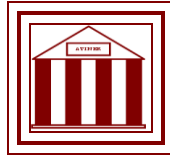


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**Broadcasting Market's Developmental
Change after European Court of
Justice, October 4th 2011**

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Broadcasting Market's Developmental Change after European Court of Justice, October 4th 2011

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Abstract

European broadcasting market is set to change radically as a result of the judgment of the European Court of Justice of October 4th, 2011. This judgment concerns a preliminary ruling before the English High Court of Justice in four cases which have seen opposing on the one hand, the Football Association Premier League Ltd (FAPL), NetMed Hellas (which is the entity with the sublicense for the broadcasting of the Premier League matches in Greece) and Multichoice Hellas SA (which is the broadcaster's leading pay-tv in Greece and Cyprus, owner of the platform called NOVA, where there is a channel broadcasting Premier League football matches), and on the other hand, some providers of satellite decoders and some English bars and restaurants' owners.

The questions submitted to the scrutiny of the European Court of Justice seek to determine the compatibility of the English copyright law, including the *Copyright, Designs and Patents Act* of 1988, with the European antitrust law.

The decision taken against the English Copyright Law art.56 TFUE, leads to legitimize the use of foreign decoders to avoid obstacles to the free viewing of football championships of the professional leagues. Economically speaking, this implies a significant reduction in the attractive value of the product offered by the single League against broadcasters placed in different member States. This happens since the exclusive rights in the territory of a single issuer, which is connected to the package of broadcasting rights for sale, do not allow the user resident in the same territory to access the vision of the same product supplied by a foreign issuer competitor.

Keywords:

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Antitrust issues relevant to the subject of television rights, which have been subject to analysis at European level, relate both to the horizontal relations, namely those between economic operators which are located within the same market level, and vertical relationships, that are those between operators that are placed in different levels of market¹.

The television rights market has a particular connotation as *the* relevant market for the purposes of application of antitrust law. In general, each market is susceptible to evaluation from two different perspectives, one pertaining to the product scope, through the consideration of products and services that can be said to be in competition, and the other relevant to the geographic scope, through the identification of the area in which the conditions of competition are homogeneous. However, with respect to the television rights market, both perspectives are of particular importance. Cultural differences and language barriers between different countries, indeed, strongly influence the geographic extent of the market. At the same time, the importance of sporting events, attracting more people than other events, including those related to football and, to a lesser extent, cycling and Formula 1, result in a fragmentation of the market into smaller markets involving television rights on events in general, television rights for sports events in general and television rights related to sport events with a high audience, which within professional football games fall².

Moreover, inside the market of television rights relating to professional football, are further distinguished, among other sport events, the matches of

¹The television rights market is commonly represented by a three-way division of levels, which include, on the first level, sports promoters (original owners of television rights that represent the provider side), at the second level, broadcasters (representing the demand side) and at the third level, consumers who are directly involved in the commercial transaction (in the case of pay TV, as purchasers of tv products) or indirectly (in the case of 'open' transmission, such as buyers of the product advertised by the company which finances the transmission itself).

²The term 'event', which is commonly used in relation to television rights, has a specific meaning, because with this term you indicate events of particular significance. This particular relevance that distinguishes events compared to the performances in general, can be read under two different value perspectives: one, economic, which is expressed by the ability of the event to generate significant revenues, the other, cultural, which regards the assessment of the content of the event. It will be recalled in this regard that the "list of events of major importance for society to be transmitted on TV channels freely available" (Resolution Antitrust n. 8/99, adopted pursuant to art. 3a Dir. 97/36 / EC) provides, among the conditions required so that an event can be said to be of particular importance, that it "enjoys among the population of a widespread recognition, and is of particular cultural significance and consists of an Italian cultural identity." When it comes to TV rights of sports events, it must also be pointed out that such events must consist of events intended for an audience, pre-arranged with respect to the telecast, which constitute the object. In this sense, sporting events which operate on the market of television rights, are different from sports programs that are born according to the television model, and that is, are destined from the outset to the only television broadcast. These last performances do not consist, therefore, in 'broadcasting of events', but can be configured such as event or 'television events'. The sport event, in other words, is the result of the organization of sporting events, referring to the promoter that exists prior to transmission, related to the broadcaster.

Series A and B, and events cup, such as the UEFA Champions League and UEFA Europa League.

That said, it should be noted that the most important decisions of antitrust supervisory bodies concern precisely the market of television rights of professional football, which, from the point of view of sports marketing, is a sector with a high specificity, since the degree of substitutability of the football event with other events from different sports disciplines is very low, if not, in many geographical areas, completely null and void. In addition, professional football attracts a target audience (males, aged generally between sixteen and fifty years) particularly sought after by advertisers, as it represents an audience of potential consumers with high purchasing power. All of these considerations, briefly noted, confirm the identification of the market for sports TV rights with the notion of relevant market for the purposes of the application of antitrust law.

2. In Italy the market of professional football and, in it, the field of television rights, is flourishing and growing. Consider in this regard that the last tender for the award of broadcasting rights¹ (now renamed audiovisual, due to last legislation) for the three seasons 2012/2015 relative to the only Series A, has ended with the sale of the package including the live broadcast of all matches of the Series A on digital satellite (and other proprietary rights of interviews and broadcast in theaters in 3D) to the company *Sky* for the equivalent of one billion, seven hundred and thirteen million of euro and the package includes the live matches of 12 clubs in Series A on the digital terrestrial *Mediaset* company for a total of eight hundred and four million euro, and there are still five other packages on the market of significant economic entity².

Also, it should be noted that what we said is much more significant if we consider that this market was born just twenty years ago after the opening to private investors. In 1993 the A and B Leagues sold tv rights regarding some matches to the private company Tele+, while the remaining were bought by RAI. Mainly, in 1996 for the first time, tv rights related to the championship of Series A and B, Coppa Italia and Super Coppa di Lega have been put on the market for a tender open to all companies, included RAI³. From that moment

¹Legislative decree, 9/2008, in execution of law 106/2007 specifically referred to audiovisual rights.

²In 1994, the price for the acquisition of television rights to the series A was around twenty-five million euro, and then become equal to about two hundred and fifty million in 2006, and further quadrupling in just four years. A. Nicita – G. Ramello, Exclusivity and Antitrust in Media Markets: The case of Pay-TV in Europe, in *International Journal of the Economics of Business*, 2005, vol. 12, n. 3, p. 289 ss.

³In 1996, the National Professional League, which brought together football clubs of Serie A and B affiliated to the FIGC, decided to break off the relationship exclusive sales until then intervening with public television, and to launch a tender for the assignment to the highest bidder of television broadcasting rights for the period 1996-1999. On that occasion, for the first time in the history of television, the public broadcaster lost the monopoly of the sport football after a battle fought also in the courtroom. Indeed, following the publication of the notice for

on, we assisted to a permanent growth accompanied by an ever more poignant interest by the Italian legislature and the Antitrust Authority and the market¹, in the wake of demands made by the European Commission².

In Italy the first legislative action that has changed the telecommunications sector (Law 14 April 1975 n. 103)¹ was issued as a result of the judgment n.

the sale of television rights, given the regularity of the tenders, it turned out to winners, for transmitting encrypted in the company Tele +, and to-air broadcasting, as well as for radio rights, the company Cecchi Gori Communications SpA (CGC), which, however, did not arranged to file, within the deadline given by the League, the bank guarantee to cover the agreed price equal to 615 billion lire. Following the revocation of television rights by the seller, and the assignment of rights to RAI as the second highest bidder, the Cecchi Gori group, therefore, initiated a legal battle, involving broadcasters also competitors, and ended with an agreement on a settlement, which provided, in summary, the sharing of television rights between all the parties involved. The Italian company Television Networks (RTI), became aware of this agreement, and presented a complaint to the Authority for Broadcasting and Publishing (at that time the competent Authority) supporting the collusive agreement. RAI and CGC decided, therefore, to involve RTI in the settlement agreement, which in December 1998 was declared by the Competition Authority and the market (in the meantime taken over the Authority for Broadcasting and Publishing) contrary to antitrust law resulting in condemnation of the companies involved in financial penalties.

¹Interventions of the AGCM are directed towards the Football League, against other broadcasters. With regard to the first, v. the provisions of the Competition Authority no. 6633, in Bulletin no. 49 of 21 December 1998 and no. 7340, in Bulletin no. 26 of 19 July 1999, in which it was confirmed the favorable individual sale of television rights by the football teams. The Competition Authority has, in fact, stated that "the clubs participating in the Football League, in the periods 1993-1996 and 1996-1999, were put in place an agreement concerning joint selling of media rights in the clear for the Championship games 's Serie A and B and the Italian Cup and the cartel resulted restrictive of competition because once a concerted fixing of prices for the sale of those rights and, therefore, likely to restrict competition in the market for premium sports TV rights, in violation of Article 2 of Law no. 287/90 ", cf. also the measure adopted on 16/12/2009, outcome of the procedure initiated on 10/4/2008 against the National Professional League, which has been found responsible for having in place an agreement restricting competition within the meaning of Article 81 of the EC Treaty (now Article 101 TFEU), consisting of coordinating the actions of the sport's commercial Serie B intended to impose potential buyers the joint sale of the entire Championship Serie B 2007/2008 and subsequently sentenced to administrative fine of one hundred and two thousand euro. With regard to the latter, v., most recently, the proceedings initiated against Italy following a complaint by Sky Television Networks SpA Italian (RTI), which was received on 25 January 2011, with which it is reported the alleged abuse of a dominant position in the acquisition by Sky - as a result of the selection procedures experienced by UEFA in 2010 - the exclusive rights for broadcasting in the Italian territory and on all platforms on a pay, the meetings of the UEFA Champions League football tournament, with the exception of the best meeting on Wednesday, in the period 2012/2015. With order n. 22646, in Bulletin no. 30 of 16/8/2011, the Competition Authority has recently decided to expand the remit of the investigation and therefore extend the deadline for the closure of the proceedings to 30/6/2012.

²At the Conference on Sport held in Brussels in 2000, the then President of the European Commission Mario Monti explicitly emphasized the economic value of sport as such "is subject to the rules of the EC Treaty, like all other sectors of the economy". As regards the main measures of the European Commission in the field of television rights and antitrust see COMP/C-2/37.398 (Joint selling of the rights of the UEFA Champions League) in July 2003, COMP / C-2/37.214 (Joint selling of the media rights to the German Bundesliga football league) in January 2005, COMP/C- 2/38.173 (joint selling of the rights of the FA Premier League) in March 2006.

225/1974 by the Constitutional Court, asked to rule on the legality of the law, which ratified the state monopoly on telecommunications services and the right to grant exclusively to RAI, for the period of twenty years, the services of radio listening and television². Those questions were raised in criminal proceedings which concerned, among other things, improper installation of mechanisms in order to be able to receive tv programs in Switzerland and Yugoslavia (cases very similar, therefore, to that which gave rise to the current intervention of the Court of Justice).

The Constitutional Court, on that occasion, whilst preserving the legitimacy of the reservation in favor of the state monopoly, recognized that this reserve must ensure that the information is characterized by objectivity and impartiality³, and in any case can not involve activities, such as those related mechanisms by foreign broadcasting stations, which do not operate on transmission bands assigned to Italy, since otherwise the freedom of movement of ideas be irreparably compromised.

The first specific legislative action in the field of sports TV rights has been with the law of 29 March 1999, no. 78. In this law, ownership of television broadcasting rights has been recognized to each football clubs in Series A and B. It was also fixed a quantitative limit for the purchase of television rights, representing 60% of all the rights leagues, calculated on the basis of the sum of the individual matches that make up the league. The same law provided, however, the possibility of derogating from the aforesaid limit, issued a decision by the Antitrust Authority, considering the competition of the system itself. The criterion percentage fixed by the legislature to establish the threshold of legitimacy of the sale of television rights has been strongly criticized by the doctrine, as easily avoidable. Indeed it was founded on a purely quantitative value that does not take into account the different attractiveness of the various matches in terms of audience.

The regulatory framework was diametrically reversed with the entry into force of Legislative Decree no. N. 9/2008, issued in implementation of Act no. 106/2007, and became fully effective from June 30th 2010. About a year before

¹The Law of 14 April 1975 no. 103 "Rules governing radio and tv", establishes the parliamentary committee for the general guidance and supervision of broadcasting services (CPIV), composed of twenty deputies and senators appointed by the Presidents of the Chambers on the basis of nominations made by all parliamentary groups in order to ensure proportional representation. The Commission is a bicameral body with powers of direction and assurance functions to ensure that the activities of RAI will be respectful of the principles of independence, objectivity, openness to different social trends, cultural and political.

²R.d. n. 1067/1923, R.d. n. 645/1936, D.P.R. n. 180/1952, l. n. 196/1952, l. n. 1214/1966 e D.P.R. n. 156/1973.

³In this regard, paragraph 8 of the judgment 225/1974 literally says that "the removal of the radio and television is legitimate only if you are sure that its exercise is foreordained to two fundamental objectives: to programs that respond to the need, to offer the public a range services characterized by objectivity and completeness of information, from wide open to all cultural currents, from fair representation of the ideas that are expressed in society, to encourage, to make effective and to ensure the right of access to the maximum extent permitted by technical means".

the start of the legislative process that led to the enactment of Law no. 106/2007, the Antitrust Authority started a survey in the field of professional football (IC27 launched on 31 March 2005 and ended on 21 December 2006). The Authority noted that "*the field of professional football presents significant profiles of interest in terms of antitrust law. By its very nature, this sector requires a degree of interdependence and solidarity between competitors, in terms of both technical and economic profile. To be able to attract the fans/consumers, it is necessary that football competitions entertain an adequate number of teams and participants and a certain balance between the clubs is guaranteed. Hence the common interest to individuals who compete with each other to the maintenance of economic stability and sporting skills of the competitors*". The survey also showed that "*the economic imbalance between clubs was to a large extent attributable to the sale of television rights system, which accounted for more than 40% of the revenues of the Series A. In addition, the effects of this system on the balance between economic and technical of the clubs, were not effectively diluted by the mechanisms of re-balancing of resources, which rank among the less restrictive in Europe. Mechanisms for allocating resources appeared unlikely to be adopted in the context of a system of individual selling of television rights. Moreover, it was believed that the goal of a stronger solidarity between clubs could be achieved not only with the instrument of the collective sale, but also with significant ways of mutual withdrawal*".

So, although in the past the Antitrust Authority had expressed negatively on the system of the collective sale of television rights, in 2006, partly due to the changes in the European Union (such as the cases *Bundensliga* in 2005 and *Premier League*, in 2006), endorses the collective sale, provided it is not imposed by the legislature, in accordance with the general view that any adjustment that sets the mode of sale of television rights, it is not appropriate since it is necessary to leave the choice to the private autonomy.

As known, the choice of the legislator in Legislative Decree n. 9 of 2008 has been in the sense of a centralized system as the only way of selling tv rights on sport events together with a mutual withdrawal¹.

The Legislative Decree no. N. 9/2008 distinguishes between the ownership and the utilization of television rights¹. The first belongs to the organizer of the

¹See ZENO-ZENCOVICH, *La statalizzazione dei "diritti televisivi sportivi"*, in *Dir. informatica*, 2008, 6, p. 695 ss.; IDEM, *Il "diritto di accesso" per "brevi estratti di cronaca" degli eventi sportivi*, in *AIDA*, 2008, 71 ss.; L. NIVARRA, *I "diritti esclusivi di trasmissione di eventi"*, in *AIDA*, 2008, p. 40 ss.; R. FERORELLI, *L'evento sportivo come bene in senso giuridico alla luce del D.Lgs. n. 9/2008*, in *Dir. informatica* 2009, 3, p. 415 ss., A. MUSSO, *Titolarità e trasferimento dei diritti radiotelevisivi sulle manifestazioni sportive*, in *AIDA*, 2009, p. 473 ss.; J. FIGUS DIAZ – V. FORTI, *La disciplina antitrust della nuova legislazione sui diritti di trasmissione: quid novi sub sole?*, in *Rivista di diritto ed economia dello sport*, vol. IV. Fasc. 2, 2008, p. 13 ss.; F. VALENTI, *L'organizzatore quale autore della manifestazione sportiva. Notazioni critiche*, in questa Rivista, 2008, I, p. 67 ss. Also see, L. SANTORO, *Vendita di diritti televisivi*, in G. LIOTTA – L. SANTORO, *Lezioni di diritto sportivo*, Milano, 2009, p. 170 ss. and p. 178 ss.

event which are the individual host teams and to the organizer of the competition; while the latter is attributed exclusively to this last (the organizer of the competition), which also has the exclusive right to legal standing for the protection of audiovisual rights². The competition organizer is required to pre-determine, in accordance with the provisions of the decree, the guidelines for the marketing of television rights. These guidelines should include the criteria for the formation of packets each containing different types of television rights, the rules for the tendering and subsequent assignment of packets in accordance with the principles of fairness, transparency and non-discrimination and other rights, which may be the subject of autonomous trade initiatives by the organizers of the events, and the term for which such rights may be marketed.

Although the Legislative Decree no. N. 9/2008 does not identify the organizer of the competition in a particular subject and in the preparatory work had emerged the opinion of the Competition Authority in the sense that the subject is other than the League, such as, for example, the FIGC, the sale of television rights is managed by the Football League Series A, the Football League Series B and Lega Pro, respectively, for their championships. This view was confirmed recently by the Antitrust Authority two months ago, in a note in which the methods of application of the criteria for the allocation of the proceeds of the collective sale of broadcasting rights were discussed. In this regard, these criteria require that a share of 40% is distributed equally between the clubs and the remaining 60% is distributed equally based upon merit. The proportion allocated to sporting merit is determined for 10% on the basis of the results achieved from 1946/1947, 15% based on the results achieved in the last 5 years and 5% based on the results achieved in the last year. The share is determined for 25% based on the number of supporters of the club identified by one or more data research companies, and 5% on the basis of the population size of the province of reference of the club. According to the Authority it is

¹This expression identifies the exclusive rights which include the "establishment and reproduction, whether direct or indirect, temporary or permanent, in any way or form, in whole or in part, of the images of the event, at any location where it takes place"; communication to the public of the shooting of electronic communications networks; distribution, both for consideration or free of charge, the original and copies of the shoot, the rental and lending of the original and copies of fixations of event, the use of images for further broadcasts of the same event, as well as for promotional and advertising of products or services, or for purposes of matching the images of the event in gaming and betting, and, finally, the image is kept for the purpose the establishment of archives or databases to be reproduced, or distributed to the public in any manner or form, from midnight of the eighth day after the event dispute (Article 2, paragraph 1, lett. n).

²With regard to the subjects, in fact, the Legislative Decree no. N. 9/2008 defines "event promoter" the sports club who assumes responsibility and expenses for organizing the event competed in the available stadium, and "organizer of the competition," the one who is entrusted or delegated the organization of the competition by the sports federation recognized by CONI and competent for the respective sport. In agreement with these definitions, the same Legislative Decree no. N. 9/2008 defines "event" the sports event that consists of a single race, which took place between two parties competing with each other, and "competition" any sporting event organized in an official championship, cup, professional tournament, involving a plurality of teams in accordance with procedures laid down in their sporting regulations.

necessary to focus on sporting merit, which would facilitate the balance between the teams and stimulate investment in sport by new subjects. In this context, the Authority does not agree that "the sports results" should also refer to the results from the season 1946/1947 which reward largely the history and reputation of a club, as this will not stimulate investment aimed to develop smaller clubs to get them to compete on equal terms. Moreover, little value should be attributed to the number of viewers since it can be used by a team disconnected from the sport merit.

What we need to point out here is that the decree n. 9/2008 is limited to the extent of the supply of audiovisual rights, totally excluding the demand which is considered constant when it cannot be, as the market always shows¹.

The peculiarity of the product, which is characterized by the necessity of the 'exclusivity'² that means the spectator is able to watch the event during its happening so in time, realizes what doctrine has identified in the competition «for» the market, non «in» the market.

3. The market for audiovisual rights is intended to be the subject of a revolution as a result of the judgment by the European Court of Justice on October 4th 2011, concerning the references for a preliminary ruling under four lawsuits filed before the English High Court of Justice. In 3 of these lawsuits the plaintiffs are the Football Association Premier League Ltd (FAPL) which manages the English Professional Championship, the NetMed Hellas to which the tv rights for belong for the broadcasting of the Premier League in Greece, and the Multichoice Hellas SA, which is the pay tv company in Greece and Cyprus owner of the NOVA system, which includes the broadcasting of the Premier League. Defendants are some providers of satellite decoders that allow the reception of broadcasting foreign programs, as well as some operators of restaurants and bars where matches of the Premier League football are broadcasted with the use of decoders. In the fourth lawsuit, instead, the plaintiff is a Mrs. Murphy, owner of a bar in Portsmouth who took action against *Media Protection Services Ltd* because she was condemned in 1st grade for broadcasting illegally in violation of the Copyright, Design and *Patents Act* of 1988. She was condemned in 2nd grade and she appellate to the High Court.

At the time of the facts of the case, the license rights for broadcasting live football matches of the Premier League were owned by *BSkyB Ltd*. In order to avoid the subscription to *BSkyB Ltd*, which was particularly expensive (about

¹See V. ZENO-ZENCOVICH, *La statalizzazione dei "diritti televisivi sportivi"*, cit., p. 695 notes that "the entrepreneur acquire the television broadcasting rights only if they give you a real economic advantage or competitive, and if their value has not been diminished by" access rights "of third parties if he has a reasonable assurance as to the continuity of programming. Otherwise, he will prefer to purchase non-sports audio-visual products. And a hyper-regulated market like the one built by the Legislative Decree no. 9/08 not to entice walked into. "

²J. FIGUS DIAZ - V. SELLING, *The antitrust provisions in the new legislation on broadcasting rights: quid novi sub sole?*, 21-22 and foreign doctrine cited in note 47, which notes that "No operator would likely be willing to bear the investment required to penetrate the market, including the acquisition of rights, with no guarantee that the same sporting event not is transmitted simultaneously by another competitor".

700 pounds per month) it was a very common practice among English pubs, to use decoders that allowed the reception of foreign channels, including those of the NOVA platform, whose subscription (approximately 800 pounds per year) was far cheaper than that of *BSkyB Ltd*. Indeed, in order to protect the territorial exclusivity of all broadcasters licensees of television rights for the purchase of such rights by company *FAPL*, in any license agreement is expressly provided an obligation for the entity to prevent the public television subscriber of watching football matches of the Premier League receiving the same vision outside of the territory for which the license was recognized. To give effect to the contents of this requirement, with specific regard to subscription agreements entered into by the licensee of the television rights to the Premier League in Greece, they required that each subscriber was equipped with an address and telephone number in Greece.

4. The questions submitted to the scrutiny of the European Court of Justice are complex and concern the interpretation of several directives (Conditional Access Directive 98/84/EC, Directive 93/83/EC on satellite broadcasting, 89/552/CEE as amended by Directives 97/36/EC and 2007/65/EC directive on television without frontiers Directive 2001/29/EC on copyright). In this latest directive, must be added also Directive 2006/115/EC on related rights. Other two questions relate, finally, to the interpretation of Articles 34, 36, 56 and 101 of the Treaty on the Functioning of the European Union (TFEU)¹. English Judges ask whether the provisions of the TFEU which enshrine the freedom of movement of goods and the freedom to provide services, preclude national legislation which such as the *Copyright, Designs and Patents Act 1988*²,

¹Article. 34 Consolidated version of the TFEU provides that "Quantitative restrictions shall be prohibited between Member States on imports and all measures having equivalent effect", art. 36 provides that "the provisions of Articles. 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy, public security, the protection of health and life of humans, animals or the preservation of plants, the protection of national treasures of artistic, historic or archaeological value, or the protection of industrial and commercial property. However, such prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States "; Article 56 provides that "within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the recipient. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the benefit of the provisions of this Chapter to service providers who are nationals of a third country and who are established within the Union "; Article. 101 provides that "are incompatible with the internal market and all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (...)".

²A person who dishonestly receives a program included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the program commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale". Art. 298 states that "A person who (a) makes charges for the reception of programs included in a broadcasting service provided from a place in the United Kingdom or any other member State, (b) sends encrypted transmissions of

punishes as a crime the conduct of the person who fraudulently receives the signal of a broadcasting service protected with the intent to evade the payment of the amount due and, accordingly, recognizes in favor of the service provider broadcasting the protection available to the copyright in respect of whom, in various ways, makes use of a decoding device in the absence of authorization.

Directive 98/84/EC aims to ensure, as part of the television market, radio and, in general, services of the information, providers for a fee and with prior individual authorization (so-called protected services), compared to a series of activities¹ involving illicit devices, as "*designed or adapted to give access to a protected service without the authorization of the service provider itself*". To this end the European legislator, in art. 3, paragraph 1, of this directive assigns to Member States to take the necessary measures to ensure that activities related to illicit devices are prohibited and appropriately sanctioned. This provision must nevertheless be coordinated with the principle of freedom to provide services, in such a manner that the same art. 3, paragraph 2, states that "*Subject to the provisions of paragraph 1, Member States may not: a) restrict the provision of protected services, or associated services, which originate in another Member State, or b) restrict the free movement of such devices for conditional access, for reasons falling within the field coordinated by this Directive*".

Directive 97/36/EC amending Directive 89/552/EEC on television without frontiers, has a special importance in the field in question. Indeed, the European Union has introduced measures aimed, on the one hand, to protect the right to information and to ensure wide public access to television coverage of national or non national events of particular importance in the social context; at the same time, on the other hand, to ensure within certain limits the rights of trading exclusive television broadcasting.

Directive 97/36/EC (Article 3a) defers, in fact, for each Member State the task of identifying the events considered to be of major importance for society, establishing for them the means of transmission, i.e. whether these events

any other description from a place in the United Kingdom or any other member State, or (c) provides conditional access services from a place in the United Kingdom or any other member State, is entitled to the following rights and remedies. He has the same rights and remedies against a person (a) who (i) makes, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, (ii) has in his possession for commercial purposes, or (iii) installs, maintains or replaces for commercial purposes, any apparatus designed or adapted to enable or assist persons to access the programs or other transmissions or circumvent conditional access technology related to the programs or other transmissions when they are not entitled to do so, or (b) who publishes or otherwise promotes by means of commercial communications any information which is calculated to enable or assist persons to access the programs or other transmissions or circumvent conditional access technology related to the programs or other transmissions when they are not entitled to do so, as a copyright owner has in respect of an infringement of copyright. Further, he has the same rights under section 99 or 100 (delivery up or seizure of certain articles) in relation to any such apparatus as a copyright owner has in relation to an infringing copy".

¹These activities, in accordance with art. 4, consist of production, import, distribution, sale, rental, or possession for commercial purposes or in the installation, maintenance or replacement for commercial purposes of illicit devices or still in their advertising.

should be available by whole or partial, or, where necessary or appropriate for objective reasons in the public interest, to transmit them wholly or partially. The list of events of major importance with regard to the Italy, was drafted by the Antitrust Authority with resolution no. 8/99 (list of events of major importance for society to be broadcasted on TV channels freely accessible)¹.

In respect of matters relating to the interpretation of the Conditional Access Directive, the Court of Justice arrives at the solution of interpretation according to which a decoding device could be said to be unlawful only if it has been manufactured or manipulated in order to make it suitable for the reception of services protected without the consent of the provider of those services. Therefore, a foreign decoder, manufactured and placed on the market with the consent of the service provider protected and upon payment of a fee, does not fall within the definition of illicit devices, and this is true even if the receiver is provided at the direction of a false name and address, which is used in violation of a contractual clause limiting its use only for private purposes.

With regard to the subject matter concerning the interpretation of the provision in Art. 3, n. 2 of the Conditional Access Directive, the Court of Justice, with a winding line of argument, arrives at the solution that this provision does not preclude national legislation which prevents the use of foreign decoder, including those obtained by a false indication of name or address, or those used outside of strictly private reasons, since it applies only to

¹This measure focuses, first, on the definition of "event of major importance for society", used, as seen above, by the European Directive and, in this regard is said that this expression must be considered an event of a sporting nature or other which satisfies at least two of the four conditions specifically listed. These are: a) that the event and its outcome enjoy special and widespread in Italy and involving persons other than those who usually watch television in the event type in question, b) that the event will enjoy from the population of a widespread recognition, and is of particular cultural significance and consists of an Italian cultural identity, c) the event involves a national team in a specific sporting discipline in the context of an international competition of particular importance; d) that the event has traditionally been broadcast on TV channels in clear and has collected a large viewing audience in Italy. The measure in question is completed, then, listing in detail the events which in any case are to be considered of major importance for society, for which it is forbidden to broadcast exclusive and only in encrypted form, so ensure the possibility for a substantial part of Italian public television, at least more than 90% of the viewers, to attend such events on free to air channels and without any additional cost. These specific events are the summer and winter Olympics, the finals of the football World Cup and European football, every game, home and away, they see involving the Italian national football team in the world championships and European, as well as in every other official competition (including, specifically, the final and the semi-finals of the European Cup and UEFA Cup, now replaced by Uefa Champion League and the UEFA Europa League), the Tour of Italy, the Italian Grand Prix automobile Formula 1 and, finally, out of the sports field, the Festival of Sanremo. Moreover, these events must be added, as the antitrust expressly reserved to make (Article 2, paragraph 3), the finals of the world championships in basketball, water polo and volleyball, if you participate in the Italian national team, the final and the semi-finals of the Davis Cup, in which they are engaged Italian tennis, and cycling world championship on the road. For all the aforementioned events we recognize the power in favor of television broadcasters to establish the mode of transmission in the clear, with the exception of the finals and matches involving the Italian national team in the World Championships and European football, for which the prescribed mandatory air broadcast full live coverage.

illegal activities, within which there can be a return to the use of foreign decoder, even under the above said. The remaining questions of interpretation are not addressed by the Court of Justice because they are deemed absorbed by the former.

With regard to the question of the opposition of the national legislation referred to in the *Copyright, Designs and Patents Act 1988* on freedom of movement of goods and provision of services within the meaning of Articles 34, 36 and 56 TFEU, the Court of Justice is wondering about what freedoms in this case can be said to be secondary to the other, so that the matter be examined only in the light of the main one, in accordance with the orientation constantly followed by the Court in the decision of other issues involving both more rules of the Treaty. In this case, the Court considers that the national legislation which is related to the question deals primarily with the freedom to provide services, while the appearance of the free movement of goods is secondary, with the result that the legislation itself is examined in the light of art. 56 TFEU. This decision is based on the grounds that the national legislation at issue "*is not to regulate the decoding devices in order to fix the requirements that they must fulfill, or to determine the conditions of sale of the same,*" but "*it will only discipline in their quality of tools that allow subscribers to benefit from the services of broadcasting coded*".

Based then on art. 56 TFEU, the Court reaches the solution to consider the English law on copyright contrary to the rules of the Treaty, since it implements a restriction on the freedom to provide services not justified by any objectively valid reason, such as meeting the strict criteria set out by the same Court¹. In fact, none of the justifications put forward in support of the legality of the provisions restricting the freedom to provide services shall be considered admissible by the Court of Justice: nor one founded on the objective of protection of intellectual property rights, nor that based on the objective of encouraging the presence of the audience in the stadium. As to the first reason, it should be noted that it has been held on other occasions justification of restrictive measures of fundamental freedoms, given that the protection of intellectual property rights is characterized as an overriding reason in the general interest, provided that the party invoking it is the holder of an intellectual property right that protects the national legislation. But as owner of the intellectual property rights, in this case the copyright on football matches of the Premier League, according to the belief expressed by the Court of Justice in this case, can not be recognized among the Football Association Premier League place given that the football match can not qualify as intellectual work lacking the requirement of originality. This statement is in line with the

¹In this regard it should be recalled that, according to the address jurisprudence of the Court of Justice, in the judgment called in question, a restriction on the fundamental freedoms guaranteed by the Treaty may be justified only where "it serves overriding requirements of public interest, is suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to achieve the same purpose. "To that effect see also EC Court of Justice 5/3/2009, due C-222/07, ECR p. 1-1407, paragraph 25 and case-law cited.

approach consistently followed by the Court of Justice, as well as with the view expressed by the majority of the doctrine.

With regard to the second justification put forward by the parties, namely that the purpose is to encourage the presence of the audience in the stadium, at its foundation is called the rule of the so-called period of exclusion, which prohibits the broadcast of football matches on Saturday afternoons in the UK. According to the FAPL, such a rule would, in fact, be violated when foreign channels broadcasted football matches of the Premier League on Saturday afternoon and trade of decoders that allow the viewing of these channels, were permitted in UK. This observation is not, however, considered decisive by the Court of Justice, in order to justify the restriction with respect to the antitrust laws, on the grounds that the same FAPL, interested in the respect of the rule in question, may, as part of the license agreements, agree within them the ban on the broadcasting of games in the periods of exclusion.

Also the last question, relevant to the application of antitrust law to license agreements that provide for a ban on the supply of decoders to persons resident outside the territory covered by the license, shall be settled by the Court of Justice in a positive sense, in the light art. 101, n. 1 TFEU. The Court notes, in fact, that, without prejudice to the validity of a contract under which the owner of an intellectual property right cedes to others the license exclusive use for a given territory, the subject of this contract is to be considered instead anti-competitive, where bears the ban on the supply decoding devices enabling access to protected services outside the territory covered in the license agreement, since such a ban would have the effect of partitioning national markets, which is contrary to the objective of single market on which European economic policy is built on.

5. The impact on the market, following the decision of the Court of Justice, as you can easily guess, will be to lower the amenity value of the product offered by the single Football League against broadcasters from different Member States, given that the right of exclusive on the territory of a single issuer, which is connected to the package of television rights for sale, it is in substance drained from the possibility that the user resident in the same territory accesses to the vision of the same product supplied by a foreign issuer competitor.

The cause of the sale of television rights in exclusivity may be said, in fact, concretely realized only if two conditions concur, namely, from the perspective of the holder of the TV rights, where these comply with the prohibition to grant third parties a license to use for the same territory, and, from the perspective of the licensee, where they operate on the market as the sole actor in the territory.

However, it is doubtful that the decrease in the market value of the television rights is to find a corrective measure in expanding the market itself, which is a consequence of the replacement of individual national markets, to which every Football League may apply to sell TV rights on their national championship, with only a single European market. This is because the geographic scope of the market for television rights, as seen above, has a

strong national identity, because of cultural factors, language barriers and preferences of different audiences of the States for a given championship, as expressly recognized by the Authority sector¹.

¹See provision no. 18235 of the AGCM (Lega Calcio / Chievo Verona) of commencement of the investigation to ascertain the existence of violations of art. 81 and / or 82 of the EC Treaty related to the decisions of the Football League to refuse the negotiation of rights to individual events, pursuant to art. 27, paragraph 4, of Legislative Decree no. N. 9/2008 and to refuse to authorize the signing of sales contracts between individual clubs and television stations, defined with order no. 20575 of 16 December 2009.