



FAPL v QC Leisure

Comments from a competition perspectives

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The facts

- FAPL grants licences for live rights on a territorial basis for 3 years. Bids may be submitted on a national, regional or global basis. Due to demand from broadcasters, the territorial basis is typically national.
- In respect of that territory, rights are granted on an exclusive basis as such rights are valued more highly by broadcasters.
- Each broadcaster agrees in its licence agreement with the FAPL to prevent the public from receiving their broadcasts outside the area for which they hold a licence. In relation to Greece:
 - Pursuant to Clause 10.2, NetMed had to ensure that its (and any permitted sublicensee's) transmissions "shall not be capable of reception and/or decryption by any viewer outside of" Greece.
 - Pursuant to Clause 12.1(b)(i), NetMed undertook that all of its transmissions capable of reception outside Greece "shall be securely encrypted and shall not be receivable by any person outside [Greece] in unencrypted form and that no device (including but not limited to any "smart card" and/or any decoding equipment which is necessary to decode or encrypt any such Transmission) ... shall be knowingly authorised or enabled by or with the authority of the Licensee and/or any Permitted Sub-Licensee and/or any distributor, agent or employee of the Licensee or any Permitted Sub-Licensee so as to permit any person to view any such Transmission outside [Greece] in an intelligible form".
- The decoder devices were lawfully acquired in Greece – subject to a contractual condition prohibiting their use outside that territory – and then sold and used in the UK in breach of that contractual condition.
- The decoder devices were then used to allow UK pubs to access encrypted services broadcast from Greece.

Freedom to provide services

- National legislation which prohibits the import, sale or use of foreign decoder cards in used in breach of clauses of territorial exclusivity is contrary to the freedom to provide services (Article 56 TFEU).
- This relates specifically to the interpretation and application of section 298 of the Copyright, Designs and Patents Act (CDPA) – not the scope of contractual provisions.
- Such a restriction in national legislation may be objectively justified where it protects IPRs – provided that it does not go beyond what is necessary in order to achieve this public interest objective.
- In this case, the ECJ concluded there was no copyright in sporting events under the Copyright Directive but left open scope for national rights (e.g. sui generis or under national copyright law).
- However, in order to achieve this public interest objective, the restriction only needs to ensure that rights holders receive appropriate remuneration:
 - The amount of the appropriate remuneration may include a premium for territorial exclusivity
 - However a premium may not be justified where it results in absolute territorial exclusivity which results in artificial price differences between partitioned national markets *and* there are mechanisms to ensure that the broadcaster is authorised by right holders in the place of origin of the communication and pays them remuneration which can take account - with a very high degree of precision - of the total number of viewers who form part of the actual and potential audience of the broadcast
 - The ECJ comments appear specific to satellite - specific reference to Satellite Broadcasting Directive

Freedom to provide services

- The conclusion under Article 56 TFEU was not affected by the fact that the decoding device was obtained by the giving of a false identity and address
- The ECJ made it clear that this would not preclude the broadcaster from taking action under its contract with the person who has given the false address or identity – including an action for damages
- But that is subject to the enforceability of such clauses under Article 101 TFEU
- The conclusion is also unaffected where the device is used for commercial purposes – even though it was contractually restricted to private use
- The ECJ made it clear that a broadcaster may demand a different fee for access to its services where the access is for commercial or private purposes

Competition law

- The clauses of an exclusive licence agreement concluded between a right holder and a broadcaster may constitute a restriction on competition prohibited by Article 101 TFEU where they oblige the broadcaster not to supply decoding devices outside the territory covered by the licence agreement
- This relates specifically to the clauses in the FAPL licence which prohibit the broadcaster from knowingly authorising or enabling any device so as to permit any person to view the transmission outside the exclusive territory in an intelligible form
- Exclusive national licensees are not prohibited. The fact that a right holder has granted an exclusive right to broadcast content from a Member State and to prohibit its transmission by others during a specified period is not an anticompetitive object
- However, the ECJ has limited the extent to which broadcasters may by agreement be prohibited from making “passive” sales to viewers outside the exclusive territory
- In particular, the ECJ objects to clauses which prohibit broadcasters from effecting *any* cross-border provision of services, which enables broadcasters to be granted *absolute* territorial exclusivity and thus eliminating *all* competition between broadcasters
- Such clauses are considered to have an anticompetitive object - in the absence of circumstances within the economic and legal context of such clauses which demonstrate that they are not liable to impair competition

Competition law

- Clauses which fall within the scope of Article 101(1) may be exempted if the criteria in Article 101(3) are met namely:
 - Contribute to improving the production or distribution of good or promoting technical or economic progress
 - Allow consumers a fair share of the resulting benefit
 - Do not impose restrictions which are not indispensable to the attainment of these objectives
 - Do not afford the possibility of eliminating competition in respect of a substantial part of the products
- The ECJ refers back to its earlier analysis of freedom to provide services to suggest that:
 - The restriction only needs to ensure that right holders receive appropriate remuneration
 - As such a premium for territorial exclusivity may not be justified where it results in absolute territorial exclusivity which results in artificial price differences between partitioned national markets *and* there are mechanisms to ensure that the broadcaster is authorised by right holders in the place of origin of the communication and pays them remuneration which can take account – with a very high degree of precision – of the total number of viewers who form part of the actual and potential audience of the broadcast
 - This leaves open the possibility that such restrictions may be justified under Article 101(3) if the circumstances are different

Competition law

- The references to “absolute territorial protection” suggests that the ECJ is drawing a distinction between “active” and “passive” sales. This concept is set out in the Vertical Block Exemption and Guidelines which permits a prohibition on active sales in the context of exclusive distribution agreement
- ‘Active’ sales mean:
 - actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or
 - actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory
- ‘Passive’ sales mean:
 - responding to unsolicited requests from individual customers including delivery of goods or services to such customers
 - general advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.

Competition law

- Limited guidance on application of these concepts to IPRs
 - Not clear that the same rules should apply in the same manner – e.g. licence agreements were specifically excluded from the Vertical Block Exemption
 - Other competition policy aims – e.g. to avoid warehousing or under-utilisation of IPRs, which is a real risk if rights are only available on a regional or global basis
 - Challenge for Commission to provide guidance in an area which it has not found straight forward
- Article 101 does not cover unilateral conduct – so there is no obligation on broadcasters to supply customers in other Member States. However, the boundary between unilateral conduct and an agreement or concerted practice is not always clear
- Particular issues in context of agreements with subscribers:
 - Can a broadcaster impose a requirement for the subscriber to have a local address and/or terminate if false information is given?
 - Can a broadcaster charge more for the provision of services out of territory?
- Focus on severability provisions – which are governed by local law

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