

# Exclusive territorial broadcast licences granted by the FA Premier League are contrary to the free movement of services and to EU competition law

4 October 2011

In a judgment handed down today in Joined Cases C-403/08 and C-429/08, the Court of Justice of the European Union ('ECJ') has held that licences for the broadcasting of football matches which grant broadcasters territorial exclusivity on a Member State-by-Member State basis and which prohibit television viewers from watching the broadcasts with a foreign decoder card are contrary both to the free movement of services and to EU competition law.

This groundbreaking finding may have far-reaching implications on the way in which media rights are bought and sold throughout the EU.

## Background to the judgment

Both cases C-403/08 and C-429/08 concern the use of foreign decoder cards in the UK which allow access to foreign transmissions of live English Premier League football matches. The Football Association Premier League Ltd ('FAPL') organises the filming of Premier League matches and licences exclusive rights to broadcast them.

During the period at issue, each Premier League match was filmed by the BBC or BSkyB ('Sky') and the signal was compressed, encrypted and transferred by satellite to each licensed broadcaster. Subscribers with a satellite dish then decrypted and decompressed the signal with a decoder card.

The exclusive rights to broadcast live matches are granted territorially and for three-year terms, on the basis of an open competitive tender procedure. The FAPL appoints only one broadcaster within each EU Member State and in order to protect the territorial exclusivity of all broadcasters, each broadcaster undertakes, in its licence agreement with FAPL, to prevent the public from receiving their broadcasts outside the territory for which they hold a licence.

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## How the cases got to the ECJ

The two cases came before the ECJ following preliminary references made by the High Court of England and Wales under Article 267 of the Treaty on the Functioning of the European Union ('TFEU'). Case C-403/08 concerns civil actions brought by the FAPL against suppliers of Greek decoder cards to public houses and bars in the UK. As for Case C-429/98, it concerns criminal proceedings brought against the owner of a public house, who was fined GBP 8,000 for using a Greek decoder card to show Premier League matches.

An oral hearing took place before the ECJ on 5 October 2010. The case stirred a great deal of interest, attested by the large number of interveners in the cases. On the one side, France, Italy and the UK came out in support of the FAPL, and argued in favour of the legality of the exclusive territorial broadcasting restrictions, on the grounds that they are necessary in order to ensure that the holders of IP rights are appropriately remunerated. On the other side, the European Commission and the EFTA Surveillance authority agreed with the defendants that the restrictions result in an unjustified partitioning of the internal market.

## The Opinion of Advocate General ('AG') Julianne Kokott delivered on 3 February 2011

AG Kokott concluded that the exclusive territorial broadcasting restrictions constitute a "serious impairment of the freedom to provide services", which cannot be justified by the need to protect commercial and industrial property. She also found that all exclusive territorial licence agreements constitute a restriction of competition by object contrary to Article 101(1) TFEU which can never be justified under Article 101(3) TFEU.

## The judgment of the ECJ

The ECJ followed the Opinion of AG Kokott in some, but not all, respects.

First, in line with the AG, the ECJ held that a foreign decoder is not an "illicit device" within the meaning of the Conditional Access Directive (Directive 98/84/EC), because it had not been manufactured, manipulated, adapted or readjusted without the permission of the service provider.

Second, the ECJ agreed with the AG that national legislation which makes it unlawful to import into and sell and use foreign decoding devices which give access to an encrypted satellite broadcasting service from another Member State constitutes a restriction on the free

movement of services, which cannot be justified either by the need to ensure that rights holders are appropriately remunerated or by the objective of encouraging the public to attend football stadiums.

Third, the ECJ found that an exclusive licence agreement which obliges a broadcaster not to supply decoding devices with a view to their use outside the territory covered by that agreement constitutes a restriction of competition by object, contrary to Article 101(1) TFEU and which cannot be justified under Article 101(3) TFEU. However, and departing from the Opinion of AG Kokott, the ECJ that Article 101(1) TFEU does not, in principle, preclude all exclusive territorial licenses, albeit that a right holder may not impose a total prohibition on the cross-border provision of broadcasting services.

Finally, the ECJ disagreed with the AG regarding whether the FAPL could object to the transmission in public houses of certain aspects of its live football matches (the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent matches etc). While the AG had considered that such transmission is not protected by the EU Copyright Directive because the public is present at the place in which the communication originates (on the television screen), the ECJ disagreed, on the basis that the public is not present at the place where the communication originates, i.e. the football stadium.

## Consequences

The ECJ's judgment is long and dense (over 200 paragraphs), however, it is already clear that its consequences are likely to depend on whether one adopts an expansive or narrow reading of certain of the judgment's key findings.

On the one hand, the judgment contains a number of potentially far-reaching statements which may reduce the value of the rights of holders of IP rights or encourage them to only offer transmission rights in the most lucrative Member States:

*"the specific subject-matter of the intellectual property does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration (...) only appropriate remuneration for each use of the protected subject-matter. In order to be appropriate, such remuneration must be reasonable in relation to the economic value of the service provided. In particular, it must be reasonable in relation to the actual or potential number of persons who enjoy or wish to enjoy the service"* (paragraphs 108 and 109).

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*“where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition”* (paragraph 140).

At the same time, there are statements which show that the ECJ generally views negatively any contractual mechanisms that result in *“artificial price differences between the partitioned national markets”* (paragraph 115), even though this may lead to consumers in poorer Member States being deprived of the services in question, either through discontinuation of supply or through much higher prices. The alternative, differential pricing, does not carry favour with Luxembourg, since it is viewed as detrimental to the internal market, even though it may make economic sense.

On the other hand, it is possible to interpret the judgment so as to limit its findings to situations where rights holders impose a total prohibition on the cross-border provision of broadcasting services:

*“it admittedly cannot be ruled out that the amount of the appropriate remuneration also reflects the particular character of the broadcasts concerned, that is to say, their territorial exclusivity, so that a premium may be paid on that basis”* (paragraph 114).

*“a right holder may in principle grant to a sole licensee the exclusive right to broadcast protected subject-matter by satellite, during a specified period, from a single Member State of broadcast or from a number of Member States”* (paragraph 138).

*“the actual grant of exclusive licences for the broadcasting of Premier League matches is not called into question. Those proceedings concern only the additional obligations designed to ensure compliance with the territorial limitations upon exploitation of those licences that are 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”* (paragraph 141).

In other words, right holders may be able to continue to impose certain restrictions on the cross-border provision of broadcasting services.

It is also noteworthy that the judgment only applies to the sale of IP rights within the EU and therefore does not affect the legality of exclusive territorial broadcast licences for rights outside of the EU.

Finally, as the judgment will affect the exploitation of IP rights in many sectors, including computer software, musical works, e-books and films, this will now require existing exclusive licensing agreements to be reviewed for their compatibility with the EU competition rules. The ECJ's judgment in these cases is therefore unlikely to be the last word on whether exclusive territorial broadcast licences are compatible with EU law.

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