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The *Murphy* Judgment: Not Quite Full Time for Football Broadcasting Rights

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The *Murphy* judgment of the Court of Justice of the European Union has been heralded, in legal and journalistic coverage, as a ground breaking and potentially far-reaching decision. However, it is questionable to what extent this is correct. The judgment represents an application of a consistent body of established Union competition case-law and policy to a new sector. Although it is unclear what effect this judgment will have on football licensing models in Europe, it does appear, at present, that there are commercial challenges presented by the judgment to ensure the compatibility of exclusive territorial licensing agreements with competition law.

On 4 October 2011, the Court of Justice of the European Union ('CJEU') delivered its judgment in the *Murphy* case.[1] The Judgment has been widely scrutinised, with commentators arguing that it may 'substantially change'[2] broadcasting licences for the transmission of Premier League games in Europe. However, even if the licensing model does change this does not necessarily mean the Judgment is controversial or incorrect. On the contrary, the CJEU appears to have passed judgement consistently with both its own case-law and Union policy. This paper seeks to explore the competition law issues raised through an analysis of both law and policy.

I. BACKGROUND

The English Football Association Premier League ('FAPL') licenses the broadcasting rights for the transmission of English Premier League football matches. The licensing agreements are awarded through an open and competitive tender process on a Member State territory basis. Thereafter, FAPL contracts with the successful tenderers (the 'broadcaster'). The agreements subject to examination by the CJEU in this case appear to have required the broadcaster:

- not to exploit their rights outside of their territory;
- to encrypt their transmissions in order to prevent viewings outside of their territory; and
- not to sell decoder cards outside of their territory.

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1 Cases C-403 & 429/08 *Football Association Premier League and others v QC Leisure and others*, and *Karen Murphy v Media Production Services* [2011] ECR I-0.

2 *Premier League broadcast tactics ruled off-side by ECJ* (Lexology 14/10/11).

The case concerns actions brought by FAPL in the English High Court after discovering that pubs in the UK had been using Greek decoder cards. FAPL appeared to argue that the supply of the decoder cards was in violation of the exclusivity provisions entered into between FAPL and the Greek broadcaster. The High Court referred a number of questions to the CJEU, including the compatibility of the exclusive territorial licensing agreements with Union competition law.

On 3 February 2011, Advocate-General Kokott delivered her opinion[3] on the legal test that should apply to exclusive territorial licensing agreements under Article 101(1) TFEU and the circumstances that should be taken into account in deciding whether the contractual restrictions contravene the prohibition imposed by Art 101(1) TFEU. In the Opinion she concluded that an 'object' analysis was appropriate since the agreements in question granted absolute territorial protection which is incompatible with the internal market.[4]

II. JUDGMENT OF THE CJEU

In respect of the competition law aspects of the Judgment, the CJEU concluded:

- Exclusive territorial licensing agreements are not anti-competitive 'in principle'.[5]
- However, an exclusive territorial licensing agreement will have an anti-competitive object if it contributes to the partitioning of the internal market and makes inter-state market penetration more difficult.[6]
- The agreements in this case did not qualify for exemption under Art 101(3) TFEU.

III. ANALYSIS

A. Should exclusive territorial licensing agreements be restrictions by object?

It is a longstanding principle of Union competition law that for an agreement to infringe the Treaty it must have as its object or effect the prevention, restriction or distortion of competition in the internal market.[7] An agreement that restricts competition by 'object' is one that has an anti-competitive objective with the result that it is unnecessary to prove that the agreement produces anti-competitive effects on the market.[8] In such cases, the Commission need only show that the relevant restriction was agreed and that its objective was the distortion of competition. In *GlaxoSmithKline*,[9] the CJEU held that a finding of restriction by 'object' does not require evidence that

[3] Op cit, n 1.

[4] Paragraph 248 of the Opinion.

[5] Paragraph 138 of the Judgment.

[6] Paragraph 139 of the Judgment.

[7] Article 101(1) TFEU.

[8] Case 29/83 *Compagnie Royale Asturienne des Mines SA v Commission* [1984] ECR 1679; Case 56/64 *Consten & Grundig* [1966] ECR 299.

[9] C-501/06 *GlaxoSmithKline v Commission* [2009] ECR I-9291.

final consumers are deprived of the advantages of effective competition.[10] On the contrary, only if a restrictive agreement does not have as its object the distortion of competition, is an 'effects-based' analysis required. In an 'effects-based' analysis, the Commission is under an obligation to prove that the agreement produces anti-competitive effects in the market given the surrounding factual and legal context.

The Judgment recognises that the mere fact a right holder has granted an exclusive right to broadcast licensable material (such as the rights held by FAPL) in a territory does not 'justify the finding that such an agreement has an anti-competitive object'.[11] The CJEU concludes, therefore, that a right-holder may 'in principle' grant exclusive territorial broadcasting rights.[12] This conclusion stems from an application of previous case-law.[13]

Further, this approach appears consistent with Union competition policy as detailed in the Vertical Block Exemption ('VBE')[14] and the accompanying vertical guidelines.[15] Neither purports to prohibit exclusive territorial arrangements. On the contrary, the Commission recognises the efficiencies associated with exclusive distribution.[16]

Therefore it is possible to argue that the approach of the CJEU towards exclusive licensing agreements is consistent with Union policy.

B. Should agreements conferring absolute territorial protection be restrictions by object?

It is established case-law that agreements which pursue the aim of partitioning the internal market are regarded as restrictions of competition by 'object'.[17] The reason for this clarity is simple: the European Union has the overriding objective of creating an internal market[18] in which competition must not be distorted.[19] It is evident from the Judgment that the court is concerned with the unity of the EU legal order and as such

[10] Ibid, paras 63 & 64. This is consistent with the approach in case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529. At para 36, the CJEU concluded that a restriction by object does not require a direct connection between the agreement and consumer prices.

[11] Paragraph 137 of the Judgment.

[12] Paragraph 138 of the Judgment.

[13] Case C-262/81 *Coditel SA v Cine-Vog Films* [1982] ECR 3381.

[14] Commission Regulation 330/2010 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, OJ 2010, L102/1.

[15] Guidelines on Vertical Restraints, OJ 2010, C130/01.

[16] Paragraph 164 of the Guidelines on Vertical Restraints.

[17] See Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235; Case 56/64 *Consten & Grundig* [1966] ECR 299; C-468/06 *Sot. Lelos kai Sia v GlaxoSmithKline* [2008] ECR I-7139; C-501/06 *GlaxoSmithKline v Commission* [2009] ECR I-9291.

[18] Article 3(3) TEU.

[19] Protocol 27 to the TFEU.

free movement questions pervade the analysis of the competition issues. This is visible in the single market objective that was a strong policy concern in this case.[20]

Single market ideas also form part of the basis of the VBE. The VBE permits exclusive distribution and may be available in respect of agreements that place restrictions on active cross-border selling.[21] However, the VBE will not be available to those agreements that place restrictions on passive cross-border selling, since such restrictions may be argued to be incompatible with the single market objective. Restrictions on passive sales confer absolute territorial protection and may, therefore, compromise the single market objective since the Union may become fragmented along national lines.

As noted in section I, the FAPL exclusive territorial licensing agreements in this case appeared to contain three potentially anti-competitive components. It may be possible to argue that the first two clauses (non-exploitation of rights outside of the allocated territory and encryption on transmissions) do not on their face have the aim of excluding, restricting or distorting competition. On the contrary, as the CJEU appears to suggest, as stand-alone clauses these would not merit the 'object' tag (i.e. an 'effect' analysis would be reserved to them).[22] Such clauses neither grant absolute territorial protection nor restrict consumer choice.[23] However, the apparent obligation not to supply decoding devices outside the allocated territory (together with the other provisions) was found to have an anti-competitive object[24] since, in the Court's view, it gave rise to absolute territorial protection.[25] As such, the Judgment appears to conclude that the aim of the arrangement was to restrict passive sales, which is described as a hardcore restriction of competition under the VBE[26] and has constituted an 'object' restriction in previous judgments.[27] As a result, the approach adopted by the CJEU seems consistent with previous case law.

Further, although of course not binding on the CJEU or able to cast any doubt on its approach, a brief comparative overview of the UK and US competition law regimes appears to suggest that there is a consistent analytical approach in the analysis of such restrictions.

1. The UK approach

Section 60 of the Competition Act 1998 provides that any questions arising in relation to the Chapter I prohibition (the UK equivalent of Article 101 TFEU) in UK

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[20] Paragraph 247 of the Opinion; paragraphs 139 and 142 of the Judgment; see also speech by Barnier of 10 November 2011 as reported in Mlex article 'ECJ's TV-rights ruling doesn't demand pan-EU broadcasting licences, says Barnier'.

[21] Article 4(b).

[22] Paragraph 141 of the Judgment.

[23] Comparable with the facts of Case 56/65 *Société Technique Minière.*

[24] Paragraph 141 of the Judgment.

[25] This has the effect of rendering the position more consistent with the facts in Case 56/64 *Consten & Grundig.*

[26] Article 4(b).

[27] For instance see C-439/09 *Pierre Fabre Dermo-Cosmétique SAS* [2011] ECR I-0.

competition law should 'so far as is possible' be examined consistently with the approach adopted at EU level 'having regard to any relevant differences'. In the UK Office of Fair Trading's (the 'OFT') 'Opinion on Newspaper and Magazine Distribution'[28] it notes that agreements that partition markets, including those that confer absolute territorial protection by preventing passive sales, may constitute restrictions by 'object' under EU competition law.[29] However, arguments were put to the OFT that, since the approach at EU level is premised on the single market objective,[30] there is a relevant difference for the purposes of UK competition law. Therefore, the argument runs, clauses that confer absolute territorial protection (thereby partitioning markets) should not be subject to an 'object' analysis for the purposes of UK competition law. However, there are a number of points that may be made concerning this argument. First, the OFT provides, similarly to the Judgment, that restrictions on parallel trade may be classified as either restrictions by object or by effect, dependant on whether it gives rise to absolute territorial protection (for instance, the prevention of passive sales from one part of the UK to another). This appears to be consistent with the analytical approach of the Judgment which concluded that the clauses in question were regarded as restrictions by object since they tended to restore the divisions in national markets, thereby frustrating the establishment of a single market, through prohibiting (or limiting) the cross-border provision of broadcasting services.[31] Second, it may be possible to question the extent to which there is no single market objective in UK competition law, given that this objective stems from the TFEU to which the UK is a signatory state. As a result, the analytical framework under UK law appears similar to that provided by the Judgment.

2. The US experience

Further, there also appears to be consistency between the US analytical approach to exclusivity arrangements and the Judgment.[32] It was established in *Continental T.V. Inc v GTE Sylvania Inc*[33] that exclusive distribution agreements should be subject to a rule of reason analysis. There is nothing in such a finding that is analytically inconsistent with the approach of the CJEU in the Judgment. As noted, the CJEU held that exclusive territorial licensing agreements are 'in principle' permissible under EU competition law; though in this case the agreement was found to restrict competition by object. Equally, Mr Justice White in *Continental* appears to accept that even in the US, in exceptional circumstances where there is absolute territorial protection, economic power enjoyed by the undertaking and no consumer benefits, a *per se* approach may be adopted.[34] As

[28] OFT 1025, October 2008.

[29] Ibid, paragraph 4.9.

[30] Ibid, paragraph 4.11-4.12.

[31] Paragraph 140 of the Judgment.

[32] For an overview see Thomas, 'Vertical Restraints on Sales Territory or Location as Violative of Section 1 Sherman Act – post-GTE Sylvania cases' 92 A.L.R. Fed. 436.

[33] (1977) 433 US 36.

[34] Thomas, 'Vertical Restraints on Sales Territory or Location as Violative of Section 1 Sherman Act – post-GTE Sylvania cases' 92 A.L.R. Fed. 436 at paragraph 2b.

noted, the CJEU appears to adopt a similar approach in that exclusivity arrangements are regarded as subject to an 'effects' analysis unless they are considered, by the court, to have the object of partitioning the internal market, to the detriment of consumers.

C. Should Article 101(3) TFEU have been a valid defence?

It was concluded by both the Advocate-General[35] and the CJEU[36] that the criteria for Art 101(3) TFEU were not satisfied. However, it is interesting that both the Advocate-General and the CJEU reserve the same treatment to the Art 101(3) TFEU question as proposed for the 'objective justification' defence in relation to the free movement question.[37] As noted, it appears to the author to be correct that Art 101(3) TFEU should not have applied to these agreements based on the limited facts as presented and recorded in the Judgment since: (i) there appear to be less anti-competitive alternatives available (as recognised by the CJEU concerning the 'closed period' rule);[38] (ii) there appear to be limited consumer benefits; and (iii) there may be an elimination of effective competition. Further, it is rare that agreements that are found to restrict competition by object, such as those in this case, are able to satisfy the criteria of Article 101(3) TFEU.

It could be argued that the approach adopted by the CJEU of assimilating Art 101(3) TFEU and the justifications for impeding free movement rules is questionable. However, on the facts, the CJEU was considering competition policy issues based on the achievement of the single market and thus it seems justifiable to consider similar factors under Art 101(3) TFEU as were raised as 'objective justifications' for restrictions on free movement (though it may be questionable whether it is the role of the court to assess commercial agreements against a policy objective, instead of against the precise tests set out in under Art 101(3) TFEU).[39] Finally, such an approach may be justified since the 'objective justifications' raised did, on the facts, overlap with potential Art 101(3) TFEU arguments.[40]

IV. CONSEQUENCES

A. Pan-European licences

Prior to the Judgment, and based on the AG's opinion, it was suggested that - if territorial licensing was prohibited - the FAPL would have been required to move to a pan-European licensing model. This solution may have had the odd effect of eliminating all competition. Moreover, it is questionable whether FAPL would opt for a pan-European licensing solution since its revenues may be too significantly reduced for

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35 Paragraph 250 of the Opinion.

36 Paragraph 145 of the Judgment.

37 The 'objective justifications' raised were that it was necessary to grant exclusivity to ensure appropriate remuneration for FAPL, protection for broadcasters and to encourage public attendance at football stadia.

38 Paragraph 123 of the Judgment. The 'closed period' rule refers to a contractual requirement that there will be no live transmission of 3pm Saturday football by all broadcasters.

39 Ken Daly, 'A Bosman Moment for Online Content Delivery' (Mlex April-June 2011).

40 Namely, indispensability, consumer benefit and efficiencies.

this to be commercially attractive. Further, there may be operational difficulties in pan-European licensing to the extent that a broadcaster may not be present in all Member States. As such, the beneficiary of such a licence may face costs establishing its operations on a pan-European basis or may choose not to do so. As a result, a pan-European licensing solution may have the further counter-intuitive effect of reducing the number of EU consumers able to watch Premier League football. However, the Judgment does not appear to require such a model.[41] As such, the potential difficulties and negative effects noted have not been realised.

B. Contractual amendments

The difficulty with the arrangements examined in the case is that they seemed to grant absolute territorial protection. As noted, the VBE is, potentially, applicable to agreements that place restrictions on active sales. By analogy, the licensing agreements could be amended to prohibit active sales (for instance by restricting direct marketing and advertising) in exclusively-reserved territories. However, this does not fully address the commercial challenges presented by the Judgment.

Further both the CJEU[42] and Advocate-General[43] appear to suggest that express provisions on 'closed periods' (i.e. the prohibition of the live transmission of 3pm Saturday football) may address the concerns raised by the FAPL concerning reduced attendances at football stadia.[44] However, while this may have the effect of creating broadcasting agreements in which transmission rights are identical, it does not address the commercial challenges presented by the Judgment, since 'closed periods' do not address the fundamental reason why the likes of Mrs Murphy use Greek broadcasters: price. In this regard, the Judgment is clear: right holders are not able to prevent the passive sale of football transmissions. Notwithstanding, FAPL may be able to deter publicans (particularly UK publicans) from obtaining subscriptions from outside of their territory through the use of protected works. The CJEU concluded that the transmission of broadcasts of protected works in pubs (such as graphics, music and highlights) constitutes a communication to the public pursuant to the Copyright Directive, thus requiring specific and separate authorisation from FAPL. As such, FAPL may continue to rely on its rights relating to the protected works in its transmissions of matches to grant authorisation – or not – to broadcasts. However, it is unclear whether (if at all) this protection will allow it to overcome all of the challenges presented by the Judgment. It will be interesting to see how the German Bundesliga proceeds with its forthcoming sale of broadcasting rights.[45]

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41 See Speech by Barnier of 10 November 2011 as reported in Mlex article 'ECJ's TV-rights ruling doesn't demand pan-EU broadcasting licences, says Barnier'.

42 Paragraph 123 of the Judgment.

43 Paragraph 210 of the Opinion.

44 Paragraph 122 of the Judgment.

45 Blitz, 'Warning of Own Goal in TV Rights Victory', Financial Times, 5 October 2011.

V. CONCLUSION

This paper has explored the competition aspects raised by the CJEU's *Murphy* judgment. While not a novel area of law, the application of established case-law to a new sector has opened an interesting debate. However, the CJEU's approach does appear consistent with its previous decisions and Union policy. Although it is unclear what effect the Judgment will have on football licensing models in Europe, it does appear, at present, that there are commercial challenges presented by the Judgment to ensure the compatibility of exclusive territorial licensing agreements with competition law.