



Neutral citation [2012] CAT 20

IN THE COMPETITION
APPEAL TRIBUNAL

Cases No: 1156-1159/8/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

8 August 2012

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)
PROFESSOR JOHN BEATH
MICHAEL BLAIR QC

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING LIMITED
VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
BRITISH TELECOMMUNICATIONS PLC

Appellants / Intervenors

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

TOP UP TV EUROPE LIMITED
RFL (GOVERNING BODY) LIMITED
THE FOOTBALL ASSOCIATION LIMITED
FREESAT (UK) LIMITED
RUGBY FOOTBALL UNION
THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD

Intervenors

Heard at Victoria House between 9 May 2011 and 15 July 2011

NON-CONFIDENTIAL EXTRACT FROM JUDGMENT:
SECTION I – INTRODUCTION AND SUMMARY

APPEARANCES

Mr Mark Hoskins QC and Mr Gerard Rothschild (instructed by Ashurst LLP) appeared for Virgin Media, Inc.

Miss Helen Davies QC, Miss Maya Lester and Mr Richard Blakeley (instructed by DLA Piper UK LLP) appeared for The Football Association Premier League Limited.

Mr James Flynn QC, Mr Meredith Pickford and Mr David Scannell (instructed by Herbert Smith LLP) appeared for British Sky Broadcasting Limited.

Mr Thomas Plewman SC, Miss Sarah Ford and Miss Sarah Love (instructed by BT Legal) appeared for British Telecommunications Plc.

Miss Dinah Rose QC, Mr Kieron Beal, Mr Josh Holmes, Miss Jessica Boyd and Mr Ben Lask (instructed by the Office of Communications) appeared for the Office of Communications.

Mr Paul Harris QC and Miss Fiona Banks (instructed by the Legal Department, RFL, the Legal Department RFU, Bird & Bird LLP, Onside Law, Denton Wilde Sapte LLP) appeared respectively on behalf of RFL (Governing Body) Limited, Rugby Football Union, The Football Association Limited, PGA European Tour and the Football League Limited.

Mr Daniel Beard QC (instructed by Milbank, Tweed, Hadley & McCloy LLP) appeared on behalf of Top Up TV Europe Limited.

Mr Timothy Ward QC (instructed by SJ Berwin LLP) appeared for Freesat (UK) Limited.

Miss Marie Demetriou (instructed by DLA Piper UK LLP) appeared for the England & Wales Cricket Board.

I. INTRODUCTION AND SUMMARY

1. Parts of this judgment contain information which has, in the course of these proceedings, been disclosed only to members of the confidentiality ring established by the Tribunal's order of 31 March 2011 (as amended from time to time), and some of which may be confidential. The Tribunal will therefore need to determine which, if any, passages should be excised before publication, having due regard to the considerations set out in paragraph 1 of Schedule 4 to the Enterprise Act 2002 ("the 2002 Act"), and in the light of any submissions made on behalf of the parties. In the meantime, in advance of the publication of a non-confidential version of the full judgment, this Introduction and Summary is being made publicly available so as to provide an overview of the Tribunal's main conclusions¹ and the outcome of the appeals themselves. Notwithstanding its prior publication, this section is part of the judgment and should be read together with the Tribunal's detailed analysis in the subsequent sections.

The contested decision

2. These appeals arise out of a decision of the Office of Communications ("Ofcom") in which Ofcom decided to vary, pursuant to section 316 of the Communications Act 2003 ("the 2003 Act"), the conditions in the licences granted to British Sky Broadcasting Limited ("Sky") under Part I of the Broadcasting Act 1990 ("the 1990 Act") for certain of Sky's pay television ("Pay TV") channels, Sky Sports 1, Sky Sports 2, Sky Sports 1 HD² and Sky Sports 2 HD (the "core premium sports channels" or "CPSCs").³ The new licence conditions ("the Conditions") require Sky to offer to wholesale its CPSCs to retailers on other broadcasting platforms and, in the case of the standard definition ("SD") versions of the channels, offer

¹ It is emphasised that in this section the conclusions are in summary form, and are fully set out only in the main part of the judgment.

² HD means "high definition".

³ In addition to the CPSCs, this judgment refers variously to the "premium channels", the "core premium channels", and to specific channels such as Sky Sports 1. This is to some extent inevitable, as although the subject-matter of the WMO is the CPSCs, Ofcom refers to evidence gathered in relation to both premium sports and movie channels, and the subject-matter of the negotiations considered in section VI below was not always limited to premium sports channels. We have, wherever possible, attempted to reflect the same language as it was used by Ofcom, or by the parties in their submissions.

them at wholesale prices set by Ofcom⁴ (“the wholesale must-offer obligation” or “WMO”).⁵ Ofcom’s decision is contained in a document entitled “Pay TV Statement”, which was published on 31 March 2010 (“the Statement”).⁶

3. The Statement is the culmination of a wide-ranging investigation into the Pay TV sector by Ofcom lasting just over three years. An overview of Ofcom’s investigation and of the main findings in the Statement is at section II below. Fundamental to Ofcom’s decision to introduce the Conditions is 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 is prejudicial to fair and effective competition.⁷
4. At Annex A to this judgment is a brief description of the Pay TV sector and a glossary explaining some of the relevant terminology and different technologies, services and platforms referred to in the main body of the judgment. It may assist the reader to have these to hand while reading the judgment.

The appeals

5. Each of Sky, The Football Association Premier League Limited (“FAPL”), Virgin Media, Inc. (“VM”) and British Telecommunications Plc (“BT” and, together with Sky, FAPL and VM, “the Appellants”) brought appeals⁸ challenging the Statement. The Appellants’ grounds of appeal are summarised very broadly in this section, at paragraph 12 below, and are described in a little more detail in section III.

⁴ HD versions of the channels are to be supplied at wholesale prices which are fair, reasonable and free of undue discrimination.

⁵ Also on 31 March 2010, Ofcom decided to approve conditionally a request by Sky (together with Arqiva, the telecommunications company which provides infrastructure and broadcast transmission facilities in the United Kingdom and Republic of Ireland) to allow it to launch a new service on the digital terrestrial television platform called “Picnic” (see further para 44 below), and to consult on a proposed decision to refer to the Competition Commission, pursuant to sections 131 to 133 of the 2002 Act, the markets for the sale of premium movie rights and premium movies services. Ofcom ultimately proceeded to refer these markets to the Competition Commission on 4 August 2010.

⁶ A non-confidential version of the Statement can be viewed at:

http://stakeholders.ofcom.org.uk/binaries/consultations/third_paytv/statement/paytv_statement.pdf

⁷ Statement, para 1.24.

⁸ The Appellants’ notices of appeal were filed on 1 June 2010, with the exception of VM, which filed its notice of appeal on 28 May 2010. All of the Appellants filed amended notices of appeal on 7 September 2010 pursuant to para 7(c) of the Tribunal’s order of 25 June 2010.

Sky's application for interim relief

6. Prior to filing its notice of appeal, Sky applied on 16 April 2010 for interim relief against the Statement pursuant to rule 61 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (“the Tribunal Rules”). Following a hearing, and with the agreement of all the parties then appearing, the President made an interim order on 29 April 2010 pending final resolution of Sky’s proposed appeal or further order (“the Interim Relief Order”). The effect of the Interim Relief Order was to vary the Conditions so as to modify Sky’s obligations under the WMO in respect of the platform operators specified in the order. Otherwise the operation of the Statement was suspended generally. In summary, Sky was required to comply with the WMO as modified, in respect of BT, VM and Top Up TV Europe Ltd (“TUTV”). Those parties who benefited from the WMO undertook to pay into escrow, pending the determination of Sky’s appeal, the difference between the price actually paid under the WMO and the prices contained in Sky’s “rate card” for the same service.⁹ The Interim Relief Order was subsequently amended, on 9 November 2010, following an application by Real Digital EPG Services Limited to be included within its scope.

The hearing of the appeals and certain procedural matters

7. At a case management conference on 25 June 2010,¹⁰ each of the Appellants was granted permission to intervene in the other appeals. RFL (Governing Body) Ltd, The Football Association Ltd, Rugby Football Union, The Football League Ltd, PGA European Tour and the England and Wales Cricket Board (together, “the Sports Body Interveners”), together with TUTV and Freesat (UK) Ltd, were also granted permission to intervene in the appeals. In view of the inter-relationship between the four appeals, they were all heard by the Tribunal at the same time, although not formally joined or consolidated. On 25 March 2011, the Tribunal also ordered that the appeals be heard (as regards evidence and documents) with two other appeals brought by Sky in cases 1170/8/3/10 (“the STB appeal”) and 1179/8/3/11 (“the CAM appeal”). In these appeals Sky contested two decisions by

⁹ Sky’s “rate card” prices are described in more detail at para 740 ff below.

¹⁰ A further case management conference took place on 6 October 2010 and a pre-hearing review took place on 23 March 2011.

Ofcom, made following the Statement, that Sky had breached the Conditions in respect of its wholesale supply of the CPSCs to TUTV.

8. The main hearing in these proceedings took place over 37 days between 9 May 2011 and 15 July 2011 and was completed within the time allotted.¹¹ That a hearing of such logistical complexity, with multiple parties and so many witnesses, should have started and finished on time is very much due to the hard work and cooperation of the parties and their representatives, as well as to the Tribunal's staff. We would like to record our thanks to all involved.
9. The proceedings raised many hundreds of contentious issues between the parties, and an attempt by Ofcom to itemise them prior to the hearing resulted in a non-exhaustive schedule that ran to 254 pages. Over 35,000 pages of submissions and evidence (including nearly 5,000 pages of written pleadings, skeleton arguments and other submissions) were filed in relation to the four main appeals alone, and the Tribunal received testimony from 41 witnesses (including 14 experts), of whom 25 gave oral evidence before us.
10. In view of this multiplicity of issues and sub-issues, and the related arguments, it has been neither possible nor necessary (and certainly not desirable) for the Tribunal to refer to, let alone resolve, each and every issue and argument raised. To have attempted this, even in respect of those grounds of appeal with which we have found it necessary to deal, would have rendered interminable what is already, inevitably, a long judgment. Instead we have focussed on what in our view are the most important issues, together with the main arguments relating to them.¹²
11. Given the interrelationship between the grounds of appeal in the four appeals, and the fact that the appeals were heard together, the Tribunal considers it appropriate to deliver a single judgment.

¹¹ Following the oral hearing a number of additional written submissions were lodged with the Tribunal, the final one being received in December 2011 in connection with the STB and CAM appeals.

¹² The Tribunal in this judgment makes extensive use of footnotes, in particular to refer to the underlying evidence in section VI. However, these footnotes should not be taken to be exhaustive in their reference to all relevant evidential material.

Summary of the grounds of appeal and of the Tribunal's conclusions

12. In very broad terms the Appellants' main grounds of appeal consisted of:
- (a) challenges by both Sky and FAPL to Ofcom's jurisdiction to take action under section 316 of the 2003 Act;
 - (b) a root and branch challenge by Sky to Ofcom's findings in the Statement as to the practices on the part of Sky which form the foundations of Ofcom's competition concerns, and to which the WMO remedy is directed;
 - (c) various challenges by all the Appellants to the validity, effectiveness and proportionality of the WMO remedy imposed by Ofcom.
13. The Tribunal has examined the grounds of appeal described at sub-paragraphs (a) and (b) above. The Tribunal's conclusions on the latter aspect of Sky's appeal are sufficient to dispose of the appeals generally, and the Tribunal has therefore not considered it necessary or appropriate to express any conclusion on the grounds referred to at sub-paragraph (c).

Sky and FAPL's challenges to Ofcom's jurisdiction: Tribunal's conclusions

14. The Tribunal has concluded that neither of Sky's and FAPL's two grounds of challenge to Ofcom's jurisdiction to take action under section 316 in the present case succeeds.
- (i) *The "licensed and connected services" argument*
15. Both Sky and FAPL submit that Ofcom's intervention is outside its powers under section 316 of the 2003 Act on the ground that the intervention is not in respect of "competition in the provision of licensed services or of connected services", as the section requires. Briefly, the main argument is that Ofcom acted with a view to securing fair and effective competition in service provision at the retail level, i.e. as between Sky and competing retailers in their provision of the CPSCs to end users; such retail services are neither licensed services nor services connected with

licensed services, and the imposition of the WMO is accordingly outside the scope of Ofcom's powers under section 316 of the 2003 Act.

16. The Tribunal has concluded that Ofcom's interpretation of the legislation is to be preferred, and that "competition in the provision of licensed services" for the purposes of section 316 includes competition at the retail level and is not confined to competition occurring at the wholesale level. Therefore, to the extent that Ofcom's intervention is aimed at securing that Sky, as the provider of the CPSCs to other retailers, "does not...engage in any practice which Ofcom consider...to be prejudicial to fair and effective competition" in the retail provision of CPSCs to end users, the imposition of the WMO is not outside its jurisdiction under section 316.
17. In the light of the Tribunal's agreement with Ofcom's primary answer to the challenge, Ofcom's alternative contention does not arise, namely that jurisdiction exists under section 316 to impose the WMO because the retail provision of the CPSCs is the provision of "connected services" within the meaning of section 316.

(ii) *The competition argument*

18. The second limb of Sky's and FAPL's challenge to Ofcom's jurisdiction is that in identifying the competition concerns in respect of which it has imposed the WMO remedy in application of section 316, Ofcom has acted in breach of its obligations under the legislation in question by failing to adhere to an approach based on the prohibitions in the competition rules laid down by EU law and mirrored in the Competition Act 1998 ("the 1998 Act"). Essentially the argument is that where the competition concerns identified by Ofcom "traverse the same ground" as the prohibitions in the ordinary competition rules, Ofcom, in assessing whether a practice is prejudicial to fair and effective competition for the purposes of section 316, must (with certain qualifications) adopt the same approach as would be applied under the competition rules and the case law relating to them.
19. The Tribunal has concluded that the interpretation of section 316 for which Sky and FAPL contend is incorrect, and that Ofcom is right in its submission that the section is not to be construed as confined to circumstances which would otherwise

constitute breaches of the competition rules, even with the qualifications acknowledged by Sky and FAPL. Therefore, in identifying practices which are or would be prejudicial to fair and effective competition for the purposes of section 316, Ofcom is not required to analyse them specifically by reference to the principles and case law on, in particular, the prohibition of abuse of a dominant position (or some approximation thereof), in order to establish jurisdiction to act.

Sky's challenge to the findings on which Ofcom's competition concerns are based: the Tribunal's conclusions

Ofcom's challenged findings

20. Ofcom's findings about the existence and nature of the practices on the part of Sky, which form the foundations of Ofcom's competition concerns and to which the WMO remedy is directed, are broadly as follows.
21. Ofcom concluded that Sky, in its dealings with other retailers who sought access to Sky's CPSCs, did not engage constructively with their requests and withheld wholesale supply. Ofcom concluded that Sky, in doing so, was: acting on certain strategic incentives; choosing to forego the opportunity to earn the revenue that such deals would have presented; and preferring to be absent from the platforms in question rather than wholesale to them. Sky's strategic incentives, as identified by Ofcom, were (i) to protect its own retail business on the Sky direct-to-home ("DTH") satellite platform and (ii) to reduce the risk of stronger competition in the bidding for content rights.
22. Ofcom maintains that Sky's acting on strategic incentives is an inference to be drawn from the empirical evidence of Sky's "actual behaviour" in the course of the of the various bilateral negotiations which took place between Sky and certain retailers or potential retailers of Sky's CPSCs in the years leading up to the Statement ("the commercial negotiations").
23. Ofcom identified other competition concerns relating to Sky's practices in respect of VM and its corporate predecessors, ntl and Telewest. These concerns were: the

absence of supply of HD versions of Sky's CPSCs, the absence of supply of certain interactive services, and the failure to reach agreement on supply of Sky's premium channels to an off-net (i.e. not on VM's cable network) internet protocol TV ("IPTV") service then in contemplation. In addition, Ofcom identified another competition concern in the level of prices charged by Sky for its current wholesale supply of the CPSCs to VM on the latter's cable network. Ofcom considered that these wholesale prices, albeit not a concern of the same magnitude as the absence of wholesale supply to other retailers, prevented VM from competing effectively against Sky in the retail supply of the CPSCs.

24. Ofcom's analysis of the evidence relating to Sky's conduct and its competition concerns is set out at Section 7 of the Statement, where in particular the following main aspects of Sky's interaction with other retailers, or potential retailers, are considered:
- (a) Negotiations with TUTV for the proposed supply by Sky of its premium channels for distribution by TUTV via digital terrestrial television ("DTT"). (See paragraph 194 ff below.)
 - (b) Negotiations with BT for the proposed supply by Sky of its premium channels for distribution by BT via DTT/IPTV. (See paragraph 260 ff below.)
 - (c) Negotiations with another potential retailer for the supply of Sky's basic and premium channels over a proposed IPTV service. (See paragraph 405 ff below.)
 - (d) Negotiations with VM (and its predecessors, ntl and Telewest (together with VM, "the cable companies")) both as to the terms of the current wholesale supply to those companies and for the supply of HD versions of Sky's premium channels, the supply of certain interactive services, and the supply of Sky's premium channels to a proposed off-net IPTV service. (See paragraph 497 ff below.)

Sky's challenge to Ofcom's findings

25. Sky has disputed almost every element of Ofcom's assessment, not least Ofcom's interpretation of the evidence of the commercial negotiations, which is central to the findings described above.
26. Sky also disputes that in the commercial negotiations it was acting on anything other than normal commercial incentives, and in particular challenges Ofcom's finding that it was acting on the strategic incentives identified in the Statement.

Tribunal's conclusions on Ofcom's core competition concern

27. The Tribunal has examined the evidence in considerable detail. As already mentioned this evidence includes the contemporaneous documents¹³ as well as the written and oral testimony of witnesses (some of whom were subject to extensive cross-examination) as to the relevant events and circumstances. The Tribunal has concluded that Ofcom's core competition concern is unfounded. That concern is based on the finding to which we have referred, namely that Sky has deliberately withheld from other retailers wholesale supply of its premium channels, preferring to be entirely absent from those retailers' platforms rather than to give them wholesale access,¹⁴ and that in doing so Sky has been acting on strategic incentives unrelated to normal commercial considerations of revenue/profit-maximisation.
28. The Tribunal is of the view that Ofcom has, to a significant extent, misinterpreted the evidence of these negotiations, which does not support Ofcom's conclusion. We have found a significant number of Ofcom's pivotal findings of fact in the Statement to be inconsistent with the evidence.
29. Some of the most important issues on which we have differed from Ofcom relate to the respective conduct and motivation of Sky and its counterparties in the various

¹³ These documents relate to the bilateral negotiations between each of the six counterparties referred to in para 24 above. In the case of some counterparties, there were more than one set of such negotiations.

¹⁴ A finding which Ofcom's leading counsel described as "the crucial finding of fact" in the Statement: Transcript 15/20. (Transcript references in the judgment are in the following form: Transcript [Day]/[Page]:[Line]. However, as here, references are not always made to the specific line of the transcript.)

commercial negotiations for access to the channels. For example, while acknowledging the existence of some “regulatory gaming”¹⁵ on the part of other retailers, Ofcom has attributed responsibility for the failure to reach agreement largely to Sky’s failure to engage constructively with its counterparties. However the evidence shows that Sky did, on the whole, engage constructively. On the other hand its counterparties by no means always did so, and in our view regulatory gaming on the part of some of Sky’s counterparties played a much more important role in the commercial negotiations and their progress (or lack of it) than Ofcom has recognised. Although regulatory gaming was not so evident in the case of the retailer to which we refer at paragraph 24(c) above, Ofcom’s findings as to the reasons for ultimate abandonment of those negotiations, and its apparent attribution of significant responsibility to Sky, are again inconsistent with the evidence.

30. Although Sky has a strong preference for having the retail role itself when supplying its premium channels to third party platforms (known as “self-retail”), and acts upon that preference in conducting negotiations for access to the channels, this is not in itself a subject of criticism by Ofcom. Further, leaving aside Sky’s very long-standing wholesale supply to the cable companies, the evidence put before us, including evidence arising out of the commercial negotiations, shows that, contrary to Ofcom’s findings, Sky has no theological objection to wholesale supply of its premium channels, and is, in principle, willing to do so where self-retail is not open to it.
31. Another example of an error of factual assessment is Ofcom’s finding that, because it was unlikely that a competitor would be willing to allow it to self-retail on the competitor’s platform, it was also unlikely that Sky itself would have had an expectation that a competitor might allow this. In our view, this finding is inconsistent with the evidence and wrong in both respects, and has important implications for Ofcom’s conclusions about Sky’s motivations and in particular the disputed strategic incentives.

¹⁵ This is a reference to the conditioning of a party’s conduct in commercial negotiations by reason of an ongoing regulatory review by Ofcom, and its hope and expectation that this review would produce a favourable outcome.

Tribunal's conclusions on Ofcom's concerns relating to the cable companies

32. Ofcom's other competition concerns, relating specifically to the prices for the existing wholesale supply of the CPSCs to VM, and the non-supply to the cable companies of certain new services, are in the Tribunal's view also unfounded. Further, in that connection we have found no evidence to justify Ofcom's finding that Sky has (or has acted upon) an incentive to weaken VM or its corporate predecessors as competitors.

(i) *Current wholesale prices*

33. As for the current terms of supply to VM, and in particular the level of the rate card prices charged by Sky, in the light of the evidence placed before the Tribunal the price level in question does not obstruct (or contribute to the obstruction of) fair and effective competition in the retail of these channels by VM. No doubt a lower wholesale price and a higher margin on packages¹⁶ which contain the Sky channels in question would be welcomed by VM. However, the small negative incremental margin which results when one of VM's subscribers to a package with only basic Pay TV channels "upgrades" to one which includes CPSCs, is not such as to affect to any significant extent VM's incentives to market the latter packages.

34. The evidence makes clear that VM has a strong commercial and financial incentive to win and retain all customers who are interested in the CPSCs, in competition with Sky and others. Ofcom found there is no margin squeeze, and on the evidence we conclude that any cost advantage which Sky enjoys over VM by reason of Sky's larger Pay TV subscriber base, is relatively small. Nor does the evidence justify a finding that the level of the rate card is a significant cause of the persistently lower CPSC penetration on cable. Other factors, unrelated to rate card levels, are at least as likely to be at the root of this phenomenon.

35. In our view the evidence overall demonstrates that VM is rightly regarded by Sky as a serious, well-established rival capable of constraining Sky's actions in the

¹⁶ The CPSCs are not retailed by either Sky or VM as "stand alone" products, but as part of a package.

market, and that it does in fact compete effectively with Sky in the retail supply of packages which include CPSCs. We therefore conclude that Ofcom's finding as to the effect of the rate card prices on VM's incentives and competitive effort is not justified. Nor indeed is customer choice likely to be adversely affected to any real extent. Existing customers of VM who wish to take CPSCs can do so without switching, and at prices which are comparable with those on DTH satellite.

(ii) *HD, interactive and IPTV*

36. As for Ofcom's specific concerns about Sky's conduct in response to the cable companies' requests for supply of HD and interactive services and for supply of premium channels to a contemplated IPTV platform, the Tribunal concludes that the evidence relating to these issues does not support Ofcom's central finding that Sky was unwilling to engage constructively in negotiating the wholesale supply of the CPSCs. Nor does it justify a finding that Sky's conduct was motivated by a desire to weaken the cable companies as competitors. Neither does the Tribunal consider that the evidence in question reveals any practice which is itself liable to prejudice fair and effective competition in the retailing of the CPSCs, or which would make any significant contribution in combination with other factors.

Strategic incentives

37. Given these conclusions, there is no need for the Tribunal to resolve the issues debated before us at some length as to the plausibility or otherwise as a matter of economic theory of the alleged strategic incentives on which Sky was said by Ofcom to be acting in its conduct of the commercial negotiations. Ofcom's position at the hearing was that its findings relating to the strategic incentives were not essential to the existence of its core competition concern, but that the fact of Sky's acting upon these incentives would be revealed when we looked at the empirical evidence of Sky's conduct.¹⁷ However, having examined that evidence with some care we have formed a clear view that Sky was acting for ordinary profit/revenue-maximising commercial motives, and that it cannot reasonably be inferred from the material put before us that the alleged incentives were conditioning Sky's conduct.

¹⁷ See para 166 below.

Ofcom's exercise of its judgment on certain issues – Tribunal's approach

38. It is to be noted that in relation to two of Ofcom's specific concerns (supply of interactive services to VM and the rate card prices paid by VM) the facts made it appropriate for the Tribunal to consider whether Ofcom was right to conclude that the conduct in question was such as to prejudice fair and effective competition in the retail supply of the CPSCs. In each of those cases Ofcom's decision on that issue was, in our view, wrong. In reaching that conclusion we were mindful that the question was one on which Ofcom, as the specialist regulator, had been required by the legislation to exercise a degree of judgment, and that therefore when reviewing a decision of that kind on appeal we should have regard to certain principles derived from the authorities, and discussed later in this judgment.¹⁸ In particular we should give due weight to Ofcom's decision and its reasoning, and should not interfere with it unless satisfied that it is wrong.

Consequences of the Tribunal's conclusions

Other appeals and grounds of appeal

39. The Tribunal's conclusions on Sky's grounds of appeal relating to Ofcom's competition concerns are sufficient to dispose of the four appeals, and it is not necessary for the Tribunal to determine Sky's and the other Appellants' grounds challenging the WMO itself, nor for the Tribunal to determine the STB and CAM appeals.¹⁹ Nor do we consider that it would be appropriate for us to do so.
40. It is sometimes appropriate for a court to express its views on issues even though they have become academic in the light of the court's findings on other matters. This can be the case where, as here, the court has heard evidence and submissions on the issues. The court's views on them might become relevant or helpful in the event of an appeal, and/or they might themselves be appealed contingently, against the possibility of the primary ruling being overturned. However these considerations did not persuade us in the present case. It would be difficult to

¹⁸ See section IV.

¹⁹ However, as we note at paras 258-259 of the judgment, the Tribunal has considered the documents and evidence in those appeals.

justify the delay in handing down the Tribunal's decision which this exercise would have entailed, as well as the additional expenditure of judicial and other resources on issues which, in the light of our primary conclusions, are academic.

41. The decision not to embark on that exercise was to some extent vindicated by Ofcom's request to the Tribunal on 14 June 2012 not to give judgment yet, but first to reopen the hearing in order to admit further evidence and allow further submissions. This request related to issues which are now academic in that they concern grounds of challenge to the WMO remedy itself. Ofcom's request²⁰ arose out of the latest FAPL auction of live audio-visual rights to its football matches, the results of which were made public at that time, and which in its view had a bearing on the arguments put before us. Had we acceded to the request other parties would certainly have wished to introduce new evidence and submissions themselves. We declined to reopen the hearing, indicating that our reasons would be contained in this judgment. Those reasons should now be clear.

Directions and other relief

42. In the light of the Tribunal's conclusions, Sky's appeal must be allowed, but the Tribunal will hear the parties in due course on the appropriate ruling, in particular as regards (1) any action that Ofcom should be directed by the Tribunal to take for the purposes of section 195(3) of the 2003 Act²¹ (as applied by section 317(7)); (2) any other order(s) that should be made in respect of the appeals themselves; and (3) the effect of this judgment on the Interim Relief Order, and generally.

²⁰ This was not the first request to the Tribunal to delay its judgment. In May 2012 FAPL asked the Tribunal not to deliver judgment while its 2012 live rights auction was in progress.

²¹ See para 67 below.