Advocate General Considers Territorial Broadcasting Restrictions Incompatible with European Law

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Football Association Premier League Ltd and Others v QC Leisure and Others concerns the legality of the use of satellite decoders purchased outside the United Kingdom to show Premier League football matches in public houses in the United Kingdom. The Advocate General concluded that the territorial exclusive licensing system in question was incompatible with the free movement of services and with competition rules under the Treaty on the Functioning of the European Union.

On 3 February 2011, Advocate General Juliane Kokott delivered her opinion in the case of *Football Association Premier League Ltd and Others v QC Leisure and Others*. The case, a preliminary reference to the European Court of Justice (ECJ), concerns the legality of the use of satellite decoders purchased outside the United Kingdom to show Premier League football matches in public houses in the United Kingdom.

The Advocate General's opinion, which is not binding on the ECJ, concluded that the territorial exclusive licensing system in question was incompatible with the free movement of services and with competition rules under the Treaty on the Functioning of the European Union. According to the Advocate General, the contractual obligation linked to the broadcasting licences requiring the broadcaster to prevent its satellite decoder cards from being used outside the licensed territory has the same effect as agreements to prevent or restrict parallel exports. Such restrictions are prohibited under EU law as they grant absolute territorial protection, which is incompatible with the internal market. On the facts, the Advocate General opined that the purchase of a Greek decoder card was payment for the broadcast service, and the purchaser therefore is free under European Law to enjoy that service throughout the European Union.

The Advocate General concluded that territoriality was being used purely to optimise value from the exploitation of the rights in question at the expense of the principle of a single European market. Such a restriction could not be justified.

The Advocate General's reasoning in this case is based on two conditions: that there is not a single exclusive licence agreement but rather a series of exclusive licences, and that there is—in addition to the exclusive licence—a further obligation on the licensee to prevent the use of decoder cards outside the licensed territory. It is not entirely clear from the Opinion whether a single exclusive licence would be sufficient to constitute a restriction of competition. It appears, however, from the Advocate General's discussion of the freedom to provide services, that an exclusive licence without an obligation for the broadcaster to prevent the reception of the programme in other Member States would not be automatically incompatible with European law.

Although the opinion and the current case concern the licensing of rights to broadcast football matches on Pay-TV, the general principles expressed in the opinion appear to have a potentially much wider scope, if followed by the ECJ. The Advocate

General's position is likely to have a material impact on the contracting of broadcasting rights, especially for premium content such as sports and films. The biggest impact on such premium content will be if all such rights must be sold as a single European package going forward. It should be noted, however, that although this is a possibility, the Advocate General has not excluded the granting of exclusive rights as such and has stated that circumstances may exist in which partitioning the market may continue to be justified.

The ECJ is expected to hand down its ruling later this year. Whether the Advocate General is followed remains to be seen.