[GB] Competition Appeal Tribunal Decision on Pay TV

IRIS 2013-1:1/23

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The UK Competition Appeal Tribunal, a specialist court hearing appeals from the decisions of the competition authorities, has published its judgment relating to the decision of the communications regulator, Ofcom, to impose a wholesale must-carry remedy on Sky. This required Sky to offer wholesale its Sky Sports 1 and 2 channels to rival pay TV retailers at a price set by Ofcom (see IRIS 2010-5/26). Appeals were entered against the decision by Sky, Virgin Media, BT and the Premier League.

Sky appealed on three grounds. First, that Ofcom had no power to intervene in the Pay-TV market as it was concerned with retail competition rather than competition in the provision of licensed services or connected services, as set out in the Communications Act 2003. The Tribunal rejected this argument, deciding that the latter phrase includes retail competition. Second, Sky argued that, in identifying the competition concerns, Ofcom had failed to adhere to an approach based on competition rules under EU law and the Competition Act 1998. This argument was also rejected by the Tribunal, which held that Ofcom was not required to apply those rules (and in particular those relating to abuse of a dominant position) in exercising its powers under the Communications Act.

Sky's third argument was that Ofcom's findings in relation to Sky's alleged practices of failing to engage constructively with other retailers and withholding wholesale supply, were unfounded. The Tribunal examined the evidence relating to negotiations with rival retailers in considerable detail, and found that it had been misinterpreted by Ofcom and that some of Ofcom's key findings of fact were inconsistent with the evidence. The Tribunal found that one the whole Sky did engage constructively with other retailers, despite having a strong preference for self-retailing. It thus upheld Sky's third argument and allowed the appeal. In view of this decision, the Tribunal did not find it necessary to examine grounds of appeal raised by other parties.

British Sky Broadcasting Limited, Virgin Media, The Football Association Premier League and British Telecommunications plc v. Office of Communications, [2012] CAT 20, 8 August 2012

http://www.catribunal.org.uk/237-6549/1158-8-3-10-British-Sky-Broadcasting-Limited.html

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