

**OPINION OF ADVOCATE GENERAL  
KOKOTT**

delivered on 3 February 2011<sup>1</sup>

Cases C 403/08 and C 429/08

Football Association Premier League Ltd and Others

v

QC Leisure and Others

(Reference for a preliminary ruling from the High Court of Justice, Chancery  
Division, United Kingdom)

Karen Murphy

v

Media Protection Services Ltd

(Reference for a preliminary ruling from the High Court of Justice,  
Administrative Court, United Kingdom)

(Satellite transmission of football matches – Marketing of decoder cards which have been lawfully placed on the market in other Member States – Directive 98/84/EC – Legal protection of services based on conditional access – Illicit access device – Directive 2001/29/EC – Harmonisation of certain aspects of copyright and related rights in the information society – Reproduction right – Communication to the public – Directive 93/83/EEC – Coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable transmission – Free movement of goods – Freedom to provide services – Competition – Article 101(1) TFEU – Concerted practices – Practice having the object of preventing, restricting or distorting competition – Criteria for assessing the anti competitive object of a practice)

**I – Introduction**

1. Protecting the economic interests of authors is becoming increasingly important. Creative works must be properly remunerated.

2. To that end, the Football Association Premier League Ltd (the FAPL), the top English football league’s organisation for marketing that league’s matches, seeks to achieve optimal exploitation of the copyright for the live transmission of its football matches. It essentially grants its licensees the exclusive right to broadcast and economically exploit the matches within their broadcasting area, generally the country in question. In order to safeguard the exclusive rights of other licensees,

they are at the same time required to prevent their broadcasts from being able to be viewed outside the broadcasting area.

3. The main proceedings in the present references for preliminary rulings concern attempts to circumvent this exclusivity. Undertakings import decoder cards from abroad, in the present cases from Greece and Arab States, into the United Kingdom and offer them to pubs there at more favourable prices than the broadcaster in that State. The FAPL is attempting to stop that practice.

4. Measures to enforce exclusive broadcasting rights are at odds with the principle of the internal market. It is for that reason necessary to examine whether such measures infringe the European Union's fundamental freedoms or its competition law.

5. However, questions also arise with regard to various directives. Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access<sup>2</sup> is of interest because the exclusivity of satellite broadcasts is guaranteed through the encryption of the broadcast signal. The FAPL takes the view that the directive prohibits the use of decoder cards outside the area assigned to them. From the perspective of the importers, by contrast, the directive justifies the free movement of such cards.

6. Furthermore, questions are raised concerning the scope of the rights to the broadcasts under Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society,<sup>3</sup> namely whether the communication of the broadcasts affects the right to the reproduction of works and whether communication in pubs constitutes communication to the public.

7. Lastly, questions also arise with regard to the effect of a licence under Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.<sup>4</sup> It will be necessary to examine whether consent to the satellite transmission of a broadcast in one particular Member State establishes the right to receive the broadcast and to show it on a screen in another Member State.

## II – Legislative context

### A – *International law*

#### 1. Berne Convention for the Protection of Literary and Artistic Works

8. Under Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September

1979 ('the Berne Convention'), authors of literary and artistic works protected by the Convention have the exclusive right to authorise the reproduction of those works, in any manner or form.

9. Article 11*bis*(1) of the Berne Convention provides:  
'Authors of literary and artistic works shall enjoy the exclusive right of authorising:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.'

## 2. Agreement on Trade-Related Aspects of Intellectual Property Rights

10. The Agreement on Trade-Related Aspects of Intellectual Property Rights, as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)<sup>5</sup> ('the TRIPS Agreement').

11. Article 9(1) of the TRIPS Agreement contains a provision on compliance with international agreements on copyright protection:  
'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.'

12. Article 14(3) of the TRIPS Agreement contains provisions on the protection of television programmes:

'Broadcasting organisations shall have the right to prohibit the following acts when undertaken without their authorisation: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organisations, they shall provide owners of copyright in the subject-matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).'

### 3. The WIPO Copyright Treaty

13. The World Intellectual Property Organisation (WIPO) adopted in Geneva, on 20 December 1996, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty. Those two treaties were approved on behalf of the Community by Council Decision 2000/278/EC of 16 March 2000<sup>6</sup> with regard to matters coming within its competence.

14. Under Article 1(4) of the WIPO Copyright Treaty, Contracting Parties must comply with Articles 1 to 21 of and the Appendix to the Berne Convention.

15. Article 8 of the WIPO Copyright Treaty provides:

‘Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.’

### 4. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations

16. Article 13 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961<sup>7</sup> lays down certain minimum rights for broadcasting organisations:

‘Broadcasting organisations shall enjoy the right to authorise or prohibit:

- (a) the rebroadcasting of their broadcasts;
- (b) the fixation of their broadcasts;
- (c) the reproduction
  - (i) of fixations, made without their consent, of their broadcasts;
  - (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;
- (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.’

17. Whilst the European Union is not a Contracting Party to the Rome Convention, under Article 5 of Protocol 28 on intellectual property to the Agreement on the European Economic Area,<sup>8</sup> the Contracting Parties to the EEA Agreement undertake to secure their adherence before 1 January 1995 to the following multilateral conventions on industrial, intellectual and commercial property:

‘ ...

(b) Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971);

(c) International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961);

...’

## B – *European Union law*

### 1. Protection of services based on conditional access

18. One of the main focuses of the questions referred for preliminary ruling is Directive 98/84 on the legal protection of services based on, or consisting of, conditional access.

19. Article 1 describes the objective of Directive 98/84:

‘The objective of this Directive is to approximate provisions in the Member States concerning measures against illicit devices which give unauthorised access to protected services.’

20. Article 2 of Directive 98/84 defines the relevant terms. The terms ‘conditional access device’, ‘illicit device’ and ‘coordinated field’ are of particular interest:

‘For the purposes of this Directive:

(a) ...

...

(c) *conditional access device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form;

(d) ...

(e) *illicit device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider;

(f) *field coordinated by this Directive* shall mean any provision relating to the infringing activities specified in Article 4.’

21. Article 3 of Directive 98/84 governs the measures which must be taken in relation to services based on conditional access and conditional access devices within the internal market:

‘1. Each Member State shall take the measures necessary to prohibit on its territory the activities listed in Article 4, and to provide for the sanctions and remedies laid down in Article 5.

2. Without prejudice to paragraph 1, Member States may not:

- (a) restrict the provision of protected services, or associated services, which originate in another Member State; or,
- (b) restrict the free movement of conditional access devices;

for reasons falling within the field coordinated by this Directive.’

22. Article 4 of Directive 98/84 lays down which activities must be prohibited: ‘Member States shall prohibit on their territory all of the following activities:

- (a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices;
- (b) the installation, maintenance or replacement for commercial purposes of an illicit device;
- (c) the use of commercial communications to promote illicit devices.’

## 2. Intellectual property in the information society

23. Two aspects of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society are relevant in the present context: the reproduction right and the right of communication to the public.

24. The reproduction right is laid down in Article 2 of Directive 2001/29: ‘Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.’

25. A restriction for certain reproductions made for technological reasons is laid down in Article 5(1) of Directive 2001/29:

‘Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.’

26. Article 3 of Directive 2001/29 governs the rights connected with communication to the public:

‘1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.’

27. Recital 23 in the preamble to Directive 2001/29 provides the following explanation for this:

‘This Directive should harmonise further the author’s right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.’

28. Directive 2001/29 supplemented the then existing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property,<sup>9</sup> which was consolidated by Directive 2006/115/EC.<sup>10</sup> Article 8(3) of Directive 2006/115 lays down a further right relating to the communication of broadcasts to the public:

‘Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.’

3. Intellectual property and satellite broadcasting

29. Directive 93/83 deals with issues relating to intellectual property in the field of satellite broadcasting. Various recitals in its preamble are of particular importance for an understanding of the directive:

‘(1) ... the objectives of the Community as laid down in the Treaty include establishing an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community and ensuring the economic and social progress of the Community countries by common action to eliminate the barriers which divide Europe;

...

(3) ... broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing these Community objectives, which are at the same time political, economic, social, cultural and legal;

...

(5) ... however, the achievement of these objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; ... this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; ... the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the Community;

...

(7) ... the free broadcasting of programmes is further impeded by the current legal uncertainty over whether broadcasting by a satellite whose signals can be received directly affects the rights in the country of transmission only or in all countries of reception together; ...

...

(14) ... the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a Community level; ... this definition should at the same time specify where the act of communication takes place; ... such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; ... communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organisation into an uninterrupted chain of communication leading to the satellite and down towards the earth; ... normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;

(15) ... the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in

the Member State in which communication to the public by satellite occurs;

(16) ... 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;

(17) ... in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version;

...'

30. The definitions laid down in Article 1(2)(a), (b) and (c) of Directive 93/83 are of particular interest to the present cases.

'(a) For the purpose of this Directive, "communication to the public by satellite" means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent.

...'

31. Furthermore, Article 2 of Directive 93/83 establishes a special right for the author in respect of communication by satellite:

'Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.'

### III – Facts and references for preliminary rulings

#### A – *Transmission of football matches*

32. The FAPL's strategy is to make games in the English Premier League available to viewers throughout the world while maximising the value of its media rights for its member clubs.

33. The FAPL's activities include organising the filming of Premier League matches and licensing the rights to broadcast them. The exclusive rights to broadcast live matches are divided territorially and are granted on the basis of

three-year terms. The system of contracts includes a covenant of exclusivity that the FAPL will appoint only one broadcaster within any particular territory and restrictions on the circulation of authorised decoder cards outside the territory of each licensee.

34. The granting of broadcasting rights for sporting events on an exclusive territorial basis is an established and accepted commercial practice amongst rights-holders and broadcasters throughout Europe. In order to protect this territorial exclusivity, each broadcaster undertakes in its licence agreement with the FAPL to encrypt its satellite-delivered signal.

35. During the period at issue in the present proceedings, each Premier League match was filmed by the BBC or by Sky. Their chosen images and the ambient sound of the match (sometimes including the Premier League Anthem ('the Anthem')) constitute the 'Clean Live Feed'. Once logos, video sequences, on-screen graphics, music (including the Anthem) and English commentary have been added, the result constitutes the 'World Feed'. Once compressed and encrypted, this is then transmitted by satellite to the licensed foreign broadcaster. The broadcaster decrypts and decompresses the World Feed, adds its own logo and any commentary, compresses and encrypts the signal again and transmits it via satellite to subscribers within its assigned territory. Subscribers with a satellite dish can decrypt and decompress the signal in a decoder, which requires a decoder card. The entire transmission process from pitch to subscriber takes about five seconds.

36. Fragments of the various film works, the musical work and the sound recording are stored sequentially in the decoder prior to their output and are subsequently deleted from the decoder.

#### B – *Case C 403/08*

37. The proceedings which form the basis of Case C 403/08 stem from actions brought by the FAPL together with the undertakings responsible for the transmission of the matches in Greece.

38. In Greece, the sub-licensee was (and remains) NetMed Hellas SA, which in practical terms was prohibited by contract from supplying the relevant decoder cards outside Greece. Matches are broadcast on 'SuperSport' channels on the 'NOVA' platform, which is owned and operated by Multichoice Hellas SA. These two Greek undertakings are under the same ultimate ownership and are collectively referred to as 'NOVA'. Reception of SuperSport channels is enabled by a NOVA satellite decoder card.

39. The actions relate to the use of foreign decoder cards in the United Kingdom

to access foreign satellite transmissions of live Premier League football matches. The claimants complain that the dealing in and use of such cards in the United Kingdom constitute an infringement of their rights under the provisions of national law designed to implement Directive 98/84 and of the copyright in various artistic and musical works, films and sound recordings embodied in the Premier League match coverage.

40. Two of the actions have been brought against suppliers of equipment and satellite decoder cards to pubs and bars, which make possible the reception of non-Sky satellite channels (including NOVA channels) that carry live Premier League matches. The third action has been brought against licensees or operators of four pubs ('publicans') who have shown live Premier League matches broadcast on the channels of an Arab broadcaster.

41. In Case C 403/08 the High Court therefore asks the Court the following questions:

A. On the interpretation of Directive 98/84

1. Illicit device

(a) Where a conditional access device is made by or with the consent of a service provider and sold subject to a limited authorisation to use the device only to gain access to the protected service in particular circumstances, does that device become an 'illicit device' within the meaning of Article 2(e) of Directive 98/84 if it is used to give access to that protected service in a place or in a manner or by a person outside the authorisation of the service provider?

(b) What is the meaning of 'designed or adapted' within Article 2(e) of the directive?

2. Cause of action

When a first service provider transmits programme content in encoded form to a second service provider who broadcasts that content on the basis of conditional access, what factors are to be taken into account in determining whether the interests of the first provider of a protected service are affected, within the meaning of Article 5 of Directive 98/84?

In particular:

Where a first undertaking transmits programme content (comprising visual images, ambient sound and English commentary) in encoded form to a second undertaking which in turn broadcasts to the public the programme content (to which it has added its logo and, on occasion, an additional audio commentary track):

(a) Does the transmission by the first undertaking constitute a protected service of ‘television broadcasting’ within the meaning of Article 2(a) of Directive 98/84 and Article 1(a) of Directive 89/552/EEC?<sup>11</sup>

(b) Is it necessary for the first undertaking to be a broadcaster within the meaning of Article 1(b) of Directive 89/552 in order to be considered as providing a protected service of ‘television broadcasting’ within the first indent of Article 2(a) of Directive 98/84?

(c) Is Article 5 of Directive 98/84 to be interpreted as conferring a civil right of action on the first undertaking in respect of illicit devices which give access to the programme as broadcast by the second undertaking, either:

(i) because such devices are to be regarded as giving access via the broadcast signal to the first undertaking’s own service; or

(ii) because the first undertaking is the provider of a protected service whose interests are affected by an infringing activity (because such devices give unauthorised access to the protected service provided by the second undertaking)?

(d) Is the answer to (c) affected by whether the first and second service providers use different decryption systems and conditional access devices?

### 3. Commercial purposes

Does ‘possession for commercial purposes’ in Article 4(a) of Directive 98/84 relate only to possession for the purposes of commercial dealings in (for example, sales of) illicit devices, or does it extend to the possession of a device by an end user in the course of a business of any kind?

## B. On the interpretation of Directive 2001/29

### 4. Reproduction Right

Where sequential fragments of a film, musical work or sound recording (in this case frames of digital video and audio) are created (i) within the memory of a decoder or (ii) in the case of a film on a television screen, and the whole work is reproduced if the sequential fragments are considered together but only a limited number of fragments exist at any point in time:

(a) Is the question of whether those works have been reproduced in whole or in part to be determined by the rules of national copyright law relating to what constitutes an infringing reproduction of a copyright work, or is it a matter of interpretation of Article 2 of Directive 2001/29?

(b) If it is a matter of interpretation of Article 2 of Directive 2001/29, should the national court consider all of the fragments of each work as a whole, or only the limited number of fragments which exist at any point in time? If the latter, what test should the national court apply to the question of whether the works have been reproduced in part within the meaning of that Article?

(c) Does the reproduction right in Article 2 extend to the creation of transient images on a television screen?

#### 5. Independent economic significance

(a) Are transient copies of a work created within a satellite television decoder box or on a television screen linked to the decoder box, and whose sole purpose is to enable a use of the work not otherwise restricted by law, to be regarded as having ‘independent economic significance’ within the meaning of Article 5(1) of Directive 2001/29 by reason of the fact that such copies provide the only basis upon which the rights-holder can extract remuneration for the use of his rights?

(b) Is the answer to Question 5(a) affected by (i) whether the transient copies have any inherent value; or (ii) whether the transient copies comprise a small part of a collection of works and/or other subject-matter which otherwise may be used without infringement of copyright; or (iii) whether the exclusive licensee of the rights-holder in another Member State has already received remuneration for use of the work in that Member State?

#### 6. Communication to the public by wire or wireless means

(a) Is a copyright work communicated to the public by wire or wireless means within the meaning of Article 3 of Directive 2001/29 where a satellite broadcast is received at commercial premises (for example a bar) and communicated or shown at those premises via a single television screen and speakers to members of the public present in those premises?

(b) Is the answer to Question 6(a) affected if:

(i) the members of the public present constitute a new public not contemplated by the broadcaster (in this case because a domestic decoder card for use in one Member State is used for a commercial audience in another Member State)?

(ii) the members of the public are not a paying audience according to national law?

(iii) the television broadcast signal is received by an aerial or satellite dish on the roof of or adjacent to the premises where the television is situated?

(c) If the answer to any part of (b) is yes, what factors should be taken into account in determining whether there is a communication of the work which has originated from a place where members of the audience are not present?

C. On the interpretation of Directive 93/83 and of Articles 28 and 30 and 49 of the EC Treaty

7. Defence under Directive 93/83

Is it compatible with Directive 93/83 or with Articles 28 and 30 or 49 of the EC Treaty if national copyright law provides that when transient copies of works included in a satellite broadcast are created inside a satellite decoder box or on a television screen, there is an infringement of copyright under the law of the country of reception of the broadcast? Does it affect the position if the broadcast is decoded using a satellite decoder card which has been issued by the provider of a satellite broadcasting service in another Member State on the condition that the satellite decoder card is only authorised for use in that other Member State?

D. On the interpretation of the Treaty rules on free movement of goods and services under Articles 28 and 30 and 49 EC in the context of Directive 98/84

8. Defence under Articles 28 and/or 49 EC

(a) If the answer to Question 1 is that a conditional access device made by or with the consent of the service provider becomes an 'illicit device' within the meaning of Article 2(e) of Directive 98/84 when it is used outside the scope of the authorisation of the service provider to give access to a protected service, what is the specific subject-matter of the right by reference to its essential function conferred by the Conditional Access Directive?

(b) Do Articles 28 or 49 of the EC Treaty preclude enforcement of a provision of national law in a first Member State which makes it unlawful to import or sell a satellite decoder card which has been issued by the provider of a satellite broadcasting service in another Member State on the condition that the satellite decoder card is only authorised for use in that other Member State?

(c) Is the answer affected if the satellite decoder card is authorised only for private and domestic use in that other Member State but used for commercial purposes in the first Member State?

9. Whether the protection afforded to the Anthem can be any broader than that afforded to the rest of the broadcast

Do Articles 28 and 30 or 49 of the EC Treaty preclude enforcement of a provision

of national copyright law which makes it unlawful to perform or play in public a musical work where that work is included in a protected service which is accessed and played in public by use of a satellite decoder card where that card has been issued by the service provider in another Member State on the condition that the decoder card is only authorised for use in that other Member State? Does it make a difference if the musical work is an unimportant element of the protected service as a whole and the showing or playing in public of the other elements of the service are not prevented by national copyright law?

E. On the interpretation of the Treaty rules on competition under Article 81 EC

10. Defence under Article 81 EC

Where a programme content provider enters into a series of exclusive licences each for the territory of one or more Member States under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory, what legal test should the national court apply and what circumstances should it take into consideration in deciding whether the contractual restriction contravenes the prohibition imposed by Article 81(1)?

In particular:

- (a) must Article 81(1) be interpreted as applying to that obligation by reason only of it being deemed to have the object of preventing, restricting or distorting competition?
- (b) if so, must it also be shown that the contractual obligation appreciably prevents, restricts or distorts competition in order to come within the prohibition imposed by Article 81(1)?

C – *Case C 429/08*

42. This reference for a preliminary ruling stems from criminal proceedings brought against Ms Murphy, the landlady of a pub, who showed Premier League matches using a Greek decoder card. Media Protection Services Ltd brought a private prosecution against her, securing at first instance and on appeal the imposition of a fine on the ground that such a card is an illicit access device within the meaning of the rules implementing Directive 98/84. Ms Murphy appealed against that conviction to the High Court.

43. In the present proceedings the High Court has referred the following questions:

On the interpretation of Directive 98/84

1. In what circumstances is a conditional access device an 'illicit device' within the meaning of Article 2(e) of Directive 98/84?
2. In particular, is a conditional access device an 'illicit device' if it is acquired in circumstances where:
  - (i) the conditional access device was made by or with the consent of a service provider and originally supplied subject to limited contractual authorisation to use the device to gain access to a protected service only in a first Member State and was used to gain access to that protected service received in another Member State?  
and/or
  - (ii) the conditional access device was made by or with the consent of a service provider and was originally procured and/or enabled by the provision of a false name and residential address in the first Member State, thereby overcoming contractual territorial restrictions imposed on the export of such devices for use outside the first Member State?  
and/or
  - (iii) the conditional access device was made by or with the consent of a service provider and was originally supplied subject to a contractual condition that it be used only for domestic or private use rather than commercial use (for which a higher subscription charge is payable), but was used in the United Kingdom for commercial purposes, namely showing live football broadcasts in a public house?
3. If the answer to any part of Question 2 is 'no', does Article 3(2) of that Directive preclude a Member State from invoking a national law that prevents use of such conditional access devices in the circumstances set out in Question 2 above?
4. If the answer to any part of Question 2 is 'no', is Article 3(2) of that Directive invalid:
  - (a) for the reason that it is discriminatory and/or disproportionate; and/or
  - (b) for the reason that it conflicts with free movement rights under the Treaty; and/or
  - (c) for any other reason?
5. If the answer to Question 2 is 'yes', are Articles 3(1) and 4 of that Directive invalid for the reason that they purport to require the Member States to impose restrictions on the importation from other Member States of and other dealings with 'illicit devices' in circumstances where those devices may lawfully be imported and/or used to receive cross-border satellite broadcasting services by virtue of the rules on the free movement of goods under Articles 28 and 30 of the EC Treaty and/or the freedom to provide and receive services under Article 49 of the EC Treaty?

On the interpretation of Articles 12, 28, 30 and 49 of the EC Treaty

6. Do Articles 28, 30 and/or 49 EC preclude enforcement of a national law (such as section 297 of the Copyright, Designs and Patents Act 1988) which makes it a criminal offence dishonestly to receive a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme, in any of the following circumstances:

(i) where the conditional access device was made by or with the consent of a service provider and originally supplied subject to limited contractual authorisation to use the device to gain access to a protected service only in a first Member State and was used to gain access to that protected service received in another Member State (in this case the United Kingdom)? and/or

(ii) where the conditional access device was made by or with the consent of a service provider and was originally procured and/or enabled by the provision of a false name and residential address in the first Member State thereby overcoming contractual territorial restrictions imposed on the export of such devices for use outside the first Member State? and/or

(iii) where the conditional access device was made by or with the consent of a service provider and was originally supplied subject to a contractual condition that it be used only for domestic or private use rather than commercial use (for which a higher subscription charge is payable), but was used in the United Kingdom for commercial purposes, namely showing live football broadcasts in a public house?

7. Is enforcement of the national law in question in any event precluded on the ground of discrimination contrary to Article 12 EC or otherwise, because the national law applies to programmes included in a broadcasting service provided from a place in the United Kingdom but not from any other Member State?

On the interpretation of Article 81 of the EC Treaty

8. Where a programme content provider enters into a series of exclusive licences each for the territory of one or more Member States under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory, what legal test should the national court apply and what circumstances should it take into consideration in deciding whether the contractual restriction contravenes the prohibition imposed by Article 81(1)?

In particular:

(a) must Article 81(1) be interpreted as applying to that obligation by reason only of it being deemed to have the object of preventing, restricting or distorting competition?

(b) if so, must it also be shown that the contractual obligation appreciably prevents, restricts or distorts competition in order to come within the prohibition imposed by Article 81(1)?

44. The FAPL, QC Leisure, Ms Murphy and Media Protection Services Ltd, the United Kingdom of Great Britain and Northern Ireland, the French Republic, the EFTA Surveillance Authority, the European Parliament, the Council and the European Commission submitted pleadings. At the hearing those parties, with the exception of France, also presented oral argument, as did the Czech Republic, the Kingdom of Spain and the Italian Republic.

#### IV – Legal assessment

45. The cases in the main proceedings stem from the practice of territorially restricting access to encrypted sports broadcasts which are transmitted via satellite to various Member States. The references for preliminary rulings concern the issue of whether this is compatible with the internal market from a multitude of varying perspectives, which have generated a large number of different questions.

46. It should be noted, first of all, that, whilst European Union law respects the special characteristics of sport, sport does not fall outside the scope of that law.<sup>12</sup> In particular, the fact that an economic activity has a connection with sport does not preclude application of the rules of the Treaties.<sup>13</sup>

47. While I take the view that resolution of the cases in the main proceedings is – so far as the use of the Greek decoder cards is concerned – essentially dependent on the application of freedom to provide services and, moreover, the question of communication to the public (Article 3 of Directive 2001/29) is of great interest first and foremost, I will nevertheless structure the Opinion in accordance with the order of the questions in Case C 403/08. I will therefore begin by examining Directive 98/84 on the protection of devices for access to services based on conditional access (see under A), then Directive 2001/29 on copyright in the information society (see under B), Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (see under C), and only then the application of the fundamental freedoms (see under D) and, lastly, competition law (see under E).

#### A – Directive 98/84

48. Directive 98/84 regulates the protection of devices for access to services based on conditional access and the free movement of such devices in the internal market. The parties derive from this two conflicting premises which form the basis for the questions relating to the directive.

49. Under Article 4 of Directive 98/84, the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices must be prohibited and appropriately sanctioned. The FAPL takes the view that a decoder card lawfully sold in one Member State becomes an illicit device if it is used in another Member State against the will of the undertaking broadcasting the protected service. Ms Murphy contends that such use of a decoder card which has been lawfully placed on the market cannot turn it into an illicit device. Rather, such use is lawful under the directive, since Article 3(2) prohibits any restriction on the dealing in licit decoder cards.

50. I propose that the Court give ‘short shrift’ to this set of questions as both premises are clearly wrong.

51. Under Article 2(e) of Directive 98/84, an ‘illicit device’ means any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider.

52. In the view of the FAPL, it is sufficient for that purpose that the decoder cards are used in the United Kingdom to receive transmissions from the Greek broadcaster, even though such transmissions may not be received in that place according to the will of the rights-holder.

53. The wording of Article 2(e) of Directive 98/84 is not, however, directed to preventing the *use* of an access device against the will of the service provider. It requires *equipment* designed or adapted to give access without the authorisation of the service provider. That definition therefore covers equipment manufactured or modified specifically for that purpose.

54. The decoder card, by contrast, is specifically designed precisely to provide access with the authorisation of the service provider. The service provider – the Greek broadcaster – places it on the market specifically for that purpose. The decoder card is likewise not adapted by virtue of importation into the United Kingdom.

55. This obvious interpretation alone is compatible with the general objective of Directive 98/84. According to recitals 2 and 3 in its preamble, it is intended to promote the cross-border provision of services. It would scarcely be compatible with this objective to regard the cross-border importation of licit conditional access devices as sufficient to justify a finding that they are illicit devices.

56. Furthermore, the general principle of legal certainty, which is a fundamental principle of European Union law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.<sup>14</sup> Where criminal provisions are

laid down, it is further necessary to observe the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), which implies that European Union rules must define in clear terms offences and the penalties which they attract.<sup>15</sup> If the European Union legislature actually intended to protect the geographical partitioning of television markets and to impose sanctions on the mere circumvention of that partitioning through the importation into other Member States of decoder cards which are licit in their State of origin, it ought therefore to have expressed this with much greater clarity.

57. Question 1 in Case C 403/08 and the first two questions in Case C 429/08 must therefore be answered to the effect that being designed or adapted within the meaning of Article 2(e) of Directive 98/84 means the manufacture or modification of equipment with the intention of providing access to a protected service in an intelligible form without the authorisation of the service provider. Where a conditional access device is made by or with the consent of a service provider and sold subject to a limited authorisation to use the device only to gain access to the protected service in particular circumstances, that device does not therefore become an 'illicit device' within the meaning of Article 2(e) of Directive 98/84 if it is used to obtain access to that protected service in a place or in a manner or by a person outside the authorisation of the service provider.

58. It does not follow, however, that Question 3 in Case C 429/08 should be answered to the effect that Article 3(2) of Directive 98/84 prohibits any restriction on dealing in licit decoder cards.

59. Article 3(2)(a) of Directive 98/84 does, it is true, prohibit restrictions on the provision of protected services, or associated services, which originate in another Member State, while Article 3(2)(b) prohibits restrictions on the free movement of conditional access devices. However, those prohibitions of restrictions are qualified: only restrictions for reasons falling within the field coordinated by the directive are unlawful. According to the definition laid down in Article 2(f), that field means any provision relating to the infringing activities specified in Article 4, that is to say, the various prohibitions relating to matters involving illicit devices. Restrictions for other reasons are not therefore excluded by Article 3(2).

60. The breach of contractual agreements concerning the accessibility of programmes in certain Member States, the provision of false names and/or addresses in the acquisition of access devices or the use, for commercial purposes, of decoder cards intended for private or domestic use are not measures to combat illicit devices. They do not therefore fall within the field coordinated by Directive 98/84.

61. The answer to Question 3 in Case C 429/08 must therefore be that Article 3(2) of Directive 98/84 does not preclude a Member State from invoking a

provision of national law that prevents use of a conditional access device in the event of breach of contractual agreements concerning the accessibility of programmes in certain Member States, following the provision of false names and/or addresses in the acquisition of the access device or the use, for commercial purposes, of an access device intended for private or domestic use.

62. In view of the fact that, according to the grounds set out in the order for reference, Question 4 in Case C 429/08, which concerns the validity of Article 3(2) of Directive 98/84, is based on the assumption that that provision precludes any restrictions for the abovementioned reasons, it does not have to be answered. There is likewise no need to answer Questions 2, 3 and 8(a) in Case C 403/08 or Question 5 in Case C 429/08.

## B – Directive 2001/29

### 1. Reproduction right

63. By its Questions 4 and 5 in Case C 403/08, the High Court asks whether the digital communication of broadcasts inevitably affects the author's right to the reproduction of his works. For technical reasons, the communication of digital programmes requires short fragments of the broadcast to be stored in the decoder's memory buffer. According to the order for reference, in accordance with the applicable standard, four frames of a video stream and a corresponding part of the sound recording are stored at any time in a receiver's memory buffer.

64. Under Article 2 of Directive 2001/29, various persons – including authors, in respect of their works, and broadcasting organisations, in respect of fixations of their broadcasts – are accorded the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.

a) Question 4(a) in Case C 403/08 – national law or European Union law

65. The referring court first asks whether classification of temporary storage as reproduction is a matter for national law or ultimately follows from Directive 2001/29. It doubts whether reproduction here exists for the purposes of national law.

66. The Court of Justice, however, has already ruled that the notion of 'reproduction in part' is to be given a uniform interpretation in European Union law.<sup>16</sup>

67. Consequently, the question whether works have been reproduced in whole or in part must be answered by means of an interpretation of Article 2 of Directive 2001/29.

b) The application of the reproduction right to live transmissions

68. Before the questions on reproduction can be answered, it is necessary to clarify whether the reproduction right is applicable at all to live transmissions.

69. Article 2(e) of Directive 2001/29 establishes for broadcasting organisations a right to reproduction of fixations of their broadcasts. Under Article 2(d), the same right for film producers applies in respect of the original and copies of their films.

70. QC Leisure and Others doubt whether a live transmission involves the reproduction of a fixation, an original or a copy. This view is presumably based on the fact that the production process described in the order for reference does not provide for any permanent fixation of the broadcast on the basis of which the film is transmitted.

71. The Commission, on the other hand, argues convincingly that, in practice, even a live transmission is based on a first fixation or original recording on the basis of which the images are relayed. That fixation is created at least in the memory buffers, in which the different camera angles are merged in order to produce the broadcast which is relayed.

72. The view taken by QC Leisure and Others would result in live transmissions being placed at an unreasonable disadvantage in comparison with transmissions of fixations. Such a restriction of the reproduction right could also be easily circumvented, as broadcasters could, without any great difficulty, integrate a first permanent fixation of the signal into the production process.

73. The reproduction right is thus also applicable to a live transmission.

c) Question 4(b) in Case C 403/08 – Reproduction in the receiver’s memory buffer

74. The High Court first asks, with regard to Article 2 of Directive 2001/29, whether it should consider each of the fragments of the broadcast which exist or the broadcast as a whole.

75. Article 2 of Directive 2001/29 provides for a right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.

76. An argument in favour of taking into consideration all fragments stored for a short time is the fact that all fragments are reproduced only with a view to

enabling continuous playback of the whole broadcast. However, in accordance with the standard, only four frames exist in the memory buffer at any one time, together with a very short soundtrack corresponding to those frames. It cannot therefore be assumed that a complete reproduction of the broadcast is produced. However, even such fragments, which are extremely small in scope, constitute the reproduction in part of a broadcast.

77. QC Leisure and Others take the view that those frames and fragments of the soundtrack cannot be regarded as reproduction of the broadcast. For reproduction in part within the meaning of Article 2 of Directive 2001/29, it is necessary that a substantial part of the work should be reproduced. This argument is based on the domestic concept of reproduction and its interpretation.

78. In the meantime, however, the Court has already interpreted the concept of reproduction under Article 2(a) of Directive 2001/29 with regard to a newspaper article. It found that copyright covers all parts of the work which represent the author's own intellectual creation.<sup>17</sup> It nevertheless excluded words in isolation from protection, inasmuch as the intellectual creation resulted only from the choice, sequence and combination of those words.<sup>18</sup> The principles laid down in that ruling can be applied to the present cases.

79. Unlike words, the images and fragments of the soundtrack which are stored for a short time in the present case are individual in nature. Each image stems from a specific choice made by the camera operator or the director and can be unambiguously attributed to the transmission in question. Although there would appear to be no particular interest in the vast majority of these individual frames, they all none the less form part of the intellectual creation represented by the transmitted broadcast.

80. In this process, on the other hand, the isolated items of colour data for individual pixels are comparable to individual words. Bringing those data together forms the individual frames which represent the author's own intellectual creation.

81. Acts of reproduction therefore occur where frames of digital video and audio are created within the memory of a decoder, as these frames are part of the intellectual creation of the author of the broadcast.

d) Question 4(c) in Case C 403/08 – Reproduction through display on a screen

82. Lastly, the referring court asks whether the display of a broadcast on a screen also constitutes reproduction.

83. Although this question may seem surprising at first glance, QC Leisure,

FAPL and the Commission rightly agree that such display does in fact amount to reproduction.

84. In principle, this follows from the same reasons as the assumption of the existence of a reproduction in the case of the temporary storage of images and fragments of the soundtrack. An image from the broadcast is displayed on the screen for an even shorter time, while the corresponding section of the soundtrack is also played.

85. The display of a broadcast on a screen therefore also constitutes reproduction.

## 2. Question 5 in Case C 403/08 – Restriction of the reproduction right

86. Question 5 in Case C 403/08 is intended to clarify whether the copies identified in the answer to the fourth question are excluded from the author's reproduction right by Article 5(1) of Directive 2001/29.

87. Article 5(1) of Directive 2001/29 excludes from the reproduction right certain processes carried out for technological reasons. That exception must satisfy three cumulative conditions, that is to say, non-compliance with any one of them will lead to the act of reproduction falling under the reproduction right provided for in Article 2 of that directive.<sup>19</sup>

88. First of all, they must be transient or incidental temporary acts of reproduction, which are an integral and essential part of a technological process. An act can be held to be 'transient' within the meaning of Article 5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end.<sup>20</sup> That is the situation here. The copies in the memory and on the screen are transient and temporary. They are also an integral and essential part of the technological process which effects the communication of a broadcast.

89. Secondly, the sole purpose of the act must be to make possible a transmission in a network between third parties via an intermediary, or a lawful use. As the referring court explains, the lawfulness or otherwise of the act cannot be based on whether the rights-holder has given consent for the copies in question as such. Reproduction with the consent of the rights-holder does not require any exception. This point therefore depends crucially on the answer to other questions, in particular whether the fundamental freedoms and/or Directive 93/83 establish a right to receive the broadcast (see below under C and D) and whether the right of communication to the public is relevant (see below under 3).

90. Thirdly, the acts of reproduction must have no independent economic significance. The fifth question in Case C 403/08 deals with the issue of whether the copies identified in the fourth question have any such significance.

91. The exception under Article 5(1) of Directive 2001/29 must be interpreted strictly because it derogates from the general principle established by Article 2.<sup>21</sup> This holds true all the more so in the light of Article 5(5) of Directive 2001/29, under which all exemptions to Article 5 are to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rights-holder.<sup>22</sup>

92. All of the conditions laid down in Article 5(1) of Directive 2001/29 seek to permit acts of reproduction which are the condition for actual exploitation. This is illustrated by the Commission in the explanatory memorandum on the proposal for a directive through the example of the transmission of a video on-demand from a database in Germany to a home computer in Portugal, which requires at least 100 acts of storage.<sup>23</sup>

93. In principle, such acts of reproduction have no independent value going beyond the economic significance of exploitation. They may possibly have an economic significance equivalent to exploitation since, if, for example, an act of reproduction with a view to transmission does not occur, exploitation at the end of the transmission chain is also not possible. However, such economic significance is entirely dependent on the proposed exploitation, with the result that it is not *independent*.

94. Consequently, the copies which are created in a decoder's memory have no independent economic significance.

95. By contrast, the copy which is produced on the screen would indeed appear to have independent economic significance. It is the subject-matter of the exploitation of a broadcast. In terms of copyright law, the exploitation of the rights to a broadcast is connected with the broadcasting right, since the authors are given a right to object to the broadcast. However, the economic significance of a broadcast is, as a rule, based on its reception. This is obvious in the case of the subscriber broadcasts in the present cases, but also holds true for broadcasts financed by advertising. Even public broadcasters financed by fees or from the national budget must in practice also justify their financing at least by reasonable audience figures.

96. Consequently, transient copies of a work created on a television screen linked to the decoder box have independent economic significance.

97. The referring court elaborates on Question 5 under letter (b), asking if it is relevant (i) whether the transient copies have any inherent value; (ii) whether they comprise a small part of a collection of works and/or other subject-matter which otherwise may be used without infringement of copyright; or (iii) whether the exclusive licensee of the rights-holder in another Member State has already received remuneration for use of the work in that Member State.

98. Sub-question (i) has already been answered: transient copies in the memory buffer do not have any inherent value, whereas transient copies on a television screen do.

99. Sub-question (ii) refers to the possibility that only certain parts of the broadcast are protected. That argument may hold with regard to communication to the public,<sup>24</sup> but it is doubtful in the case of the reproduction right under examination here.<sup>25</sup> If the referring court should nevertheless conclude that only parts of the broadcast are protected, that would have no bearing on the application of Article 5(1) of Directive 2001/29. The national rules designed to implement Article 5(3)(i) of Directive 2001/29 would instead be relevant. Under that provision, Member States may provide for exceptions or limitations to the reproduction right in the case of the incidental inclusion of a work or other subject-matter in other material.

100. Lastly, sub-question (iii) underlines the crucial point in the two references for preliminary rulings, namely remuneration for use of the work in another Member State. Since the independent economic significance of the reproduction of a broadcast on a screen coincides with the interest in receiving that broadcast, the question arises whether the remuneration paid for receiving that broadcast in one Member State establishes the right to receive the broadcast in another Member State. This is the subject of the subsequent questions on Directive 93/83 (see below under C) and on the fundamental freedoms (see below under D). It does not, however, affect the application of Article 5(1) of Directive 2001/29.

101. In summary, it must be stated with regard to Question 5 in Case C 403/08 that transient copies of a work created on a television screen linked to the decoder box have independent economic significance within the meaning of Article 5(1) of Directive 2001/29, whereas transient copies created in a decoder's memory do not.

### 3. Further communication to the public

102. Question 6 in Case C 403/08 seeks clarification as to whether the showing of live transmissions of football matches in pubs infringes the exclusive right of communication to the public of protected works within the terms of Article 3 of Directive 2001/29.

a) Admissibility of the question

103. Doubts could be raised as to whether this question is relevant to the outcome of the case and is thus admissible. According to the referring court, section 72 of the Copyright, Designs and Patents Act permits, in principle, television programmes to be shown in public if the person showing the programme does not receive any remuneration for doing so. Even if such showing were incompatible with Article 3 of Directive 2001/29, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.<sup>26</sup>

104. In accordance with settled case-law, in the context of the cooperation between the Court and the national courts, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling,<sup>27</sup> and it is presumed that questions referred by national courts for a preliminary ruling are relevant.<sup>28</sup> This presumption may, however, be rebutted in exceptional cases, in particular where it is quite obvious that the interpretation which is sought of the provisions of European Union law referred to in the questions is hypothetical.<sup>29</sup> Were this the case, the question would be inadmissible.

105. In the present cases, it appears that there is a far-reaching right under national law to show television programmes in public without charge, although this does not cover all elements of programmes. In particular, musical works are excluded. Furthermore, it cannot be ruled out that an interpretation of that provision in accordance with Article 3 of Directive 2001/29 permits that right to be further restricted.

106. The question is not therefore manifestly irrelevant to the outcome of the proceedings and is for that reason admissible.

b) The question

107. Consequently, it is necessary to examine whether there is communication to the public, within the meaning of Article 3 of Directive 2001/29, if a live transmission of a football match is shown in a pub. First of all, the scope of the group of protected works must be defined and then the applicability of Article 3(1) must be examined.

i) The protected works

108. Article 3 of Directive 2001/29 requires the introduction of exclusive rights to authorise or prohibit certain actions with regard to works. Article 3(1) concerns the rights of authors, whilst Article 3(2) relates to the rights of certain other persons, in particular producers of films (c) and broadcasting organisations (d).

109. Paragraphs (1) and (2) do not contain the same rights. Article 3(1) grants the right to any communication to the public of works, by wire or wireless means, *including* the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them. The right under Article 3(2) applies *only* in regard to this latter form of access, that is to say, where the works covered are accessed by members of the public from a place and at a time individually chosen by them.

110. According to the explanatory memorandum on the proposal for Directive 2001/29, ‘access ... from a place and at a time chosen by [members of the public]’ is intended to cover on-demand transmission, which is not relevant here.<sup>30</sup> Non-interactive transmissions, that is to say, the conventional reception of television programmes, are, by contrast, not the subject-matter of Article 3(2). The existing provisions, namely Article 8 of Directive 2006/115 and Article 4 of Directive 93/83, were intended to continue to apply to such transmissions.<sup>31</sup>

111. Under Article 8(3) of Directive 2006/115, broadcasting organisations are given the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee. No entrance fee was charged in the cases in the main proceedings, however.

112. There would appear to be no specific provision relating to non-interactive communication of films. If football transmissions were to be regarded as films, a national provision governing the right of communication to the public at most could therefore be taken into consideration.

113. As European Union law stands at present, there are thus no comprehensive rights protecting the communication of a broadcast to the public in the absence of an entrance fee. Rather, Article 3(1) of Directive 2001/29 grants only rights relating to copyright works which are included in the broadcast. In the present cases, for example, one could think of the Premier League Anthem, which is transmitted in conjunction with the broadcast, but also of various other works mentioned in the orders for reference.

114. Under Article 12(2) of Directive 2001/29, but also under Article 14 of Directive 2006/115, the protection of these works is left intact or is not affected by protection

of rights related to copyright under each of the directives. However, the referring court will have to examine whether those works may possibly fall under national provisions implementing Article 5(3)(i) of Directive 2001/29. Under Article 5(3)(i), Member States may provide for exceptions or limitations to the right of communication to the public in the case of incidental inclusion of a work or other subject-matter in other material.

115. Article 3(1) of Directive 2001/29 is therefore relevant only in so far as works are communicated with the football matches shown in pubs, in respect of which United Kingdom law does not provide for any exception to the application of the provisions implementing Article 3(1).

ii) The applicability of Article 3(1) of Directive 2001/29

116. With regard to the works thus falling under Article 3(1) of Directive 2001/29, it is necessary to examine whether a showing in a pub represents ‘communication to the public ... by wire or wireless means’.

117. Satellite broadcasting itself is in principle communication to the public of protected works. It must be assumed, however, that the relevant rights-holders have given their consent. Rather, it is questionable whether showing the transmission in a pub, instead of showing it for domestic or private purposes, constitutes a *retransmission* to the public which requires further consent from the rights-holder, which is absent in the present cases.

118. In cases which appear to be similar, namely those regarding transmissions of television programmes in a hotel, the Court has assumed further communication to the public to exist.<sup>32</sup> In principle, it is conceivable that visitors to a pub are, like guests in a hotel, to be regarded as an indeterminate number of potential television viewers who represent a new public vis-à-vis private recipients.<sup>33</sup> The Court has also stated that communication in the hotel cases was of a profit-making nature.<sup>34</sup> Such profit-making purposes are certainly also pursued by publicans when they show transmissions of football matches, and authors have an underlying interest in sharing in the profit derived from the commercial exploitation of their works.

119. The practice of marketing decoder cards follows this logic, since the broadcasting organisations charge pubs a higher fee for using decoder cards, whilst they enjoin private customers to use their cards only for domestic or private purposes.

120. It is, none the less, necessary to examine whether communication to the public within the meaning of Article 3(1) of Directive 2001/29 should actually be assumed to exist. This is suggested by an interpretation in the light of the rules of

international law. However, recital 23 in the preamble shows, against the background of the drafting history of Article 3(1), that the European Union legislature did not intend to create any rights for authors in respect of free public showings of television broadcasts.

### The Berne Convention

121. Indications as to the meaning of communication to the public can be derived in principle from Article 11*bis*(1) of the Berne Convention. Article 11*bis*(1)(i) to (iii) grants authors the exclusive right of authorising three different forms of public communication of their works:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;
- (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

122. According to the WIPO Guide,<sup>35</sup> an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention, Article 11*bis*(1)(iii) is applicable: the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work. That provision is specifically intended to cover the presentation of radio and television programmes in places where people gather: cafés, restaurants, hotels, large stores, trains or aircraft.<sup>36</sup>

123. The fact that the broadcast, including the protected works, is shown on the screen to the audience present would, from this perspective, constitute communication to the public.

124. Whilst the European Union is not party to the Berne Convention, it has, under Article 9(1) of the TRIPS Agreement and Article 1(4) of the WIPO Copyright Treaty, undertaken, together with the Member States, to comply with Articles 1 to 21 of the Berne Convention. It would therefore be consistent with the European Union's obligations under international law to implement Article 11*bis*(1)(iii) of the Berne Convention in European Union law.

125. Furthermore, Article 14(3) of the TRIPS Agreement expressly provides that broadcasting organisations must be given the right to prohibit the communication to the public of television broadcasts when undertaken without their authorisation. States which do not grant such rights to broadcasting organisations must at least provide owners of copyright in the subject-matter of broadcasts with the possibility of preventing communication, subject to the provisions of the Berne Convention.

126. Communication to the public would accordingly have to be assumed to exist in the present cases.

The intention of the European Union legislature

127. Although the Commission proposal for Directive 2001/29 sought also to implement Article 11*bis*(1)(iii) of the Berne Convention in European Union law, the Council and the Parliament did not follow the Commission on this point. They did not wish to create any rights at all for authors in respect of free public presentation of works as part of a television broadcast.

128. Article 3(1) of Directive 2001/29 is not expressly designed to implement Article 11*bis* of the Berne Convention. However, it can be seen from the explanatory memorandum on the Commission's proposal for the directive that the intention was to implement Article 8 of the WIPO Copyright Treaty, the wording of which is largely identical to that of Article 3 of the directive.<sup>37</sup> That provision fails expressly to mention communication to the public by means of public presentation. However, in view of the fact that that Treaty expressly requires compliance with Article 11*bis* of the Berne Convention, it would be reasonable to construe 'communication to the public' in Article 8 of the WIPO Copyright Treaty, and thus in Article 3 of Directive 2001/29, in the same way as in Article 11*bis* of the Berne Convention.

129. It is correspondingly evident from the explanatory memorandum on the Commission's proposal for a directive that Article 3(1) of Directive 2001/29 is intended to cover *all* forms of public communication.<sup>38</sup> Accordingly, the three forms of public communication mentioned in Article 11*bis* of the Berne Convention would be included.

130. Nevertheless, the Commission and QC Leisure argue that Article 3 of Directive 2001/29 does *not* implement Article 11*bis*(1)(iii) of the Berne Convention. In this regard they rightly rely on the discussions on the directive following the Commission proposal, which resulted in recital 23.

131. At first reading, the Parliament proposed that Article 3(1) of Directive 2001/29 should not cover 'direct representation or performance'.<sup>39</sup> The Commission amended its proposal accordingly.<sup>40</sup> Whilst the Council did not take up the amended Commission proposal, some Member States nevertheless secured the restriction contained in the second to fourth sentences of recital 23,<sup>41</sup> which is also mentioned by the referring court.

132. According to the second sentence of recital 23 in the preamble to Directive 2001/29, the author's right of communication to the public should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. The third sentence, more specifically, states

that this right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. The fourth and final sentence makes it clear that this right should not cover any other acts.

133. It follows from those three sentences, taken together, that Article 3(1) of Directive 2001/29 is intended to implement only Article 11*bis*(1)(i) and (ii) of the Berne Convention, that is to say, the rules on broadcasting and on communication by an organisation other than the original broadcaster. In those cases, different places and transmission by wire or wireless means are to be taken into consideration.

134. By contrast, the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work within the meaning of Article 11*bis*(1)(iii) of the Berne Convention typically occurs at the place where the communication originates. No transmission takes place.

135. This restrictive effect of recital 23 in the preamble to Directive 2001/29 was also discussed within the Council and the European Union legislature was therefore aware of it. The Council Presidency stressed that acts other than those referred to in that recital, in particular placing a computer with internet connection at the disposal of the public in a cybercafé or a library, would not be covered.<sup>42</sup> In this connection, the Italian delegation even questioned the appropriateness of excluding Article 11*bis*(1)(iii) of the Berne Convention from the scope of Article 3(1) of Directive 2001/29.<sup>43</sup>

136. The restriction of the scope of Article 3(1) of Directive 2001/29 is confirmed by the fact that a number of rules of international, European and national law give the impression that television programmes could in principle be shown in pubs without further consent from rights-holders.

137. At the level of European Union law, mention should be made, first and foremost, of Article 8(3) of Directive 2006/115, which provides a right of objection for broadcasting organisations only in cases where an entrance fee is charged. That provision is not an isolated case, but corresponds to Article 13(d) of the Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961. Although the European Union is not a Contracting Party to that Convention, which is subject to participation only by States under Article 24, the Member States are required to accede to it under Article 5(1)(c) of Protocol 28 on intellectual property to the Agreement on the European Economic Area.<sup>44 45</sup>

138. Similarly, section 72 of the Copyright, Designs and Patents Act provides that a television broadcast may be shown in principle in the United Kingdom if no admission fee is charged. In Germany there is a similar provision regarding the rights of broadcasting organisations,<sup>46</sup> although Article 11*bis*(1)(iii) of the Berne

Convention is implemented by Paragraph 22 of the *Urheberrechtsgesetz* in respect of authors.<sup>47</sup>

139. Consequently, the European Union legislature has thus far not intended to implement Article 11*bis*(1)(iii) of the Berne Convention or Article 14(3) of the TRIPS Agreement as part of European Union law. This decision must be respected in particular because the rights of authors stemming from Article 11*bis*(1)(iii) are not directed against State authorities, but necessarily restrict the rights of others in private-law relations.

140. It is not necessary in the present preliminary-reference proceedings to decide whether Article 11*bis*(1)(iii) of the Berne Convention or Article 14(3) of the TRIPS Agreement are directly applicable; furthermore, the provisions of the TRIPS Agreement are not such as to create rights upon which individuals may rely directly before the courts by virtue of European Union law,<sup>48</sup> and the Court has not yet considered the direct applicability of the Berne Convention as part of European Union law.<sup>49</sup>

141. However, the hotel cases are understood by some parties to these proceedings as meaning that the Court none the less takes the view that Article 3(1) of Directive 2001/29 does implement Article 11*bis*(1)(iii) of the Berne Convention. In particular, it relies on the statements contained in the WIPO Guide on that provision.<sup>50</sup> It also states that Directive 2001/29 applies to all communications to the public of protected works.<sup>51</sup>

142. However, recital 23 in the preamble to Directive 2001/29 was not the subject of the hotel cases. Above all, those rulings related to a different situation, namely communication within the meaning of Article 11*bis*(1)(ii) of the Berne Convention, that is to say, a communication made by a broadcasting organisation other than the original one.<sup>52</sup> Such communication is naturally directed at a public not present at the place in which the communication originates. Consequently, the Court did not decide in those cases whether Article 11*bis*(1)(iii) of the Berne Convention is implemented by Article 3(1) of Directive 2001/29.

143. Article 3(1) of Directive 2001/29, in conjunction with recital 23 in the preamble thereto, must therefore be understood as covering only communication of works to a public which is not present at the place in which the communication originates. Application to the communication of broadcasts in pubs

144. Where a publican shows a television programme to his customers on a television in the pub, it must in principle be assumed, with regard to his action, that the relevant public is present at the place in which the communication originates. The communication originates on the screen.

145. The referring court asks under Question 6(b)(iii) whether it is relevant if the television broadcast signal is received by an aerial or satellite dish on the roof of or adjacent to the premises where the television is situated. This cannot be relevant, however. In practice, any form of communication requires such transmissions of signals between aerials, decoders and screens and within those devices. It would be arbitrary to take into consideration the length of the cables.<sup>53</sup> Such technical requirements for any communication must therefore still be attributed to the original broadcast.

146. The situation might be different if the signal were not only communicated on a receiver, but – as in the hotel cases – were distributed to various other receivers. The distributing device could then be regarded as the place in which the communication originates and reception would take place at a different place. This would be retransmission by wire or wireless means, as in the hotel cases, which the legislature specifically did not intend to exclude from Article 3(1) of Directive 2001/29.

147. The answer to Question 6 in Case C 403/08 must therefore be that a copyright work is not communicated to the public by wire or wireless means, within the meaning of Article 3(1) of Directive 2001/29, where it is received or viewed as part of a satellite broadcast at commercial premises (for example, a bar) or shown at those premises, free of charge, via a single television screen and speakers to members of the public present on those premises.

### *C – Directive 93/83*

148. The first part of Question 7 in Case C 403/08 asks whether it is compatible with Directive 93/83 if national copyright law provides that when transient copies of works included in a satellite broadcast are created inside a satellite decoder box or on a television screen, there is an infringement of copyright under the law of the country of reception of the broadcast. The national court also asks whether the position is affected if the broadcast is decoded using a satellite decoder card which has been issued by the provider of a satellite broadcasting service in another Member State on the condition that the satellite decoder card is authorised for use only in that other Member State.

149. Under Article 2 of Directive 93/83, Member States must provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works.

150. Under Article 1(2)(b) of Directive 93/83, the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals

are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

151. In the present context that would be Greece. The signals are transmitted to satellites from there and return there. By contrast, Directive 93/83 is not relevant in regard to the use of Arab decoder cards.

152. Those provisions would not appear to contain any rules regarding the cross-border reception of satellite broadcasts, in particular the reception of Greek signals by pubs in the United Kingdom. However, according to recital 14 in the preamble to Directive 93/83, that provision is intended to avoid the cumulative application of several national laws to one single act of broadcasting.

153. As recital 7 in the preamble to Directive 93/83 explains, prior to the adoption of the directive, there was legal uncertainty as to whether broadcasting by a satellite whose signals can be received directly affects the rights in the country of transmission only or in all countries of reception together. A cumulation would not only give rise to the simultaneous application of different legal orders. The rights to the broadcast could also be enjoyed by different holders in different Member States. A cumulation could therefore render satellite broadcasts excessively difficult or even impossible.

154. According to recital 15 in its preamble, Directive 93/83 is therefore intended to guarantee that the broadcasting rights are awarded in accordance with the law of a single Member State, that is to say, the State in which the broadcast occurs under Article 1(2)(b). According to this country-of-origin principle (recital 18), the broadcasting right for that State includes the right also to transmit the broadcast into other Member States.

155. However, the FAPL is essentially correct in its view that Directive 93/83 does not permit other rights to the broadcast works to be infringed. Under Article 5, protection of copyright-related rights under the directive leaves intact and in no way affects the protection of copyright.<sup>54</sup>

156. In particular, Directive 93/83 does not explicitly call into question the reproduction right for the broadcast. The referring court and various parties to the proceedings therefore take the view that the broadcasting right makes no implication as to the right to create transient copies of the broadcast in connection with reception and communication of the broadcast.<sup>55</sup>

157. Nevertheless, under Article 1(2)(a), Directive 93/83 expressly applies only to signals intended for reception by the public. Consent for the transmission of the broadcast must therefore include the right to the acts of reproduction which are necessary for its reception.

158. On the other hand, the FAPL relies on recital 16 in the preamble to Directive 93/83, according to which the principle of contractual freedom on which the directive is based will make it possible to limit the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned.

159. However, that recital concerns contractual restrictions which, by their nature, have effect only between contracting parties. Consequently, it also cites as examples only measures which the contracting parties can take, namely technical measures in connection with the broadcast, such as encryption and the language version of the broadcast. It is not possible to derive from that recital any rights vis-à-vis recipients of broadcasts who are not bound contractually.

160. My interpretation is confirmed by recital 17 in the preamble to Directive 93/83. That recital states that, in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version. The legislature thus proceeded on the basis of the assumption that the transmission of a satellite broadcast goes together with its reception and the payment must include such exploitation. The payment should obviously also cover reception outside the State of broadcast, whilst such reception must be forecast in particular with reference to the language version of the broadcast.

161. The right to communicate copyright works by satellite under Article 2 of Directive 93/83 therefore goes together with the recipients' right to receive and to watch such broadcasts.

162. It is uncertain whether the foregoing considerations also apply to encrypted satellite broadcasts. Since encryption makes it possible to control access, it is conceivable that the broadcasting right is limited to the reception area agreed between the rights-holder and the broadcasting organisation. However, Article 1(2)(c) of Directive 93/83 states that there is communication to the public of encrypted broadcasts by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent. If these conditions are satisfied – as in the present case – the encrypted satellite broadcast will be equivalent to an unencrypted satellite broadcast. Encryption does not therefore affect the scope of the broadcasting right which justifies reception.

163. The broadcasting right is also not limited by conditions relating to the issue of decoder cards. These can at most have a contractually binding effect, but do not create any obligations for third parties.

164. As far as Directive 93/83 is concerned, I therefore propose that Question 7 in Case C 403/08 be answered to the effect that the right to communicate copyright works by satellite under Article 2 of Directive 93/83 includes the right also to receive and watch that broadcast abroad.

*D – The fundamental freedoms*

165. The significance of the fundamental freedoms with regard to the use of the Greek decoder cards is addressed in particular in Questions 6 and 7 in Case C 429/08, but also in Questions 7 and 8(b) and (c) in Case C 403/08. The High Court wishes to ascertain whether Articles 28 EC, 30 EC and/or 49 EC preclude enforcement of a national law which makes it a criminal offence or a breach of copyright to receive a programme included in a broadcasting service provided from a place inside the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme. The Court mentions three sets of circumstances in Case C 429/08, which may exist alternatively or cumulatively:

(i) The conditional access device was made by or with the consent of a service provider and originally supplied subject to limited contractual authorisation to use the device to gain access to a protected service only in a first Member State. It was nevertheless used to gain access to that protected service in a second Member State (in this case the United Kingdom) (this is also the purport of Question 8(b) in Case C 403/08).

(ii) The conditional access device was made by or with the consent of a service provider and was originally procured and/or enabled by the provision of a false name and false residential address in the first Member State, thereby circumventing contractual territorial restrictions imposed on the export of such devices for use outside the first Member State.

(iii) The conditional access device was made by or with the consent of a service provider and was originally supplied subject to a contractual condition that it be used only for domestic or private use, and not for commercial use (for which a higher subscription charge is payable). The device was nevertheless used in the United Kingdom for commercial purposes, namely showing live football broadcasts in a public house (this is also the purport of Question 8(c) in Case C 403/08).

166. I will begin by considering the first case and then go on to discuss whether the other two cases lead to a different conclusion.

a) The applicable fundamental freedom

167. As decoder cards have been brought from Greece into the United Kingdom, the free movement of goods under Article 34 TFEU (formerly Article 28 EC)<sup>56</sup> may be applicable. In practice, however, such cards constitute a means, the key as it were, to gain access in the United Kingdom to a television programme broadcast

from Greece. The provision of that programme is a service within the meaning of Article 56 TFEU (formerly Article 49 EC).<sup>57</sup>

168. Where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it.<sup>58</sup>

169. As the Commission rightly states, the Court has already found, in connection with the sale of *decoder devices* for encrypted satellite television, that it is impossible to determine generally whether it is free movement of goods or freedom to provide services which should take priority.<sup>59</sup> However, the case in question concerned restrictions which were specifically directed at the trade in decoder devices and thus also indirectly made access to satellite television services more difficult.

170. The disputed point in the present proceedings, by contrast, is not primarily the trade in the cards, but their use in order to gain access to the encrypted programmes in the United Kingdom. Furthermore, if we compare the material value of the cards with the prices charged for access to the programmes, the card is entirely secondary in importance. The references have therefore to be examined with regard to freedom to provide services.

b) Restriction of freedom to provide services

171. Freedom to provide services requires the abolition of all restrictions on the free provision of services, even if those restrictions apply without distinction to national service providers and to those from other Member States, in so far as they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services covers both providers and recipients of services.<sup>60</sup>

172. In the present cases, the question whether the providers of television programmes are required to grant access to interested parties from other Member States on conditions comparable to those for nationals does not arise. Such an obligation would require freedom to provide services to have effect vis-à-vis third parties, something which the Court has not thus far accepted, at least in this form.<sup>61</sup>

173. It is also not relevant whether the providers of television programmes are authorised to restrict access to their programmes contractually to certain territories.<sup>62</sup> Such contractual rules can have effect only between the contracting

parties. However, in the present cases there are no contractual relations between the rights-holders and the providers of decoder cards in the United Kingdom or the publicans.

174. Rather, it is uncertain whether freedom to provide services permits the recognition and enforcement of rights to satellite programmes on the basis of which the rights-holders can prohibit third parties not contractually linked to them from watching and showing those programmes in Member States other than those intended. By virtue of such rights, the utilisation of services from other Member States would be prevented, namely access to television programmes.

175. This impairment of freedom to provide services is particularly intensive as the rights in question not only render the exercise of freedom to provide services more difficult, but also have the effect of partitioning the internal market into quite separate national markets. Similar problems exist with regard to access to other services, for example the sale of computer software, musical works, e-books or films via the internet.

176. There is thus a serious impairment of freedom to provide services.

c) The justification for the restriction

177. Since the freedom to provide services is one of the fundamental principles of the European Union, a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest. If that is the case, it must also be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it.<sup>63</sup>

178. Article 52(1) TFEU (formerly Article 46(1) EC), which is applicable to freedom to provide services by reason of Article 62 TFEU (formerly Article 55 EC), allows restrictions which are justified on grounds of public policy, public security or public health. In addition, the case-law has recognised a number of overriding reasons in the general interest which can justify restrictions of the freedom to provide services.<sup>64</sup>

Protection of industrial and commercial property

179. In the present context, protection of industrial and commercial property is particularly at issue.<sup>65</sup> This justifies restrictions which are necessary to safeguard rights which constitute the specific subject-matter of such property.<sup>66</sup> It is therefore necessary to examine whether there exist rights to satellite transmissions of football matches, the specific subject-matter of which requires a partitioning of the internal market.

180. In the field of the free movement of goods, it is primarily the exploitation of rights through the sale of copies of the work that is affected. Such exploitation is based on the exclusive right to copy the work and to place the copies on the market. This exclusive right is exhausted when a product has been lawfully distributed on the market in a Member State by the actual proprietor of the right or with his consent.<sup>67</sup> Apart from particular situations, such as the resale right for the benefit of the author of an original work of art,<sup>68</sup> there are no rights which preclude the re-sale of such goods within<sup>69</sup> the internal market. Rather, with the sale the rights-holder has already realised the economic value of the intellectual property in question.<sup>70</sup>

181. The copyright in gramophone records which were lawfully placed on the market in a Member State did not therefore preclude their sale in another Member State.<sup>71</sup> QC Leisure and Ms Murphy rely on this case-law in order to justify their business practices.

182. However, the FAPL takes the view that, in the field of the provision of services, there is no exhaustion comparable to the movement of goods.

183. This is surprising, because restrictions on the fundamental freedoms must, as a rule, be justified by reference to the same principles.

184. Admittedly, some services differ from goods in that they cannot be re-used per se, for example the services provided by hairdressers. With the payment for the provision of the service the economic value is realised, but the service cannot be passed on as such. In this sense, there is actually no scope for an 'exhaustion' of the right to the service.

185. Other services, by contrast, do not differ significantly from goods. Computer software, musical works, e-books, films etc. which are downloaded from the internet can easily be passed on in electronic form. This is also illustrated by the fact that additional digital rights management measures are needed to prevent them being passed on. In these areas such a strict delimitation of the two fundamental freedoms would be arbitrary.

186. The examples cited – music, films or books – also show that the question at issue has considerable importance for the functioning of the internal market beyond the scope of the cases in the main proceedings. A delimitation of the markets based on intellectual property rights means at best that access to the goods in question will be granted subject to differing conditions, in particular as regards prices or digital rights management. Often, however, access to such goods is completely precluded on many markets, either because certain language versions are offered only to customers from certain Member States or because customers

from certain Member States cannot acquire the product at all. For example, in autumn 2010 dealers from the United Kingdom announced that they could no longer sell e-books to customers outside that Member State.<sup>72</sup> No comparable products are offered for sale in other Member States in the case of many English-language books.

187. At the same time, in the case of products offered which, as in the main proceedings, are based on conditional access or which are downloaded only from the internet, a market delimitation can be achieved much more effectively than in the case of physical goods such as books or CDs. The latter can be traded as a result of exhaustion in the internal market. For consumers, such barriers create unnecessary incentives to procure the corresponding goods illegally, that is to say, in particular without any remuneration for the rights-holder.

188. It is for that reason necessary to examine carefully whether the principle of exhaustion applies *mutatis mutandis* in the present context, that is to say, whether the specific subject-matter of the rights in question requires that the internal market be partitioned.

189. The FAPL relies, for each broadcast, on its rights to some 25 works, including films, artistic works, sound recordings and music. In some cases those works are protected under European Union law and in some cases under national law.

190. Whilst the rights to individual works which occur together in the broadcast are disputed in the present proceedings, there is no need to examine them further here. For the purposes of the present analysis, reference can be made in general to the rights to the broadcast. First of all, there are indisputably at least certain rights to that broadcast and, secondly, it must be assumed that the broadcast is transmitted with the consent of all the rights-holders concerned. The specific subject-matter of that package of rights can be seen, at least in so far as is relevant in the present context, in its commercial exploitation.<sup>73</sup>

191. The transmission of football matches is exploited through the charge for the decoder cards. Such exploitation is not undermined by the use of Greek decoder cards, as charges were paid for those cards.

192. Whilst those charges are not as high as the charges imposed in the United Kingdom, there is no specific right to charge different prices for a work in each Member State. Rather, it forms part of the logic of the internal market that price differences between different Member States should be offset by trade.<sup>74</sup> The possibility, demanded by the FAPL, of marketing the broadcasting rights on a territorially exclusive basis amounts to profiting from the elimination of the internal market. In this regard, contrary to the view taken by the FAPL, the present

proceedings fall within the scope of the case-law on the exhaustion of rights to goods.

193. However, the FAPL takes the view that, according to the case of *Coditel I*,<sup>75</sup> the rights claimed by it are compatible with freedom to provide services. *Coditel I* concerned German television being fed into the Belgian cable distribution network. In that context, in particular, a film transmitted in Germany with the consent of the rights-holder was shown. This was challenged by an undertaking which had acquired the rights to show that film in Belgian cinemas and on Belgian television.

194. The Court held at the time that the right of a copyright owner to require fees for any showing of a cinema film is part of the essential function of copyright.<sup>76</sup> There could be no objection in principle to partitioning that exploitation on a territorial basis, possibly even on the basis of the borders of the Member States.<sup>77</sup>

195. This does not, however, imply anything capable of calling into question the above considerations in the present context. The broadcast was transmitted as agreed between the rights-holders and the Greek broadcasting organisation. In addition, a fee was charged for each showing of the broadcast, albeit on the basis of Greek rates.

196. *Coditel I*, by contrast, did not directly concern an unauthorised and unremunerated showing in a cinema, but the retransmission of an authorised showing on television. In this regard, the Court stated that the showing on television could impair the exploitation of the rights to showing in the cinema and that it would therefore seem reasonable to permit a television showing only with a certain delay. From the perspective of the 1970s, it added that television showings were possible in purely practical terms only in the context of national monopolies.<sup>78</sup> On the basis of the specific conditions existing on the television and cinema markets at that time, the Court therefore concluded that the allocation of television rights on a territorial basis was justified.

197. The situation in *Coditel I* is not comparable to the situation here. The partitioning of the internal market for live football transmissions is precisely not intended to protect any other form of exploitation of the transmitted football match. Rather, the direct aim of partitioning the markets is to optimise exploitation of the same work within the different market segments.

198. In addition, European Union law has developed in the meantime: under Directive 93/83 satellite broadcasting rights in a Member State include transmission in other Member States within the broadcasting area and are also to be correspondingly remunerated. In addition, because access to the broadcast in the present proceedings even requires the purchase of a decoder card, each individual recipient pays a fee.

199. As a further – implicit – factor, *Coditel I* also involved the exploitation, on the Belgian cable network, of the film transmitted on German television, without a fee having been paid. This would be regarded today as (further) communication to the public within the meaning of Article 3(1) of Directive 2001/29<sup>79</sup> and Article 8(3) of Directive 2006/115 to which the rights-holder can object. Communication by a further broadcasting organisation would be relevant.<sup>80</sup> However, there is no need for a restriction of freedom to provide services in the case of simple communication in order to protect the specific subject-matter of the right to such communication to the public.

200. In summary, it must be stated that a partitioning of the internal market for the reception of satellite broadcasts is not necessary in order to protect the specific subject-matter of the rights to live football transmissions.

201. It could, finally, be argued, to counter this approach, that it could make access to transmissions of football matches more difficult. If the FAPL cannot prevent the use of cheaper decoder cards from other Member States, the possibility cannot be discounted that in future it will offer transmission rights only in the most lucrative market in the European Union – the United Kingdom – or make the service offered on other markets conditional on the charging of prices similar to those in the United Kingdom. It would then be more difficult to gain access to the transmissions in Member States such as Greece.

202. That would be an economic decision to be taken by the holder of the rights, however. It will ultimately depend on how that holder can best exploit his rights on the whole. In this regard it would appear relevant in particular whether alternative marketing models can be developed, as the Commission demands, or whether restricting the commentary to certain language versions might create a sufficiently effective practical delimitation of the markets in order to continue to serve the different national markets at different prices.

#### The closed periods

203. As an additional ground of justification, which is not, however, dealt with in the orders for reference, the FAPL claims that the football associations can adopt a window of two-and-a-half hours during which no football matches are to be transmitted. This is the core period during which the vast majority of football matches in the associations' top leagues take place. The window differs from one country to the next because it depends on the different customs for the scheduling of matches. Through a territorial allocation of transmission rights, the associations and the broadcasting organisations can ensure that no transmission infringes the national window.

204. The FAPL argues convincingly that the importation of decoder cards would make it more difficult, or even impossible, to enforce this closed period. The windows protected in the country of origin of the card may differ from those in the place where the card is used, or there may even be no such protection. At the same time, competition between pubs is impaired. Users of domestic decoder cards cannot show any matches during the closed periods, whereas users of imported cards can. Preventing such a distortion of competition is also a legitimate interest.

205. However, the closed periods can justify a restriction of freedom to provide services only in so far as they are appropriate for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.<sup>81</sup> Furthermore, the measures designed to implement such a policy must in no case be disproportionate in relation to that aim.<sup>82</sup>

206. The purpose of the closed period is to ensure that spectators are not deterred from attending local football matches of any kind and/or participating in matches at amateur and/or youth level on account of television transmissions which coincide with such matches.<sup>83</sup> Participation in football and its character as a direct spectator sport should not be affected by television transmissions.

207. Contrary to the view taken by QC Leisure, this is not a specific commercial interest, but primarily a sporting interest which is in principle to be recognised in European Union law. This is shown by the powers in relation to sport which were conferred on the European Union by the Lisbon Treaty (Articles 6(e) TFEU and 165 TFEU). In particular, they require account to be taken of the specific nature of sport and its structures based on voluntary activity.<sup>84</sup> From an economic point of view, it would certainly be more attractive to allow the live transmission of all matches.<sup>85</sup>

208. However, legitimate reliance on that aim as a justification for a partitioning of the internal market is called into question in the present proceedings by the economic interests in the partitioning of the market which also exist. The football associations are required to assess the need for closed periods and they should in principle enjoy a broad margin of discretion in this regard. It cannot be ruled out a priori, however, that the decision by the English Football Association to make use of a closed period is also based at least in part on safeguarding the economic interest of the most important members of the association in partitioning the internal market for live football transmissions. A particularly strict test is therefore to be applied to the demonstration of the need for closed periods.

209. It is, in fact, doubtful whether closed periods are capable of encouraging attendance at matches and participation in matches. Both activities have a completely different quality to the following of a live transmission on television. It

has not been adequately shown to the Court that the closed periods actually encourage attendance at and participation in matches. Indeed, there is evidence to refute this claim: for example, in an investigation of the closed periods under competition law the Commission found that only 10 of 22 associations had actually adopted a closed period. No closed periods were adopted in France, Germany, Italy and Spain, or in Northern Ireland, that is to say, within the sphere of influence of English football.<sup>86</sup> Furthermore, in Germany today all Bundesliga matches are evidently transmitted live without attendance at matches in the top two leagues suffering as a result.<sup>87</sup>

210. This does not mean that it cannot be shown in the proceedings before the High Court that different conditions apply in English football which mandatorily require protection by means of closed periods. However, such evidence would have to show that live transmissions have substantial detrimental effects on attendance at matches and/or participation in football matches in order for enforcement of the closed periods to be able to prevail over the adverse effects on the internal market.

Interim conclusion

211. Consequently, neither the specific subject-matter of the rights to the transmission of football matches nor – according to the information available to the Court – the closed periods for live transmissions justify a partitioning of the internal market.

d) Justification in the event of the provision of false information in procuring the decoder cards

212. The order for reference in Case C 429/08 also raises the question of whether the conclusion reached thus far is affected where the conditional access device was procured and/or enabled by the provision of a false name and a false residential address in the first Member State, thereby circumventing contractual territorial restrictions imposed on the export of such devices for use outside the first Member State.

213. It is clear that these circumstances were expressly not made the subject of the proceedings which form the basis of Case C 403/08.<sup>88</sup> Ms Murphy claims that she was unaware of such circumstances.

214. As Ms Murphy rightly submits, those circumstances cannot influence the application of the fundamental freedoms in relation to the final customers for the decoder cards. Agreements between individuals and the associated circumstances cannot restrict the exercise by third parties of the fundamental freedoms; such agreements would otherwise be to the detriment of third parties. Furthermore,

third parties cannot know, as a rule, how the cards were acquired and would have no opportunity to assess whether they could invoke the fundamental freedoms should those agreements be relevant.

215. It is therefore irrelevant whether decoder cards were procured and/or enabled in the other Member State by the provision of a false name and a false residential address.

e) Effects of the restriction to private or domestic use

216. Lastly, both in Case C 429/08 (Question 6(iii)) and in Case C 403/08 (Question 8(c)), questions are asked as to the significance of a contractual restriction on using decoder cards in the State of origin only for domestic or private use, but not for commercial use, for which a higher subscription charge is payable.

217. Such an agreement can, as such, also have effects only between the contracting parties.

218. As has already been explained, Article 3(1) of Directive 2001/29 likewise does not require the creation of rights which can be enforced vis-à-vis third parties.<sup>89</sup>

219. However, the referring court in Case C 403/08 considers it possible that such rights may exist under national law, in particular with regard to the Premier League Anthem, which is played in connection with broadcasts. European Union copyright law, in particular Directive 2001/29, would not preclude such a provision since it is restricted to a single legal context. As recital 7 in the preamble to that directive in particular stresses, differences between domestic rules not adversely affecting the functioning of the internal market need not be removed or prevented.

220. It is therefore necessary to examine whether freedom to provide services would be an obstacle to such national rights.

221. If the cards are authorised in Greece only for domestic or private use, preventing their use in British pubs would not be discriminatory. It would nevertheless be a restriction of freedom to provide services because the pubs would be unable to avail themselves of that service.

222. This would be justified if it were recognised in the internal market that there are rights which allow the authorisation to receive television broadcasts to be restricted to domestic or private use. In principle, authors have an interest in sharing in the profits generated as a result of profit-oriented use of their works. Although the European Union does not protect this interest, it has at least recognised it at

the international-law level.<sup>90</sup> If the national legislature recognises that authors have a right in relation to such use with a corresponding specific subject-matter, that right can justify a restriction of freedom to provide services.

223. Although a contractual restriction on using decoder cards in the State of origin only for domestic or private use cannot therefore justify a territorial restriction of freedom to provide services, the Member State in question may, none the less, in principle set out rights which allow authors to object to the communication of their works in pubs.

f) Question 9 in Case C 403/08

224. The answer to Question 9 in Case C 403/08 follows from the foregoing considerations.

225. The High Court asks, first of all, whether freedom to provide services precludes enforcement of a provision of national copyright law which makes it unlawful to perform or play in public a musical work where that work is included in a protected service which is accessed and played in public by use of a satellite decoder card, in the case where that card has been issued by the service provider in another Member State subject to the condition that the decoder card is authorised only for use in that other Member State.

226. In this regard the findings for the rest of the broadcast stand: on the one hand, freedom to provide services precludes such a partitioning of the internal market; on the other, the Member States may provide for more extensive protection of rights-holders with regard to communication to the public, for instance for musical works.

227. The second part of this question is more problematic, namely whether it makes a difference if the musical work is an unimportant element of the protected service as a whole and the showing or playing in public of the other elements of the service are not prevented by national copyright law.

228. In the cases in the main proceedings, the protection of such rights under purely national law gives rise to a restriction of freedom to provide services. This can be justified if it is proportionate in relation to the protection of the rights in question.<sup>91</sup>

229. A prohibition of reception would clearly be reasonable if rights existed to the whole broadcast or substantial parts which permitted an objection to be made to its communication in a pub.

230. If, on the other hand, secondary elements are involved, the economic value of which represents only a very small portion of the value of the broadcast as a whole and which are only of very low importance or are even without importance for viewers, it would be disproportionate to prohibit the reception of the broadcast as a whole for their protection.<sup>92</sup> This does not rule out ensuring an adequate remuneration in some other way. A flat-rate levy paid to a collecting society by publicans who show the television programme might be imagined, for example.<sup>93</sup>

231. It is for the referring court to decide which of the two cases applies.

232. Freedom to provide services does not therefore preclude national rules which permit the holder of rights to a broadcast – for example, pursuant to Article 14(3) of the TRIPS Agreement – to object to the communication of the broadcast in a pub, provided that the restriction of freedom to provide services stemming from the exercise of that right is not disproportionate to the share of the protected rights to the broadcast.

g) Question 7 in Case C 429/08

233. This question concerns the prohibition of discrimination on grounds of nationality under Article 18 TFEU (formerly Article 12 EC). Such discrimination could exist in so far as the criminal provision applied to Ms Murphy relates only to broadcasts provided from a place in the United Kingdom, whereas broadcasts from other Member States are not protected. Apparently, regard is not had to the Greek broadcaster for the purpose of applying that national provision, but to the fact that the broadcast was originally produced in the United Kingdom.

234. This question is relevant only in so far as the national rule is not already precluded by freedom to provide services and Directive 93/83.

235. The Commission correctly argues that, apart from freedom to provide services, Article 18 TFEU has no independent significance in principle.<sup>94</sup> This question must therefore be examined from the perspective of freedom to provide services.

236. The alleged discrimination could stem from the fact that providers from the United Kingdom are protected, whereas providers from other Member States are not. The latter would have to fear that their services will be used in the United Kingdom without remuneration or at least that the rates which they charge will be circumvented in the United Kingdom by means of the importation of decoder cards from other Member States. There is no clear justification for discrimination against foreign providers. However, there is no need for the Court to examine this point any further in the present proceedings.

237. The point at issue is not the rights of foreign providers, but whether domestic providers can rely on these protective provisions. Even if the form of protection were to discriminate against foreign providers, this could not preclude domestic providers from availing themselves of the protection which they enjoy under national law. Rather, the question would arise whether the protection must also be extended to foreign providers.<sup>95</sup>

238. It is consequently irrelevant for the purposes of the present reference for a preliminary ruling whether the national law infringes the freedom to provide services because it applies to programmes included in a broadcasting service provided from a place in the United Kingdom but not to programmes from any other Member State.

h) Conclusion on Questions 6 and 7 in Case C 429/08 and on Questions 7, 8(c) and 9 in Case C 403/08

239. As an interim conclusion, it must be stated that freedom to provide services under Article 56 TFEU precludes provisions which prohibit, on grounds of protection of intellectual property, the use of conditional access devices for encrypted satellite television in a Member State which have been placed on the market in another Member State with the consent of the holder of the rights to the broadcast. It is irrelevant whether such devices were procured and/or enabled in the other Member State by the provision of a false name and false residential address. An individual agreement to use decoder cards only for domestic or private use also cannot justify a territorial restriction of freedom to provide services.

240. Freedom to provide services does not preclude national rules which allow the holder of rights to a broadcast to object to its communication in a pub, provided that the restriction of freedom to provide services stemming from the exercise of that right is not disproportionate to the share of the protected rights to the broadcast.

241. It is irrelevant, for the purposes of the present references for preliminary rulings, whether the provision of national law infringes freedom to provide services because it applies to programmes included in a broadcasting service provided from a place in the United Kingdom but not to programmes from any other Member State.

242. Lastly, it should be pointed out that the Commission decision on the joint selling of the media rights of the FA Premier League on an exclusive basis does not call that conclusion into question.<sup>96</sup> Even if the decision were to be construed as meaning that the Commission regards the territorial partitioning of the internal market as a condition for authorisation, the Commission may not impose any restrictions on the freedom to provide services which extend further than the Treaties.<sup>97</sup>

*E – Competition law*

243. Question 10 in Case C 403/08 and Question 8 in Case C 429/08 are identical. With regard to the application of the prohibition of anti-competitive practices under Article 101(1) TFEU (formerly Article 81(1) EC), the referring courts are seeking to ascertain whether it is sufficient that a licence agreement concerning the territorially limited transmission of a broadcast has the object of preventing, restricting or distorting competition or whether an actual impairment of competition must be shown.

244. A concerted practice pursues an anti-competitive object for the purpose of Article 101(1) TFEU where, according to its content and objectives and having regard to its legal and economic context, it is liable in an individual case to result in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices.<sup>98</sup> It is thus not necessary to examine the effects of an agreement in order to establish its anti-competitive object.<sup>99</sup>

245. It must therefore be examined in the present cases whether licence agreements pursue an anti-competitive object where a programme content provider enters into a series of exclusive licences, each for the territory of one or more Member States, under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory.

246. In order to assess the anti-competitive object of an agreement, regard must be had, in particular, to the content of its provisions, the objectives which it seeks to attain and the legal and economic context of which it forms a part.<sup>100</sup>

247. An agreement between a producer and a distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market. Thus, on a number of occasions, the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements the object of which is to restrict competition within the meaning of Article 101(1) TFEU.<sup>101</sup>

248. A contractual obligation linked to a broadcasting licence requiring the

broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory has the same effect as agreements to prevent or restrict parallel exports. Such an obligation is intended to prevent any competition between broadcasters through a reciprocal compartmentalisation of licensed territories. Such licences with absolute territorial protection are incompatible with the internal market.<sup>102</sup> There is therefore no reason to treat such agreements any differently from agreements intended to prevent parallel trade.

249. The examination of freedom to provide services<sup>103</sup> confirms this conclusion since conflicting assessments of the fundamental freedoms and competition law are to be avoided in principle.<sup>104</sup>

250. It must also be pointed out that an anti-competitive agreement within the meaning of Article 101(1) TFEU can be justified pursuant to Article 101(3) TFEU. However, a person who relies on that provision must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied.<sup>105</sup> In this connection, it would appear that similar considerations should apply as in the examination of whether a restriction of freedom to provide services is justified.

251. Question 10 in Case C 403/08 and Question 8 in Case C 429/08 must therefore be answered to the effect that where a programme content provider enters into a series of exclusive licences each for the territory of one or more Member States under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory, such licence agreements are liable to prevent, restrict or distort competition. They are therefore incompatible with Article 101(1) TFEU; it is not necessary to show that such effects have actually occurred.

## V – Conclusion

252. I therefore propose that the Court answer the questions referred for preliminary ruling as follows:

1. Question 1 in Case C 403/08:

Being ‘designed’ or ‘adapted’ within the meaning of Article 2(e) of Directive 98/84/EC means the manufacture or modification of equipment with the intention of providing access to a protected service in an intelligible form without the authorisation of the service provider. Where a conditional access device is made by or with the consent of a service provider and sold subject to a limited authorisation

to use the device only to gain access to the protected service in particular circumstances, that device does not therefore become an ‘illicit device’ within the meaning of Article 2(e) of Directive 98/84 if it is used to obtain access to that protected service in a place or in a manner or by a person outside the authorisation of the service provider.

2. Question 3 in Case C 429/08:

Article 3(2) of Directive 98/84 does not preclude a Member State from invoking a provision of national law that prevents use of a conditional access device in the event of breach of contractual agreements concerning the accessibility of programmes in certain Member States, following the provision of false names and/or addresses in the acquisition of the access device, or the use, for commercial purposes, of an access device intended for private or domestic use.

3. Question 4 in Case C 403/08:

(a) The question whether works have been reproduced in whole or in part must be answered by means of an interpretation of Article 2 of Directive 2001/29/EC.

(b) Acts of reproduction occur where frames of digital video and audio are created within the memory of a decoder, as those frames constitute part of the broadcast author’s own intellectual creation.

(c) The display of a broadcast on a screen also constitutes reproduction.

4. Question 5 in Case C 403/08:

Transient copies of a work created on a television screen linked to the decoder box have independent economic significance within the meaning of Article 5(1) of Directive 2001/29, whereas transient copies created in a decoder’s memory do not.

5. Question 6 in Case C 403/08:

A copyright work is not communicated to the public by wire or wireless means, within the meaning of Article 3(1) of Directive 2001/29, where it is received or viewed as part of a satellite broadcast at commercial premises (for example, a bar) or shown at those premises, free of charge, via a single television screen and speakers to members of the public present in those premises.

6. Question 7 in Case C 403/08:

The right to communicate copyright works by satellite under Article 2 of Directive 93/83/EC includes the right also to receive and watch that broadcast abroad.

7. Questions 6 and 7 in Case C 429/08 and Questions 7, 8(c) and 9 in Case C 403/08:

(a) Freedom to provide services under Article 56 TFEU (previously Article 49 EC) precludes provisions which prohibit, on grounds of protection of intellectual property, the use of conditional access devices for encrypted satellite television in a Member State which have been placed on the market in another Member State with the consent of the holder of the rights to the broadcast. It is irrelevant whether such devices were procured and/or enabled in the other Member State by the provision of a false name and false residential address. An individual agreement to use decoder cards only for domestic or private use also does not affect that conclusion.

(b) Freedom to provide services does not preclude national rules which allow the holder of rights to a broadcast to object to its communication in a pub, provided that the restriction of freedom to provide services stemming from the exercise of that right is not disproportionate to the share of the protected rights to the broadcast.

(c) It is irrelevant for the purposes of the present references for preliminary rulings whether the provision of national law infringes freedom to provide services because it applies to programmes included in a broadcasting service provided from a place in the United Kingdom but not from any other Member State.

8. Question 10 in Case C 403/08 and Question 8 in Case C 429/08:

Where a programme content provider enters into a series of exclusive licences each for the territory of one or more Member States under which the broadcaster is licensed to broadcast the programme content only within that territory (including by satellite) and a contractual obligation is included in each licence requiring the broadcaster to prevent its satellite decoder cards which enable reception of the licensed programme content from being used outside the licensed territory, such licence agreements are liable to prevent, restrict or distort competition. They are therefore incompatible with Article 101(1) TFEU; it is not necessary to show that such effects have actually occurred.

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<sup>1</sup> Original language: German.

<sup>2</sup> Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 (OJ 1998 L 320, 54).

<sup>3</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 (OJ 2001 L 167, 10).

<sup>4</sup> Council Directive 93/83/EEC of 27 September 1993 (OJ 1993 L 248, 15).

<sup>5</sup> OJ 1994 L 336, 1.

<sup>6</sup> OJ 2000 L 89, 6.

<sup>7</sup> As set out in the German *Bundesgesetzblatt* 1965 II, p. 1245.

<sup>8</sup> OJ 1994 L 1, 194.

<sup>9</sup> OJ 1992 L 346, 61.

<sup>10</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (OJ 2006 L 376, 28).

<sup>11</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, 23), codified by Directive 2010/13/EU of the

European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95, 1).

<sup>12</sup> See Articles 6 TFEU and 165 TFEU, Declaration No 29 in the Final Act of the Intergovernmental Conference on the Treaty of Amsterdam signed on 2 October 1997 (OJ 1997 C 340, p. 136) and the ‘Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies’, Nice European Council (7, 8 and 9 December 2000), Presidency conclusions (par. 52 and Annex IV; see in particular points 1, 7 and 17 of that declaration).

<sup>13</sup> Case C 49/07 *MOTOE* [2008] ECR I 4863, par. 22 and the case-law there cited.

<sup>14</sup> Case C 308/06 *Intertanko and Others* [2008] ECR I 4057, par. 69.

<sup>15</sup> Case C 308/06 *Intertanko and Others*, cited in footnote 14, para. 70 and 71.

<sup>16</sup> Case C 5/08 *Infopaq International* [2009] ECR I 6569, par. 27 et seq.; see also, with regard to Directive 2001/29 in general, Case C 467/08 *Padawan* [2010] ECR I 0000, para. 32 and 35.

<sup>17</sup> *Infopaq International*, cited in footnote 16, in particular par. 37 et seq.

<sup>18</sup> *Infopaq International*, cited in footnote 16, par. 45.

<sup>19</sup> *Infopaq International*, cited in footnote 16, par. 55.

<sup>20</sup> *Infopaq International*, cited in footnote 16, par. 64.

<sup>21</sup> *Infopaq International*, cited in footnote 16, para. 56 and 57.

<sup>22</sup> *Infopaq International*, cited in footnote 16, par. 58.

<sup>23</sup> COM(97) 628, Article 5, par. 3 (p. 29 of the English version).

<sup>24</sup> See below, points 105 and 108 et seq.

<sup>25</sup> See above, point 68 et seq.

<sup>26</sup> Case 152/84 *Marshall* [1986] ECR 723, par. 48; Case C 91/92 *Faccini Dori* [1994] ECR I 3325, par. 20; and Case C 555/07 *Küçükdeveci* [2010] ECR I 0000, par. 46.

<sup>27</sup> Inter alia, Case C 415/93 *Bosman* [1995] ECR I 4921, par. 59, and Joined Cases C 295/04 to C 298/04 *Manfredi and Others* [2006] ECR I 6619, par. 26.

<sup>28</sup> Case C 105/03 *Pupino* [2005] ECR I 5285, par. 30; Case C 404/07 *Katz* [2008] ECR I 7607, par. 31; and Case C 82/09 *Dimos Agiou Nikolaou* [2010] ECR I 0000, par. 15.

<sup>29</sup> See, inter alia, Case C 415/93 *Bosman*, cited in footnote 27, par. 61, and Case C 344/04 *IATA and ELFAA* [2006] ECR I 403, par. 24.

<sup>30</sup> COM(97) 628, Article 3, par. 2 et seq. (pp. 25 and 26 of the English version).

<sup>31</sup> COM(97) 628, Article 3, par. 3 (p. 26 of the English version).

<sup>32</sup> Case C 306/05 *SGAE* [2006] ECR I 11519; and order of 18 March 2010 in Case C 136/09 *Organismos Sillogikis Diacheirisis Dimiourgou Theatrikou kai Optikoakoustikon Ergon*, not published in the ECR.

<sup>33</sup> *SGAE*, cited in footnote 32, par. 37 et seq.

<sup>34</sup> *SGAE*, cited in footnote 32, par. 44.

<sup>35</sup> *Guide to the Berne Convention* (Geneva, 1978).

<sup>36</sup> WIPO Guide, Note 11*bis*. 11 et seq.

<sup>37</sup> COM(97) 628, Article 3, par. 1 (p. 25 of the English version).

<sup>38</sup> COM(97) 628, Article 3, par. 1 (p. 25 of the English version).

<sup>39</sup> Document A4-0026/99, Amendment 13 (OJ 1999 C 150, 171 at 174).

<sup>40</sup> Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(1999) 250 final (OJ 1999 C 180, p. 6), recital 16.

<sup>41</sup> See Council documents 14238/99 of 22 December 1999, 5, footnotes 6 and 7, 5168/00 of 10 January 2000, 4, and 5499/00 of 24 January 1999, 2 et seq.

<sup>42</sup> Council document 5168/00 of 10 January 2000, 4, par. 9.

<sup>43</sup> Council document 5168/00 of 10 January 2000, 4, par. 11.

<sup>44</sup> OJ 1994 L 1, 194.

<sup>45</sup> With regard to the effect of this Protocol, see the Opinion of Advocate General La Pergola in Case C 293/98 *Egeda* [2000] ECR I 629, point 17.

<sup>46</sup> See Paragraph 87(1)(3) of the German *Urheberrechtsgesetz* (Law on copyright) and, in this regard, Wandtke/Bullinger-Erhard, *Urheberrecht*, 3rd edition 2009, par. 23, and Diesbach/Bormann/Vollrath, 'Public Viewing' als Problem des Urheber- und Wettbewerbsrechts, *Zeitschrift für Urheber- und Medienrecht* 2006, 265 (266 et seq.).

<sup>47</sup> It would appear to be sufficient, however, if a pub pays a relatively small royalty to a collecting society in order to comply with the obligations under that provision; see the survey of rates of the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, [www.gema.de/fileadmin/inhaltsdateien/musiknutzer/tarife/tarife\\_ad/tarifuebersicht\\_gaststaetten.pdf](http://www.gema.de/fileadmin/inhaltsdateien/musiknutzer/tarife/tarife_ad/tarifuebersicht_gaststaetten.pdf).

<sup>48</sup> See, most recently, Case C 428/08 *Monsanto Technology* [2010] ECR I 0000, par. 71.

<sup>49</sup> See the judgment in Case C 293/98 *Egeda*, cited in footnote 45, in comparison with the Opinion of Advocate General La Pergola in that case, point 17 et seq., and Case C 28/04 *Tod's and Tod's France* [2005] ECR I 5781, par. 14.

<sup>50</sup> *SGAE*, cited in footnote 32, par. 41.

<sup>51</sup> *SGAE*, cited in footnote 32, par. 30.

<sup>52</sup> *SGAE*, cited in footnote 32, par. 40.

<sup>53</sup> See the Opinion of Advocate General Sharpston in *SGAE*, cited in footnote 32, point 63.

<sup>54</sup> With regard to the regulatory content of Directive 93/83 in relation to communication to the public, see Case C 293/98 *Egeda*, cited in footnote 49, par. 25, and *SGAE*, cited in footnote 32, par. 30.

<sup>55</sup> See above, point 82 et seq. and point 95 et seq.

<sup>56</sup> With regard to the application of the provisions of the Lisbon Treaty, see my Opinion in Case C 379/09 *Casteels* [2010] ECR I 0000, point 25.

<sup>57</sup> Case C 17/00 *De Coster* [2001] ECR I 9445, par. 28.

<sup>58</sup> Case C 36/02 *Omega* [2004] ECR I 9609, par. 26 and the case-law cited.

<sup>59</sup> Case C 390/99 *Canal Satélite Digital* [2002] ECR I 607, par. 32.

<sup>60</sup> Case C 42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I 7633, par. 51 and the case-law cited, and Joined Cases C 447/08 and C 448/08 *Sjöberg* [2010] ECR I 0000, par. 32.

<sup>61</sup> However, see the Opinion of Advocate General Mengozzi in Case C 341/05 *Laval un Partneri* [2007] ECR I 11767, point 156 et seq., in particular point 159, and the case-law on collective agreements there cited.

<sup>62</sup> This is a matter of competition law which I will examine below in point 243 et seq. of this Opinion.

<sup>63</sup> See, for example, Case C 341/05 *Laval un Partneri*, cited in footnote 61, par. 101 and the case-law cited.

<sup>64</sup> Joined Cases C 447/08 and C 448/08 *Sjöberg*, cited in footnote 60, par. 36.

<sup>65</sup> Case 262/81 *Coditel and Others II* [1982] ECR 3381, par. 13, and Case C 255/97 *Pfeiffer* [1999] ECR I 2835, par. 21.

<sup>66</sup> Case C 255/97 *Pfeiffer*, cited in footnote 65, par. 22, and, with regard to free movement of goods, Case 16/74 *Centrafarm and de Peijper* [1974] ECR 1183, par. 7; Case C 10/89 *HAG GF* [1990] ECR I 3711, par. 12; and Case C 115/02 *Rioglass and Transremar* [2003] ECR I 12705, par. 23.

<sup>67</sup> Case 119/75 *Terrapin (Overseas)* [1976] ECR 1039, par. 6; Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran and K-tel International* [1981] ECR 147, par. 10; and in Case C 200/96 *Metronome Musik* [1998] ECR I 1953, par. 14.

<sup>68</sup> Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ 2001 L 272, p. 32); see, in this regard, Case C 518/08 *Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos* [2010] ECR I 0000.

<sup>69</sup> On the other hand, the Court rejected international exhaustion as a result of goods having been placed on the market outside the internal market in Case C 355/96 *Silhouette International Schmied* [1998] ECR I 4799, par. 22, and Case C 16/03 *Peak Holding* [2004] ECR I 11313.

<sup>70</sup> With regard to trade mark rights, see Case C 16/03 *Peak Holding*, cited in footnote 69, par. 40.

<sup>71</sup> Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran and K-tel International*, cited in footnote 67, par. 10.

<sup>72</sup> Gallagher, *Waterstones halts overseas e-book sales*, report of 26 October 2010, [www.thebookseller.com/news/132290-waterstones-halts-overseas-e-book-sales.html](http://www.thebookseller.com/news/132290-waterstones-halts-overseas-e-book-sales.html), visited on 9 November 2010.

<sup>73</sup> See Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran and K-tel International*, cited in footnote 67, par. 12 et seq., and Case 158/86 *Warner Brothers and Metronome Video* [1988] ECR 2605, par. 13 et seq.

<sup>74</sup> See Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran and K-tel International*, cited in footnote 67, par. 24, with regard to the movement of goods.

<sup>75</sup> Case 62/79 *Coditel and Others I* [1980] ECR 881.

<sup>76</sup> Case 62/79 *Coditel and Others I*, cited in footnote 75, par. 14.

<sup>77</sup> Case 62/79 *Coditel and Others I*, cited in footnote 75, par. 16, and similarly, with regard to the rental right, the Opinion of Advocate General La Pergola in Case C 61/97 *FDV* [1998] ECR I 5171, point 15.

<sup>78</sup> Case 62/79 *Coditel and Others I*, cited in footnote 75, par. 16.

<sup>79</sup> With regard to the assessment of the present proceedings on the basis of that provision, see point 107 et seq. above.

<sup>80</sup> The reference for a preliminary ruling in Case 62/79 *Coditel and Others I* was directed at the enforcement of this right laid down in Article 11bis(1)(ii) of the Berne Convention; see the Report for the Hearing in that case, cited in footnote 75, p. 884.

<sup>81</sup> See, for example, Case C 76/90 *Säger* [1991] ECR I 4221, par. 15; Case C 46/08 *Carmen Media Group* [2010] ECR I 0000, par. 60; and Case C 515/08 *Santos Palhota and Others* [2010] ECR I 0000, par. 45.

<sup>82</sup> Case C 76/90 *Säger*, cited in footnote 81, par. 17; Case C 318/05 *Commission v Germany* [2007] ECR I 6957, para. 133 and 136; and Case C 250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I 11135, par. 44.

<sup>83</sup> See recital 10 in the preamble to Commission Decision of 19 April 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case 37.576 — UEFA's broadcasting regulations) (OJ 2001 L 171, p. 12).

<sup>84</sup> See also the declarations on the Treaty of Amsterdam and of the Council cited in footnote 12.

<sup>85</sup> This is shown by the complaint lodged by various broadcasting organisations which led to the Commission decision cited in footnote 83.

<sup>86</sup> See the decision cited in footnote 83, recital 55 and Annex II.

<sup>87</sup> For attendance figures, see DFL Deutsche Fußball Liga GmbH, Bundesliga 2010, *Die wirtschaftliche Situation im Lizenzfußball*, p. 20 et seq.

<sup>88</sup> See par. 66 of the order for reference.

<sup>89</sup> See above, point 107 et seq.

<sup>90</sup> See above, point 121 et seq.

<sup>91</sup> See the references in footnote 82.

<sup>92</sup> See Case 302/86 *Commission v Denmark* [1988] ECR 4607, par. 21.

<sup>93</sup> See the levy examined in Case C 467/08 *Padawan*, cited in footnote 16.

<sup>94</sup> Case C 92/01 *Stylianakis* [2003] ECR I 1291, par. 18; Case C 76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I 6849, par. 34; and Case C 56/09 *Zanotti* [2010] ECR I 0000, par. 24.

<sup>95</sup> See Joined Cases C 92/92 and C 326/92 *Phil Collins and Others* [1993] ECR I 5145, par. 34 et seq.

<sup>96</sup> Annex 23 to the FAPL's pleadings, see the Notice in OJ 2004 C 115, p. 3, and Press Release IP/06/356 of 22 March 2006.

<sup>97</sup> See Case C 97/09 *Schmelz* [2010] ECR I 0000, par. 50; see also Article 13(2) EU and the second sentence of Article 17(1) EU.

<sup>98</sup> Case C 8/08 *T-Mobile Netherlands and Others* [2009] ECR I 4529, par. 43.

<sup>99</sup> *T-Mobile Netherlands and Others*, cited in footnote 98, par. 30; Case C 534/07 *P Pryn and Pryn Consumer v Commission* [2009] ECR I 7415, par. 81; and Joined Cases C 501/06 P, C 513/06 P, C 515/06 P and C 519/06 P *GlaxoSmithKline Services v Commission* [2009] ECR I 9291, par. 55.

<sup>100</sup> *GlaxoSmithKline Services v Commission*, cited in footnote 99, par. 58.

<sup>101</sup> Joined Cases C 468/06 to C 478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I 7139, par. 65 and the case-law cited, and *GlaxoSmithKline Services v Commission*, cited in footnote 99, par. 59 et seq.

<sup>102</sup> Case 258/78 *Nungesser and Eisele v Commission* [1982] ECR 2015, par. 61.

<sup>103</sup> See above, point 177 et seq.

<sup>104</sup> See, to that effect, my Opinion in Case C 169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I 10821, point 134 et seq.

<sup>105</sup> *GlaxoSmithKline Services v Commission*, cited in footnote 99, par. 82.