

COPYRIGHT REFORM AGAINST THE BACKGROUND OF *PAY TV* AND *MURPHY*: A LEGAL ANALYSIS

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SUMMARY

- *In the context of the Pay TV case, the Commission has come to the preliminary conclusion that the licensing agreements between the Hollywood major studios and Sky UK are restrictive of competition by object insofar as they prohibit, inter alia, the (unauthorised) online transmission of copyright-protected content outside the territory covered by the licence. In addition, the Commission considers that these clauses do not fulfil the conditions set out in Article 101(3) TFEU.*
- *The position expressed in the context of the Pay TV case has given rise to controversy. This is so because the licensing agreements concerning online content do not change the conditions of competition prevailing on the relevant markets. What precludes the cross-border provision of such services – and thus rivalry between broadcasters – is the operation of the copyright regime, not the contractual provisions found in licensing agreements.*
- *If the Commission adopts a prohibition decision concluding that the agreements between Sky UK and the Hollywood major studios are restrictive by object and cannot be justified under Article 101(3) TFEU, it is reasonable to presume that all similar agreements concluded by other broadcasters and content providers would also be contrary to Article 101 TFEU. Regardless of the business model, the economic and legal context of all such*

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agreements seems to be the same, as would be the underlying purpose. When an agreement is deemed restrictive by object, factors such as the market position of the parties, or the actual or likely effects of the practice do not alter the legal qualification of the clauses.

- *The Commission may take action to clarify that some agreements similar to those examined in Pay TV fall outside of the scope of Article 101 TFEU. The Commission could adopt, first, a 'finding of inapplicability' decision identifying the agreements that are compatible with Article 101 TFEU. There are no precedents of this approach. Second, it could issue a set of Guidelines with the same objective. Third, the Commission could craft the decision in a way that clarifies that its outcome is confined to the specific facts of the case.*
- *Informal hints by the Commission that it does not intend to take action against other broadcasters or content providers do not completely rule out the possibility of intervention. EU competition law is also enforced by national courts and competition authorities. Murphy and Coditel II, the two landmark cases on the question, arose in disputes at the national level. Above all, hints by the Commission in this sense are an indication that it does not intend to investigate similar cases in the near future.*
- *The legal landscape would change with the adoption of the (proposed) SatCab Regulation. It is reasonable to infer from Murphy that, in principle, any agreement requiring the geo-blocking of transmissions covered by the SatCab Regulation would be restrictive by object and would not satisfy the conditions set out in Article 101(3) TFEU. References to contractual freedom in the Proposal do not change this conclusion.*

1. The *Pay TV* case: legal and policy context

In January 2014, the European Commission (hereinafter, the ‘Commission’) announced the launch of an investigation into the agreements involving five of the six so-called Hollywood major studios¹ and the leading pay TV providers in the largest EU Member States (France, Germany, Italy, Spain and the UK).² The primary concern expressed by the Commission at the time was that the licensing agreements between studios and broadcasters could restrain the ability of the latter to offer their services in Member States other than the one covered by the exclusive licence. The issue underlying the investigation was clear from the outset. From a legal perspective, the Commission was exploring the implications of the Court of Justice (hereinafter, the ‘ECJ’ or the ‘Court’) ruling in *Murphy*³ – which concerned satellite transmissions and which suggested that some territorial restraints in copyright licensing agreements could be in breach of Article 101 TFEU. The crucial question in this regard was whether the logic of the said ruling could be extended, by analogy, to all forms of broadcasting. From a policy-making standpoint, the objective of the investigation transpires from the press release issued in 2014: the case could contribute to ensuring that subscribers to pay TV services are able to access copyright-protected content across borders.

The proceedings eventually open in July 2015⁴ were at the same time more focused and broader than the original investigation. They were more focused in the sense that they concerned a single pay TV provider, Sky UK. They were, on the other hand, broader, in the sense that they were directed against all six Hollywood major studios – Disney, initially left out of the investigation, also received a Statement of Objections. The opening of formal proceedings dispelled all doubts about the scope of the case: the Commission considers that *Murphy* can apply both to online and to satellite

¹ These were Twentieth Century Fox, Warner Bros, Sony, NBCUniversal and Paramount.

² See the Pay TV Statement at http://europa.eu/rapid/press-release_SPEECH-14-13_en.htm.

³ 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*”), EU:C:2011:631, para 137.

⁴ “Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland”, IP/15/5432.

transmissions. According to this view, any clause restricting the ability of broadcasters to offer their content across borders would be contrary to Article 101 TFEU. This idea would be made explicit in the decision pursuant to which the authority accepted the commitments offered by Paramount (hereinafter, the '*Paramount* decision').⁵ The launch of the Digital Single Market Strategy in May 2015,⁶ gave the impression the *Pay TV* case was an element of a Commission-wide policy initiative. It would seem that geo-blocking has come to be perceived as one of the obstacles preventing the cross-border provision of online services and as such a policy priority for the institution.

1.1. *Pay TV* and the case law

In *Pay TV*, the Commission relies upon a long-standing principle according to which agreements aimed at limiting trade between Member States are, as a rule, restrictive of competition by object (or 'by their very nature'). This case law dates back to *Consten-Grundig*, where the Court held that an agreement giving absolute territorial protection to a distributor of a tangible good is contrary to Article 101(1) TFEU and very unlikely to meet the conditions set out in Article 101(3) TFEU.⁷ This rule applies to similar restrictions, including agreements providing for prohibitions regarding the export of goods⁸ and to agreements providing for a differential price depending on whether the good is intended for domestic consumption or for export.⁹ The principle laid down in *Consten-Grundig* is not an absolute one. In a given economic and legal context, an agreement aimed at restricting trade between Member States may fall outside the scope of Article 101(1) TFEU.

⁵ Commission Decision of 26 July 2016 in Case AT.40023 – *Cross-border access to pay-TV* (the '*Paramount* decision').

⁶ 'A Digital Single Market Strategy for Europe', COM(2015) 192 final

⁷ Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* ('*Consten-Grundig*'), EU:C:1966:41.

⁸ Case 19/77, *Miller International Schallplatten v Commission*.

⁹ Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission* ('*Glaxo Spain*'), EU:C:2009:610.

In the absence of exhaustion, an agreement that provides for absolute territorial protection within the meaning of *Consten-Grundig* is not caught by Article 101(1) TFEU. This conclusion is apparent from *Coditel II*. In the first judgment of the saga (*Coditel I*),¹⁰ the Court held that the exhaustion doctrine does not apply to the right of communication to the public. In *Coditel II*,¹¹ it confirmed that the absence of exhaustion has consequences for the analysis under Article 101(1) TFEU. Accordingly, an agreement giving a licensee the exclusive right to broadcast a work in a given Member State, and thus to prevent others from doing so, is not as such restrictive of competition, even if it leads to absolute territorial protection. The Court acknowledged that the principles applying to the rights incorporated in tangible goods cannot be mechanically applied to instances in which rights are exploited in an intangible manner.¹²

Coditel II applies in the default scenario, which is one in which the transmission of the copyright-protected work is subject to the ‘country of destination’ principle. Under this principle, the act of communication to the public is deemed to take place in every Member State in which it is received. The rationale behind *Coditel II* seems straightforward. Where the ‘country of destination’ principle applies, what prevents competition between broadcasters is not the exclusive territorial licence, but the underlying intellectual property regime, which requires authorisation for every communication to the public. The ‘country of origin’ principle is the exception to the default scenario. It is deemed to apply where it is specifically provided for in the intellectual property regime. Under the *lex specialis* that is the ‘country of origin’ principle, the act of communication to the public is deemed to take place only in the Member State in which the transmission originates.

¹⁰ Case 62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* (‘*Coditel I*’), EU:C:1980:84.

¹¹ Case 262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v Ciné-Vog Films SA and others* (‘*Coditel II*’), EU:C:1982:334.

¹² *Ibid.* The Court explained in para 11 of the case that ‘the problems involved in the observance of a film producer’s rights in relation to the requirements of the Treaty are not the same as those which arise in connection with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records, whereas the film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated and the commercial exploitation of which comes under the movement of services, no matter whether the means whereby it is shown to the public be the cinema or television’.

Thus, it allows for lawful cross-border rivalry between licensees, and makes it possible for broadcasters to reach audiences across Member States without infringing the right of communication to the public.

Murphy exemplifies how the legal analysis changes where the ‘country of origin’ principle applies. The broadcasts at stake in that case were subject to the *lex specialis* of the Cable and Satellite Directive, pursuant to which satellite transmissions are only deemed to take place in the so-called ‘country of uplink’. The Court held that the principles laid down in *Coditel I* do not apply in such a regulatory context. Unlike the factual scenario at stake in the *Coditel* saga, a satellite broadcaster can reach audiences based in other Member States without infringing another licensee’s exclusive right.¹³ Accordingly, any national legislation aimed at preventing the lawful cross-border transmission of content via satellite is contrary to the Treaty provisions relating to the freedom to provide services, and cannot be justified by the protection of intellectual property.¹⁴

By the same token, the Court held that, in the circumstances of the *Murphy* case, an agreement aimed at preventing or restricting the lawful cross-border provision of services via satellite is *prima facie* contrary to Article 101(1) TFEU.¹⁵ In addition, it held that such an agreement cannot be justified by Article 101(3) TFEU.¹⁶ There are two aspects that are worth noting about the ruling. First, the Court expressly upheld *Coditel II*, the principles of which were restated. This aspect suggests that the Court sees the two rulings as compatible with each other, in spite of the divergence in outcome. Second, it only ruled on the facts and arguments brought before it. Importantly, it held that the *prima facie* prohibition of agreements aimed at restricting trade between Member States

¹³ *Murphy*, note 3, para 119, where the Court explains that ‘[i]n 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’.

¹⁴ *Ibid*, para 117.

¹⁵ *Ibid*, para 144.

¹⁶ *Ibid*, para 145.

applies ‘in principle’.¹⁷ Such agreements may, in a given economic and legal context, fall outside the scope of Article 101(1) TFEU. However, the Court noted that the parties had not brought forward any evidence in this sense.¹⁸

1.2. Open questions

There is a difference between the *Pay TV* case and *Murphy*. In the latter, the Court only considered a factual scenario in which the ‘country of origin’ principle was applicable. In the *Pay TV* case, by contrast, the Commission considers online transmissions as well. At the time of writing this piece, there should be little doubt that the ‘country of destination’ principle applies to online broadcasts.¹⁹ This impression is confirmed by the legislative initiatives that have taken place in the past year.²⁰ However, the reasoning and approach in the *Pay TV* case appears to assume that the logic of *Murphy* applies without modification to instances in which the right of communication to the public is subject to the ‘country of destination’ principle. In this sense, the Commission seemingly takes the view that *Murphy* has overruled *Coditel II*. This is apparent from the *Paramount* decision,²¹ where it claims the licensing agreements under consideration are restrictive of competition by object.²²

¹⁷ Ibid, para 139, where the Court explained that ‘agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, **in principle**, as agreements whose object is to restrict competition within the meaning of Article 101(1) TFEU’ (emphasis added).

¹⁸ Ibid, para 143, where the Court noted 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’.

¹⁹ This is something that the Commission had always accepted in EU competition law proceedings. See in this sense Commission Decision of 8 October 2002 in Case No COMP/C2/38.014 – *International Federation of the Phonographic Industry*. See in particular para 21, where the Commission conceded that the ‘country of destination’ principle ‘appears to reflect the current legal situation in copyright law’.

²⁰ This is so, in particular, given the fact that the Commission has explicitly proposed to move to the ‘country of origin’ principle in its Proposal for a SatCab Regulation. See in this sense the Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes COM(2016) 594 final. See also the Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market COM(2015) 627.

²¹ *Paramount* decision, note 5.

²² Ibid, para 47: ‘The Commission therefore reached the preliminary conclusion that the Contested Clauses are liable to impair competition and have an anticompetitive object because they are designed to prohibit or limit cross-border passive sales of retail pay-TV services and grant absolute territorial exclusivity in relation to Paramount’s content’.

The legal position of the Commission has given rise to controversy. This is not surprising. To begin with, it is not entirely clear how it can be reconciled with *Coditel II*, which, according to *Murphy*, remains good law.²³ This is a question that the Commission does not address in *Paramount*, in spite of the precedents that suggest that Article 101(1) TFEU is not infringed where the cross-border provision of goods or services would amount to a breach of intellectual property rights. *Micro Leader* is an example in this regard.²⁴ In that case, the General Court ('GC') held that, when the right of distribution is not exhausted, what prevents competition is not the contentious agreement, but the operation of the copyright system.²⁵ There is not, in other words, a causal link between the agreement and the absence of competition.

The EU courts have consistently emphasised that the question of whether an agreement is restrictive of competition, whether by object or effect, cannot be established in the abstract. It must consider the relevant economic and legal context and, in particular, whether the agreement is capable of restricting competition that would otherwise have existed. 'Competition' within the meaning of Article 101(1) TFEU means, in other words, 'competition that would have existed in the absence of the agreement'.²⁶ The case law suggests that, where the agreement does not restrict competition that would otherwise have existed, it falls outside the scope of Article 101(1) TFEU. Rulings in which the analysis of the counterfactual was relevant include *European Night Services*,²⁷ *O2*²⁸ and, more recently, *E.ON Ruhrgas*.²⁹

²³ *Murphy*, note 3, para 137.

²⁴ Case T-198/98, *Micro Leader Business v Commission*, EU:T:1999:341.

²⁵ *Ibid*, para 34: 'even if MC did in fact restrict in that way the opportunities for Canadian distributors to sell their products outside Canada, MC would merely have been enforcing the copyright it holds over its products under Community law. Under Article 4(c) of Directive 91/250, the marketing in Canada of copies of MC software does not exhaust MC's copyright over its products since that right is exhausted only when the products have been put on the market in the Community by the owner of that right or with his consent'.

²⁶ See in this sense Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38 ('competition [...] must be understood within the actual context in which it would occur in the absence of the agreement in dispute').

²⁷ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services Ltd and others v Commission*, EU:T:1998:198.

²⁸ Case T-328/03, *O2 (Germany) GmbH & Co. OHG v Commission*, EU:T:2006:116.

²⁹ Case T-360/09, *E.ON Ruhrgas AG and E.ON AG v Commission*. See also, in the same vein, Case T-370/09, *GDF Suez SA v Commission*.

2. *Pay TV* as a ‘by object’ case

2.1. *Consequences of qualifying an agreement as a ‘by object’ infringement*

As already pointed out, the Commission takes the view in the *Paramount* decision that an agreement requiring a broadcaster such as Sky UK to prevent the unauthorised transmission of copyright-protected content is restrictive of competition by object, and this insofar as it prevents the broadcaster from responding to unsolicited requests (what it calls ‘passive sales’) from end-users residing or located in Member States other than the one covered by the licence. In this regard, *Paramount* transposes the divide between active and passive selling that is found in the Guidelines on vertical restraints³⁰ and in the Guidelines on technology transfer agreements.³¹ According to *Paramount*, a clause whereby the licensor of the right of communication to the public commits to imposing similar restraints on other licensees (thereby preventing them from responding to unsolicited requests from end-users based in Sky UK’s territory) would also be a ‘by object’ infringement.

The legal qualification of these agreements as restrictive by object – and thus as *prima facie* prohibited under Article 101 TFEU – would have several implications. First, where an agreement is deemed restrictive by its very nature, it is not necessary to show that it has an appreciable impact on competition within the meaning of *Völk*.³² The mere fact that the agreement is capable of having an effect on trade between Member States would be sufficient to make it fall under the scope of

³⁰ *Paramount* decision, note 5, para 77, where the Commission explains that the commitments offered by Paramount as they will remove the contractual clauses that prevent Sky from making cross-border passive sales in the EEA’ and also ‘remove the contractual clauses that require Paramount to prohibit or limit other pay-TV broadcasters from making cross-border passive sales in the United Kingdom and the Republic of Ireland’. See, by comparison, the Guidelines on vertical restraints OJ (2010) C 130/1.

³¹ Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements OJ (2014) C 89/3.

³² Case 5/69, *Franz Völk v SPRL Ets J Vervaecke*, EU:C:1969:35.

Article 101(1) TFEU.³³ An agreement that deals expressly with imports and exports, such as the ones examined in *Pay TV*, is by its very nature capable of affecting trade between Member States.³⁴ Second, it is not necessary to show that a ‘by object’ infringement has anticompetitive effects.³⁵ It is sufficient that the agreement in question is ‘capable’ of restricting competition.³⁶ The ‘capability’ of an agreement to restrict competition need not be shown by the authority or the claimant invoking Article 101 TFEU. It is typically inferred from the analysis of the economic and legal context. In practice, it looks like the parties to the agreement bear the evidential burden of proving that, in the relevant economic and legal context, the agreement is not capable of restricting competition.³⁷

An agreement that is caught by Article 101(1) TFEU by its very nature can only escape the prohibition laid down in that provision if it can be shown that it meets the conditions set out in Article 101(3) TFEU. In accordance with Regulation 1/2003, it is for the parties to the agreement to show that the said conditions are fulfilled in the specific context of the case. In principle, any agreement can fulfil the conditions laid down in Article 101(3) TFEU. At the same time, the case law and administrative practice suggest that ‘by object’ infringements are less likely to fulfil these conditions. This is the case, in particular, of what the Commission deems to be the most egregious violations of EU competition law. Agreements aimed at restricting trade between Member States are among these. Unsurprisingly, the Commission comes to the conclusion, in its *Paramount* decision, that the geo-blocking clauses do not fulfil the conditions set out in Article 101(3) TFEU.

Against this background, it is not immediately obvious to see how similar clauses imposed in agreements between other broadcasters and content providers could escape a finding that they are restrictive by object. Irrespective of the identity and market position of the parties, the nature and the objective purpose of restraints providing for geo-blocking would be the same. The economic

³³ Case C-226/11, *Expedia Inc. v Autorité de la concurrence and others*, EU:C:2012:795.

³⁴ Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty OJ (2004) C 101/81, para 63.

³⁵ This principle is clear since *Consten-Grundig*, note 7.

³⁶ Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, para 31.

³⁷ *Murphy*, note 3, paras 140 and 142.

and legal context in which they are imposed is also the same. In this sense, the use of one business model or the other (free-to-air TV or pay TV) does not appear to make a difference. At least, there is nothing in *Murphy* or *Coditel II* that suggests that this is a decisive factor. Thus, if the Commission adopts a prohibition decision finding that a clause inserted by a film studio and requiring Sky UK to block the unauthorised transmission of content online is restrictive by object it is reasonable to presume that all agreements providing for such clauses are prima facie incompatible with Article 101 TFEU.

It makes sense to use some analogies to illustrate the practical implications of qualifying an agreement as restrictive of competition by object. For instance, it is known that resale price maintenance agreements, whereby a manufacturer sets the price at which the products are to be resold by the distributor, are restrictive of competition by object, and that the Commission is only willing to show some flexibility in relation to this practice in a very narrow set of circumstances.³⁸ Moreover, national competition authorities regularly take action against resale price maintenance, which is typically prohibited and fined. As a consequence, these clauses are generally avoided in agreements between manufacturers and distributors, and this irrespective of the market position of the parties. The same can be said of other agreements that are known to be restrictive by object, such as exchanges of information among competitors about their future conduct.³⁹

2.2. Tools to limit the implications of a finding of a 'by object' infringement

The Commissioner has informally taken the view that the proceedings are confined to the agreements between the Hollywood major studios and Sky UK. In particular, she has suggested that independent producers would not be subject to intervention along the same lines.⁴⁰ From a legal

³⁸ Guidelines on vertical restraints, note 30, para 225.

³⁹ See for instance *T-Mobile*, note 36.

⁴⁰ See in particular the following speech by Commissioner Vestager: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/celebrating-european-culture_en.

perspective, this idea could be implemented in three ways. One route is the adoption of a ‘finding of inapplicability’ decision in accordance with Article 10 of Regulation 1/2003.⁴¹ The Commission may conclude that a given practice falls outside the scope of Articles 101 and/or 102 TFEU (because an agreement is found not to restrict competition or because the conditions set out in Article 101(3) TFEU are deemed to be fulfilled). Firms are not entitled to a finding of inapplicability. These decisions are adopted at the discretion of the Commission where it considers that the public interest (and legal certainty) so requires. The Commission has not adopted a single finding of inapplicability in the years that have passed since Regulation 1/2003 was enacted. In addition, the Commission has not signalled, whether directly or indirectly, its intention to do so in the specific circumstances of the *Pay TV* case. Because market integration is a central goal of EU competition policy, it may not be willing to declare, by means of a formal decision, that agreements providing for absolute territorial protection are sometimes acceptable, in particular if they concern major market players.⁴² Accordingly, a finding of inapplicability, even if adopted, could have a narrow scope of application.

A second conceivable route is the adoption of a set of Guidelines outlining the instances in which agreements providing for geo-blocking are likely to be considered compatible with Article 101(3) TFEU.⁴³ This instrument would not have the power of a formal decision – it would be a mere soft law instrument – but would allow stakeholders to evaluate the likelihood that their agreements will be considered compatible with Article 101 TFEU. The Commission has already adopted Guidelines relating to the exploitation of other intellectual property rights. At the same time, this is

⁴¹ In accordance with Article 10 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ (2003) L 1/1: ‘Where the Community public interest relating to the application of Articles [101 and 102] of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article [101] of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article [101(1)] of the Treaty are not fulfilled, or because the conditions of Article [101(3)] of the Treaty are satisfied [...]’.

⁴² In the aftermath of *Glaxo*, note 9, the Commission refused to adopt a decision establishing whether the dual pricing scheme adopted by the pharmaceutical producer fulfilled the conditions set out in Article 101(3) TFEU. Its failure to adopt a decision on the question is currently pending before the GC. See Case T-574/14, *EAEPC v Commission*, pending.

⁴³ The possibility of adopting a Block Exemption Regulation providing that some licensing agreements fulfil the conditions of Article 101(3) TFEU seems to be excluded insofar as the enabling regulation adopted by the Council does not comprise the sort of exclusive territorial licensing agreements covered by the *Pay TV* case.

also a context in which the Commission has proved reluctant to declare that agreements restricting trade between Member States are acceptable. In fact, its stance vis-à-vis passive sales restrictions in technology licensing agreements has become stricter over time.⁴⁴ Nothing suggests that the adoption of Guidelines is likely in the near future.

There is a third route, at which the Commission has hinted recently and which appears to be a reaction to concerns about the impact of the *Pay TV* case on European and/or smaller film producers.⁴⁵ If a decision establishing an infringement of Article 101 TFEU is eventually adopted, the Commission could carefully craft the scope of the ‘by object’ prohibition to make it clear that it is only applicable to the agreements concerned by the investigation. The decision could be presented as a one-off case that is confined to its specific facts. From a legal standpoint, it is not entirely clear how this outcome would be achieved. From a policy-making standpoint, these hints suggest that the Commission is unlikely to open new investigations concerning other broadcasters and/or film or content producers in the near future.

2.3. Other implications of the finding of a ‘by object’ infringement

The Commission is not the only body in charge of the enforcement of Articles 101 and 102 TFEU. National courts and competition authorities have the power to apply these two provisions in accordance with the principles set out in Regulation 1/2003.⁴⁶ Thus, once the authority comes to the conclusion that a given agreement is restrictive of competition by object, it cannot be ruled out that the prohibition decision acquires a life of its own. A national court or competition authority might challenge clauses imposed in other agreements that they consider to be comparable to those

⁴⁴ See in this sense Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements OJ (2014) L 93/17.

⁴⁵ Nicholas Hirst, ‘EU refines pay-TV antitrust case to avoid harm to film makers’ (Politico, 26 April 2017).

⁴⁶ See in this sense Articles 5 and 6 of Regulation 1/2003, note 41.

considered in *Pay TV*. One should not forget, in this regard, that *Coditel II* and *Murphy* both originated in disputes at the national level. In these disputes, Article 101 TFEU was invoked to justify a breach of intellectual property legislation.

It is not certain that national courts and authorities will follow the approach declared by the Commission in its *Pay TV* decision. The German competition authority, for instance, has departed from the policy position taken by the Commission in relation to online selective distribution,⁴⁷ and has adopted a stricter approach.⁴⁸ It is not certain either that the Commission will pro-actively seek to advance its views if national courts or authorities choose to deviate from its decision. It may adopt a *laissez-faire* attitude. Cases are all fact-specific and the Commission may take the view that the national court or authority is in a better position to establish whether a given practice amounts to an infringement. The Commission has adopted such a *laissez-faire* attitude in the past, even when national authorities took conflicting approaches.⁴⁹

3. *Pay TV* as a ‘by effect’ case

Because of the unintended consequences that choosing the ‘by object’ route might have on European and/or smaller producers, the Commission could choose the ‘by effect’ route in the *Pay TV* case. This route would allow it to introduce in the analysis under Article 101(1) TFEU factors that are not relevant in ‘by object’ cases, such as the market share enjoyed by the content provider and/or the broadcaster, or the time since the release of the content. On the other hand, and for the reasons exposed above, an infringement may not be any easier to establish under this approach. The Commission would still need to show that cross-border competition between broadcasters would

⁴⁷ Bundeskartellamt, ‘Unlawful restriction of online sales of ASICS running shoes’ (27 August 2015), available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/27_08_2015_ASICS.html.

⁴⁸ This approach has given rise to litigation in Germany, which is currently pending before the Court of Justice. See Case C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*.

⁴⁹ See the Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016, available at http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf.

have existed in the absence of the geo-blocking clauses, and, moreover, that this competition has appreciably decreased as a result of the agreement.

4. The competition law status of geo-blocking and the SatCab Regulation

The above analysis assumes that the underlying regulatory framework would not change. The conclusions would be different if the current proposals to review copyright legislation were to be adopted. The Commission Proposal for a SatCab Regulation would expand the scope of the ‘country of origin’ principle to – at least – the so-called ‘ancillary online services’.⁵⁰ This legislative move would make these online transmissions subject to the regime that already applies to satellite. It is therefore reasonable to assume that *Murphy* would be fully applicable in the new regulatory environment. Put differently, it is not obvious to see why it would not. This would mean that, as far as the transmissions covered by the Regulation are concerned, clauses providing for geo-blocking are restrictive of competition ‘by object’. In addition, the vocabulary used in *Murphy* suggests that agreements providing for geo-blocking would not meet the conditions of Article 101(3) TFEU – which would also rule out the possibility of the Commission adopting a finding of inapplicability decision. The parties to an agreement would only be able to escape the prohibition if they are in a position to show that there are factors pertaining to the economic and legal context that justify a different outcome under Article 101(1) TFEU.

It makes sense to identify the aspects of *Murphy* that suggest the above conclusions. The ECJ did not dispute that the cross-border provision of services may undermine the exclusivity enjoyed by licensees, and that this can impact negatively on the willingness of the latter to pay for content. Absent ‘complete exclusivity’, in other words, the licensee can be expected to pay less than

⁵⁰ See in this sense Article 2 of the Proposal for a SatCab Regulation, note 20.

it would otherwise have. There would be no ‘exclusivity premium’.⁵¹ These considerations did not affect the outcome of the ruling. The Court noted that EU law in no way allows content providers to obtain the highest possible remuneration, but only an appropriate one that takes EU law into account.⁵² In this same vein, it pointed out that the SatCab Directive had already defined the appropriate balance between intellectual property protection and the freedom to provide services across borders, and that national legislation – or a licensing agreement⁵³ – could not be invoked to upset that balance.⁵⁴

Similarly, references to contractual freedom found in the Proposal⁵⁵ should not be interpreted as preserving content providers’ and/or broadcasters’ right to restrain cross-border access to online content by means of geo-blocking. In fact, a virtually identical reference to contractual freedom in the SatCab Directive⁵⁶ did not preclude the Court from ruling, in *Murphy*, that clauses limiting a broadcaster’s ability to provide services across borders are restrictive by object and cannot be justified under Article 101(3) TFEU. This outcome is unsurprising. The principle of contractual freedom does not and cannot preclude the application of Article 101 TFEU. In fact, the Proposal makes an explicit reference to Union law, which is a reminder that secondary legislation must be interpreted in line with primary EU law – including competition law.

⁵¹ *Murphy*, note 3, paras 114-115.

⁵² *Ibid*, para 108.

⁵³ *Murphy*, note 3, para 145, which refers to the reasoning in paras 105-124.

⁵⁴ *Ibid*, para 121, where the Court notes that ‘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’.

⁵⁵ See in particular Recital 11 of the Proposal for a SatCab Regulation, note 20.

⁵⁶ See Recital 16 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 OJ (1993) L 248/15.