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UEFA and FIFA challenge EU approved listed TV events

The European Commission has allowed free-to-air broadcasting of two major football tournaments. Daniel Geey and Joseph Ward, of Field Fisher Waterhouse LLP, examine UEFA & FIFA's challenge to this decision.

The European Union's Television Without Frontiers Directive (TWFD), as amended by the Audio Visual Media Services Directive (AVMD), provides the legal basis for Member States to compile lists of 'designated events' which are of major importance to countries in the European Community, that must be broadcast on free-to-air television.

The national list system highlights the debate surrounding a government's duty to safeguard certain sporting and cultural events whilst also having concern for the need for a competitive market in the sale of sports rights. UEFA has challenged the European Commission's (the Commission) decision to approve the listing of the entire UEFA European Championship Finals Tournament by the UK, whilst FIFA has challenged the listing of the entire 64 matches of the FIFA World Cup by both Belgium and the UK.

UEFA and FIFA cases

UEFA and FIFA point to the UK and Belgian lists as preventing them from licensing new entrants who wish to use premium sports broadcasting to establish themselves in the European football broadcasting market, thereby creating an artificial barrier to entry. UEFA and FIFA plead similar arguments that the listing of all matches:

- regardless of popularity is not justified, proportionate or necessary;
- prevents the granting of exclusive licences to broadcasters; and

● is an infringement of competition law.

Issues raised by UEFA relating to the UK list¹ include the contention that the Commission has 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. FIFA, in its challenge to the UK list² argues that the Commission has not sufficiently stated its reasons for accepting the UK's inclusion of every World Cup Finals match, regardless of whether they involve England, Northern Ireland, Wales or Scotland.

Table 1 is a comprehensive review of football matches submitted by Member States. A number of nations have included key games from the European Championship Finals Tournament and the FIFA World Cup, regardless of whether these include the home nation.

TvDanmark

In *TvDanmark*³ (TVD), an English court decision, the Danish Government had listed the Danish football team's away qualifying fixtures for their World Cup programme as special events under the TWFD, meaning they were not exclusively available on pay television channels unless public broadcasters could broadcast them in some capacity. TVD succeeded in bidding for the rights to exclusively televise the live games, yet the Independent Television Commission (ITC)⁴ - who in the UK had to approve any broadcaster under its jurisdiction in televising a listed event - refused to grant its consent. The House of Lords held in favour of the ITC and the court explained that as a consequence of the ruling 'a broadcast will be unattractive to the pay-television broadcaster and that the value of rights will be depressed. But that is

the consequence which inevitably follows from the protection which the Directive was intended to confer upon the public right of access to such events.⁵

Such comments from the House of Lords demonstrate the competing complexities of the protected list system. The decision has certainly raised questions concerning a terrestrial broadcaster's potential position of strength against pay-TV companies. Pay-TV broadcasters argue that as a result of the TVD case, they are put at a disadvantage for an 'A' listed event as they cannot broadcast the rights exclusively if a public broadcaster wants to screen them too.

Interestingly, while FIFA and UEFA contend that the UK list is not proportionate or justifiable, one way to possibly circumvent the UK list would be to auction the rights on a non-exclusive basis. The UK list only applies in prohibiting a pay-TV or non-qualifying broadcaster⁶ from purchasing the exclusive rights to an A listed event⁷. Although there has been strong support for the contention that exclusive deals do not yield the maximum amount of revenue for a rights holder, the most recent Premier League and Champions League deals in the UK offer substantive examples of increases in revenue for a rights holder even in situations where two broadcasters both have the ability on a non-exclusive basis to broadcast at least the same competition, if not the same game. If an A listed game is sold on a non-exclusive basis by a rights holder (i.e. the UK arrangements for the FA Cup final), both a terrestrial broadcaster (BBC) and a pay-TV broadcaster (Sky) can televise the match.

UK listed events

The Commission, in approving the listing of all matches for the World

Cup Finals and the European Championship Finals Tournament for Belgium and the UK, justify each competition's inclusion on the basis of the criteria below.

The Commission has deemed that the following criteria are reliable indicators of whether an event is of major importance for a society⁸:

- A special resonance within the Member State, and not simply of significance to those who ordinarily follow the sport or are activity concerned.
- A generally recognised, distinct cultural importance for the population of the Member State, in particular as a catalyst of cultural identity.
- Each event has traditionally been broadcast on free-to-air television and has commanded large television audiences.
- Involvement of the national team in the event concerned, which is a competition or tournament of international importance.

Usually two of the above four indicators would need to be satisfied.

The UK has an A and a 'B' list. An A listed live event, in almost all circumstances, must be broadcast by a qualifying broadcaster. Exclusivity of an A listed event is virtually impossible to non-qualifying broadcasters in the UK. The difference between A and B listed events is that A events will usually never be able to be broadcast on an exclusive basis by a non-qualifying broadcaster. B listed events can be screened exclusively by non-qualifying pay-TV broadcasters as long as access is still available on terrestrial channels, usually through deferred highlights programmes.

Circumstances where A listed events can be broadcast live on pay-TV platforms are, for example:

- where the event is non-

Listed events have the problem of not being able to realise their true pay-TV commercial value

exclusively broadcast on both terrestrial and pay-TV; or

- where no qualifying broadcasters bid for the live rights and a pay-TV broadcaster obtains consent from the Office of Communications (Ofcom) in the UK to broadcast the events.

Comparison with other nations' lists

The submission of lists of events that Member States deem to be of major importance is not mandatory. Only Austria, Finland, France, Germany, Ireland, Italy, the UK and Belgium have submitted lists. Denmark submitted a list which the Danish Government withdrew after the TVD case. The differences between the UK list and other lists reveal some interesting points.

In relation to the FIFA World Cup and the European Championship Finals, a number of countries have limited the number of games to include just the semi-finals, the final and matches involving the nation submitting the list - in some instances they also include the opening game (see Table 1). These lists have not been challenged by FIFA or UEFA.

Some nations have also listed certain games from the European club football tournaments: the UEFA Cup and the Champions League. These are mainly limited to the finals and semi-finals of the competition, should a club from the nation submitting the list be playing in the later stages of either the UEFA Cup and the Champions League. The UK has not listed any European club competition games, although as ITV currently has rights to screen live Champions League action along with BSkyB, it would be of interest to see if this position changes, should a terrestrial broadcaster fail to secure future rights to the Champions League in the UK.

The Italian equivalent to the UK list is substantially more selective in relation to the World Cup and European Championships however, and includes only the final and all matches involving the Italian national team. However, the Italian list is more restrictive in relation to the broadcasting of the Champions League; if an Italian team reaches the semi-finals and/or final, the broadcast must be screened on free-to-air television. The UK list does not require any Champions League matches to be made available to free-to-air broadcasters.

In Germany, for example, the 2008 European Championships are being broadcast by ARD and ZDF who are both qualifying broadcasters able to televise 27 of 31 matches live, including all German national team games, the opening match, the four quarter-finals, the semi-finals and the final. For the 2010 FIFA World Cup, ARD and ZDF will broadcast 46 of 64 matches (including the opening match, the semi-finals and the final). Pay-TV broadcaster Premiere will broadcast all matches including 18 exclusively. These stipulations appear to fall in line with Germany's list.

Trade off - free-to-air v free competition

Listed events have the problem of not being able to realise their true pay-TV commercial value. Pay-TV broadcasters in the last decade have purchased the most popular sports events as drivers for their pay-TV platforms. The value that a terrestrial television broadcaster may attach to a match will probably differ considerably from that of a pay-TV broadcaster. The flip side is that if the allocation of sporting and socially integrating programmes of national resonance is auctioned off to the highest bidder, European citizens' access to popular events would be

further restricted. The anti-pay-TV camp would point to other public goods, such as clean air or street lighting, which benefit the wider public and confer beneficial externalities on the wider community. Although less tangible than the economic rationale advocated by many, the non-economic benefits have obviously been sacrosanct enough to be granted protection and are enshrined by the TWFD and AVMD. It is possible for a non-qualifying broadcaster to gain exclusive rights to a listed event, if a qualifying broadcaster does not show interest in purchasing the rights. However, this eventuality is remote due to the popularity of events in the listed section because, by the Government's own opinion, such events are special and unique

enough to warrant protection. Almost certainly the BBC, ITV, Channel 4 or Channel 5 in the UK (as qualifying broadcasters) would be extremely interested in any premium listed sporting event. Such policy decisions taken by national governments for blanket lists governing the FIFA World Cup and UEFA European Championships have been equally welcomed by consumers as much as they have been denigrated (and now challenged) by certain rights holders. As a result, national governments do give priority to qualifying terrestrial broadcasters. Whilst rights holders are concerned that governments are over stepping the mark in casting the listed net too wide, many citizens view such policy as quite a refreshing counter-balance in an

increasingly growing live pay-TV sports market. It would be doubtful any sports fan would argue against the listing of events in a growing age of subscription based television services.

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1. T-55/08.
2. T-68/08.
3. Regina v ITC (appellants) ex parte Tv Danmark 1 Limited on 25 July [2001] UKHL 42.
4. The ITC ceased to exist on 18 December 2003 and was replaced by the Office of Communications.
5. TvDanmark [2001] UKHL 52-53.
6. In the UK, ITV, BBC, Channel 4 and Channel 5 are qualifying broadcasters.
7. Broadcasting Act 1996, s. 97 to 105, as amended by the Communications Act 2003.
8. For example Commission Decision of 25 June 2007 (2007/475/EC) para 5.

Table 1: Listed Football Events

	FIFA World Cup	European Championship	International matches	Champions League matches	UEFA Cup	National domestic football cup
Austria	Matches involving the Austrian team, the opening match, the semi-finals and final	Matches involving the Austrian team, the opening match, the semi-finals and final	N/A	N/A	N/A	Austrian Football Cup Final
Belgium	Finals in full	Finals in full	Matches involving the Belgian team	Matches involving the Belgian team	Matches involving the Belgian team	Belgium Football Cup Final
Finland	Matches involving the Finnish team, the opening match, quarter-finals, semi-finals and final	Matches involving the Finnish team, the opening match, quarter-finals, semi-finals and final	N/A	N/A	N/A	N/A
France	Matches involving the French team, the opening match, semi-finals and final	Matches involving the French team, the opening match, semi-finals and final	Official matches of the French team in the FIFA calendar	The final	The final, where a French club involved in one of the French championships is playing	French Football Cup Final
Germany	Matches involving the German team, opening match, semi-finals and final	Matches involving the German team, opening match, semi-finals and final	The German team's home and away matches	The final, where a German club is involved	The final, where a German club is involved	The semi-finals and final of the German FA Cup
Ireland	Matches involving the Irish team, opening match, semi-finals and final	Matches involving the Irish team, opening match, semi-finals and final	Ireland's qualifying games for the European Championship and the FIFA World Cup	N/A	N/A	N/A
Italy	Matches involving the Italian team and the final	Matches involving the Italian team and the final	Matches involving the Italian team in official competitions	The final and semi-finals where an Italian team is involved	The final and semi-finals where an Italian team is involved	N/A
UK	Finals Tournament	Finals Tournament	N/A	N/A	N/A	The FA Cup Final Scottish FA Cup Final



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