

# The Commission Investigation into Pay TV Services: Open Questions

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## I. Introduction

In January 2014, the Commission announced the opening of an investigation into pay TV services.<sup>1</sup> Vice-President Almunia's statement (hereinafter, the 'pay TV statement', or the 'statement') expressed concerns about the fact that the exclusive territorial licensing agreements concluded between five of the six Hollywood major studios<sup>2</sup> and pay TV operators<sup>3</sup> may give 'absolute territorial exclusivity' to the latter. As is true of cases previously dealt with by the Media Unit within DG Competition,<sup>4</sup> the investigation concerns an instance in which the limited territorial scope of intellectual property rights leads (or contributes) to the partitioning of the internal market along national borders. Two key legal developments provide the necessary background to understand the policy issues driving the proceedings.

One of these developments is the *Murphy* ruling,<sup>5</sup> delivered in 2011. In this case, the Court of Justice (hereinafter, the 'ECJ' or the 'Court') held that an exclusive territorial licensing agreement is restrictive of competition by object within the meaning of Article 101(1) TFEU where it requires the 'broadcaster not to supply decoding devices enabling access to that right holder's protected subject-matter with a view to their use outside the territory covered by that licence agreement'.<sup>6</sup> Even though the Court was careful to limit the scope of the ruling, its outcome was received with surprise.<sup>7</sup> For almost 30 years, since *Coditel II* (1982), it had been safe to assume that exclusive territorial licensing agreements

## Key Points

- In January 2014, the Commission launched an investigation into pay TV services in the context of a review of EU copyright rules and following the ruling in *Murphy*, where the ECJ held that exclusive territorial licensing agreements may be restrictive by object.
- Vice-President Almunia's statement expressed concerns with restraints limiting the passive sales of pay TV services and with the 'portability' of subscriptions across borders.
- The Commission envisions a form of cross-border competition between pay TV operators that is not easy to reconcile with the observable industry dynamics.
- It is not clear to what extent the suggested approach considers the 'economic and legal context' in which agreements between studios and broadcasters are concluded.

concluded between right holders and broadcasters do not in themselves infringe Article 101(1) TFEU—and this in spite of the fact that they lead to the partitioning of the internal market.<sup>8</sup> In *Coditel II*, such partitioning was assumed to be the consequence not so much of

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1 'Statement on opening of investigation into Pay TV services', SPEECH 14/13 (13 January 2014).

2 The following are mentioned in the statement: Twentieth Century Fox, Warner Bros, Sony, NBC Universal, and Paramount.

3 These are BSkyB (UK), Sky Italia, Canal+ (France), Sky Deutschland, and DTS (Spain).

4 See in particular *CISAC* (Case COMP/C2/38.698) Commission Decision of 16 July 2008 [2008] OJ C323/12.

5 Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd (Murphy)* [2011] ECR I-9083.

6 *Ibid.*, para 146.

7 See in particular Peter Alexiadis and David Wood, 'Free Market 1: Copyright 0—UK Premier League Loses Away from Home' (2012) 18 *Utilities Law Review* 243 and Bill Batchelor and Tom Jenkins, 'FA Premier League: The Broader Implications for Copyright Licensing' (2012) 33 *European Competition Law Review* 157.

8 Case 262/81 *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others (Coditel II)* [1982] ECR 3381.

licensing but of the fact that copyright remains national in scope in the EU. After *Murphy*, it can no longer be assumed that restraints that provide for, or support, exclusive territorial licensing fall in principle outside the scope of Article 101(1) TFEU. The exact reach and implications of the ruling remain unclear.<sup>9</sup> Against this background, the pay TV investigation can be seen as an attempt by the Commission to explore the outer boundaries of *Murphy*. Such an attempt is of particular relevance at a time when EU copyright rules are being reviewed. This (ongoing) process is the second key development that helps make sense of the investigation.

In the Public Consultation on the review of EU copyright rules launched in December 2013, the Commission notes that (precisely because copyright is national in scope) it is 'not possible to access many online content services from anywhere in Europe'.<sup>10</sup> It is pointed out in the document that there are, as a result, 'continued problems' with the cross-provision (and cross-access) of services. In an evolving regulatory context, the investigation could be aptly described as an attempt to identify whether, and to what extent, Article 101 TFEU can contribute to the policy objectives sketched in the Consultation. The pay TV statement singles out the two restraints that appear to drive the efforts of the Commission. First, exclusive territorial licensing is seen with concern insofar as it hinders the 'portability' of subscriptions across the EU (that is, the accessibility of pay TV services from a Member State other than the one of subscription).<sup>11</sup> Secondly, it considers that, as a consequence of the 'absolute territorial exclusivity' conferred by virtue of these agreements, consumers based in one Member State may not be able to subscribe to pay TV services offered by broadcasters established in other Member States.<sup>12</sup>

The purpose of this piece is to place the pay TV investigation in its legal and economic context and to evaluate the consequences of the positions at which the statement hints. While there are still many open questions, it would

seem that the Commission is of the view that competition between broadcasters could be increased by removing restrictions to the 'passive sale' of subscriptions across national borders. This vocabulary suggests that the investigation is driven by an attempt to transpose to the provision of pay TV services the legal framework applying to vertical restraints and to technology transfer agreements, where the distinction between 'active' and 'passive' selling of products and services is of fundamental importance.<sup>13</sup>

The first question to be addressed in the article will thus be whether an expansion in this direction is appropriate given the features of broadcasting as a service and given the nature of the interactions between right holders—such as film studios—and pay TV operators. It should be noted in this regard that broadcasting is peculiar in that it is an instance in which the intellectual property right is exploited in an immaterial form (as a non-rival good<sup>14</sup>) and that the right of communication to the public, which is the relevant one in the context of the investigation, is not subject to the exhaustion principle. After more than two decades of premium pay TV in Europe, it is now clear that this economic segment is also peculiar in that firms compete not so much 'within' the market but 'for' the market. In other words, pay TV operators compete to acquire the rights to premium content on an exclusive basis for a given period of time. In this sense, the investigation hints at a form of competition that does not seem to fit the observable market dynamics.

The second question relates to the potential implications of remedial intervention addressing the concerns identified in the statement. In this regard, it is relevant and useful to refer to past proceedings raising similar issues in comparable legal and economic ecosystems. Administrative action dealing with the sale of television rights by sports associations is one example that comes to mind immediately<sup>15</sup>; the line of practice relating to copyright collecting societies is another.<sup>16</sup> What these

9 See in this regard the discussion of the cases found in Chapters 10 (1496) and 14 (1744) of Jonathan Faull and Ali Nikpay (eds), *The EU Law of Competition* (OUP 2014).

10 Public Consultation on the review of EU copyright rules, available at [http://ec.europa.eu/internal\\_market/index\\_en.htm](http://ec.europa.eu/internal_market/index_en.htm).

11 The pay TV statement explains that 'if you subscribe to a Pay TV service in Germany and you go to Italy for holidays, you may not be able to view the films offered by that service from your laptop during your holidays'.

12 As pointed out by the Vice-President: 'if I live in Belgium and want to subscribe to a Spanish Pay TV service, I may not be able to subscribe at all if there is absolute territorial exclusivity'.

13 See Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Art 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1 and Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Art 101(3) of the Treaty on the Functioning of

the European Union to categories of technology transfer agreements [2014] OJ L93/17.

14 A good is said to be non-rival where one person's use of the good does not diminish another person's use of it. See N Gregory Mankiw, *Principles of Economics* (6th edn South-Western 2012) 218.

15 See in particular *UEFA Champions League* (Case COMP/C.2-37.398) Commission Decision 2003/778/EC [2003] OJ L291/25; *Joint selling of the media rights to the German Bundesliga* (Case COMP/C.2/37.214) Commission Decision 2005/396/EC [2005] L134/46; and *Joint selling of the media rights to the FA Premier League* (Case COMP/38.173) Commission Decision of 22 March 2006 [2006] OJ C7/18.

16 In addition to *CISAC* (n 4), see in particular *IFPI 'Simulcasting'* (Case No COMP/C2/38.014) Commission Decision 2003/300/EC [2003] L107/58; and *The Cannes Extension Agreement* (Case COMP/C2/38.681) Commission Decision 2007/735/EC [2007] O L296/27.

cases show is that there is a major qualitative difference between requiring a firm to put an end to an infringement, on the one hand, and altering the market structure to implement a particular policy vision, on the other. Remedies in themselves may not be sufficient to achieve the latter. Competition ‘within’ the market may not be successfully introduced, in other words, where the features of the sector lead firms to compete ‘for’ the market instead. In this same vein, the abovementioned cases suggest that the many forms that inter-firm rivalry can take are equally valid and meaningful.

## II. Legal and economic background

### A. The logic of *Coditel II*

A copyrighted work such as a film can be exploited in various ways. It can be sold in the form of a DVD, shown in cinema theatres, or streamed via the Internet. There are clear differences between these different forms of exploitation. When sold as a DVD, the work is reproduced and incorporated into a physical good. In such an instance, the author can be adequately rewarded for her creation (that is, the exclusive intellectual property right can be said to fulfil its essential function) where she is able to control (that is, to authorise or prohibit) the reproduction of the work<sup>17</sup> and its distribution.<sup>18</sup> Following the first sale of a DVD reproducing the work, the exclusive right is said to be exhausted, by which it is meant that subsequent sales do not come within the scope of the copyright. It has long been established that the exhaustion principle applies at the EU level. Accordingly, any attempt on the part of the author to control the subsequent circulation of the DVD anywhere in the EU after its first sale will be found to infringe the rules on free movement of goods.<sup>19</sup>

Typically, different conclusions follow where the work is exploited in an intangible form.<sup>20</sup> Where the work is broadcast, the exclusive right enjoyed by the author cannot be said to be exhausted once the film is aired with

her consent in one Member State of the EU. If the exhaustion principle applied in that context, the right to authorise or prohibit *any* communication to the public of the work would be emptied of its substance. Broadcasting the film for the first time in a given Member State would preclude its ability to control (or require fees for) subsequent showings of the film in that State, and to control (or require fees for) its showing for the first time in others. The copyright, in other words, would fail to fulfil its essential function. This is the—relatively intuitive and straightforward—reasoning advanced by the ECJ in *Coditel I*.<sup>21</sup> As explained by the Court, the right to authorise *any* showing of a film comes within the scope of the copyright (and is in this sense different from subsequent sales of tangible goods embodying an intellectual property right).<sup>22</sup> The same idea is also found in Directive 2001/29, which explicitly provides that the exhaustion principle does not apply to the right of communication to the public.<sup>23</sup>

It is against this background that the logic underpinning *Coditel II* must be understood. The ruling came at a time where the principle pursuant to which agreements between undertakings ‘aimed at prohibiting or limiting parallel trade’ are restrictive of competition by object within the meaning of Article 101(1) TFEU was well-established and undisputed.<sup>24</sup> Export bans<sup>25</sup> and, more generally, vertical agreements giving ‘absolute territorial protection’<sup>26</sup> to distributors are presumed to violate EU competition law by their very nature. This is so because such restraints run counter to the objective of market integration.<sup>27</sup> Accordingly, the fundamental question raised in *Coditel II* can be formulated as whether this case law, which applied to physical goods (including those incorporating intellectual property), could be extended to intangible property, such as a broadcast. The ECJ ruled that the grant of an exclusive licence to show the film in a given Member State (and thus to prevent others from doing so) is not in itself contrary to Article 101(1) TFEU insofar as it aims to preserve the essential function of the copyright.<sup>28</sup>

17 See for example Art 2 of 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 L167/10.

18 Ibid, Art 4.

19 See in particular Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* [1971] ECR 487 (in relation to copyright) and Case 15/74 *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc* [1974] ECR 1147 (in relation to patents). The exhaustion principle is now recognised in Art 4(2) of Directive 2001/29 (n 17).

20 See Case 128/11 *UsedSoft GmbH v Oracle International Corp* [2012] (ECJ), 3 July 2012, where the ECJ held that Art 4(2) of Directive 2001/29 applies where the right holder distributes software copies via the Internet.

21 Case 62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others (Coditel I)* [1980] ECR 881.

22 Ibid, in particular paras 14 and 16.

23 See in this sense Art 3(3) of Directive 2001/29 (n 17).

24 Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission (Consten-Grundig)* [1966] ECR 429.

25 See for instance Case 19/77 *Miller International Schallplatten GmbH v Commission* [1978] ECR 131.

26 This expression was used by the ECJ in *Consten-Grundig* (n 24) and defined as the elimination of ‘any possibility of competition at the wholesale level’ in products manufactured by the supplier.

27 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291.

28 *Coditel II* (n 8) paras 12, which refers to *Coditel I*, and 17.

The principle whereby an exclusive territorial licensing agreement such as the one examined in *Coditel II* is not restrictive by object means that such an agreement would only be caught by Article 101(1) TFEU if an analysis of the context in which it is implemented reveals that it has an anticompetitive impact. What the ruling makes clear in this regard is that the mere fact that it is not possible for other operators to broadcast the film during the exclusivity period is not in itself sufficient to establish an infringement. It would need to be shown that there are 'legal and economic circumstances' which, given the 'specific characteristic' of the relevant market, lead to restrictive effects on competition.<sup>29</sup> Such effects may take the form, inter alia, of 'barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry'; the 'possibility of charging fees which exceed a fair return on investment'; or where the length of the agreement is 'disproportionate'.<sup>30</sup>

## B. The unclear scope and implications of *Murphy*

A key technological development altered the broadcasting landscape in the 29 years separating *Coditel II* and *Murphy*. If the former concerned the activities of domestic cable operators importing signals from other Member States, the latter was delivered at a time where end-users had the means to access foreign broadcasts directly with satellite dishes. The fact that such signals can be received in a Member State other than the one where they originate does not amount to a copyright violation. In accordance the Satellite and Cable Directive, the act of communication to the public is only deemed to take place where the signals are introduced to an 'uninterrupted chain of communication leading to the satellite'.<sup>31</sup>

The Satellite and Cable Directive creates a situation that is somewhat paradoxical. Exclusive rights (which are national in scope), including the right of communication to the public via satellite, are not contested—one

of the primary aims of the Directive was in fact to require Member States to provide for such a right. At the same time, and in accordance with the 'country of origin' principle, it is possible for each of these broadcasters to reach end-users based in other Member States. Unsurprisingly in such a regulatory context, the use of encryption technologies restricting access by end-users to services offered by broadcasters established in other Member States has become pervasive. The Commission expressed concern with the generalisation of these technologies in a report on the application of the Directive issued in 2002, as it was perceived to undermine its objectives.<sup>32</sup>

The *Murphy* case concerned a preliminary reference raising, inter alia, the question of whether an obligation, imposed by a right holder on a broadcaster, not to supply decoding devices outside the territory covered by the exclusive licence was contrary to Article 101 TFEU. The ECJ reiterated the principle laid down in *Coditel II*, and noted that nothing in the Satellite and Cable Directive prevents the award of exclusive territorial licences.<sup>33</sup> At the same time, it held that the case did not concern the award of such licences, but only the 'additional obligations' concerning the supply of decoding devices.<sup>34</sup> The Court referred to the line of case law pursuant to which agreements limiting parallel trade are in principle restrictive of competition by object (and cited two cases involving tangible goods incorporating patent rights). It held that the restrictions at hand breached Article 101(1) TFEU by their very nature, and that the right holder had not put forward any argument suggesting that the 'economic and legal context' in which the agreement had been concluded justified a different outcome.<sup>35</sup>

While the ruling remained formally confined to the circulation of decoding devices, it seemingly extended to broadcasting services the logic applied in past cases to physical goods. The Court suggests that licensees may not be given 'absolute territorial exclusivity' by right holders. In practice, this position leads to something akin to the extension of the exhaustion doctrine to broadcasting via satellite.<sup>36</sup> If it is not possible for the

<sup>29</sup> Ibid, para 17.

<sup>30</sup> Ibid, para 19.

<sup>31</sup> See Art 1(2)(b) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15, pursuant to which 'The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.'

<sup>32</sup> See the Report from the Commission Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

(COM/2002/0430 final), where the Commission states that '[c]omplete application of the principle of the Directive, which involves moving beyond a purely national territorial approach, should therefore be encouraged in order to allow the internal market to be a genuine market without internal frontiers for rightholders, operators and viewers alike'.

<sup>33</sup> *Murphy* (n 5) para 138.

<sup>34</sup> Ibid, para 141.

<sup>35</sup> In para 143, the ECJ notes that 'FAPL and others and MPS have not put forward any circumstance falling within the economic and legal context of such clauses that would justify the finding that, despite the considerations set out in the preceding paragraph, those clauses are not liable to impair competition and therefore do not have an anticompetitive object'.

<sup>36</sup> See in this sense the views expressed by Batchelor and Jenkins (n 7).



author and the broadcaster to provide the technical means to preserve the essence of the right subject to the licence (to authorise any communication to the public), then such right would cease to be exclusive in the strict sense of the word and its essential function ('to require fees for any showing', to use the expression found in *Coditel I*) undermined. To the extent that the Satellite and Cable Directive did not question the existence of national rights (but rather sought to strengthen them), this outcome is not uncontroversial.

This part of the judgment is also difficult to reconcile with *Coditel II*. The award of an exclusive territorial licence may itself (that is, in the absence of 'additional obligations') amount to 'absolute territorial exclusivity' in a particular legal and technological context.<sup>37</sup> Accordingly, the same degree of protection that, in one case, amounts to a serious violation of Article 101(1) TFEU<sup>38</sup> is deemed unproblematic (in that it is understood to be the very consequence of the existence of the intellectual property right) in the other. One possible reading of *Murphy* is that it implicitly overruled *Coditel II* and that the principles applying to the circulation of physical goods would now extend to restraints aimed to preserve the 'essential function' of the right of communication to the public.<sup>39</sup> To the extent that the principle set out in *Coditel II* was expressly confirmed in the judgment, however, it may also be argued that the Court saw the two rulings as compatible with one another.<sup>40</sup>

### C. Summary: an attempt to reconcile *Coditel II* and *Murphy*

There is a long line of case law based on the principle whereby the contractual restraints that are necessary and proportionate to achieve the objectives of an agreement that is itself efficiency-enhancing (or pro-competitive, if one prefers) fall outside the scope of Article 101(1) TFEU. In accordance with *Pronuptia*, contractual arrangements that seek to preserve the know-how of the franchisor and the uniformity and reputation of the franchising system are not restrictive of competition.<sup>41</sup>

Other measures, such as vertical price-fixing, would however be caught by Article 101(1) TFEU, even in such a context.<sup>42</sup> Similarly, the obligations imposed on the members of a purely qualitative selective distribution system escape the prohibition altogether provided that they are proportionate and that the product in question justifies the setting-up of the system.<sup>43</sup> As *Pierre Fabre* suggests, on the other hand, restraints such as a ban on online sales will normally go beyond what is necessary to achieve the objectives of an agreement of this kind.<sup>44</sup> In *Nungesser*, concerning the commercial exploitation of seeds protected by plant breeders' rights, the ECJ distinguished between 'open' and 'closed' exclusive licences. While the first were deemed to fall outside the scope of Article 101(1) TFEU, the second were found to be disproportionate insofar as they granted 'absolute territorial protection' to the licensees.<sup>45</sup>

One could try to draw a similar distinction in the context of broadcasting rights. In line with *Coditel II*, the award of an exclusive territorial licence would as such escape the prohibition set out in Article 101(1) TFEU to the extent that it is necessary to preserve the 'essential function' of the copyright. Such outcome would be dictated the 'economic and legal context' (by reference to the formula found in *Murphy*) in which territorial exclusivity is introduced. However, any 'additional obligations' would be disproportionate insofar as they would reinforce the effects that naturally result from such an arrangement. From this perspective, 'absolute territorial exclusivity' would be the inevitable consequence of the existence of the intellectual property rights, and only justifiable in that context.

If one examines the case law of the ECJ, there is some support for such an interpretation. The very few judgments in which an agreement aimed at prohibiting or limiting parallel trade has not been found to restrict competition by object seem to involve the exploitation of intellectual property rights. In addition to *Coditel II*, *Erauw-Jacquery* is of particular relevance. In that case, the ECJ held that an export prohibition imposed on a licensee did not infringe Article 101(1) TFEU as it was

37 This fact is noted by Alexiadis and Wood (n 7) when they claim that *Murphy* is not technologically neutral.

38 According to the Court, moreover, this restraint cannot be justified under Art 101(3) TFEU. See *Murphy* (n 5) para 145.

39 In Chapter 10 of Faull and Nikpay (n 9), the authors claim that 'the better interpretation [of *Murphy*] is perhaps that the Court is bringing copyright more into line with these internal principles – although exclusive territorial licensing could be justifiable, absolute protection cannot'.

40 One should note in this regard that, unlike the Court, AG Kokott did not even refer in her Opinion to the principle set out in *Coditel II* and boldly stated that '[t]here is therefore no reason to treat such agreements any differently from agreements intended to prevent parallel trade'. See *Murphy* (n 5), Opinion of AG Kokott, paras 243–251.

41 Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353, paras 15–17.

42 Ibid, para 25.

43 Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875.

44 Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-9419.

45 Case 258/78 *LC Nungesser KG and Kurt Eisele v Commission* [1982] ECR 2015.

found to fall within the scope of the intellectual property right covered by the agreement (in particular, it was deemed necessary to preserve the value of the innovation).<sup>46</sup> If *Murphy* is interpreted in this light, the clauses concerning the supply of decoding devices would be disproportionate to the extent that they relate to the distribution of physical goods and not the intellectual property as such. While this looks like a reasonable dividing line, there is something formalistic about it. One may convincingly argue that limiting the supply of decoding devices is necessary to preserve the 'essential function' of the copyright and as such ancillary to the main objective of the agreement. Interestingly, the ECJ never engaged with this question in *Murphy*, as it was not raised by the parties in the context of Article 101(1) TFEU. The analysis under Article 56 TFEU, on the other hand, revolved around the 'subject-matter' of the right (as opposed to its 'essential function') and the adequate level of remuneration.<sup>47</sup>

### III. Legal and economic issues raised by the investigation

#### A. The restraints targeted by the investigation and their status under Article 101(1) TFEU

The pay TV statement is not explicit about the restraints that, in the Commission's view, are (at least potentially) contrary to Article 101(1) TFEU. The document refers to agreements that provide for 'absolute territorial exclusivity' and to 'restrictions that prevent the selling of the content in response to unsolicited requests from viewers located in other Member States'. One interpretation of the statement is that it simply intends to examine whether Hollywood major studios restrict by contract the supply of decoding devices in other Member States, which, after *Murphy*, is in principle in breach of Article 101(1) TFEU. The wording of the statement suggests, however, that other restraints with similar effects are being targeted.

If the scope of the pay TV investigation is indeed broader, the question arises of what criteria the Commission might use to identify the problematic restraints. In this sense, it is not clear whether the authority intends to

distinguish between exclusive territorial licences as such, on the one hand, and 'additional obligations', on the other; or whether, instead, it takes the view that *Murphy* has effectively overruled *Coditel II* and that licences themselves can be challenged insofar as they give 'absolute territorial exclusivity' to broadcasters. In the former scenario, it would be necessary to define a set of criteria to distinguish between the obligations that are necessary to preserve the 'essential function' of the copyright and those that are disproportionate relative to that objective.

The explicit reference to portability in the pay TV statement suggests that the Commission may be contemplating challenging exclusive territorial licensing agreements as such, at least in the way that they are currently implemented.<sup>48</sup> The fact that an end-user is unable to access a pay TV service from a laptop in other Member States is indeed the very consequence of the limited territorial scope of licences, not of an 'additional obligation' reinforcing their effects. Unlike the case where an end-user travels abroad with the decoding equipment to access the satellite services of its home provider, this is a situation that requires in principle a subscription in the country of destination. In this same vein, it must be noted that, to the extent that it concerns access to content via the Internet, the instance described by the Commission would not be covered by the Satellite and Cable Directive.

The analytical framework at which the statement hints leads to the same conclusion. The document does not seem to distinguish between the licences as such and 'additional obligations' imposed on top of them, but between agreements that restrict 'active' and/or 'passive' sales. Accordingly, territorial licensing would be acceptable only to the extent that it protect licensees against 'active selling' by licensees established in other territories. This approach would amount to transposing to this context the principles that apply to the assessment of vertical restraints within the meaning of Regulation 330/2010<sup>49</sup> and technology transfer agreements within the meaning of Regulation 316/2014.<sup>50</sup> The concept of 'passive sale' refers to instances where the provider of a good or service responds 'to unsolicited requests from individual customers including delivery of goods or services to such customers', as opposed to instances where it actively approaches them.<sup>51</sup> An agreement that protects resellers or licensees against

46 Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC* [1988] ECR 1919, paras 9–11.

47 *Murphy* (n 5), paras 104–121. In para 106, the ECJ held that 'derogations from the principle of free movement can be allowed only to the extent to which they are justified for the purpose of safeguarding the rights which constitute the specific subject-matter of the intellectual property concerned'.

48 In the pay TV statement, Almunia clarifies that the investigation does not call 'into question the possibility to grant licenses on a territorial basis'.

This position does not necessarily imply that exclusive territorial licensing would survive as currently understood. As explained in detail below, the statement suggests that the degree of territorial protection given to licensees could be limited in line with the principles applying to vertical restraints and to technology transfer agreements.

49 See n 13.

50 Ibid.

51 Guidelines on vertical restraints [2010] C130/1, para 51.

both active and passive sales from other resellers or licensees is not covered by either of the Regulations.<sup>52</sup> According to the Guidelines, such a restraint would generally be considered to restrict competition by object. As such, its compatibility with Article 101 TFEU would in principle have to be established under the third paragraph of the provision.<sup>53</sup>

Assuming that ‘absolute territorial exclusivity’ is a restriction of competition by object may be problematic if such conclusion is reached mechanically and without considering the ‘economic and legal context’ in which the agreement is concluded. This step of the analysis was covered only very partially by the Court in *Murphy* and is one that would require a comprehensive assessment in the context of a sectoral investigation. As explained at length above, it is difficult to liken an exclusive territorial licence to other object restrictions since the very purpose of exclusivity is to preserve the ‘essential function’ of the copyright. In such a context, the agreement remains within the boundaries of the intellectual property right to which it relates. This is a key difference with Regulation 316/2014 and one that casts doubts about the appropriateness of extending the active/passive selling divide to broadcasting activities. In the context of vertical restraints and technology transfer agreements, the notion of passive selling is only relevant to the extent that the intellectual property rights have been exhausted (in the case of works protected by copyright, in particular, when the right of distribution has been exercised).<sup>54</sup> The said notion is only relevant, in other words, where the scope of the agreement is broader than that of the intellectual property right at issue. It is interesting to note that the Commission (at a time when it was markedly

more formalistic in its approach<sup>55</sup>) raised an argument based on this very logic in *Erauw-Jacquery*. It claimed before the ECJ (which agreed) that the export restriction at stake in the case did not infringe Article 101(1) TFEU, insofar as it fell ‘within the ambit’ of the intellectual property right.<sup>56</sup>

Beyond intellectual property issues, it is notorious that exclusivity is pervasive in dealings between right holders and broadcasters. Far from an exception, it seems to be an industry-wide feature. The economic logic behind the marked preference for exclusive licensing—as well as the reason why rights are sometimes sold on a non-exclusive basis—is well identified in theory.<sup>57</sup> A look at the evolution of pay TV activities in Europe moreover shows that the rise and success of operators has been very much influenced by their ability to acquire and exploit the exclusive rights to premium content, including Hollywood blockbusters. Exclusivity is valued by broadcasters to such an extent that it is the very reason why rivalry between satellite pay TV providers was as short-lived as it was destructive across the continent in the late 1990s–early 2000s. In all of the Member States covered by the investigation, a monopolistic or quasi-monopolistic TV operator emerged after a period of unsustainable cut-throat competition.<sup>58</sup> If there is something that the experience of the past 20 years has shown—and that has only been confirmed with the entry of telecommunications operators in the pay TV segment—is that, in markets for the acquisition of television rights, competition typically takes place ‘for’ the market rather than ‘within’ it.<sup>59</sup> These are markets, by reference to Paul Klemperer’s words, of the ‘winner-takes-all’ type.<sup>60</sup>

52 See Art 4(b) of Regulation 330/2010 and Art 4(1)(c)(ii) and 4(2)(b) of Regulation 316/2014 (n 13).

53 See paras 60–63 of the Guidelines vertical restraints (n 51), where the Commission explains that ‘Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature and therefore fall outside Article 101(1)’.

54 See in this sense Guidelines on the application of Art 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] C89/3.

55 See in this sense Valentine Korah, ‘EEC Competition Policy – Legal Form or Economic Efficiency’ (1986) 39 Current Legal Problems 85; and Barry Hawk, ‘System failure: Vertical Restraints and EC Competition Law’ (1995) 32 Common Market Law Review 973. To put things in perspective, the Commission intervened in *Coditel II* and argued that the exclusive territorial licensing agreement was restrictive by object within the meaning of Art 101(1) TFEU. According to the authority, this conclusion followed from the fact that an exclusive licensing agreement limits the ability of the licensor to offer the same content in the territory in question and hinders the ability of licensees based in other territories to offer the same content (and to the extent that it is the case, it could be said to be aimed at restricting potential competition).

56 *Erauw-Jacquery* (n 46), para 9.

57 See for instance Mark Armstrong, ‘Competition in the Pay-TV Market’ (1999) 13 Journal of the Japanese and International Economies 257 and

David Harbord and Marco Ottaviani, ‘Anticompetitive Contracts in the UK Pay-TV Market’ (2002) 23 European Competition Law Review 122.

58 Competition between Sky and BSB proved to be very short-lived following the rapid collapse of the latter. For an account, see Mark Williams, ‘Sky Wars: The OFT Review of Pay-TV’ (1997) 18 European Competition Law Review 214. A similar process took place in Germany following the initial reluctance of the Commission to allow a merger to monopoly. See ‘Bundeskartellamt clears the takeover of Premiere by KirchGruppe’, 14 avril 1999, available at [www.bundeskartellamt.de](http://www.bundeskartellamt.de). The merger leading to the emergence of a quasi-monopoly in the Spanish pay TV segment was cleared by a Decision of the Council of Ministers of 29 November 2002, *Sogecable/Canal Satélite Digital/Vía Digital* BOE (2003) n 12. A similar operation concerning the Italian market was cleared by the Commission in 2003—see *NewsCorp/Telepiù* (Case COMP/M.2876) Commission Decision of 4 April 2003 [2004] OJ L110/73. The same move was cleared by the French authorities in 2006. See the Letter of the Minister of Finance of 30 August 2006 BOCCRF n 7 bis of 15 September 2006.

59 If there is competition at the downstream level, this is typically the consequence of a wholesale licensing agreement (or a regulatory obligation with the same effects) concluded between the exclusive licensee and its retail competitors.

60 Paul Klemperer, ‘Bidding Markets’ (2007) 3 Journal of Competition Law and Economics 1.

It is unclear from the pay TV statement whether sufficient importance has been attached to this market feature, the implications of which were not addressed in *Murphy*.<sup>61</sup> The Commission claims that the alleged restraints are problematic insofar as they prevent cross-border competition between providers. In this sense, it is assumed in the document that competition 'within' the market that would have existed is being restricted. To the extent that the long-standing dynamics of the industry suggest otherwise, there are reasons to believe this is not the case. At the very least, it is open to question whether, in such a context, the agreement infringes Article 101(1) TFEU by its very nature. The fact that competition takes place 'for' the market, and that contractual steps are taken to adapt to the prevailing market features, does not seem to be a sufficiently compelling reason to intervene, or at least to claim that firms are behaving in a patently anticompetitive manner.

The marked preference for exclusivity in dealings between right holders and broadcasters strongly suggests that the contested restraints are a source of efficiency gains. A pay TV operator may not be willing to invest in the development of a multichannel service if it does not have the guarantee that it will be the only one offering the product. Accordingly, these agreements would be an effective means to address the free-riding problem, which is acknowledged by the Commission in the two above-mentioned sets of Guidelines.<sup>62</sup> Exclusivity may also be beneficial from the perspective of the right holder. It may indeed be an effective means to ensure that the broadcaster is genuinely committed to the promotion of the product and to tailoring it to the local audience.<sup>63</sup> The very fact that territorial restrictions intend to preserve the 'essential function' of the copyright should be seen as an efficiency gain in itself. As the ECJ explained in *Nungesser* and *Erauw-Jacquery*, so long as the contractual restraints found in an agreement remain within the scope of the relevant intellectual property right, they can be presumed to preserve the necessary incentives to engage in inventive (and, by analogy, creative) activities and ensure an appropriate reward for such investments.<sup>64</sup> While this factor

alone may not be decisive (distribution agreements providing for 'absolute territorial protection' also have the potential to generate efficiencies), it further suggests, when considered together with the above, that the compatibility of exclusive territorial licensing with Article 101(1) TFEU is better established in light of the likely effects of an agreement in the context in which it is implemented.

## B. The goals of the investigation

As already mentioned, it would seem that the Commission would like to see pay TV operators compete with one another across borders for subscribers. Because this idea reflects a view of rivalry that is not easily reconciled with the observable market dynamics, it is not clear, from a policy-making standpoint, whether there are reasons to believe that intervention will lead to the outcome envisioned in the statement (the emergence of a form of rivalry 'within' the market which is currently indirect in that it seems to depend on a grey market of third-party providers). From a legal perspective, the question relates to the assessment of the counterfactual (that is, to the assessment of the conditions of competition in the absence of the contentious restraints) under Article 101(1) TFEU. As the ECJ made clear in *Société Technique Minière*, it is necessary to determine whether the agreement restricts competition that would have existed in its absence.<sup>65</sup> One would therefore expect the Commission to show that the observed absence of competition 'within' the market is the consequence of the contentious restraints.

The experience of past cases examined by the Media Unit within DG Comp shows that the absence of competition 'within' the market sometimes has a compelling economic logic that cannot be ignored. In cases concerning the exploitation of television rights for premium football content, the Commission has introduced remedies seeking to avoid the acquisition of all rights by a single broadcaster. Starting with *UEFA Champions League*, it requires right holders to sell their content in different 'packages' so as to increase the chances that more than a single operator would be able to broadcast the tournament,

61 This issue was not discussed by the ECJ under Art 101(1) TFEU in *Murphy* (n 5). In paras 114–116, the Court examined whether exclusivity could be justified on account of the fact that the price paid for the rights included a substantial 'exclusivity premium'. This argument was rejected insofar as it gives rise to 'artificial price differences' and leads to the partitioning of the internal market. The idea that competition 'within' the market had been short-lived in the past or that the market dynamics are prone to 'winner-takes-all' scenarios was, however, not discussed explicitly in the judgment.

62 See Guidelines on vertical restraints (n 51), para 107 and Guidelines on the application of Art 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (n 54), para 203.

63 See in this sense Gregor Langus, Damien Neven, and Sophie Poukens, 'Economic Analysis of the Territoriality of the Making Available Right in

the EU', study prepared for DG Markt, available at [http://ec.europa.eu/internal\\_market/index\\_en.htm](http://ec.europa.eu/internal_market/index_en.htm); and Suzanne Rab and Alison Sprague, 'The Red White and Blue: Mrs Murphy revisited', available at <http://www.ceg-global.com/>.

64 *Nungesser* (n 45), para 55 and *Erauw-Jacquery* (n 46), para 10.

65 See Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, where the ECJ held that 'the competition in question [that is, within the meaning of Article 101(1) TFEU] must be understood within the actual context in which it would occur in the absence of the agreement in dispute'. See also Case T-328/03 *O2 (Germany) GmbH & Co. OHG v Commission* [2006] ECR II-1231, paras 74–79 and Guidelines on the application of Art 81(3) of the Treaty [2004] OJ C101/97, para 18.



thereby creating competition ‘within’ the market.<sup>66</sup> What became immediately apparent when the same policy was extended to national football championships (the first decision in this sense being *Bundesliga*<sup>67</sup>) is that the forces resulting in the emergence of monopsony positions in these markets are powerful and very difficult to alter. The segmentation of rights, alone, did not prevent the acquisition of all of the packages by a single provider (often the monopolistic or quasi-monopolistic incumbent pay TV operator, but sometimes a new entrant).<sup>68</sup> In its 2006 *Premier League* decision, the Commission took a step further and directly forced competition ‘within’ the market by introducing the so-called single buyer rule, pursuant to which the packages would have to be acquired by at least two providers.<sup>69</sup> This move by the Commission saw the emergence of Setanta, a small pay TV operator competing with the incumbent. It would soon become clear that this attempt would be short-lived, as the new entrant had to leave the market before the full term of the three-year agreement.<sup>70</sup> Subsequent developments show that competition ‘within’ the market through the ‘single buyer rule’ may not be successfully maintained over time even when a powerful incumbent telecommunications operator acquires a portion of the rights, as Orange did in its home market in 2008.<sup>71</sup> The French provider changed its business strategy after a first attempt to become an active player in acquisition markets and did not take part in subsequent auctions organised by the national league.<sup>72</sup>

The experience of intervention on markets for the acquisition of rights to premium content is also valuable in that it suggests that competition ‘for’ the market is not necessarily any less meaningful than other manifestations of rivalry. When there are two pay TV operators that are sufficiently well established (or where there is a powerful new entrant), they may compete effectively in every new auction to acquire the whole of the rights. Either from a legal or from a policy-making standpoint, there seems to be no apparent reason why one form of rivalry should be favoured over others, in the same way

that there it would be unconvincing to claim that price competition should be favoured over rivalry based on quality or innovation. Arguing that authorities, when preserving the competitive process, should adapt enforcement to, and understand, the features of the market seems uncontroversial.

The *CISAC* case offers equally valuable insights about the potential of remedial intervention to implement a particular vision of competition. In that case, as in the pay TV industry, the internal market was partitioned along national borders. According to the Commission, the absence of cross-border competition was not the consequence of the dynamics of the sector but of a concerted practice among copyright collecting societies aimed at limiting the territorial scope of activity of each of them. When the decision was challenged, the General Court (‘GC’) noted that, in light of the nature of the economic activity (and in particular the need to ensure the effective monitoring and enforcement of the intellectual property rights), there was no reason to assume that collecting societies had sufficient incentives to enter one another’s territories. At the very least, the GC noted, the alternative explanations offered by the applicants were as plausible as the theory advanced by the Commission.<sup>73</sup>

As can be seen, remedial action in the context of the pay TV investigation may very well turn out to be plain ineffective to achieve the objectives envisioned by the Commission. As in *CISAC* or in *Premier League*, merely removing from the licensing agreements explicit references to the supply of decoding devices to end-users based in other Member States (and similar ‘additional obligations’) may not be enough to alter market conditions if pay TV operators lack the incentive to offer their services across borders (the number of potential subscribers may be too low in relation to the costs that the expansion of the support and/or commercial network would entail; broadcasters may fear the reaction of pay TV operators in other territories). This is a possibility that the Commission considered in its Report on the

66 *UEFA Champions League* (n 15), paras 32–39.

67 *Joint selling of the media rights to the German Bundesliga* (n 15).

68 In the aftermath of the *UEFA Champions League* decision, Canal+ (the incumbent pay TV operator in France) acquired all the packages offered by the national league; see ‘Canal+ rafle tout’ *L’Equipe* (Boulogne-Billancourt, 10 December 2004). The experience of the past decade provides several interesting examples showing that new entrants can sometimes successfully outbid incumbents. These examples include that of Belgacom, discussed below; that of Mediaset, which successfully outbid Sky Italia (until then a quasi-monopolistic provider) in 2006 (the latter example, which led to intervention by the Italian competition authority, is discussed in Pablo Ibáñez Colomo, ‘Saving the Monopsony: Exclusivity, Innovation and Market Power in the Media Sector’, College of Europe Research Papers in Law no 7/2006, available at [www.coleurope.eu](http://www.coleurope.eu)); and that of Arena, a consortium of two cable operators which acquired the rights for three

seasons in 2005 (see in this sense Harald Evers, ‘Federal Cartel Office Approves Co-operation Between Arena and Premiere’ *IRIS* 2007-8:13, available at <http://merlin.obs.coe.int/>).

69 *Joint selling of the media rights to the FA Premier League* (n 15), para 32.

70 ‘Heroic Failure’ *The Economist* (London, 25 June 2009).

71 ‘Droits TV: Orange ne diffusera plus la Ligue 1’ *20 Minutes* (Paris, 3 September 2010).

72 In the two auctions, Canal+ acquired the bulk of the rights offered by the French football league. See Alexis Delcambre, ‘Canal+ sort vainqueur de l’appel d’offres pour les droits de diffusion de la Ligue 1’ *Le Monde* (Paris, 5 April 2014).

73 Case T-442/08 *International Confederation of Societies of Authors and Composers (CISAC) v European Commission* [2013] (GC, 12 April 2013).

application of the Cable and Satellite Directive.<sup>74</sup> In a study produced for DG Markt prior to the opening of the pay TV investigation, Plum Consulting acknowledged that the development of cross-border competition following *Murphy* is 'highly uncertain' even if passive sales were to be allowed.<sup>75</sup>

In view of the above, it cannot be excluded that the Commission, in order to achieve effective cross-border rivalry, requires remedies that do not simply proscribe certain restraints but that amount to the imposition of positive obligations on the film studios and/or the pay TV operators. It would in fact seem that some of the concerns identified in the statement could only be addressed in practice by doing so. The portability of pay TV subscriptions is a clear example in this regard. As explained above, the lack of availability of this service is not so much the consequence of a contractual restraint but of the fact that there is no such thing as an EU-wide copyright title. Probably, the only way in which it could be effectively introduced is by altering existing agreements and explicitly providing for such an option.<sup>76</sup> Remedial action along such lines could meet with controversy as it could be perceived to be disproportionate relative to the alleged infringement, or not obviously related to it. There is indeed a qualitative difference—and a logical disconnect—between prohibiting a certain line of conduct and dictating the conditions of competition. This is a theme that has attracted the attention of many commentators in the past years. It has been argued—and there are attempts to study the issue systematically—that intervention is sometimes driven not so much by an attempt to address anti-competitive practices but to regulate the market (by which it is generally meant that the purpose of intervention is to alter the competitive process to achieve a particular outcome or to shape the market structure so as to conform to a pre-conceived vision).<sup>77</sup>

### C. The implications of the investigation

The exact legal and economic consequences of remedial action cannot be anticipated at this stage. The Commission

is careful to clarify that the purpose of the investigation is not to require studios to license their rights on a pan-European basis and that territorial licensing is not as such being called into question. The fact that such far-reaching remedies are in principle excluded does not mean that intervention will be without consequences. Unintended effects seem inevitable if one considers that the existing arrangements appear to be both a source of efficiency gains and a rational adaptation to the features of the market. If the ability of the pay TV operator to address free riding issues is reduced as a result of the increase in 'passive sales', the right holder may change the conditions offered to other broadcasters. In order to limit the attractiveness of the cross-border supply of services, the right holder may for instance limit the language options that are given to other licensees, or limit the extent of the rights covered by the agreement. A look at the aftermath of *Murphy* suggests that these effects are not remote or speculative. As observed by Van Rompuy, following the ruling pay TV operators in Member States other than the UK are no longer able to offer an English language option. Moreover, it would seem that the number of games these licensees are able to watch has also been reduced.<sup>78</sup> The consequences of administrative action against football associations suggest similar conclusions. A paradoxical consequence of the introduction of the so-called single buyer rule in the *Premier League* Decision is that end-users were required to subscribe to two different pay TV services to gain access to all the televised games of the English football championship.

There is no reason to assume that the detrimental effects of intervention on the range and quality of services will be necessarily outweighed by any price reduction that might result from the emergence of competition 'within' the market. The ability to segment markets along national borders by means of various legal and technological devices, however inimical to market integration, allows right holders to price discriminate based on end-user's willingness to pay in the

74 As explained by the Commission, 'even if a viewer located outside the Member State in which transmission is organised is prepared to make the requisite payment, they often receive a negative response from the broadcasting organisation concerned, as the latter does not hold the copyright relating to broadcasting in the Member State in question. The absence of a transfer of rights may result in the absence of an economic interest on the part of the broadcasting organisation in ensuring that its programmes are broadcast outside its national market (given the reduced audience) or in the absence of a willingness to transfer on the part of the rightholders'.

75 Plum Consulting, 'The economic potential of cross-border pay-to-view and listen audiovisual media services', study prepared for DG Markt, available at [http://ec.europa.eu/internal\\_market/index\\_en.htm](http://ec.europa.eu/internal_market/index_en.htm).

76 For a discussion of the contractual adjustments that would be necessary to introduce portability, see Oliver Bomsel and Camille Rosay, 'Why territories matter—Vertical restraints and portability in audiovisual media services' (ParisTech Chair of Media and Brand Economics, October 2013), available at <http://www.letsgoconnected.eu>.

77 See in particular Niamh Dunne, 'Commitment Decisions in EU Competition Law' (2014) 10 Journal of Competition Law and Economics 399.

78 Ben Van Rompuy, 'Premier League fans in Europe worse off after Murphy judgment' (Kluwer Competition Law Blog, 6 May 2014) <http://kluwercompetitionlawblog.com>.

different territories.<sup>79</sup> When this possibility disappears or is significantly undermined, the new scenario may not benefit end-users, in the sense that it may be neutral and even detrimental for some of them.<sup>80</sup> If the effects of intervention on prices are uncertain, and the most immediate precedents suggest that a negative impact on the quality of the services in less profitable areas is likely, then it is difficult to see what might be driving administrative action. This is so unless the Commission contemplates introducing very specific price and/or quality requirements in agreements between right holders and pay TV operators. While competition authorities are generally reluctant to provide for such—overtly regulatory—remedies, this is not to be excluded, in particular in light of the evolution of the field in recent years.<sup>81</sup> Remedial action in this sense is likely to meet with the criticism, outlined above, about the use of competition law as a device to shape market structures.

#### IV. Conclusions

Many uncertainties surround the pay TV investigation at this stage. The extent to which intervention—if it takes place eventually—will alter the features of existing markets is not yet clear. Because of their importance, however, it seems justified to outline the legal issues raised. The statement shows that the implementation of the market integration objective lacks clear boundaries. As discussed above, the principle whereby agreements ‘aimed at prohibiting or limiting parallel trade’ are restrictive of competition by object within the meaning of Article 101(1) TFEU is not an absolute one. The legal outcome may indeed change in a particular case in light of the ‘economic and

legal context’ in which the agreement in question is concluded. However, the existing case law and administrative practice provide for very little specific guidance in this regard. The pay TV investigation is a good opportunity to inject greater rigour to the analysis of this question. The fact—undisputed and uncontroversial—that market integration is worthy of protection in and of itself cannot mean that the objective should not be implemented in a systematic and predictable manner.

The exact purpose of intervention in the pay TV segment is yet to be clarified by the Commission. The inability of broadcasters to offer their services across borders was perceived to be the inevitable consequence of the limited territorial scope of intellectual property rights in *Coditel II* and is now understood to be the very concern justifying administrative action. The implications of this shift in policy are potentially far-reaching. To the extent that competition between broadcasters takes place ‘for’ the market, one is tempted to assume that taking contractual steps to preserve the exclusivity of the rights is a logical adaptation to the features of the industry and not a breach of Article 101(1) TFEU—or not the equivalent of a restriction by object. By the same token, it is unclear why intervention to introduce a form of rivalry that contradicts the observable dynamics would be justified, at least so if one assumes that the purpose of competition rules is not to alter the workings of the relevant market but to preserve the competitive process.

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79 For an analysis applied to the exclusive licensing of broadcasting rights, see ‘Goodfellas? The European Commission investigates pay-TV film deals’ (Oxera, March 2014) [www.oxera.com](http://www.oxera.com).

80 See in particular Damien Geradin and Nicolas Petit, ‘Price Discrimination under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?’ (2006) 2 *Journal of Competition Law and Economics* 479.

81 See for instance in this sense the commitments offered in *Rambus* (Case COMP/38.636) Commission Decision of 9 December 2009 [2010] C30/17; *Standard & Poor’s* (Case COMP/39.592) Commission Decision of 15 November 2011 [2012] C32/8; *Visa MIF* (Case AT.39398) Commission Decision of 26 February 2014 [2014] OJ C147/7.