

Copyright reform against the background of Pay TV and Murphy

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Key points

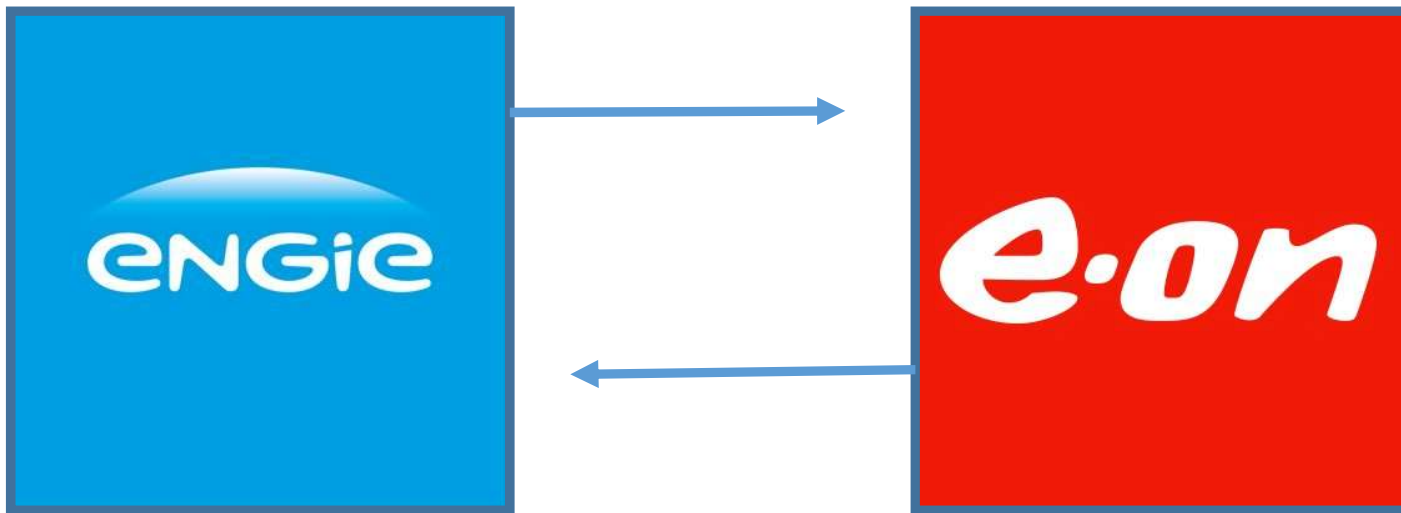
- 1. The regulatory framework impacts competition law analysis**
→ The copyright system and competition law influence one another
- 2. EU competition law is enforced by national courts and authorities**
→ Lack of action by the Commission does not rule out intervention
- 3. Primary EU law takes precedence over secondary EU law**
→ 'Freedom of contract' cannot ignore Article 101 TFEU

Competition law analysis and the regulatory framework

- EU Competition law must consider the ‘economic and legal context’ of which a practice is part
- The analysis of the legal context behind a practice may shed light on its object and effect
 - **Counterfactual:** This analysis may reveal that the practice is not capable of restricting competition that would otherwise have existed
 - This may be the case where, for instance, there are no ‘real, concrete possibilities’ for the parties to enter each other’s market

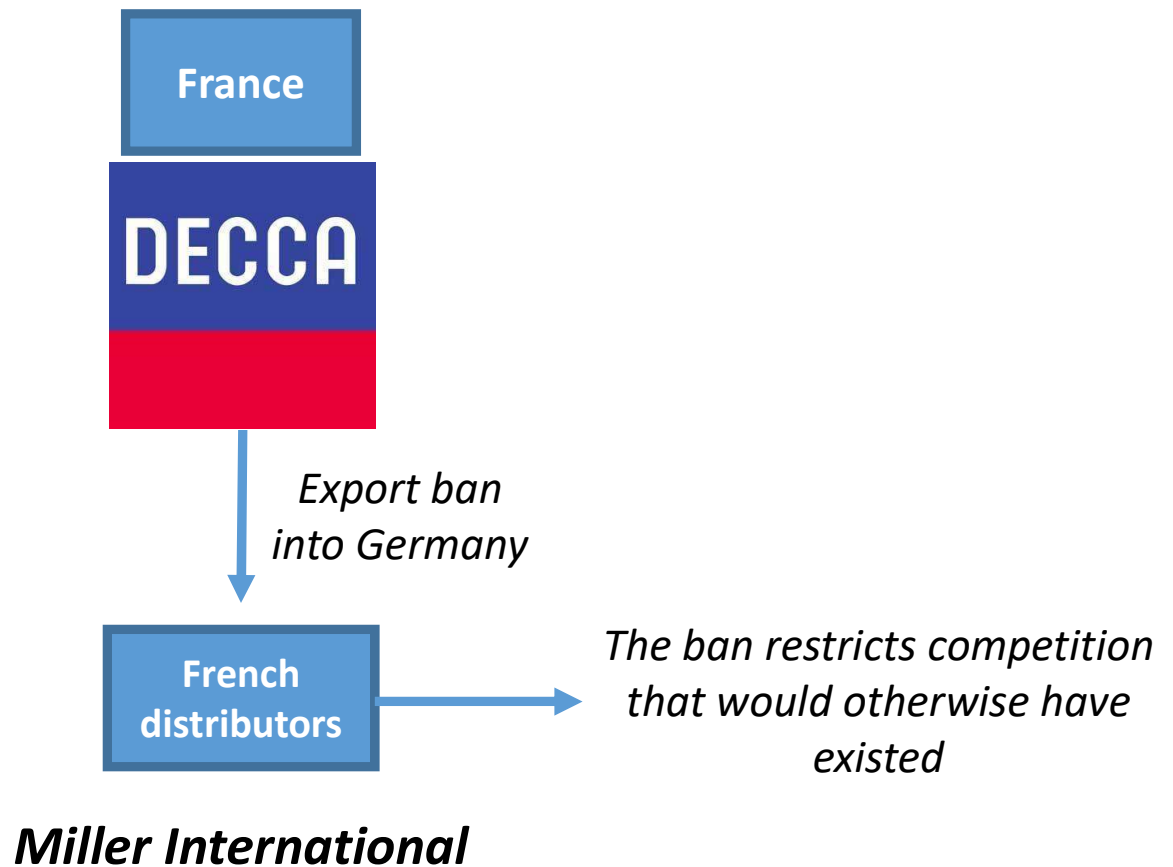
Competition law analysis and the regulatory framework

A de facto monopoly precludes competition, even absent the agreement

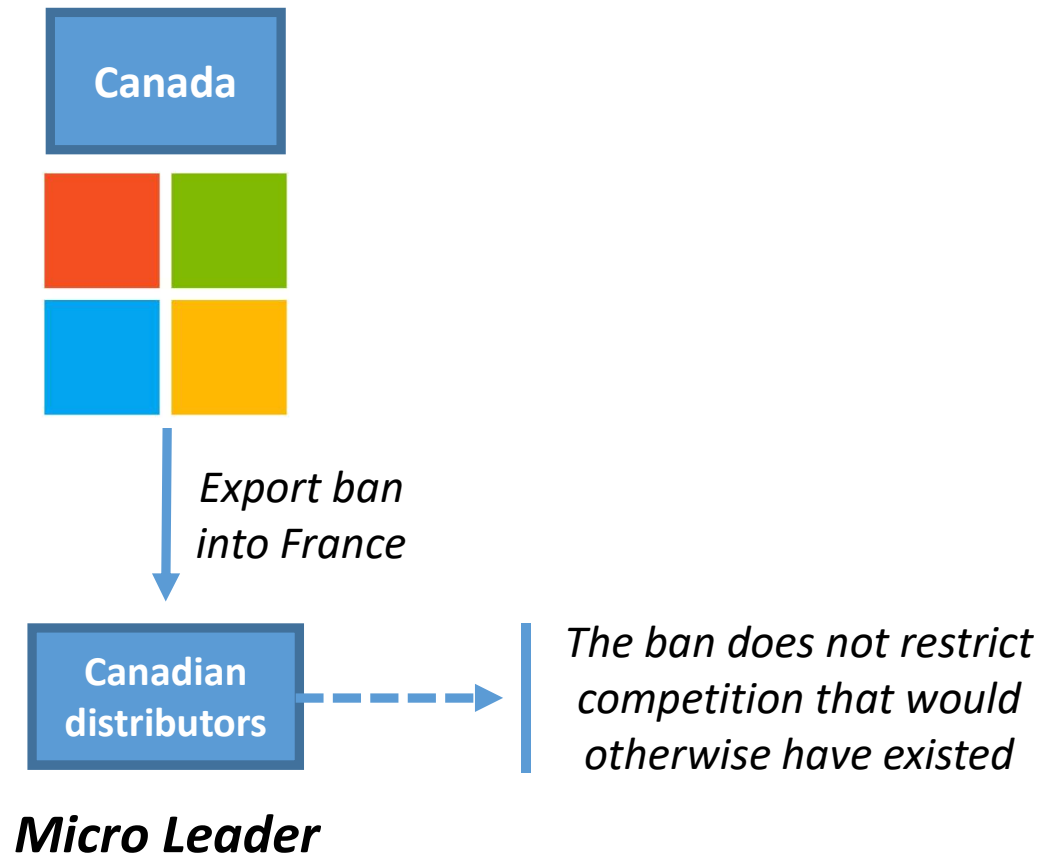


E.On Ruhrgas

Competition law analysis and the regulatory framework

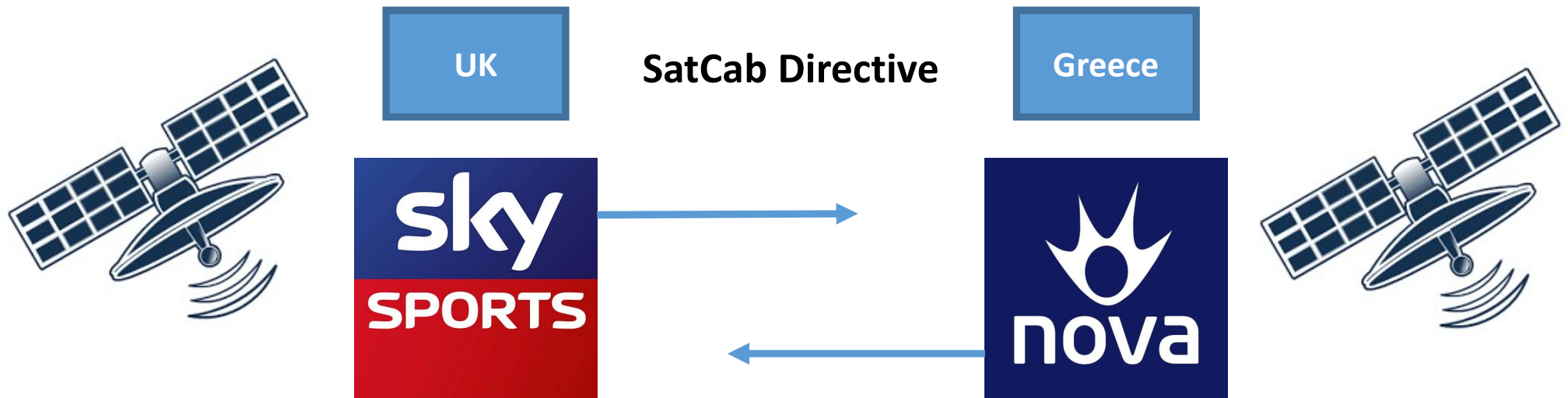


Competition law analysis and the regulatory framework



Competition law analysis and the regulatory framework

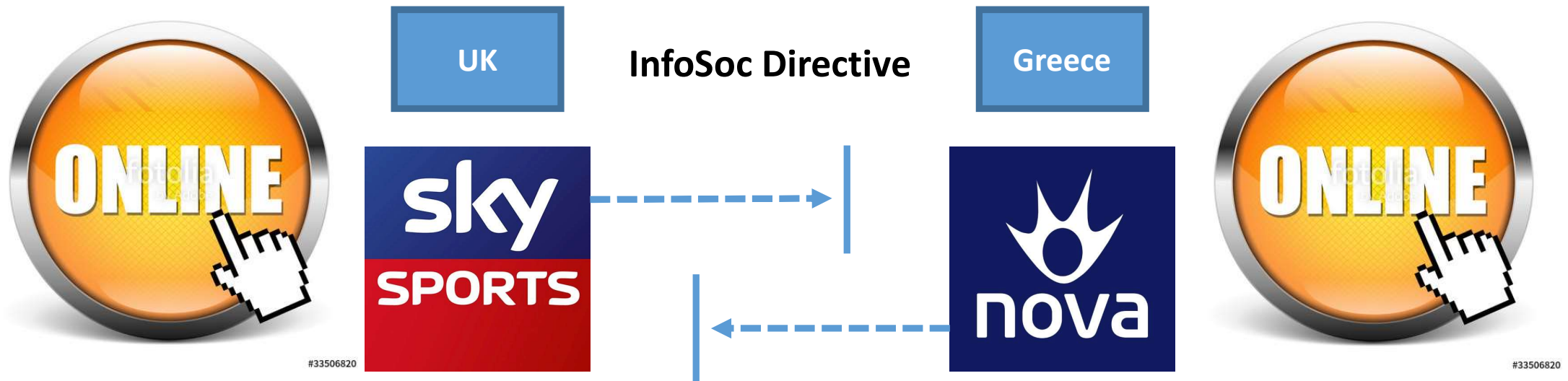
Under the 'country of origin' principle, cross-border competition between satellite broadcasters is possible



FA Premier League (Murphy)

Competition law analysis and the regulatory framework

Under the 'country of destination' principle, cross-border competition between online broadcasters is not possible



The *Pay TV* case

Competition law analysis and the regulatory framework

- Under the 'country of origin' principle, the case against restrictions to the cross-border provision of services is compelling
 - Any such clauses (including geo-blocking) would be capable of restricting competition that would otherwise have existed
 - As a result, these same clauses would in principle be restrictive of competition by object
 - In addition, they are unlikely to fulfil the conditions set out in Article 101(3) TFEU

Competition law analysis and the regulatory framework

- It is worth going back to the Court's reasoning in *Murphy*:
 - Under the 'country of origin' licensees have paid remuneration and are entitled to broadcast across borders
 - There is nothing precluding licensors from calculating the remuneration in light of the potential audience in other Member States
 - The balance between copyright protection and cross-border access achieved via harmonisation cannot be upset via legislation or licensing agreements

Competition law analysis and the regulatory framework

'119. However, those statements were made in a context which is not comparable to that of the main proceedings. In the case which led to the judgment in *Coditel I*, the cable television broadcasting companies communicated a work to the public without having, in the Member State of the place of origin of that communication, an authorisation from the right holders concerned and without having paid remuneration to them'

Competition law analysis and the regulatory framework

'120. By contrast, in the main proceedings the broadcasters carry out acts of communication to the public while having in the Member State of broadcast, which is the Member State of the place of origin of that communication, an authorisation from the right holders concerned and by paying them remuneration – which can, moreover, take account of the actual and potential audience in the other Member States'

Competition law analysis and the regulatory framework

'121. Finally, account should be taken of the development of European Union law that has resulted, in particular, from the adoption of the Television without Frontiers Directive and the Satellite Broadcasting Directive which are intended to ensure the transition from national markets to a single programme production and distribution market'

Competition law analysis and the regulatory framework

‘145. It should be added that while, in principle, Article 101(1) TFEU does not apply to agreements which fall within the categories specified in Article 101(3) TFEU, clauses of licence agreements such as the clauses at issue in the main proceedings do not meet the requirements laid down by the latter provision for reasons stated in paragraphs 105 to 124 of the present judgment and therefore the possibility of Article 101(1) TFEU being inapplicable does not arise’

Competition law analysis and the regulatory framework

- By the same token, there were other factors that were deemed irrelevant in the judgment, namely:
 - The fact that undermining exclusivity would impact negatively on licensees' willingness to pay for content (the 'exclusivity premium') is irrelevant
 - EU law does not seek to ensure that right holders obtain the highest possible remuneration, but only a reasonable one

Competition law analysis and the regulatory framework

- Summing up, the adoption of the SatCab Regulation would have consequences for competition law analysis
 - Once the 'country of origin' principle is introduced, cross-border competition among broadcasters becomes lawful
 - Any clauses restricting broadcasters' ability to offer content across borders would be capable of restricting competition that would otherwise exist
 - Murphy becomes the framework to assess the compatibility of such restrictions with Article 101 TFEU

Key points

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→ The copyright system and competition law influence one another
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The enforcement of EU competition law

- EU competition law is also enforced by national courts and authorities in accordance with the principles set out in Regulation 1/2003
 - Thus, lack of action by the Commission does not preclude intervention at the national level
 - Action at the national level may eventually reach the Court of Justice via a preliminary reference
 - In fact, the leading cases on exclusive licensing (Coditel II and Murphy) originated in disputes at the national level

The enforcement of EU competition law

- Accordingly, hints by the Commission that it does not intend to investigate new cases does not rule out intervention
 - What is more, intervention at the national level may not be in line with the preferences of the Commission (e.g. online selective distribution)
 - Similarly, the Commission may not adopt a pro-active attitude when cases are open (e.g. online hotel booking)
- Hints by the Commission, in other words, do not necessarily exclude a finding of infringement, but may delay it

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Contractual freedom

‘11. Through the principle of contractual freedom it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law’.

SatCab Proposal

Contractual freedom

'16. Whereas the principle of contractual freedom on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned'

Directive 93/83

Contractual freedom

'227. In any event, it must be borne in mind that what is at issue in the present case is a decision adopted in application of Article [102 TFEU], a provision of higher rank than [the Software Directive]. The question in the present case is not so much whether the concept of interoperability in the contested decision is consistent with the concept envisaged in that directive as whether the Commission correctly determined the degree of interoperability that should be attainable in the light of the objectives of Article [102 TFEU]'.

Case T-201/04, *Microsoft*