



Towards More Competition in Pay TV Services?

The Commission investigates agreements between
Hollywood major studios and broadcasters

Pablo Ibáñez Colomo

POLICY BRIEFING 5 | 2014

Towards More Competition in Pay TV Services?

The Commission investigates agreements between Hollywood major studios and broadcasters

There is no real cross-border competition for pay TV services in the EU. Within the UK, hundreds of thousands of expatriates have to turn to local options (such as BT, Sky or Virgin) if they want to subscribe to a premium service giving access to top sports events and recent cinema releases.

[In a public statement](#) in January of this year, Joaquin Almunia – EU Commissioner for competition – regretted that officials working for the European institutions in Brussels are in the same situation: he himself, for instance, would not be able to subscribe to Spanish pay TV from his current address in Brussels. He also noted that pay TV services are not accessible – for instance via the Internet – from Member States other than the one in which they are subscribed. There is, in other words, no cross-border ‘portability’ of subscriptions.

The main reason why markets for pay TV services are still partitioned along national borders is well known, and it is that there is no EU-wide copyright title. Right holders (including film studios and national football leagues) must license their content on a national basis, and Pay TV operators acquire the rights to broadcast an event or a film only in a given EU Member State. As a result, these same operators cannot provide their services in countries in which they do not operate, or for which they do not hold licences.

It follows that a true single market for broadcasting services could emerge only with the licensing of television rights on a pan-European

basis. Accordingly, if the current situation is indeed as problematic as Commissioner Almunia suggests, the natural solution must necessarily involve the adoption of legislation expanding the territorial scope of intellectual property rights. In fact, the EU Commission (and more precisely the Directorate General for internal market affairs) is currently reviewing copyright rules. In the different policy documents issued to date, several ambitious proposals, aimed at enhancing the cross-border provision and access of protected works, are sketched.

It is unclear, however, whether the further integration of national copyright systems (or even the creation of an EU-wide one) is a political priority at this stage. The launch of a long-awaited White Paper – which tends to be a reliable indicator of the likely adoption of legislation at the EU level at a subsequent stage – has been delayed until at least the appointment of a new EU Commission. In this context, the Directorate General for Competition has decided to explore the extent to which the objectives that would be more logically achieved through ad hoc legislation on intellectual property could instead be furthered through the application of EU competition rules.

It is in this context that Commissioner Almunia announced in January 2014 the opening of an investigation into the agreements concluded between five of the six Hollywood major studios and pay TV operators in several Member States, including the UK. The suggestion is that the observed absence of portability and cross-border supply of premium television services may be the consequence of a set of agreements restricting competition between operators and thus in violation of Article 101 of the Treaty on the Functioning of the EU. The investigation is still ongoing.

Action by the EU Commission follows the ruling of the European Court of Justice in *Murphy*, ([Joined Cases C-403/08 and C-429/08](#)), a case which received widespread publicity in the UK. Karen *Murphy* was the owner of a British pub in Portsmouth, who sought to avoid the subscription fees charged by Sky – the holder of the rights to the FA Premier League in the UK at the time – by importing a decoder from Greece. In its 2011 judgment, the ECJ held that an agreement limiting the ability of the Greek broadcaster to supply its decoding devices outside of its home Member State amounted to a restriction of competition within the meaning of the abovementioned provision.

The *Murphy* ruling extended to the broadcasting arena a long line of case law pursuant to which agreements restricting the cross-border trade of goods or services have been considered to be among the most egregious violations of EU competition law. The result may seem surprising, but one should not forget that competition policy in the EU has been, from the outset, an instrument to achieve the integration of national economies. As a result, Article 101 of the Treaty can in principle apply even when, as in the present case, geographic market partitioning seems to be

largely the inevitable consequence of the exercise of intellectual property rights.

The EU Commission is now looking into pay TV agreements to determine whether they include contractual restraints that purport to limit the territorial reach of the services provided by the licensees in each Member State. Underlying the investigation there is the assumption that, if the contested restraints were to be removed, pay TV operators would compete against one another for subscribers. That is to say, for example, Canal+ would offer its services to (among others) French expatriates based in London and other British towns in competition with local providers. Similarly, broadcasters like Sky would provide subscriptions to British citizens living in Paris or the South of France (and others, such as French nationals interested in an extensive coverage of, for instance, the FA Premier League). Increased cross-border competition, in turn, would on this theory lead to lower prices and other benefits for consumers.

But it is not at all clear that the scenario envisioned by the EU Commission will be achieved through intervention under competition law. The form of cross-border competition which Commissioner Almunia seems to want may simply not be possible in the pay TV segment. It is true that there are many sectors in which firms rival one another 'within' the market: think, for example, of restaurants, supermarkets, airlines or broadband Internet. In all of these firms are present simultaneously in a given geographic area to offer their services.

But a look at the dynamics of the industry clearly shows that rivalry in television takes a different form. Broadcasters compete 'for' the market, not 'within' it. Rivalry, in other words, is of the 'winner-takes-

all' type. Every three or five years pay TV operators bid to acquire the rights to offer a particular type of content on an exclusive basis.

Against this background, it appears that the EU Commission would like to see the emergence of a form of rivalry that cannot and perhaps even should not exist – not even at the national level. Exclusivity is after all in the interest of both broadcasters and right holders. The contractual restraints that are the subject of the ongoing investigation are primarily aimed at ensuring that the rights will be exploited in the manner agreed upon by the parties. This raises a number of questions, most fundamentally, whether an agreement can be said to violate competition law if the rivalry it is said to restrict is commercially not practical.

A second, related, question is whether the EU Commission has evidence to the effect that the absence of cross-border competition is the consequence of the contested restraints. It is not clear whether, and if so how, the EU Commission would be able to show that, in a 'but for' world, cross-border competition would have emerged. There have been several intellectual property-related cases in which the Commission failed to provide evidence of a similar nature. The most obvious example that comes to mind is CISAC. In that case, the EU Commission argued that the absence of cross-border competition among copyright collecting societies within the EU was the consequence of a 'concerted practice'. The General Court of the EU annulled the decision, and took the view that the absence of rivalry could be plausibly explained on other grounds.

A third question raised by the investigation relates to the benefits expected from intervention. It is far from obvious that reducing the

degree of territorial protection will result in benefits for EU consumers. In fact, it may very well end up harming them – in particular the less well-off. Market partitioning may be against the objectives of the EU, but it allows firms to reach consumers in all countries. Absent segmentation, serving consumers in low-income countries may endanger the profits made in high-income ones. As a result, firms may decide to stop providing their services (or to degrade the quality thereof) altogether in the former. This is not theoretical or speculative. In the aftermath of the *Murphy* ruling, the quality and breadth of broadcasts of the FA Premier League has decreased in Greece. This is a natural response to the emergence of a grey market. Similar effects are possible in the pay TV context..

Intervention to promote portability and cross-border access to pay TV services is potentially far-reaching. It could lead to major changes to the way in which premium rights are licensed by film studios and other organisations. Such an outcome would confirm the perception of many commentators, who have claimed in recent years that the EU Commission has increasingly made use of its powers in the field not so much to preserve competition but to regulate and re-shape markets in accordance with a preconceived idea of how the industry should be organised. From this perspective, the pay TV investigation would be an attempt to achieve through competition law the objectives of the review of EU copyright rules, around which political consensus is proving difficult to gather.

Pablo Ibáñez Colomo

(Department of Law,
London School of Economics
and Political Science)

PABLO IBÁÑEZ COLOMO

Pablo Ibáñez Colomo is Associate Professor of Law at the London School of Economics. He received a PhD from the European University Institute in June 2010 (Jacques Lassier Prize). Before joining the EUI as a Researcher in 2007, he taught for three years at the Law Department of the College of Europe (Bruges), where he also took an LL.M. in 2004.



THE LONDON SCHOOL
OF ECONOMICS AND
POLITICAL SCIENCE ■

Department of Law
The London School of Economics
and Political Science
Houghton Street
London WC2A 2AE