

**TO THE EUROPEAN COMMISSION'S
DIRECTORATE-GENERAL FOR COMPETITION ("DG COMP")**

**LIGA NACIONAL DE FÚTBOL PROFESIONAL COMMENTS ON THE
PRELIMINARY REPORT ON THE E-COMMERCE SECTOR INQUIRY
PUBLISHED ON 15 SEPTEMBER 2016**

- (1) Liga Nacional de Fútbol Profesional ("**LaLiga**") is a private sports association, whose members are, by virtue of Spanish law, all clubs playing in the Spanish First and Second professional football leagues. LaLiga has legal personality and is autonomous as to its internal organisation and functioning. It is part of the Royal Spanish Football Association, with whom it coordinates the organisation of its leagues.
- (2) The Preliminary Report on the E-commerce Sector focuses on two major categories in e-commerce: goods and digital content. As regards digital content, the Preliminary Report points at three main types of contractual agreements that may hinder competition in the internal market: territorial exclusivity; duration of contracts; and bundling of rights.
- (3) LaLiga's comments refer to the **digital content** category. More precisely, LaLiga will focus on two contractual clauses, namely (i) territorial exclusivity, because it normally includes geo-blocking obligations, which particularly seem to concern DG COMP yet, in LaLiga's opinion, are essential to both football right holders and the football broadcasting industry; and (ii) bundling of rights, which is likewise indispensable given the particular nature of online transmissions.
- (4) LaLiga's comments are structured as follows:
 - (i) on the need to consider the economic and legal context of territoriality, which, in the end, is the same as to consider the specificities of each economic sector;
 - (ii) on the economic context of football broadcasting;
 - (iii) on particularities of the Internet that inevitably challenge the territorial nature of copyright;
 - (iv) on the need to distinguish Internet passive sales of goods from Internet passive sales of copyrighted content.

1 PRELIMINARY COMMENT: ECJ CASE LAW EMPHASISES THE IMPORTANCE OF THE ECONOMIC AND LEGAL CONTEXT WHEN ASSESSING TERRITORIAL EXCLUSIVITY

- (5) The ECJ has long made it clear that the territorial licensing of rights on protected content is compatible with the internal market. This finding is logical, since intellectual property and copyright are not harmonised at the EU level.
- (6) *Consten & Grundig*¹ made it clear that **territorial exclusivity, while compatible in principle with the internal market** and the EU competition rules, must not aim at restoring national borders by ensuring absolute territorial protection. Already in *Consten & Grundig* the ECJ emphasised the importance of analysing the **economic and legal context** of the agreement at issue.²
- (7) The ECJ further emphasised this point (i) indirectly in *Coditel I*,³ where it held that territorial exclusivity could coincide with national borders without automatically infringing the competition rules;⁴ and (ii) explicitly in *Coditel II*,⁵ where it held that exercising copyright could breach competition law if, taking into account the economic and legal context of the relevant agreement, its clauses had the "effect" of restricting competition "to an appreciable degree".⁶
- (8) The Court in *Coditel II* went on to state that it is for national courts "to establish whether or not the exercise of the exclusive right to exhibit a cinematographic film creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry, or the possibility of charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements, and whether or not, from a general point of view, such exercise within a given geographic area is such as to prevent, restrict or distort competition within the common market."⁷

¹ ECJ judgment of 13 July 1966, Joined Cases 56/64 and 58/64, *Établissements Consent SARL and Grundig-Verkaufs-GmbH v Commission*, ECLI:EU:C:1966:41.

² *Consten & Grundig*, [1966] ECR 428.

³ ECJ judgment of 18 March 1980, Case 62/79, *SA Compagnie générale pour la diffusion de la télévision (Coditel) v SA Ciné Vog Films*, ECLI:EU:C:1980:84.

⁴ *Coditel I*, at paragraph 16.

⁵ ECJ judgment of 6 October 1982, Case 262/81, *Coditel SA v Ciné-Vog Films, SA*, ECLI:EU:C:1982:334.

⁶ *Coditel II*, at paragraph 17.

⁷ *Coditel II*, at paragraph 19.

- (9) More recently, the ECJ held in *Murphy*⁸ that contractual terms which pursue an absolute territorial protection of a licensee of intellectual property rights may constitute a restriction of competition by object contrary to Article 101 TFEU **unless such terms, considered within their economic and legal context, cannot impair competition.**⁹
- (10) This requisite contextual analysis, which LaLiga will briefly touch upon in the following sections, necessarily brings us to the conclusion that in the current context of sports (and football in particular), featuring both national demand patterns and a fragmented legislation on copyright and related rights, territoriality is not only admissible but fully justified.

2 FIRST COMMENT: TERRITORIAL EXCLUSIVITY IS ESSENTIAL IN THE FIELD OF SPORTS AND, IN PARTICULAR, IN THE FIELD OF FOOTBALL

- (11) On 6 October 2016, when DG COMP published the results of the Preliminary Report, UEFA's representative, Mr. Han, emphasised at least **two aspects that singularise sports –and, in particular, football– from other economic sectors:** (i) the national nature of the demand due to linguistic and cultural differences; and (ii) the importance of live broadcasts. LaLiga fully shares UEFA's indications.
- (12) **First**, DG COMP already recognised the national nature of the relevant broadcasting markets in its Decision on UEFA's broadcasting regulations.¹⁰
- (13) Indeed, an overwhelming majority of acquirers of LaLiga's rights ask for **national rights** and subsequently broadcast **nationally tailored products**. Even where there is an option to acquire rights for several Member States acquirers are rarely interested – there is no cross-border demand to speak of. Broadcasters largely contend -and empirical evidence confirms- that final consumers want high quality products, related mainly to their own football leagues, and national commentaries.
- (14) In other words, it is not LaLiga that artificially segments the market, but the very market that clearly reveals a preference for national products. LaLiga simply sells its products to the broadcaster making the best offer, regardless of the territories such broadcaster bids for (i.e., a single broadcaster could acquire the rights for several territories if so wished). Failure to meet demand preferences would result in uniform products of a lesser quality, which would inevitably erode both right holders' and broadcasters' revenues

⁸ ECJ (Grand Chamber) judgment of 4 October 2011, Joined Cases C-403/08 and C-429/08, *Football Premier League Ltd and Ors v QC Leisure and Ors; and Karen Murphy v Media Protection Services Ltd*, ECLI:EU:C:2011:631.

⁹ *Murphy*, at paragraph 140.

¹⁰ Commission Decision of 19 April 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case 37.576 — UEFA's broadcasting regulations), at paragraphs 44 and 45.

and, thus, further limit their capacity to invest in new technologies and new broadcasting products. This in turn could increase prices for consumers while reducing the offer of sports content.

- (15) The huge investment needed in this industry is also the very reason why dynamic pricing models that depend on the number of subscriptions, as suggested by DG COMP, would not ensure an adequate economic return that is essential for innovation and to ensure high quality standards. Revenues would always be contingent.
- (16) Moreover, the current business model including territorial exclusivities does not harm EU-wide availability of LaLiga's products. In territories with sufficient demand, private operators engage in the broadcasting of nationally tailored products. In territories where no private operator wishes to take the risk of broadcasting due to insufficient demand, consumers can always access the content directly through LaLiga's website. Therefore, availability and variety are always guaranteed, which would not necessarily be the case if a single pan-European operator acquired the rights and could decide on purely economic grounds whether or not to broadcast country-by-country.
- (17) **Secondly**, 98% of LaLiga's revenues from the sale of copyrighted content (i.e., broadcasting of football matches of the Spanish first and second division) derive from the live broadcast of matches. The remainder are revenues from the sale of match summaries and other broadcasts.
- (18) LaLiga sells its rights for "pay-TV" broadcasts, regardless of the medium through which different licensees might decide to market protected content. LaLiga simply sells the rights to the highest bidder, who is free to bid for only one territory or several territories.
- (19) The above percentage clearly shows the **overwhelming interest of consumers in the first, live broadcast of a match**. Hence LaLiga's fundamental interest in guaranteeing territoriality of its rights. It is virtually meaningless for LaLiga to assign exclusive territories unless there is geo-blocking ensuring an adequate economic return from the exploitation of rights in a given assigned territory.
- (20) In other words, if there is no geo-blocking at the time of the live broadcast of a match and if it is therefore possible to access content in any Member State, LaLiga cannot actually enjoy the benefits that territoriality confers. Indeed, consumer interest in subsequent releases of a match is marginal.
- (21) Finally, failure to meet the "national" and "live" requirements that LaLiga's clients ask for, would inevitably result in a substantial reduction of LaLiga's revenues, which would impair the high investment needed in this field to produce a large choice of constantly improved products. Pan-European licensing would, moreover, probably increase the market power of very few broadcasters –if not of a single one only–, which is also an undesirable consequence in terms of variety and innovation for the benefit of EU

consumers. This would be in direct contrast with the results envisaged by DG COMP, which would ideally consist of enabling new (and more) operators to enter the market for the acquisition of protected content, including sports.

3 SECOND COMMENT: INTERNET IS A MEANS OF COMMERCIALISING COPYRIGHTED CONTENT WHICH, BY ITS VERY NATURE, MAY CHALLENGE TERRITORIALITY AS AN INHERENT ASPECT OF COPYRIGHT

- (22) Current copyright rules do not distinguish the means by which protected content is marketed.
- (23) However, both the law and the courts in the EU accept as the core substance of copyright the possibility for the holder to limit the marketing of protected products and to do so on the basis of geographical criteria. Hence, EU case law has consistently supported the grant of exclusive territorial rights matching the territory of a Member State, unless the aim is to restore national borders and to partition the internal market.
- (24) This being common ground, LaLiga argues that if EU institutions did not attend to the particularity of the Internet for marketing content protected by copyright, they would de facto be eliminating altogether any protection that intellectual property rights offer to products or services marketed over the Internet.
- (25) At least two legal arguments support LaLiga's position.
- (26) **First**, recital 29 of the Copyright Directive¹¹ itself acknowledges that each act of "making available" protected content over the Internet requires the owner's permission. This follows from the fact that the legal doctrine of "exhaustion" is not applicable to content offered online, since such content is accessible from anywhere and may be viewed again endlessly.
- (27) **Secondly**, the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization (WIPO) also recognised the particularities of online sales in their *Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet*.¹² This document emphasised the need to address the absence of barriers throughout the Internet by adopting a clear regulatory framework guaranteeing an adequate protection of industrial property rights. This reasoning is also applicable to copyright and comparable rights.

¹¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ No. L 167/10.

¹² The text of the Joint Recommendation and the explanatory notes, adopted at the thirty-sixth series of meetings of the Assemblies of the WIPO Member States from 24 September to 3 October 200, are available at <http://www.wipo.int/edocs/pubdocs/en/marks/845/pub845.pdf>.

- (28) In LaLiga's view, those arguments entail the need to accept that at the present state of EU law, marketing protected content over the Internet may be subject to contractual clauses on geo-blocking which are necessary to ensure that there is substance to copyright in an online environment.
- (29) As the law stands, to compel audio-visual rights holders to enable its licensees in a given Member State to make their online pay-TV broadcasts available to consumers in another Member State is to force such right holders to grant a **compulsory licence** in the latter Member State.
- (30) Likewise, bundling online rights and the rights to broadcast on other platforms is the necessary consequence of this ubiquitous and uncontrollable nature of the Internet. Were rights licensed separately for different platforms a pan-European online broadcaster might emerge and make it impossible for pay-TV broadcasters to compete.
- (31) Again, the demand for "live" matches clearly indicates that further releases of the match would not be profitable for pay-TV broadcasters, were the live transmission be readily accessible all over Europe through the Internet.
- (32) In conclusion, both geo-blocking and bundling are the market responses to a particularity of the Internet that is currently ill-addressed in Competition Law terms. It is overtly contradictory to, on the one hand, acknowledge the territorial nature of copyright and related rights; and, on the other hand, oblige right holders not to protect their legitimate economic rights given the ubiquitous and uncontrollable nature of the Internet.

4 THIRD COMMENT: PASSIVE SALES OF INTANGIBLE CONTENT OVER THE INTERNET MUST BE DISTINGUISHED FROM PASSIVE ONLINE SALES OF PHYSICAL GOODS

- (33) Closely linked to the second comment above, LaLiga contends that there is urgent need for a distinction between passive sales of tangible goods; and passive sales of intangible protected content through the Internet.
- (34) Paragraph 141 of the judgment in *Murphy* is relevant for this purpose. It is plain that the Court ruled only on "additional obligations" which, beyond territorial exclusivity as such, required the licensee not to provide decoders (i.e., physical goods) outside the territory covered by the licence. In the ECJ's words:

"In the main proceedings, the actual grant of exclusive licences for the broadcasting of Premier League matches is not called into question. Those proceedings concern only the additional obligations designed to ensure compliance with the territorial limitations upon exploitation of those licences that are contained in the clauses of the contracts concluded between the right holders

and the broadcasters concerned, namely the obligation on the broadcasters not to supply decoding devices enabling access to the protected subject-matter with a view to their use outside the territory covered by the licence agreement." (emphasis added).

- (35) That the Court should emphasise the limited scope of its judgment is symptomatic. It is more than likely that the Court was aware of the implications of online broadcasts of protected content, and notably of the fact that geo-blocking is the only technical means available to control such broadcasts. Against this background, it made perfect sense to state in so many words that territorial exclusivity was not an issue.
- (36) In support of the differences that warrant disparate treatment of passive sales of, respectively, physical goods and intangible goods on the Internet, LaLiga should also mention recitals 28 and 29 of the Copyright Directive:

"(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

(29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides." (emphasis added)

- (37) It is therefore the current Directive which acknowledges that, to the extent that rights relating to intangible online content are not exhausted by their initial marketing in the EU, each act making available online services must be subject to the authorisation of the holder of such rights.

- (38) In addition to the above, the current definition of “active sales” at point 51 of the Commission’s Guidelines,¹³ which highlights specific advertising or promotional efforts, is irrelevant in the field of online broadcasting of football matches. Internet consumers need no input or other marketing effort from the broadcaster to know the date and time of any match played worldwide.
- (39) In other words, it would be impossible in practice for broadcasters to recoup the cost of acquiring pay-TV rights if allegedly only “passive” cross-border sales of online football broadcasts were allowed.
- (40) Rather, the consequence would be that broadcasters choose only a few sporting events (or other copyrighted content) for which a sufficient demand is certain (i.e., the own broadcasts of which are not challenged by any passive sales by other licensees), ensuring recovery of their investment. At the end of the day, this will logically entail an output reduction (less offer of sports broadcasts) with two immediate consequences: disappearance of non-major sporting events and less choice for consumers.

5 CONCLUSION

- (41) Summing up, the necessary conclusion from the above is that the very particular economic and legal context of territorial exclusivity and bundling in the field of football proves the compatibility of both restraints with Competition Law.
- (42) Conversely, prohibiting geo-blocking and bundling of rights in this sector risks undermining the competitiveness of the European broadcasting industry and European sporting events at large, since broadcasters will only take the commercial risk to broadcast prime content for which they can reasonably foresee sufficient demand. The result would be to reduce the variety of output and, in the end, consumer choice.

Madrid, 18 November 2016.

¹³ Communication of the Commission – Guidelines on Vertical Restraints, [2010] OJ No C 130/1 (point 51).