[FR] Court of Cassation Upholds Exclusive Commercialisation of Orange Sports Channel

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Amélie Blocman
Légipresse

The Court of Cassation has found in favour of Orange (a subsidiary of France Télécom) in its dispute with its competitors SFR and Free, which claimed it was making access to its sport channel Orange Sports dependent on subscription to its triple-play offer (television, Internet and telephone) (see IRIS 2009-6: 12/19). The applicants claimed that the two-fold exclusivity for distributing and broadcasting exclusive audiovisual programmes constituted joint selling, which is prohibited by Article L 122-1 of the French Consumer Code, and hence was an act of unfair competition on the part of Orange. The Court of Cassation rejected the appeal against the decision of the Paris court of appeal delivered on 14 May 2009, and confirmed that Orange's strategy did not constitute unfair competition. The Court of Cassation found that the court of appeal had analysed the situation correctly, in accordance with the criteria set out in the Directive of 11 May 2005 on unfair commercial practices, without proceeding with the direct application of the Directive by substitution, or violating the principle of the presence of all the parties concerned, as SFR and Free claimed. The Court held that the appeal judgment noted rightly that it was not proven that the offer made by France Télécom's company (Orange) was misleading or contrary to professional diligence and was right in holding that the offer left consumers free to choose their ADSL operator because of the configuration of the market and more particularly because of the structure of the offer. As a result consumers were able to choose their operator according to the associated services and hence operators had the capacity to differentiate themselves from their competitors. Having noted that, in the context of the competition between them, all Internet access providers make every effort 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 events content, the appeal judgment observed that the average consumer about to take out a subscription for the supply of Internet access reaches a decision precisely on the basis of the associated services and hence on the basis of the capacity for differentiation among the various competing offers. The Court of Cassation found that the court of appeal had been right in deducing from these observations, which reflected in general the usual behaviour of the average consumer in deciding between offers of Internet access and also in possibly deciding to change to a different operator, that the exclusive access to the Orange Sports channel included in the ADSL offer of the company Orange did not substantially compromise the consumer's ability to make a

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reasoned decision.

This judgment comes just as the French competition authority (Autorité de la Concurrence) is beginning its investigation, further to an application from SFR and Canal+, into the same exclusive features on the grounds of tied selling. France Télécom also announced early in July that it was looking for partners, particularly in terms of capital, for its Orange Sports and Orange Cinéma channels, as it did not wish to pay on its own the annual charge of EUR 203 million for acquiring exclusive rights for League football matches. It would appear then that the time has come for Orange's exclusivity strategy to end, even though it has been definitively validated by the Court of Cassation's judgment.

Cour de cassation (ch. com.), 13 juillet 2010, SFR et Free c. France Télécom

Court of Cassation (commercial section), 13 July 2010, SFR and Free v France Télécom

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