[GB] Competition Appeal Tribunal allows BT to Transmit Sky Sports 1 and 2 on its Platform as an Interim Measure

IRIS 2015-1:1/22

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The Competition Appeal Tribunal has determined that British Sky Broadcasting Limited (Sky) should allow British Telecommunications Plc (BT) sports channel BT Sports to screen Sky's sports channels. The background to the case was that in 2010, the UK communications regulator Ofcom decided to vary Sky's broadcast licence pursuant to section 316 of the Communications Act 2003, whereby Sky had to offer its Sky Sports 1 and 2 channels at wholesale prices to other TV platforms - this is known as wholesale must-offer obligation (WMO) (see IRIS 2010-5/26).

Later in 2010, Sky appealed Ofcom's decision to the Competition Appeal Tribunal, pursuant to Competition Appeal Tribunal Rules (SI No. 1372 of 2003), seeking urgent interim relief. The parties to the appeal, including Sky, BT and Ofcom, agreed on an Interim Relief Order (IRO). Various appeals were lodged and the IRO has remained in operation far longer than expected for various reasons, as the appeals by different broadcasters have taken longer to resolve, including appeals to the Court of Appeal (see IRIS 2014-4/17 and IRIS 2013-1/23).

However, at the time of the IRO, BT was using a platform called Cardinal STB (set-top box), but owing to advancements in technology, they began to use YouView STB (set-top box). While the YouView platform had conditional access capabilities, it did not have the ability to decrypt a DTT (Digital Terrestrial Channel) signal, which had enabled BT viewers using the Cardinal platform to watch Sky Sports 1 and Sky Sports 2.

Sky could screen BT Sports, but BT did not have wholesale supply of Sky Sports 1 and 2 channels. BT considered this a violation of the Interim Relief Order (IRO), whereby Sky was required to provide its two sports channels to Qualifying Platforms. The schedule to the IRO defined a Qualifying Platform as "via DTT (in the case of BT, Virgin and Top Up TV and via its existing cable platform in the case of Virgin), with all parties having liberty to apply."

BT had a commercial agreement with Sky to supply Sky Sports 1 and 2 via IPTV (Internet protocol television) to customers using BT's Cardinal System, as this was not covered by the IRO. In July 2013, BT stopped supplying Sky Sports to

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customers via DTT. However, neither the IRO nor the commercial agreement covered the provision of Sky Sports via BT's YouView STB. Although there were negotiations about supplying the YouView Channel, the talks broke down, as Sky wanted, as a condition, for BT Sport to supply its channels by wholesale arrangement to Sky.

On 24 May 2013, BT complained to Ofcom pursuant to the Competition Act 1998, contending that Sky's condition of wanting a reciprocal arrangement was an abuse of a dominant position, even though BT had acquired significant TV football rights, especially for the 2014/15 season. Ofcom considered that there was no urgency to adopt the remedy sought by BT; also Ofcom announced that they would review the 2010 WMO.

As a consequence, BT applied to the Competition Tribunal claiming relief pursuant to rule 61(a) of the Tribunal Rules for an interim order and, in addition, BT invoked the "liberty to apply" forming part of the existing IRO. In both instances, BT sought for the definition of Qualifying Platform to include its YouView platform. Sky would have to demonstrate damage as a consequence of such a change.

Sky argued that to vary a term BT had to show a significant change of circumstances, which could not be shown, as Sky considered that BT was having a "second bite of the cherry", as the YouView platform was envisaged at the time the original IRO was agreed.

However, BT argued that it was not applying a general liberty to apply, but a specific liberty pursuant to para 2 of the IRO schedule. Whilst there was an agreed definition of Qualifying Platforms, the terms envisaged reconsideration of the platform definition. It was not a case of considering a significant circumstance change, but of applying the obvious meaning of the express liberty to apply term. The BT YouView channel had been envisaged, it had yet to be developed. At the same time, improvements in copper wire technology allowed broadcasting to an IPTV platform.

The Tribunal stated that the technological developments had rendered the original IRO redundant and BT should not be expected to use defunct Cardinal STB technology to access Sky Sports channels. BT's competitiveness had improved by acquiring additional football rights, but its customers should benefit from new technology. Moreover, Sky offered its sports channels to BT's Cardinal platform, suggesting Sky did not consider BT as a commercial threat. Commercial and technological developments would change the relative competitiveness between Sky and its rivals, and the regulator, Ofcom, should review matters rather than the Competition Appeal Tribunal when determining each case.

The Tribunal granted BT's application to amend the IRO, meaning Sky must now supply Sky Sports 1 and 2 to BT's YouView platform. However, the Tribunal noted that its order was conditional on BT maintaining BT Sport on Sky's platform.

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British Sky Broadcasting Limited v. Office of Communications and British Telecommunications PLC and others [2014] CAT 17

http://www.catribunal.org.uk/238-6095/1152-8-3-10-IR-British-Sky-Broadcasting-Limited-.html

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