[FR] Access to the Channel Orange Sports May Be Tied to Subscription to Orange Broadband

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Amélie Blocman
Légipresse

The court of appeal of Paris has overturned the very recent judgment by the commercial court which found Orange guilty of tied sale practices and unfair competition in its dispute with its competitors Free and SFR (see IRIS 2009-4: 9). The latter complained that the operator, which had spent EUR 203 million on buying exclusive broadcasting rights for premier league football matches between 2008 and 2011, was making subscription to its channel Orange Sports which was broadcasting the matches dependent on taking out a subscription to Orange's broadband Internet access. Having been ordered in the first instance to stop commercialising its channel, the operator referred before the court of appeal to a very recent decision by the ECJ, delivered on 23 April 2009 (C-261/07 and C-299/07), according to which the Directive of 11 May 2005 on unfair commercial practices of companies in relation to consumers should be interpreted as meaning the application of national regulations which, save for exceptions and without taking into account the specific circumstances of the case at issue, prohibited any joint offer made by a vendor to a consumer. In the light of this jurisprudence, the parties called on the court of appeal to interpret the national legislation, and more specifically Article L. 122-1 of the Consumer Code which prohibits tied sales, in such a way as to comply with Community law. Applying the principle of compliant interpretation, the court found that the decision of 23 April 2009 could be applied without any real doubt to the present dispute. In doing so, it noted that Article L. 122-1 of the Consumer Code came up against the scheme instituted by the Directive in that it prohibits tied offers generally and preventively, regardless of any check on their unfair nature with regard to Articles 5-9 of the Directive. The court therefore applied this appreciation, recalling that the Directive states that a commercial practice is unfair more specifically if it is misleading, within the meaning of Articles 6 and 7, or aggressive, within the meaning of Articles 8 and 9, in that it involves harassment or constraint. The court, contrary to the claims made by SFR and Free, held that the mere fact of the consumer having to take out a subscription to Orange broadband in order to have access to the Orange Sports channel did not meet the definition of constraint. The court observed, in fact, that in the context of the competition among them, all the IAPs tried to enrich the content of their offers to make them more attractive by setting up innovative services or acquiring exclusive rights for audiovisual, cinematographic or sports content. Listing various exclusive agreements concluded more specifically by Free and SFR, the plaintiffs in the proceedings, the court observed

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that it was the necessary result of this configuration of the market that the average consumer considering subscribing to broadband Internet access did so quite specifically by considering the services associated with the subscription. Consequently, it could not be considered that the fact that access to the Orange Sports channel was exclusively associated with Orange's offer of broadband Internet access significantly altered the consumer's freedom of choice among the various broadband offers - indeed, the contrary was true. What was essential, within the meaning of the Directive, was that the subscriber was free to not take up the subscription, which was not contested in the present case. Since France Telecom/Orange could not be held to have infringed Article L. 122-1 of the Consumer Code, as interpreted in the light of the 2005 Directive, the judgment was overturned. On the following day, Orange resumed commercialising its channel Orange Sports; its competitors, for their part, announced their intention to appeal to the court of cassation.

Cour d'appel de Paris (pôle 5, ch. 5), 14 mai 2009, France Telecom et Orange c. Free, Neuf Cegetel-SFR et LFP

Court of appeal of Paris (centre 5, chamber 5), 14 May 2009, France Telecom and Orange vs. Free, Neuf Cegetel-SFR and LFP

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