OFCOM may vary a licence by a notice served on the licence holder if—

(a) in the case of a variation of the period for which the licence is to continue in force, the licence holder consents; or

(b) in the case of any other variation, the licence holder has been given a reasonable opportunity of making representations to OFCOM about the variation.

(5) Paragraph (a) of subsection (4) does not affect the operation of section 41(1)(b); and that subsection shall not authorise the variation of any conditions included in a licence in pursuance of section 19(1) or 52(1) or in pursuance of any other provision of this Part which applies section 19(1).

(6) A licence granted to any person under this Part shall not be transferable to any other person without the previous consent in writing of OFCOM

(7) Without prejudice to the generality of subsection (6), OFCOM shall not give their consent for the purposes of that subsection unless they are satisfied that any such other person would be in a position to comply with all of the conditions included in the licence which would have effect during the period for which it is to be in force.

(8) The holding by a person of a licence under this Part shall not relive him of—

(a) Any liability in respect of a failure to hold [a licence under section 8 of the Wireless Telegraphy Act 2006; or

(b) Any obligation to comply with requirements imposed by or under Chapter 1 of Part 2 of the Communications Act 2003 (electronic communications networks and electronic communications services).

4 General licence conditions

(1) A licence may include—

(a) such conditions as appear to OFCOM to be appropriate having regard to any duties which are or may be imposed on them, or on the licence holder, by or under this Act, the Broadcasting Act 1996 or the Communications Act 2003;

(b) Conditions requiring the payment by the licence holder to OFCOM (whether on the grant of the licence or at such times thereafter as may be determined by or under the licence, or both) of a fee or fees of an amount or amounts so determined;

(c) conditions requiring the licence holder to provide OFCOM, in such manner and at such times as they may reasonably require, with such information as they may require for the purpose of exercising the functions assigned to them by or under this Act, the Broadcasting Act 1996 or the Communications Act 2003;

(d) conditions providing for such incidental and supplemental matters as appear to OFCOM to be appropriate.

(2) A licence may in particular include conditions requiring the licence holder—

(a) to comply with any direction given by OFCOM as to such matters as are specified in the licence or are of a description so specified; or

(b) (except to the extent that OFCOM consent to his doing or not doing them) not to do or to do such things as are specified in the licence or are of a description so specified.

(3) The fees required to be paid to OFCOM by virtue of subsection (1)(b) shall be in accordance with such tariff as may from time to time be fixed by OFCOM.

(4) A tariff fixed under subsection (3) may specify different fees in relation to different cases or circumstances; and OFCOM shall publish every such tariff in such manner as they consider appropriate.

(5) Where the holder of any licence—

(a) Is required by virtue of any condition contained in the licence to provide OFCOM with any information, and

(b) In purported compliance with that condition provides them with information which is false in a material particular,

he shall be taken for the purposes of sections 41 and 42 or (as the case may be) sections 237 and 238 of the Communications Act 2003 (enforcement of television licensable content service licences) to have failed to comply with that condition.

(6) Nothing in this Act which authorises or requires the inclusion in a licence of conditions relating to any particular matter or having effect for any particular purpose shall be taken as derogating from the generality of subsection (1).

13 Prohibition on providing television services without a licence

(1) Subject to subsection (2), any person who provides any relevant regulated television service without being authorised to do so by or under a licence under this Part or Part I of the Broadcasting Act 1996 shall be guilty of an offence.

(1A) In subsection (1) "*relevant regulated television service*" means a service falling, in pursuance of section 211(1) of the Communications Act 2003, to be regulated by OFCOM, other than a television multiplex service.

(2) The Secretary of State may, after consultation with OFCOM, by order provide that subsection (1) shall not apply to such services or descriptions of services as are specified in the order.

(3) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to a fine.

(4) No proceedings in respect of an offence under this section shall be instituted—

(a) in England and Wales, except by or with the consent of the Director of Public Prosecutions;

(b) in Northern Ireland, except by or with the consent of the Director of Public Prosecutions for Northern Ireland.

(5) Without prejudice to subsection (3), compliance with this section shall be enforceable by civil proceedings by the Crown for an injunction or interdict or for any other appropriate relief.

(6) Any order under his section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Broadcasting Act 1996 (amended)

12 Conditions attached to multiplex licence

(1) A multiplex licence shall include such conditions as appear to the Commission to be appropriate for securing—

(a) that the licensed service is established by the licence holder in accordance with the timetable and other proposals indicated in the technical plan submitted under section 7(4)(b),

(b) the implementation of any proposals submitted by the licence holder under section 7(4)(c), (d), (e) or (f),

(c) that all digital programme services broadcast under the licence are provided by the holder of a licence under section 18 or by an EEA broadcaster,

(d) that all digital additional services broadcast under the licence are provided by the holder of a licence under section 25 or by an EEA broadcaster,

(e) that in the terms on which the licence holder contracts, or offers to contract, for the broadcasting of digital programme services or digital additional services, he does not show undue discrimination either against or in favour of a particular person providing such a service or a class of such persons,

(f) that the licence holder does not, in any agreement with a person providing a digital programme service or digital additional services which entitles that person to use a specified amount of digital capacity on the frequency or frequencies to which the licence relates, restrict that person's freedom to make arrangements with some other person as to the use of any of that digital capacity (except to the extent that the restriction is reasonably required for the purpose of ensuring the technical quality of the broadcasts or for the purpose of securing compliance with any other condition of the licence),

(g) that the signals carrying the multiplex service attain high standards in terms of technical quality and reliability throughout so much of the area for which the service is provided as is for the time being reasonably practicable, and

(h) that, while the licence is in force, at least 90 per cent. of digital capacity on the frequency or frequencies to which the licence relates is available for the broadcasting of digital programme services, qualifying services, programme-related services or relevant technical services.

(2) Any conditions imposed in pursuance of subsection (1)(a) or (b) may be varied by the Commission with the consent of the licence holder (and section 3(4)(b) shall accordingly not apply to any such variation).

(3) Where the licence holder applies to the Commission for the variation of any condition imposed in pursuance of subsection (1)(b) and relating to the characteristics of any of the digital programme services to be broadcast under

the licence, the Commission shall vary the condition accordingly unless it appears to them that, if the application were granted, the capacity of the digital programme services broadcast under the licence to appeal to a variety of tastes and interests would be unacceptably diminished.

(3A) In subsection (1)(c) and (d) "EEA broadcaster" means a person who for the purposes of Council Directive 89/552/EEC is under the jurisdiction of an EEA State other than the United Kingdom.

(4) In subsection (1)(h)—

(a) "qualifying service" does not include the qualifying teletext service,

(b) "programme-related service" means any digital additional service consisting in the provision of services (apart from advertising) which—

i) are ancillary to the programmes included in one or more television programme services (within the meaning of Part I of the 1990 Act) and are directly related to the contents of those programmes, or

ii) relate to the promotion or listing of such programmes, and

(c) "relevant technical service" means any technical service which relates to one or more digital programme services.

(5) The Secretary of State may by order amend subsection (1)(h) by substituting for the percentage for the time being specified there a different percentage specified in the order.

(6) No order under subsection (5) shall be made unless a draft of the order has been laid before and approved by a resolution of each House of Parliament.

(7) Section 10 of the 1990 Act (Government control over licensed services) shall apply in relation to a multiplex service licensed under this Part as it applies in relation to a service licensed under Part I of that Act.

Communications Act 2003

3 General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

(2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following—

(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;

(b) the availability throughout the United Kingdom of a wide range of electronic communications services;

(c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;

(d) the maintenance of a sufficient plurality of providers of different television and radio services;

(e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;

(f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both—

i) unfair treatment in programmes included in such services; and

ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

211 Regulation of independent television services

(1) It shall be a function of OFCOM to regulate the following services in accordance with this Act, the 1990 Act and the 1996 Act—

(a) services falling within subsection (2) that are provided otherwise than by the BBC or the Welsh Authority; and

(b) services falling within subsection (3) that are provided otherwise than by the BBC.

(2) The services referred to in subsection (1)(a) are—

(a) television broadcasting services that are provided from places in the United Kingdom with a view to their being broadcast otherwise than only from a satellite;

(b) television licensable content services that are provided by persons under the jurisdiction of the United Kingdom for the purposes of the Television without Frontiers Directive;

(c) digital television programme services that are provided by persons under the jurisdiction of the United Kingdom for the purposes of that Directive;

(d) restricted television services that are provided from places in the United Kingdom; and

(e) additional television services that are provided from places in the United Kingdom.

(3) The services referred to in subsection (1)(b) are—

(a) television multiplex services that are provided from places in the United Kingdom; and

(b) digital additional television services that are provided by persons under the jurisdiction of the United Kingdom for the purposes of the Television without Frontiers Directive.

232 Meaning of "television licensable content service"

(1) In this Part "television licensable content service" means (subject to section 233) any service falling within subsection (2) in so far as it is provided with a view to its availability for reception by members of the public being secured by one or more of the following means—

(a) the broadcasting of the service (whether by the person providing it or by another) from a satellite;

(aa) the broadcasting of the service (whether by that person or by another) by means of a radio multiplex service; or

(b) the distribution of the service (whether by that person or by another) by any means involving the use of an electronic communications network.

(2) A service falls within this subsection if it—

(a) is provided (whether in digital or in analogue form) as a service that is to be made available for reception by members of the public; and

(b) consists of television programmes or electronic programme guides, or both.

(3) Where—

(a) a service consisting of television programmes, an electronic programme guide or both ("the main service") is provided by a person as a service to be made available for reception by members of the public, and

(b) that person provides the main service with other services or facilities that are ancillary to, or otherwise relate to, the main service and are also provided so as to be so available or in order to make a service so available,

subsection (1) has effect as if the main service and such of the other services or facilities as are relevant ancillary services and are not two-way services constituted a single service falling within subsection (2).

(4) Where a person providing the main service provides it with a facility giving access to another service, the other service shall also be taken for the purposes of this section as provided by that person with the main service only if what is comprised in the other service is something over which that person has general control.

(5) A service is a two-way service for the purposes of this section if it is provided by means of an electronic communications network and an essential feature of the service is that the purposes for which it is provided involve the use of that network, or a part of it, both—

(a) for the transmission of visual images or sounds (or both) by the person providing the service to users of the service; and

(b) for the transmission of visual images or sounds (or both) by those users for reception by the person providing the service or by other users of the service.

(6) In this section—

"electronic programme guide" means a service which consists of—

(a) the listing or promotion, or both the listing and the promotion, of some or all of the programmes included in any one or more programme services the providers of which are or include persons other than the provider of the guide; and

(b) a facility for obtaining access, in whole or in part, to the programme service or services listed or promoted in the guide;

"relevant ancillary service", in relation to the main service, means a service or facility provided or made available by the provider of the main service that consists of or gives access to—

(a) assistance for disabled people in relation to some or all of the programmes included in the main service;

(b) a service (apart from advertising) which is not an electronic programme guide but relates to the promotion or listing of programmes so included; or

(c) any other service (apart from advertising) which is ancillary to one or more programmes so included and relates directly to their contents.

316 Conditions relating to competition matters

(1) The regulatory regime for every licensed service includes the conditions (if any) that OFCOM consider appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services.

(2) Those conditions must include the conditions (if any) that OFCOM consider appropriate for securing that the provider of the service does not—

(a) enter into or maintain any arrangements, or

(b) engage in any practice,

which OFCOM consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services.

(3) A condition imposed under this section may require a licence holder to comply with one or both of the following—

(a) a code for the time being approved by OFCOM for the purposes of the conditions; and

(b) directions given to him by OFCOM for those purposes.

(4) In this section—

"connected services", in relation to licensed services, means the provision of programmes for inclusion in licensed services and any other services provided for purposes connected with, or with the provision of, licensed services; and

"licensed service" means a service licensed by a Broadcasting Act licence.

317 Exercise of Broadcasting Act powers for a competition purpose

(1) This section applies to the following powers of OFCOM (their "Broadcasting Act powers")—

(a) their powers under this Part of this Act and under the 1990 Act and the 1996 Act to impose or vary the conditions of a Broadcasting Act licence;

(b) every power of theirs to give an approval for the purposes of provision contained in the conditions of such a licence;

(c) every power of theirs to give a direction to a person who is required to comply with it by the conditions of such a licence; and

(d) every power of theirs that is exercisable for the purpose of enforcing an obligation imposed by the conditions of such a licence.

(2) Before exercising any of their Broadcasting Act powers for a competition purpose, OFCOM must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998 (c. 41).

(3) If OFCOM decide that a more appropriate way of proceeding in relation to a matter would be under the Competition Act 1998, they are not, to the extent of that decision, to exercise their Broadcasting Act powers in relation to that matter.

(4) If OFCOM have decided to exercise any of their Broadcasting Act powers for a competition purpose, they must, on or before doing so, give a notification of their decision.

(5) A notification under subsection (4) must—

(a) be given to such persons, or published in such manner, as appears to OFCOM to be appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, are likely to be affected by their decision; and

(b) must describe the rights conferred by subsection (6) on the persons affected by that decision.

(6) A person affected by a decision by OFCOM to exercise any of their Broadcasting Act powers for a competition purpose may appeal to the Competition Appeal Tribunal against so much of that decision as relates to the exercise of that power for that purpose.

(7) Sections 192(3) to (8), 195 and 196 apply in the case of an appeal under subsection (6) as they apply in the case of an appeal under section 192(2).

(8) The jurisdiction of the Competition Appeal Tribunal on an appeal under subsection (6) excludes—

(a) whether OFCOM have complied with subsection (2); and

(b) whether any of OFCOM's Broadcasting Act powers have been exercised in contravention of subsection (3);

and, accordingly, those decisions by OFCOM on those matters fall to be questioned only in proceedings for judicial review.

(9) For the purposes of this section a power is exercised by OFCOM for a competition purpose if the only or main reason for exercising it is to secure that the holder of a Broadcasting Act licence does not—

(a) enter into or maintain arrangements, or

(b) engage in a practice,

which OFCOM consider, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services.

(10) Nothing in this section applies to—

(a) the exercise by OFCOM of any of their powers under sections 290 to 294 or Schedule 11;

(b) the exercise by them of any power for the purposes of any provision of a condition included in a licence in accordance with any of those sections;

(c) the exercise by them of any power for the purpose of enforcing such a condition.

(11) In subsection (9) "connected services" and "licensed service" each has the same meaning as in section 316.

(12) References in this section to the exercise of a power include references to an exercise of a power in pursuance of a duty imposed on OFCOM by or under an enactment.

361 Meaning of "available for reception by members of the public"

(1) The services that are to be taken for the purposes of this Part to be available for reception by members of the public include (subject to subsection (2)) any service which—

(a) is made available for reception, or is made available for reception in an intelligible form, only to persons who subscribe to the service (whether for a period or in relation to a particular occasion) or who otherwise request its provision; but

(b) is a service the facility of subscribing to which, or of otherwise requesting its provision, is offered or made available to members of the public.

(2) A service is not to be treated as available for reception by members of the public if it is an on-demand programme service.

(6) References in this section to members of the public are references to members of the public in, or in any area of, any one or more countries or territories (which may or may not include the United Kingdom).

(7) The Secretary of State may by order modify any of the provisions of this section if it appears to him appropriate to do so having regard to any one or more of the following—

(a) the protection which, taking account of the means by which the programmes and services are received or may be accessed, is expected

by members of the public as respects the contents of television programmes or sound programmes;

(b) the extent to which members of the public are able, before television programmes are watched or accessed, to make use of facilities for exercising control, by reference to the contents of the programmes, over what is watched or accessed;

(c) the practicability of applying different levels of regulation in relation to different services;

(d) the financial impact for providers of particular services of any modification of the provisions of that section; and

(e) technological developments that have occurred or are likely to occur.

(8) No order is to be made containing provision authorised by subsection (7) unless a draft of the order has been laid before Parliament and approved by a resolution of each House.

362 Interpretation of Part 3

(1) In this Part—

"additional radio service" means an additional service within the meaning given by section 114(1) of the 1990 Act for the purposes of Part 3 of that Act;

"additional radio service" means an additional service within the meaning given by section 114(1) of the 1990 Act for the purposes of Part 3 of that Act;

"analogue teletext service" is to be construed in accordance with section 218(4);

"ancillary service" has the same meaning as it has, by virtue of section 24(2) of the 1996 Act, in Part 1 of that Act;

"assistance for disabled people" means any of the following—

(a) subtitling;

(b) audio-description for the blind and partially sighted; and

(c) presentation in, or translation into, sign language;

"available for reception by members of the public" is to be construed in accordance with section 361;

"the BBC Charter and Agreement" means the following documents, or any one or more of them, so far as they are for the time being in force—

(a) a Royal Charter for the continuance of the BBC;

(b) supplemental Charters obtained by the BBC under such a Royal Charter;

(c) an agreement between the BBC and the Secretary of State entered into (whether before or after the passing of this Act) for purposes that include the regulation of activities carried on by the BBC;

"BBC company" means—

(a) a body corporate which is controlled by the BBC; or

(b) a body corporate in which the BBC or a body corporate controlled by the BBC is (to any extent) a participant;

"C4 company" means—

(a) a body corporate which is controlled by C4C; or

(b) a body corporate in which C4C or a body corporate controlled by C4C is (to any extent) a participant;

"Channel 3", "Channel 4" and "Channel 5" each has the same meaning as in Part 1 of the 1990 Act (see section 71 of that Act);

"Channel 3 licence" means a licence to provide a Channel 3 service;

"a Channel 3 service" means a television broadcasting service comprised in Channel 3;

"digital additional sound service" means a digital additional service within the meaning given by section 63 of the 1996 Act for the purposes of Part 2 of that Act;

"digital additional television service" means a digital additional service within the meaning given by section 24(1) of the 1996 Act for the purposes of Part 1 of that Act;

"the digital public teletext service" means so much of the public teletext service as consists of a service provided in digital form;

"digital sound programme licence" and "digital sound programme service" each has the same meaning as in Part 2 of the 1996 Act (see sections 40 and 72 of that Act);

"digital television programme service" means a digital programme service within the meaning given by section 1(4) of the 1996 Act for the purposes of Part 1 of that Act;

"EEA State" has the meaning given by Schedule 1 to the Interpretation Act 1978, and "another EEA State" means an EEA State other than the United Kingdom;

"licensed public service channel" means any of the following services (whether provided for broadcasting in digital or in analogue form)—

(a) any Channel 3 service;

(b) Channel 4;

(c) Channel 5;

"local digital sound programme licence" and "local digital sound programme service" each has the same meaning as in Part 2 of the 1996 Act (see sections 60 and 72 of that Act);

"local radio multiplex licence" and "local radio multiplex service" each has the same meaning as in Part 2 of the 1996 Act (see sections 40 and 72 of that Act);

"local sound broadcasting licence" means a licence under Part 3 of the 1990 Act to provide a local sound broadcasting service;

"local sound broadcasting service" means a sound broadcasting service which, under subsection (4)(b) of section 245, is a local service for the purposes of that section;

"the M25 area" means the area the outer boundary of which is represented by the London Orbital Motorway (M25);

"national Channel 3 service" means a Channel 3 service provided between particular times of the day for more than one area for which regional Channel 3 services are provided;

"national digital sound programme service" has the same meaning as in Part 2 of the 1996 Act;

"national radio multiplex licence" and "national radio multiplex service" each has the same meaning as in Part 2 of the 1996 Act (see sections 40 and 72 of that Act);

"networking arrangements" has the meaning given by section 290;

"OFCOM's standards code" means any code or codes for the time being in force containing standards set by OFCOM under section 319 (whether originally or by way of any revision of any standards previously so set);

"*product placement*" has the meaning given by paragraph 1 of Schedule 11A;

"provision", in relation to a service, is to be construed (subject to subsection (3)) in accordance with subsection (2), and cognate expressions are to be construed accordingly;

"the public teletext provider" means—

(a) subject to paragraph (b), the person holding the licence under section 219 to provide the public teletext service; and

(b) in relation to a time before the grant of the first licence to be granted under that section, the person holding the Broadcasting Act licence to provide the existing service (within the meaning of section 221);

"the public teletext service" means the service the provision of which is required to be secured in accordance with section 218;

"qualifying service" has the same meaning as in Part 1 of the 1996 Act (see section 2(2) of that Act);

"radio licensable content service" has the meaning given by section 247;

"radio multiplex service" has the same meaning as (by virtue of section 258 of this Act) it has in Part 2 of the 1996 Act;

"radio programme service" means any of the following—

(a) a service the provision of which is licensed under Part 3 of the 1990 Act;

(b) a digital sound programme service the provision of which is licensed under Part 2 of the 1996 Act;

(c) a digital additional sound service the provision of which is licensed under section 64 of the 1996 Act;

"regional Channel 3 licence" means a licence under Part 1 of the 1990 Act to provide a regional Channel 3 service;

"regional Channel 3 service" means a Channel 3 service provided for a particular area determined under section 14(2) of the 1990 Act;

"restricted television service" means any restricted service within the meaning given by section 42A of the 1990 Act for the purposes of Part 1 of that Act;

"S4C" and "S4C Digital" means the services so described in section 204(3);

"S4C company" means—

(a) a body corporate which is controlled by the Welsh Authority; or

(b) a body corporate in which that Authority or a body corporate controlled by that Authority is (to any extent) a participant;

"simulcast radio service" means any simulcast radio service within the meaning given by section 41(2) of the 1996 Act for the purposes of Part 2 of that Act;

"sound broadcasting service" has the same meaning as in Part 3 of the 1990 Act (see section 126 of that Act);

"standards objectives" has the meaning given by section 319(2);

"subtitling" means subtitling for the deaf or hard of hearing, whether provided by means of a teletext service or otherwise;

"television broadcasting service" means (subject to subsection (4)) a service which—

(a) consists in a service of television programmes provided with a view to its being broadcast (whether in digital or in analogue form);

(b) is provided so as to be available for reception by members of the public; and

(c) is not—

i) restricted television service;

ii) a television multiplex service;

iii) a service provided under the authority of a licence under Part 1 of the 1990 Act to provide a television licensable content service; or

iv) a service provided under the authority of a licence under Part 1 of the 1996 Act to provide a digital television programme service;

"television licensable content service" has the meaning given by section 232 of this Act;

"television multiplex service" has meaning given by section 241(1) of this Act to a multiplex service within the meaning of Part 1 of the 1996 Act;

"television programme service" means any of the following—

(a) a television broadcasting service;

(b) a television licensable content service;

(c) a digital television programme service;

(d) a restricted television service;

"the Television without Frontiers Directive" means Council Directive 89/552/EEC on the Co-ordination of certain provisions laid down by law,

regulation or administrative action in member States concerning the pursuit of television broadcasting activities, together with any modifications of that Directive by Directive 97/36/EC of the European Parliament and the Council;

"text service" means any teletext service or other service in the case of which the visual images broadcast or distributed by means of the service consist wholly or mainly of non-representational images.

(2) In the case of any of the following services—

(a) a television broadcasting service or sound broadcasting service,

(b) the public teletext service;

(c) a television licensable content service or radio licensable content service,

(d) a digital television programme service or digital sound programme service,

(e) a restricted television service,

(f) an additional television service or additional radio service,

(g) a digital additional television service or a digital additional sound service,

the person, and the only person, who is to be treated for the purposes of this Part as providing the service is the person with general control over which programmes and other services and facilities are comprised in the service (whether or not he has control of the content of individual programmes or of the broadcasting or distribution of the service).