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Pay TV replay for BT v SKY

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Competition analysis: How will the Ofcom guidance affect the regulation of the pay-TV sector? Frances Murphy, partner and head of the antitrust, competition and trade regulation group at Bingham McCutchen in London, explains why this is a significant win for Ofcom, and assesses the likelihood of further appeals in this case.

Original news

British Telecommunications plc v Office of Communications [2014] EWCA Civ 133, [2014] All ER (D) 158 (Feb).

Ofcom found that Sky's pricing models and practices of restricting wholesale access to their channels was prejudicial to fair and effective competition. Ofcom exercised its jurisdiction under the Communications Act 2003, s 316 (CA 2003) to impose conditions on Sky's broadcasting licences. The Competition Appeal Tribunal (CAT) dismissed Sky's appeal against Ofcom's jurisdiction to impose conditions but allowed its appeal on the pricing issue. Sky appealed the jurisdiction point. Sky's competitors also appealed against the CAT's refusal to consider other issues relating to pricing. The Court of Appeal found that the Competition Appeal Tribunal failed to consider properly Ofcom's findings that there is insufficient competition in the pay-TV industry.

What is the background to this case and why is it important?

In 2010, the telecoms regulator in the UK (Ofcom) decided to vary, pursuant to CA 2003, s 316, the conditions in the licences granted to Sky for Sky's premium sports channels. The new licence conditions (the conditions) required Sky to offer its premium sports channels to retailers on other broadcasting platforms and, in the case of the standard definition (SD) versions of the channels, to offer them at wholesale prices set by Ofcom ('the wholesale must-offer obligation' or 'WMO'). The wholesale prices set by Ofcom were lower than the wholesale prices that Sky had been charging. Ofcom's decision was the culmination of a wide-ranging investigation into the pay-TV sector by Ofcom lasting just over three years. Fundamental to Ofcom's decision to introduce the conditions was its finding that Sky has exploited its market power by restricting wholesale distribution of its premium channels to potential new retailers in a way which was prejudicial to fair and effective competition.

Sky challenged Ofcom's decision before the specialist CAT in 2010. The Football Association, Premier League Limited, Virgin Media, Inc and British Telecommunications also appealed Ofcom's decision.

In its judgment in August 2012, the CAT disagreed with Ofcom's decision that Sky had exploited its market position but held that Ofcom did have jurisdiction under CA 2003, s 316 to require Sky to offer a wholesale rate determined by Ofcom if Sky had been abusing its market position relative to pay-TV and the rates imposed by Ofcom were appropriate to ensure 'fair and effective competition'.

Sky, BT and Ofcom appealed various aspects of the CAT's judgment to the Court of Appeal. On 17 February 2014 the court issued its judgment. In short, the court found in favour of Ofcom, that Ofcom does have jurisdiction under CA 2003, s 316 to impose conditions so as to ensure fair and effective competition in the wholesale and retail provision of licensed services to consumers generally and that the CAT's judgment failed properly to consider Ofcom's findings that there was ineffective competition in the market. The case has been remitted to the CAT for further review.

This judgment is a significant win for Ofcom. It confirms the regulator's jurisdiction under CA 2003, s 316 to determine 'competition concerns' and to impose appropriate measures to ensure 'fair and effective' competition in the market.

Why was the case brought under Ofcom's regulatory powers and not its competition powers?

Under CA 2003, s 317 Ofcom must consider whether it would be more appropriate to proceed under the Competition Act 1998 (CA 1998), before proceeding under CA 2003, s 316.

Ofcom interpreted (rightly as it turned out) CA 2003, s 316 to confer power on it to impose licence conditions to ensure fair and effective competition in the provision of licensed services. Ofcom decided that the imposition of conditions in the form of a wholesale must-offer obligation would be appropriate to ensure fair and effective competition and to provide a comprehensive solution to a general problem affecting the relevant markets. CA 1998 does not confer power on Ofcom to impose licence conditions as a means of ensuring fair and effective competition. Accordingly, in the circumstances of this case, Ofcom decided that it would not be more appropriate to proceed under CA 1998.

What is the wholesale must offer obligation and why did the Ofcom decision of 2010 impose such an obligation on Sky?

The WMO is the wholesale price Ofcom required Sky to offer its SD premium sports channels to retailers on other broadcasting platforms.

Ofcom required Sky to offer access at the prices set by Ofcom so as to try and ensure that rivals could compete effectively with Sky by expanding the range of premium sports channels they could offer in their TV bundles and thereby attracting more viewers

On what basis did the CAT find Ofcom's decision to be 'unfounded' and why is the Court of Appeal making the CAT revisit its findings?

The CAT concluded that Ofcom's core competition concern, that Sky was exploiting its market position, was unfounded. Ofcom's concern was based on its findings that Sky had deliberately withheld from other retailers wholesale supply of its premium channels, preferring to be entirely absent from those retailers' platforms rather than give them wholesale access. The CAT decided, following its own review of the facts, that Ofcom had, to a significant extent, misinterpreted the evidence of Sky's negotiations, and that the facts did not support Ofcom's conclusion.

However, the Court of Appeal decided that the CAT's findings were based on an 'incomplete set of conclusions' and that significant independent competition concerns based on the rate-card price and penetration discount remained and had not been properly addressed by the CAT.

Lord Justice Aikens said that the CAT had been under a duty to undertake three exercises in relation to the appeal: 'to correctly analyse and understand the extent of Ofcom's findings of fact and grounds for exercising its jurisdiction under the competition rules; to ensure that it fully understood the extent of Sky's challenge; and to fully work out what impact Ofcom's coming to a different conclusion would have had on its findings of fact and exercise of judgement'.

The Court of Appeal concluded that the CAT had failed to properly undertake these exercises.

What happens now and how much further is this likely to go?

The case has been remitted to the CAT for further analysis. The CAT will have to consider the appeal once again taking into account all the factors raised by Ofcom, as suggested by the Court of Appeal. Before that happens Ofcom, Sky or BT could seek leave to appeal the Court of Appeal's judgment to the Supreme Court.

Interviewed by Jenny Rayner.

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