

Top European Football clubs again have reason to fear from a later expected decision of the Court of Justice of the European Union

According to the recent opinion of Advocate General Kokott in the case of Football Association Premier League Ltd and Others v QC Leisure and Others, the present system of exclusive license agreements relating to the broadcasting of live football matches are contrary to EU law.

Probably many would not think, but EU law is of considerable importance for the football industry. Numerous long standing rules of sport law have already been considered unlawful or fundamentally altered by the Court of Justice of the European Union. For instance in the famous Bosman case (1995) the transfer fees in case of out-of-contract players were held to be contrary to the free movement of workers and were abolished accordingly. The present case may result to the change of a common practice concerning certain football related copyrights. Although the Advocate General's opinion does not bind the Court of Justice of the European Union, in fact such opinions are followed in some three quarters of the cases. If exclusive license agreements with absolute territorial protection for broadcasting live football matches will be found illegal by the Court of Justice of the European Union, it will certainly have a significant effect on the substantial part of the income football clubs generate.

Exclusive license agreements concerning broadcasting of live football matches

The Football Association Premier League Ltd. (the FAPL) is the top English football league's organisation for marketing that league's matches, including exploitation of the copyright for the live transmission of football matches.

According to the present practice of FAPL, it grants its licensees the exclusive right to broadcast the matches within their broadcasting area. In order to safeguard the exclusive rights of other licensees, the licensees are required to prevent their broadcasts from being able to be viewed outside the broadcasting area by encrypting their satellite signals. Subscribers view the country specific broadcast using a decoder card. Furthermore, to ensure the exclusivity "from outside" as well, each exclusivity agreement also imposes restrictions on the trading with the decoder cards outside the given territory.

In the present case however, some companies - by circumventing this exclusivity - imported decoder cards from another EU Member State and offered them to pubs at more favourable prices than the broadcaster in the UK, causing thereby a profit loss to FAPL.

Freedom to provide services

The Advocate General explained that the territorial exclusivity rights - related to the use of decoder cards to gain access to live programmes - had the effect of partitioning the internal market into quite separate national markets, which constitutes a serious impairment of the freedom to provide services (Article 56 TFEU).

According to the Advocate General, the commercial exploitation of the IP rights was not undermined by the use of foreign decoder cards, as corresponding charges were paid for those cards which have been placed on the market in another Member State with the consent of the holder of the rights to the broadcast and by the sale of the foreign decoder cards FAPL has already realized the economic value of the intellectual property in question.

FAPL has no right to apply different charges for foreign decoder cards and for cards that were intended to be marketed within the UK. Rather, it forms part of the logic of the internal market that price differences between different Member States should be offset by trade. Additionally, the application of different charges may infringe the prohibition of discrimination on the grounds of nationality (Article 18 TFEU).

Consequently, in the opinion of the Advocate General, the FAPL's practice of exclusive license agreements amounts to profiting from the elimination of the internal market. Accordingly, a partitioning of the internal market is not necessary in order to protect the specific subject matter of the rights to live football transmissions and is therefore not a justified restriction of the freedom to provide services.

Competition law - cartels

As regards those contractual provisions of the exclusive license agreements, which required the licensees (broadcasters) to prevent their decoder cards from being traded outside their licensed territory (which thereby intended to ensure absolute territorial protection) was considered by the Advocate General to have the same effect as agreements aimed at preventing or restricting parallel trade. Thus, such agreements are incompatible with Article 101(1) TFEU.

Effects

If the present opinion will be followed by the Court of Justice of the European Union, it may have serious implications, as broadcasters will be forced to abandon their territorial licensing policy altogether. We all can assume that the exploitation of the concerning copyright is a big business, resulting considerable profits, the amount of which may now be endangered.

Thus, rights holders (such as the FAPL) may need to change how they exploit their copyrights through sales to broadcasters, if they do not wish to lose the profit from the price differences resulting from the present system of exclusive licenses.

On the contrary, if right holders will be unable to develop alternative marketing models which are compatible with the EU law, it is possible that access to transmissions of football matches may be more difficult in the future: the rights holders will either offer transmission rights only limited to the most lucrative market(s) in the European Union, or will charge equal – the highest – prices within each Member States of the EU. In any event, the broadcasters', the subscribers', and the football fans' interest will have to be protected from the possible negative consequences.

The full text of the opinion is readable here:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-403/08>

bpv | JÁDI NÉMETH Attorneys at Law |

H-1051 Budapest, Vörösmarty tér 4. |

Telephone: (+36) 1 429 4000 | Facsimile: (+36) 1 429 4001 |

budapest@bpv-jadi.com | www.bpv-jadi.com

bpv | LEGAL

Brussels – Bucharest – Budapest – Prague – Vienna –
Baden – Bratislava – Mödling
www.bpvlegal.com