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FEATURED ARTICLE
04/11



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'Listing' of major events: UEFA and FIFA's failed challenge

UEFA and FIFA recently failed in an action challenging the 'listing' of the European Championships and World Cup as events of national importance that should be available on television to as wider section of the public as possible. Daniel Geey, a Solicitor with Field Fisher Waterhouse LLP, examines the legislation that allows 'listing' of sporting events and explains the European Union General Court's reasoning for rejecting the argument that only games featuring the national team can be considered of major importance for society.

In three separate cases¹, UEFA and FIFA brought actions before the General Court ('the GC') relating to the way its broadcasting rights can be marketed in Belgium and the UK. UEFA challenged the European Commission's ('the Commission') decision to approve the listing of the UEFA European Championship finals tournament (the 'EURO') by the UK government, whilst FIFA challenged the listing of the entire 64 matches of the FIFA World Cup by both the Belgian and the UK governments.

UEFA and FIFA contended that they could not effectively maximise their broadcasting revenues for the World Cup and EURO because they were constrained as to the broadcasters to whom they could sell the broadcasts. Such restrictions relate to European legislation which safeguards a European citizen's right to access to events of national significance.

What is apparent throughout the three decisions is the inherent tension between a government's duty to safeguard certain sporting and cultural events and the need for a robust and competitive market in the sale of live sports

rights. UEFA and FIFA argued that European Union (EU) legislative intervention in the market has had the side effect of protecting terrestrial broadcasters from external competition. This was one of the reasons for the actions brought by the two international football associations. The General Court (GC) rejected all three actions. This article explains some background to the legislation, highlights a number of the reasons for the GC's rejection of UEFA and FIFA's claims and assesses the significance of the GC's rejection of the UEFA and FIFA actions.

Background

The EU's Television Without Frontiers Directive, as amended by the Audio Visual Media Services Directive, provides the legal basis for Member States to compile lists of designated events that are of major importance to citizens.

It should be noted that there is no obligation on Member States to introduce listed events legislation and supply a list to the Commission. From previous research it appears that only Austria, Belgium, Finland, France, Germany, Ireland, Italy and the UK have a list system in place. The only constant in each of the submitted Member State lists are the World Cup and European Championships. Crucially, the UK list - for example - reserves every World Cup and EURO match collectively as broadcasts of major cultural importance to the UK. The protected events lists are then submitted to the Commission. The Commission then decides whether the listing of events in question complies with EU law.

The legislation

It should be stressed that any such events designated as listed cannot be exclusively broadcast on pay-TV platforms and therefore must be

broadcast to some degree on free-to-air television². The relevant legislation at the time (Article 3a of Television Without Frontiers Directive) stated:

'1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society.'

The provision, in effect, prohibits broadcasters who do not meet the 'substantial proportion of the public' test (i.e. non-BBC, ITV and Channels 4/5 broadcasters) from purchasing the exclusive rights to an 'A' listed event. Notably, it does not prohibit rights holders from selling their rights on a non-exclusive basis to a terrestrial and pay-tv broadcaster. Rights holders would argue, however, that exclusivity is what gives the product its inherent value.

Context

With the recommendations of the report into the Listed Events regime headed by David Davis effectively put on hold by the UK government until 2012³, various broadcasting players have made their opinions quite clear.

Jeremy Darroch, Chief Executive of BSkyB, has previously said that he will lobby for the abolition of listed-events legislation:

"It's not for me to dictate to a rights holder how they should sell their rights. What we want is the

chance to pitch and show what we can do to showcase their sport. There is no such thing as free sports coverage. We all pay our licence fee.”⁴

Roger Mosey, who at the time was Head of Sport at the BBC, defended the present free-to-air ‘crown jewels’ list.

“Pay-TV can hardly claim it’s starved of good content by the current framework” he said, commenting that if the list was reduced, the UK would “lose an important part of our national life”⁵.

The challenge

UEFA challenged the Commission’s Decision to approve the UK’s listing of the entire EURO, arguing amongst other things, that:

- there was a failure by the Commission to state reasons in its Decision;
- the Decision and the UK legislation deprived broadcasters in other Member States of the opportunity to broadcast EURO matches in the UK;
- the Commission erred in concluding that matches not involving England, Northern Ireland, Wales or Scotland in the European Championships could be considered as events of major importance for the UK; and
- the Decision granted to a number of terrestrial broadcasters the possibility of acquiring live broadcast rights for the EURO, therefore shielding them from effective competition. This was to the detriment and exclusion of pay-TV channel operators.

FIFA challenged the listing of World Cup games by both the UK and Belgium. FIFA contend that, in the UK’s case, the Commission failed to state reasons for approving the inclusion of all 64 matches. In addition, FIFA believed that the procedure adopted in the

The GC considered that non-gala matches will have a significant impact on the qualification of certain teams

Commission Decision:

- was not clear or transparent;
- that not all matches were of importance to the UK or Belgian public; and
- relating to the UK, the list infringed competition law.

FIFA pointed out that the Decision to guarantee broadcast on free to air TV all matches prevented it from licensing new entrants who wished to use premium football to establish themselves in the European sports broadcasting market.

The Decision

The GC upheld the legality of the Commission’s Decisions. Set out below is a selection of quotes from the three judgments setting out some of the rationale employed by the GC.

One of major points argued throughout all three cases was the contention that not all EURO and World Cup games should have been listed by the relevant national governments. The Court however believed that:

‘[for] other matches of the World Cup and the EURO, the Court holds first that those competitions may be regarded as single events rather than as a series of individual events divided into “prime” and “non-prime” matches or into “gala” and “non-gala” matches. Thus, the participation of the teams in “prime” and “gala” matches may depend on the results of “non-prime” and “non-gala” matches, which may therefore generate a particular interest for the public to follow those matches.’⁶

Therefore at first instance, the GC assessed that all the matches within a tournament could be classed as a single event rather than separated out as individual games. This damaged the UEFA and FIFA’s argument significantly, because the rights holders were in effect

arguing that it was fair for national matches to be broadcast in that national territory, but that non-national matches should be not classed as protected under the list system. It was these matches that FIFA and UEFA ideally wished to market on an exclusive basis to pay-TV operators. In reinforcing the non-distinction between gala and non-gala matches, the GC held that:

‘the fact that certain ‘non-prime’ or ‘non-gala’ matches may affect whether a team advances to the “prime” or “gala” matches may justify a Member State’s decision to consider that all of the matches of those competitions are of major importance for society’⁷.

Interestingly, the GC considered that non-gala matches will have a significant impact on the qualification of certain teams. This had the effect of making non-gala matches of significant importance in certain final group game matches.

This begs the question as to how many UK viewers would deem a EURO finals match between Romania v France of cultural significance to the UK? However, if in the next World Cup Romania v France were the determining fixture to decide whether England goes through to the knock-out stages of the competition, there would certainly be an argument for that game being of cultural significance. This perspective appears to have been enshrined by the GC. The context of the game therefore becomes very important and something that could not be easily catered for before a tournament began. Similarly, the entitlement of a UK citizen to watch the complete tournament unravelling on a free-to-air, non-pay TV broadcast channel, to many, is viewed as an inherent right. The expectation of not having to pay for watching live

football which UK viewers have traditionally watched for free does hold some merit when one considers that the hugely popular Premier League and Champions League competitions are not protected under the UK list at all.

Another interesting argument raised by the rights holders concerned the contention that the relevant national legislation and the subsequent Decision taken by the Commission:

- practically prohibited broadcasters in other Member States from broadcasting the EURO and World Cup matches in the UK⁸); and

- reduced competition in the upstream broadcast acquisition market for the World Cup and EURO competitions because only qualifying broadcasters (i.e. terrestrial broadcasters) could bid for the exclusive rights on offer.

The GC justified the first contention by stating that the provisions ‘may be justified since they are intended to protect the right to information and to ensure wide public access to television broadcasts of events... of major importance for society’⁹.

Similarly, the argument that the listing of events regime reduced competition for the rights to the World Cup and EURO was dismissed by the GC. The GC’s logic was that it was up to a rights holder to sell their rights as they saw fit. If a rights holder decides to sell its rights on an exclusive basis to broadcasters, a natural consequence of such a decision as set out in the UK legislation, for example, is that such an exclusive arrangement can only be entered into with a broadcaster who has the appropriate level of national coverage. Should the rights holder sell its rights on a non-exclusive basis, there may be additional competition at the upstream level. The GC concluded that:

‘although the categorisation of the World Cup and the EURO as events of major importance for society is liable to affect the price which FIFA and UEFA will obtain for the grant of the rights to broadcast those competitions, this does not destroy the commercial value of those rights because it does not oblige FIFA and UEFA to sell them on whatever conditions they can obtain’¹⁰.

The court even stressed that rights holders still have the ability to sell their rights on a non-exclusive basis. That still remains an option; albeit a risky one if they believe the rights will still be more lucrative to sell to free-to-air and pay-TV broadcasters on a non-exclusive basis. The commercial attraction of non-exclusive broadcasts to pay-TV broadcasters would also be a problem. It should be noted, however, that the FA Cup Final is broadcast on terrestrial and pay-TV in the UK. Even though it is listed, it is one game that crosses the free-to-air and pay-TV divide.

Conclusion

By only launching actions against the two Belgian and UK lists, both organisations must have been satisfied that the other national submitted lists went no further to protect a smaller number of events. Presumably, there must have been various discussions with national governments about the scope and breadth of the submitted lists. For the organisations to take action in the first place shows how dissatisfied they must have been with the current arrangements.

One take on the actions brought by UEFA and FIFA is they may have been playing the ultimate game of hardball, banking on an amicable settlement between national governments that would have allowed the rights holders to have withdrawn their actions. This would have probably allowed

UEFA and FIFA to sell the rights to other non-national team games to interested pay-TV operators. This would still have allowed all games involving England, for example, to appear live on UK free-to-air broadcasts.

Unless overturned on appeal to the Court of Justice for the European Union (CJEU), it appears that the unsatisfactory position from a rights holder’s perspective looks set to continue. This author doubts there will be many citizens complaining about having premium football matches on terrestrial television. Football fans should be happy. Rights holders less so.

Daniel Geey Solicitor
Field Fisher Waterhouse LLP, London
daniel.geey@ffw.com

1. Case T-385/07 - FIFA v Commission, Case T-55/08 - UEFA v Commission and Case T-68/08 - FIFA v European Commission, judgments of 17 February 2010.
2. The Court explains in paragraph 11 of Case T-55/08 that “‘Group A’ includes events which cannot be covered live on an exclusive basis if certain criteria are not met. ‘Group B’ includes events which may be broadcast live on an exclusive basis only if arrangements have been made to ensure deferred broadcast.’ In the UK, the BBC, ITV and channels 4 and 5 fall under the definition of free-to-air broadcasters.
3. See www.culture.gov.uk/news/media_releases/7287.aspx
4. www.marketingmagazine.co.uk/news/888008/Sky-target-crown-jewels-list-free-to-air-sports/
5. www.tvsportsmarkets.com/news/2009/mar/bskyb-lobbies-over-listed-events
6. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cp110009en.pdf>
7. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cp110009en.pdf>
8. This was because the UK legislation classified qualifying broadcasters as those whose pictures are accessible to at least 95% of the UK population.
9. Paragraph 149 of the UEFA Decision (T-55/08).
10. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cp110009en.pdf>



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