[GB] Court of Appeal Allows Pay-tv Wholesale Charges Appeal

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Tony Prosser
University of Bristol Law School

The Court of Appeal has allowed an appeal by British Telecommunications (BT) against the decision of the Competition Appeal Tribunal overturning the decision of Ofcom to require BSkyB to offer BT Sky Sports channels at a regulated rate (see IRIS 2013-1/23). The Ofcom decision would have made Sky Sports 1 and 2 available to BT, a major competitor of Sky, at substantially lower rates than the previous wholesale price, and would have assisted BT in its attempts to challenge Sky's dominance of the pay-tv sports market. The Court held that the Tribunal had failed to investigate the level of discounts BSkyB claimed to give rivals for its sports channels.

The first issue concerned Sky's appeal against the Tribunal's decision. Sky maintained that, under the Communications Act 2003, Ofcom had no jurisdiction to consider these matters in the wholesale pay-tv market but could only consider matters relating to competition between providers of services to the public. The Court rejected this appeal, holding that the legislation must be interpreted widely and includes the provision of services to the public at both levels, and so it was within the powers of Ofcom to impose a wholesale must-offer condition in Sky's licence.

The second issue was the appeal by BT against the Tribunal's finding that Ofcom had been wrong in its decision that Sky had failed to negotiate with competitors in relation to wholesale prices. The Tribunal had not addressed Ofcom's finding that the Sky rate-card was in itself an impediment to fair and effective competition, nor had the Tribunal addressed Ofcom's findings in relation to the competition concerns raised by Sky's methods of discounting. The Tribunal had not given satisfactory reasons for failing to deal further with the rate-card price and penetration discount method issues. These defects amounted to an error of law requiring the decision of the Tribunal to be set aside.

The case has thus been returned to the Competition Appeal Tribunal for a new decision based on more extensive findings and conclusions.

British Telecommunications plc v Office of Communications, Sky Broadcasting, The Football Association Premier League, and Virgin Media inc., [2014] EWCA Civ 133, 17 February 2014

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