

# Free Market 1: Copyright 0 - UK Premier League Loses Away from Home

Peter Alexiadis and David Wood\*

Partners, Gibson, Dunn & Crutcher LLP/Brussels

In a judgment that calls into question the effectiveness of exclusive territorial licences under national copyright laws, the European Court of Justice of the European Union held on 4 October 2011 that broadcasting licences which prohibit the broadcasting of football matches outside the particular European Union ('EU') Member State for which the licence was granted cannot be enforced.

The commercial implications of the judgment are enormous in practice, despite the fact that the judgment has not called into question the ability of rights holders to grant territorial exclusivity to their licensees. Both copyright rights holders and acquirers of such rights will need to reconsider their business strategies across the EU. If any comfort can be found in the judgment for copyright holders, it lies in the fact that the court has opened up the possibility that football broadcasts that include elements of 'literary or artistic works' alongside them might nonetheless be able to benefit fully from the grant of exclusivity. Some commercial solace can also be found in the fact that the English High Court, due to apply the judgment to the facts in early 2012, is likely to find that it is only a private user that can benefit fully from the judgment, as a commercial user (*e.g.*, a pub landlord) is *not* able to benefit from the use of a decoder sold to a non-UK customer because its use will in all likelihood be considered to facilitate a new "communication to the public" before its customers, which would be actionable by the UK copyright holder.

## The Pre-match Atmosphere

The Court of Justice of the European Union ('the court') adopted the judgment following two preliminary references (requests for legal interpretation) made to it in 2008, under what is today Article 267 TFEU, by two separate divisions of the High Court of England and Wales.

The first case (C403/08) concerned a civil action brought by the Football Association Premier League Ltd ('FAPL') and a number of undertakings responsible for the transmission of football matches in Greece, against UK pubs that screened Premier League matches by using Greek decoder cards (rather than decoder cards acquired in the United Kingdom at UK prices) and against the (Greek) suppliers of such decoder cards to those pubs.

The second case (C429/08) concerned the criminal prosecution of a pub landlord in Portsmouth, Mrs Murphy, who had been fined because she screened the matches in her pub using a decoder box and a subscription card

obtained from the Greek broadcaster NetMed Hellas SA, the Greek licensee of FAPL, rather than Sky Television, the official exclusive broadcaster of the Premier League in the United Kingdom.

Given that NetMed Hellas was prohibited by contract from supplying the relevant decoder cards outside Greece, and as a result of the complexity of the matter (involving IP rights, competition law principles and the EU's Fundamental Freedoms, including the freedom to provide and acquire goods and services to and from anywhere in the EU), the High Court referred a long list of questions to the court, inviting it *inter alia* to clarify:

- (a) Whether a foreign satellite decoder card bought under a false name and address could be regarded as an 'illicit device' under the terms of the Conditional Access Directive (Directive 98/84), and hence be prohibited from sale or use in the United Kingdom.
- (b) A request for clarification of the rules regarding the freedom of movement/provision of services of Article 56 TFEU and the conformity of those rules with contractual obligations granting exclusive territorial licences for broadcasting.
- (c) An analysis of those exclusivity clauses under Article 101 TFEU, which prohibits anti-competitive arrangements such as market-sharing agreements.
- (d) A number of questions relating to what constitutes an infringing reproduction of a copyright work, including the meaning to be attributed to the expression 'right to communicate copyright works' by satellite, particularly in relation to the relevant terms of the Information Society Directive (Directive 2001/29) and the Cable and Satellite Directive (Directive 98/83).

## The Pundit's View

On 3 February 2011, Advocate-General Kokott, whose free market credentials are well known to EU law practitioners, published her non-binding opinion in the proceedings. In the opinion, AG Kokott encouraged the court to adopt a ground-breaking ruling to include the following findings:

- (a) A foreign satellite decoder card should not be considered to be an 'illicit device' within the meaning of the Conditional Access Directive, given that the Directive refers *expressis verbis* to pirate or counterfeit cards.
- (b) Prohibiting the distribution in one Member State of decoder cards which have been lawfully distributed in another Member State (in this case, Greece) constitutes a restriction of the freedom to provide services. Furthermore, such a restriction cannot be justified on any grounds, whether by reference to intellectual

\* This article reflects the authors' personal opinions and do not necessarily reflect the views of the firm's clients. Many thanks to our colleagues Alvaro García-Delgado and Elissavet Kazili for their invaluable contributions to this article; all errors of judgement remain the responsibility of the authors.

property rights protection, or because of the ‘closed period’ allowed to football broadcasters and preserved by football’s governing body in Europe, UEFA (and which is intended to preserve physical attendance at matches). AG Kokott even went further and claimed that such restrictions need not be discriminatory in order to be contrary to EU law, but that a partitioning of the internal market would be sufficient to constitute an infringement since ‘freedom to provide services requires the abolition of all restrictions on the free provision of services’.

- (c) Licences that grant absolute territorial protection are incompatible with the internal market, since they create a compartmentalisation of licensed territories that prevents competition between broadcasters. Therefore, such agreements are similar to the ones that prevent parallel trade. As such, they are contrary to Article 101 TFEU since they are intended to restrict competition. It is also presumed that the possibilities of being able to justify such a possibility under the conditions listed in Article 101(3) TFEU are very low.
- (d) The activity of broadcasting matches on a single TV in a pub does not constitute an infringing ‘communication to the public’, and is therefore consistent with the terms of the Information Technology Directive. Furthermore, the right to communicate copyright works by satellite complements the right of the audience to receive and watch such broadcasts.

## The Referee’s View

On 4 October 2011, the court delivered its much anticipated judgment, upholding most of AG Kokott’s opinion. In doing so, the court has taken one more step in its goal to complete the Internal Market, albeit by non-political means. It is not clear, however, whether the price ultimately paid to support the court’s various conclusions will be too high (see below), especially for businesses acting at a European level.

## The Conditional Access Directive

The court explains how decoding devices imported from another Member State cannot be regarded as ‘illicit devices’ and, in so doing, concludes by adopting a formalistic approach according to which the ‘illicit device’ category encompasses exclusively those decoders which have been ‘adapted’ to circumvent the law or which allow ‘access ... free of charge’ or facilitate ‘without authority the circumvention of any technological measures’. This is an essential aspect of the case given that, if the court had concluded that foreign satellite decoder cards were ‘illicit’, the prohibition of their distribution under Article 4 of the Conditional Access Directive would have been permitted.

## Free Movement of Services

Having correctly identified that the ‘supply of telecommunications equipment is ... a purely secondary matter’<sup>1</sup> in the proceedings, thereby focusing its attention on the freedom to provide services, the court concludes that the British legislation prohibiting foreign decoding

devices from being imported into and sold and used on national territory ‘prevents those services from being received by persons resident outside the Member State of broadcast’.<sup>2</sup>

This provision is therefore considered by the court to be a clear restriction on the freedom to provide services, and the existence of objective justifications for such a restriction must be assessed in order to determine its (un)lawfulness. The two main objective justifications put forward by the FAPL to defend the legality of such clauses relate to (i) the protection of intellectual property rights, and (ii) the promotion of attendances at football grounds.

As regards the first FAPL justification (which was supported by the governments of the United Kingdom, France and Italy, coincidentally three of the major footballing nations of the EU), the court concedes that, even if ‘sporting events cannot be regarded as intellectual creations’,<sup>3</sup> they do indeed ‘have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works [by copyright]’.<sup>4</sup>

Nevertheless, a restriction on the free provision of services could in principle only be justified where national legislation ‘is designed to confer protection on sporting events’. In the case at hand, the restriction imposed by private parties is not considered to be proportionate to the otherwise legitimate goal of protecting intellectual property. According to the court, while intellectual property rights aim at achieving a level of ‘appropriate remuneration’ for the rights holder, they do ‘not guarantee the right holders concerned the opportunity to demand the highest possible remuneration’. Accordingly, the level of ‘appropriate remuneration’ must be ‘reasonable in relation to parameters of the broadcasts concerned, such as their actual audience, their potential audience and the language version’. In this respect, the court asserts that there is no need to restrict the freedom of provision of services, given that the appropriate commercial level of remuneration could easily be calculated considering actual and potential audience both in the Member State of broadcast and in any other Member State where the broadcasts are received.<sup>5</sup>

As regards the proportionality of the restriction, the court takes the view that imposing a premium in order to confer absolute territorial exclusivity goes beyond what is necessary to ensure an appropriate level of remuneration for the licensor, because such a practice may result in the partitioning of the Internal Market along national lines and thereby create artificial price differences which are ‘irreconcilable with the fundamental aim of the Treaty’.<sup>6</sup>

The FAPL’s argument that the restriction imposed reflects a means of guaranteeing attendance at football grounds was also rejected by the court on proportionality grounds. In this respect, the court observed that the incorporation of clauses limiting the broadcasting of matches during a specified period would have a less adverse effect on the fundamental freedom to provide services than the specific restriction in question.<sup>7</sup>

2 At paragraph 87.

3 At paragraph 98.

4 At paragraph 100.

5 At paragraphs 106 to 113.

6 At paragraphs 114 to 121.

7 At paragraphs 122 to 125.

1 At paragraph 80.

Finally, the court adds that these conclusions as regards the freedom to provide services cannot be affected either by the fact that the foreign decoding device has been purchased or enabled by the giving of a false identity and a false address, with the intention of circumventing the territorial restriction in question, or by the fact that it is used for commercial purposes although it was restricted to private use. According to the court, these two issues remain a merely private matter between the two parties and should be resolved through claims for damages from the purchaser that has contravened the law.<sup>8</sup>

### Competition Law Aspects

As regards competition law matters, the main question referred to the court related to whether ‘the clauses of an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster constitute a restriction on competition prohibited by 101 TFEU’. In this respect, the court indicated from the outset that the granting of licences to a sole licensee does not, in fact, constitute a restriction of competition and that this possibility is contemplated by the law in Article 1(2)(b) of the Satellite Broadcasting Directive.

Nevertheless, a problem arises with the imposition of ‘*additional obligations* ... contained in the clauses of the contracts concluded between the right holders and the broadcasters concerned, namely, the obligation on the broadcasters not to supply decoding devices enabling access to the protected subject-matter with a view to their use outside the territory covered by the licence agreement’ (*emphasis added*). According to the court, as a result of these additional obligations regarding decoders, the agreement restores the divisions between national markets and ‘enables each broadcaster to be granted absolute territorial exclusivity in the area covered by its licence and, thus, all competition between broadcasters in the field of those services to be eliminated’.<sup>9</sup>

It is worth noting that the court has been more conservative in this respect, by narrowing down the recommendations of AG Kokott concerning the competition issues addressed in the relevant case law. In particular, while AG Kokott expressed the view that *any* exclusive territorial licence runs counter to Article 101 TFEU, the court ruled that it is only those broadcasting licences that prohibit the purchase of decoder cards from other Member States that are in breach of EU competition rules.

### Copyright-protected Work

As regards the possibility of a copyright infringement, the main question referred to the court related to whether the broadcasts in a pub which contained protected works, such as the opening video sequence to the televised football or the Premier League musical anthem itself, could be treated as acts of ‘communication to the public’. Should that be the case, the publicans showing the matches would be in breach of Article 3(1) of the Copyright Directive, thereby allowing rights holders to prohibit these kinds of communications.

In this respect, the court confirmed that a ‘communication to the public’ was taking place in the circumstances, inasmuch as the pub landlord was intentionally (and commercially) transmitting the broadcast to customers who constituted a ‘new public’ for those works. In this respect, the court followed the line it had established in previous case law,<sup>10</sup> where it had found that hotel owners were also carrying on acts of ‘communication to the public’, rather than the more narrow view suggested by AG Kokott in her opinion.

### The Application of Murphy’s Law

While the judgment of the court is generally well reasoned on a number of individual points when taken in isolation, it suffers because it does not seem to see the proverbial ‘wood for the trees’. This occurs because, on the one hand, the court seems to have made a number of heroic assumptions about the commercial drivers of broadcasting services and, in doing so, appears to have pitted the forces of competition rules and free movement principles against one another while, on the other hand, it has subjected what is essentially EU ‘framework’ copyright legislation to a technical interpretation which might be at odds with its specific implementation in many national copyright regimes.

Thus the court has stretched certain *legal doctrines* to their limits in arriving at a number of its conclusions. For example:

- While correctly pointing out that one should not confuse the analysis of the ‘freedom to provide services’ with that of the ‘free movement of goods’,<sup>11</sup> the court has nevertheless gone on to all intents and purposes to assimilate the treatment of one concept with the other when determining that the conduct in question was anti-competitive because it interfered with parallel trade. With respect, however, the sale of a decoder designed to provide access to copyright protected material is not just any ‘good’ whose consumption is a straightforward issue. Rather, it is a physical product whose sole role is dedicated to facilitating the provision of a service, an essential aspect of which is the preservation of exclusivity for the broadcasting of one-off events scheduled to occur at specific times in specific settings. Yet even if one were to take the formalistic view that decoders should benefit separately from the principle of free movement of goods, its acquisition in Greece under false pretences (especially given the copyright protection function it performs) should have at least raised some concerns that rights to the decoders had not been properly exhausted in the country of first sale. Such a line of enquiry would be independent to the issue of whether the decoder was an ‘illicit device’ under the Conditional Access Directive. Thus, the court has not heeded its own advice in differentiating between the two concepts.
- The long established precedent of *Coditel*,<sup>12</sup> which would otherwise wholly justify the creation of absolute territorial

10 See, for example, Case C306/05, *SHAE v Rafael Hoteles SA* [2006] ECR I 11519.

11 At paragraphs 77 to 84.

12 See Case 62/79 *Coditel SA and others v Ciné-Vog Films SA and others* [1980] ECR 881.

8 At paragraphs 126 to 132.

9 At paragraphs 137 to 146.



exclusivity in the context of broadcasting, has been almost summarily dismissed as irrelevant by the court. If this were not bad enough, the Advocate-General excluded reference to the *Coditel* precedents altogether in her opinion. The court summarily notes (at paragraph 119) that *Coditel I* does not constitute a bar to its interpretation that copyright protection in the FAPL case could not be the subject of absolute territorial protection essentially because the two cases are “not comparable”. The sum total of the Court’s analysis of *Coditel I* is then confined to one sentence, which reads: “In the case which led to the judgment in *Coditel I*, the cable television broadcasting companies communicates a work to the public without having, in the Member State of the place of origin of that communication, an authorization from the right holders concerned and without having paid remuneration to them.” With respect, the *ratio decidendi* of the *Coditel* case-law is much broader than the court concedes. In Case 26/81, for example, the court made it clear that, *inter alia*, it will be a matter for a national judge to determine whether the exercise of exclusive copyrights creates barriers which are “artificial and unjustifiable in terms of the needs of the cinematographic industry” given the “specific characteristics of the market”. In his respect, one should also be mindful of the possibility of “charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements”. With respect, there was no reason for the court to ignore whether these types of important considerations might apply to the facts at hand, even if the copyrights in question were not cinematographic in nature. While there will be many who take the view that the *Coditel* line of reasoning needed to be updated to reflect the modern digital era, the ‘Gordian Knot’ approach of the court does not seem to appreciate the extent of the balancing process that needs to be conducted for the Community legal regime to facilitate (as opposed to compel) a truly pan-European copyright licensing environment.

- Ignoring the *Coditel* precedents also cannot be justified simply because the broadcasting of football matches does not qualify as a “work” (as concluded at paragraph 96 by the court). As the court itself concedes, little or nothing should turn on this fact, given that “sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal order.” Moreover, the court goes on to acknowledge that Member States would be entitled to restrict the free movement of services through the introduction of legislation regarding the broadcast of particular sporting events (at paragraph 104). One cannot ignore the fact that football brings together a series of set-piece moves (corners, free-kicks), ‘theatrical’ exchanges of various kinds (exaggerating the effects of fouls) and, most importantly, a range and diversity of camera work, adjacent clips and cut-away shots from other matches or commentators, different styles of commentary and so forth, which all work towards creating the unique entertainment experience associated with a broadcast football match. Similarly, would evidence that the result of a match had been rigged allow that match to satisfy the

conclusion that it is a ‘work’ because its result was choreographed from the outset? By the same token, is a theatrical avant-garde production without a set script or a free form modern dance routine not worthy of protection because it has not been choreographed in advance and the performers simply told to ‘express themselves’? Seen in this light, the traditional definition of a “work” at EU level should not constitute a bar to the enforcement of copyright under the logic of *Coditel*.

- The court and the Advocate-General have largely ignored the fact that the decoders were procured illegally in Greece, by parallel traders who provided false names and addresses. Under traditional ‘exhaustion of rights’ doctrine, the illegality of the first sale in a Member State would mean that the intellectual property rights in the decoders would *not* be exhausted and that the rights holder could legitimately exercise his or her ability to prevent the Greek decoders being used in the United Kingdom.<sup>13</sup> Given that copyright has been traditionally allowed greater scope for territorial protection through the logic of the *Coditel* case law, it appears to be counterintuitive to ignore such a hallmark of ‘exhaustion’ doctrine derived from the protection of other intellectual property rights. Moreover, the court’s assertion that the appropriate legal recourse for rights holders is to prosecute individual breaches of unauthorised decoder use is to misunderstand the complexity and expense involved in prosecuting multiple copyright infringements in the digital era.
- The approach of the court is also at odds with the underlying logic of a number of other legal doctrines. For example, the various Directives establishing a framework for copyright protection consider the rights to be inherently national in their scope (which the court concedes). Should the treatment of other types of copyright be any different simply because of the fact that broadcasting content can be commercialised across national borders by satellite so readily as compared to other forms of copyright? Does the approach make sense in the face of a wave of measures taken at Member State level to ensure that cross-border piracy is not taking place in the downloading of musical and video content without payment to the rights holders? The attitude of the court, in holding that the actions of the rights holder and its local licensees were anti-competitive ‘by object’ rather than ‘by effect’,<sup>14</sup> makes little sense unless it is possible to confer effective exclusivity on a copyright holder through lesser means. Yet the very nature of such trans-national broadcasting transmissions suggests that a ‘real life’ answer can provide no realistic alternatives. On the contrary, while asserting that the exclusivity needs to be assessed in light of its surrounding circumstances,<sup>15</sup> the court all but ignores those circumstances when arriving at its

13 This aspect of the ‘exhaustion of rights’ doctrine can be found in two landmark precedents – Case 15/74 *Centrafarm v Sterling Drug* [1974] ECR 1147 and Case 78/70 *Deutsche Grammophon v Metro* [1971] ECR 487. As regards the lack of consent to originally market patented goods, refer to Case 19/84 *Pharmon v Hoechst*, [1985] ECR 2281. See also Case 187/80 *Merck v Stephor* [1981] ECR 2063 (trade marks).

14 See paragraphs 135 to 146.

15 As had AG Kokott at paragraph 246 of her opinion. And see paragraphs 140 to 146.

final judgment. The fact that football broadcast rights are acquired to cover a bundle of matches that will occur at one-off times in the future, the fact that many of those games are of marginal interest to many viewers and are ‘subsidised’ by the more popular games, and the fact that those rights have been subject to the most intense competition law scrutiny (in terms of the longevity of exclusivity, the scope of the rights and the extent of competition afforded by other licensed platforms) are all very relevant considerations which should play a material role in the evaluation of the reasonableness of a satellite broadcaster enforcing territorial exclusivity strictly. The court’s desire to decide the case ‘in a bubble’ can be seen by the fact that rights holders of varying complexions were denied the right of intervention in the proceedings, when one would have thought that their input into the workings of content delivery and protection would have been invaluable had the court been keen to understand the economics of the industry.

- The analysis of the court and the Advocate-General presumes that the segmentation of national markets by reference to copyright fosters price discrimination. While that might well be the case in practice, the Commission’s own recent ‘Enforcement Priorities Guidelines’<sup>16</sup> make it clear that price discrimination can often have consumer welfare enhancing characteristics; in the absence of the court examining the effects of such price discrimination, conclusions as to the restriction of competition ‘by object’ appear to be unfounded. Indeed, the court is relatively unforgiving about the prohibition on the use of foreign decoders insofar as its motivation to preserve absolute territorial protection may be driven by the desire to “demand the highest possible remuneration” (at paragraph 108), which cannot be guaranteed by the “specific subject-matter” of the copyright. From there, it is one short leap for the court to conclude that this premium in the hands of rights holders lead to “artificial price differences between the partitioned national markets” (at paragraph 115). In making these sweeping assumptions about “high” and “discriminatory” prices, the court appears to be judging what constitutes a ‘fair’ price in market conditions without any recourse to the cost of bidding for the rights, the inherent *ex ante* risks in penetrating certain new markets with satellite broadcast, and so forth. The court’s views in this regard about the relative ease of determining a fair price for premium content, while at the same time compensating the rights holder but not exploiting customers, do not sit comfortably with the wave of litigation on both sides of the Atlantic surrounding the concept of FRAND (fair, reasonable and non-discriminatory) licensing standards measures.<sup>17</sup> Moreover, when one considers that the amendments

introduced in 2010 to the EU’s vertical restraints regime<sup>18</sup> relaxed the official position on the grant of exclusivity, the taking by the court of a more restrictive view of the need for intra-brand competition seems at odds with prevailing competition law enforcement goals of the Commission.<sup>19</sup> Finally, when the court takes the view that the provisions of decoders to individuals and to businesses on different terms do not justify differential treatment across EU borders, it turns its back on a very important and commercially legitimate commercial segmentation of the market. Would the court suggest that a pharmaceutical patent used for phosphate production in one Member State should be used without commercial restriction for high end pharmaceutical products in another Member State? The emphasis on the copyright licensing system being designed to maximize royalties is no doubt unfortunate, as what lies at the heart of copyright protection is much more complex as regards the protection of the “essential subject-matter” of such rights. Given the use to which the FAPL puts its copyright royalties and the public good preserved by encouraging attendances at games, the court’s emphasis on profit maximization seems to overemphasize its relative importance.

- By summarily overriding *Coditel*, the court appears to be returning to the position expressed by the Court in 1966 in *Consten & Grundig*,<sup>20</sup> where it took the view that absolute territorial protection accompanied by measures that prevent parallel trade is anti-competitive by its very object. That precedent was, however, developed at a time when the concept of ‘premium content’, let alone the bidding procedures usually associated with the acquisition of such rights, did not exist. It is arguable that, in this type of situation, competition is being waged *for* the market rather than *in* the market. As such, the observations of the court about greater competition ‘between broadcasters’ seem somewhat misplaced, whereas the proper role of competition rules should be to ensure that the scope and duration of such rights are proportionate and not exclusionary in their effect, rather than a blanket prohibition of exclusivity being prescribed. Indeed, in a world of ‘winner takes all’ bidding for intellectual property rights, while it is clear that the court’s ruling is designed to create a common market, achieving the goal of greater competition (on which the judgment is purportedly based) appears to be elusive if the mantra

16 ‘Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’, OJ C 45, 24 February 2009, at 7 to 20.

17 The *Qualcomm* and *Rambus* cases are just two examples of cases where the regulators on both sides of the Atlantic analysed the way in which access to licences was granted. See in this respect, Case COMP/39.247 *Qualcomm*, Case COMP/ 38.636 *Rambus* and *Broadcom Corp. v Qualcomm, Inc.* (Federal Circuit, December 1, 2008) No. 2007-1545 & 2008-1162 and *Rambus v FTC* (D.C. Cir. 2008). 522 F.2d 456.

18 The cornerstone of the new regime is Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (the ‘Vertical Agreements Block Exemption’), OJ L 102, 23 April 2010, at 1 to 7. Accompanying Guidelines were also published together with the Vertical Agreements Block Exemption: ‘Guidelines on Vertical Restraints’, OJ C 130, 1920 May 10, at 1.

19 Under the new vertical restraints regime, which came into force in 2010, even the imposition of resale price maintenance obligations would be permissible for a period of two years while a product was being introduced to a new territory (see, for example, paragraphs 62 and 225 of the ‘Guidelines on Vertical Restraints’). Similarly, absolute territorial exclusivity can be protected in a number of situations which are capable of yielding pro-competitive results: see, for example, paragraphs 137 and 198 of the ‘Guidelines on Vertical Restraints’.

20 Cases 56 & 58/64 *Etablissements Consten SA and Grundig GmbH v Commission* [1966] ECR 299.

on which the court relies is that of intra-brand competition. For the reasons stated above, the net result of the ruling will be to create an environment where there are fewer rights holders; in such an environment, the more laudable goal of inter-brand competition is made more difficult to attain. Given that live football coverage can be readily accessed across the EU by means of Internet streaming by ordinary citizens, it would appear that this goal is already being achieved, especially given the manner in which the rights were awarded at the outset in accordance with competition law principles (and that, in any event, pub landlords cannot benefit from the judgment insofar as they are engaging in a “communication to the public”).

- Finally, the relevance to the sporting world of the principle of ‘solidarity’ under EU law<sup>21</sup> is all but ignored by the court, as it does not take into account the fact that the rights acquired by Sky Television from the FAPL have been acquired in such a way as to promote a minimum number of broadcast games from less glamorous English football clubs, while at the same time avoiding the real-time transmission of games near the individual clubs so as to avoid a negative impact on live attendances. Given the importance of both of these factors to the financial livelihood of the football clubs as a whole, and especially given that these conditions were negotiated between the FAPL and the European Commission in the context of a competition law review under Articles 101(1) and (3) TFEU,<sup>22</sup> it is more than surprising that the court attaches little weight to them. If public policy is an unruly horse to ride, proportionality is also a thin line to tread. Football clubs will at least know that these are very real, and proportionate, concerns. The court takes the view that there are ‘more proportionate’ ways in which the FAPL can achieve its avowed aims to promote solidarity in the UK Premier League. Yet discussions about shades of proportionality are inevitably fruitless, and this is one such classic case, especially given that the various rationales cited by the FAPL were considered by the Commission to be ‘indispensable’ for the award of an exemption decision under Article 101(3) TFEU, when considering the compatibility the FAPL arrangement under EU Competition Rules. One is at a loss to understand how, in conducting a competition law assessment, something which in one breath is deemed to be ‘indispensable’ can in another breath be found to be clearly ‘not more proportionate’ than other commercial options.

The *commercial* implications of the judgment are arguably even more profound than its legal significance:

- If the ‘protection’ of an exclusive national territory through the restricted use of decoders is no longer permitted in practice, the selling of media rights on a

national basis is clearly undermined, given that satellite broadcasters are transmitting live sporting events at specific times and according to different national commercial terms and conditions. The net result will be that the acquisition of rights will shift from the national to the European level, and experience tells us into the hands of one or only a handful of powerful buyers. Accordingly, a national monopolist in each EU Member State might now be replaced by a pan-European monopolist. From a consumer welfare point of view, is this result more or less desirable than the situation at present? Will it be more efficient if the premium of pan-European exclusivity drives prices up for the highest bidder? How big would pan-European purchasers need to be to exercise some level of countervailing buyer power over the rights holder(s)? From a strictly commercial point of view, it is equally true (and acknowledged by the court) that the Premier League had received no bids for the European rights to its football coverage, whether from satellite or Internet broadcasters. In such a situation, effectively pushing a broadcaster towards a pan-European licensing solution might arguably result in more, rather than less, competitive distortions. It is clearly one thing for the court’s judgment to facilitate the creation of pan-European licensing options, and quite another for it to seek to impose such commercial outcomes through this judgment. When one considers that the OFT’s initiatives against BSKyB for access to content are based on the current competitive *status quo*, one must also ask whether the OFT’s proposed intervention can continue to be justified in the new commercial environment.<sup>23</sup>

- The distortive effects on the competitive landscape are also clear insofar as the judgment effectively endorses a position which runs counter to the principle of ‘technology neutrality’.<sup>24</sup> While the ruling clearly affects the satellite industry and also that of the Internet (whose more widespread use will probably further erode crowd numbers and atmosphere at the grounds), it leaves untouched terrestrial and cable broadcasting, as these platforms are inherently limited by the nature of the technology which they deploy. A natural extension of the doctrine endorsed by the court would therefore be to forbid geographic blocking techniques imposed by content providers on the Internet (that is, the technical equivalent of a satellite decoder card). As such, has the judgment unwittingly sown the seeds for a dominant or an emerging dominant undertaking in the Internet space to dominate Internet transmissions of sporting events? In addition, the court may have unwittingly involved itself in a distortion of competition by emphasising the fact that its judgment is focused upon the terms of the *Satellite Broadcasting Directive*,

23 See Ofcom, ‘Pay TV Statement’, 31 March 2010.

24 The concept of technology neutrality underpins the regulatory framework for electronic communications. According to this principle, spectrum users should be the ones choosing the best technologies and services to use in the available frequencies. In this respect, Member States’ functions should be limited to ensuring that all technologies and services can be used in all frequencies. See in this respect recital 18 of Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (‘the Framework Directive’), as amended by Directive 2009/140/EC and Regulation 544/2009.

21 See, for example, section ‘4.8 Media’, of the ‘Commission’s White Paper on Sport’, Brussels, 11 July 2007 COM(2007) 391 final, as well as section ‘3.2. Sustainable financing of sport’ of the Commission’s Communication ‘Developing the European Dimension in Sport’, Brussels, 18 January 2011 COM(2011) 12 final.

22 See Case COMP/38.173 *The Football Association Premier League Limited*, Case COMP/38.453 *FAPL+ Sky* and Case COMP/38.828 *PO/FA Premier League Limited + British Sky Broadcasting plc*.



including the meaning of the expression “communication to the public”. Thus, while the Commission’s *Simulcasting Decision*<sup>25</sup> took the view that the “country of destination” principle applied for the purpose of calculating online licence fees, acts of communication under the *Satellite Broadcasting Directive* are very much limited to the broadcaster’s country of origin, they creating another imbalance between competing delivery platforms.

- From a net welfare analysis perspective, it is questionable whether European consumers will be better off as a result of the judgment. In such situations, price discrimination seems primarily to inure to the benefit of the smaller EU Member State markets, such as Greece itself. Accordingly, if one is seeking to promote a Euro-price, the most likely result is that today’s cheaper jurisdictions are likely to be paying more, rather than consumers in the more expensive jurisdictions paying less than their current levels. In a worst-case scenario, some smaller jurisdictions might be excluded altogether.
- Aside from the protection of smaller football clubs (see above), another victim of ‘collateral damage’ as a result of the creation of a truly European market might be the cultural and linguistic range which currently characterises broadcasting licensing business models. In a pan-European setting, the net winners will be English language content and the net losers will be those potential licensees who would otherwise seek to promote cultural diversity through their own combinations of packaging, commentary and ancillary services. By the same token, there is nothing in the judgment which would prevent specific language versions being licensed, thereby ‘isolating’ national markets by another means.
- Although the live match coverage itself is not covered by copyright protection (at least insofar as European legislation is concerned), the door has been left open to the FAPL to assert its rights over FAPL-branded opening videos, background sound effects, on-screen graphics, and so forth. The acknowledgement by the court that those copyrights can be protected fully where they reside in formats which are repeated, pre-engineered or scripted in the context of the live (and spontaneous) football coverage, means that broadcasters can arguably avoid the major impact of the court’s judgment simply through ‘complicating’ their live coverage by including copyright-rich elements (for example, FAPL-branded opening videos, background sound effects, on-screen graphics or even just a small ‘Premier League’ logo) on some part of the viewing screen. As such, the broadcaster would be able to prevent live broadcasts of such content effected by decoders brought in from another Member State.
- Similarly, there is nothing to prevent a copyright licensee preventing the active selling of decoders outside its licensed territory. Indeed, perhaps even a broader ban on decoder sales is possible if they are intended for public viewings.

## Conclusion

The specific concerns expressed above, and in particular the failure of the court to carry out a welfare analysis, suggest that the court may have scored a proverbial ‘own goal’. While it is often true that ‘hard cases make bad law’, many of the possible negative repercussions of the judgment might have been avoided had the court been willing to embark upon such a welfare analysis, as it had sought to conduct in the *Glaxo* case.<sup>26</sup> Such a welfare analysis would, however, be more complex and subtle than the single-minded pursuit of the belief that anything which forges a common ‘market’ must be supported by all elements of Community law.

By conducting such an analysis, the court would have been in a position to determine whether the criteria set forth in Article 101 (3) could be fulfilled in this particular case. This would include an analysis of the effectiveness derived from differential pricing, the “value” of certain sporting events in each Member State, and broader social goal of promoting match attendances and supporting smaller clubs and national teams. Such an approach is brought into even sharper focus by a recent judgment of the Court of Justice, which has ruled that the requirements of undistorted competition in the Protocol to the TFEU constitute a fundamental principle of EU law according to which internal market (*i.e.*, free movement) principles must be applied consistently.<sup>27</sup> As such, the adaption by the court of the approach endorsed in *Glaxo Smith* appears to be a necessity, rather than an option.

The most likely aftermath from the judgment, after another period of commercial uncertainty and fraught negotiations, is likely to see legal coverage in commercially marginal territories disrupted. Experience tells us that this, in turn, is likely to lead to the greater unlawful or pirated distribution in those territories, thereby depriving the rights holders of revenue and the relevant Member States of tax revenues.

Further intense reflection will be needed on the impact of the judgment on audio and audio-visual ‘works’. At the very least, there will be great uncertainty as to the scale of that impact. In these circumstances, it is likely that this uncertainty will lead to a more difficult environment for the negotiation of cross-border licences, since the parties will be unsure of their rights and the enforceability of their contracts. Thus, rather than facilitating an outcome that everybody wants, the emergence of EU-wide licensing arrangements and the increased availability of premium content, there is a risk that the effect will be quite the reverse.

26 Case T168/01 *GlaxoSmithKline Services Unlimited, Formerly Glaxo Wellcome Plc v Commission* [2006] ECR II 2969, paragraph 118. Nevertheless, the Court of Justice of the EU overturned that part of the CFI’s judgment, arguing that an error of law had been committed by the Court of First Instance:

: see Joined Cases C501/06 P, C513/06 P, C515/06 P and C519/06 P *GlaxoSmithKline Services Unlimited v Commission and Others* [2009] ECR I 9291.

27 See Case C-496/09 *Commission v. Italian Republic*, Judgment of 17 November 2011 (NYR).

25 Commission decision of 8 October 2002, Case No COMP/C2/38.014 - IFPI “Simulcasting”

