

# **MEDIA LAW INTERNATIONAL®**

Specialist Guide to the Global Leaders in Media Law Practice

## **PORTUGAL**

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It is a well-known fact that acquiring exclusive television broadcasting rights of major sporting events is an expensive business. It is estimated, for example, that FIFA earned a minimum of USD2 billion in television and media rights deals for the 2010 South Africa World Cup.



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### **When the Access to News Becomes the News Itself**

Given the size of the investment that national broadcasters make in acquiring these exclusive rights, it is both natural and understandable that they should want to protect it and eventually recoup their funds. The organisers of these sports events, such as the IOC, FIFA and UEFA, are, on the other hand, under immense pressure to not only ensure that the rights they are licensing enjoy the exclusivity that justify their large price-tag, but also that they maximise the revenue they can extract from this business model. It should be pointed out, however, that the continuous development of new technological means of distributing media content constantly chips away at the aforementioned business model, thus increasing the pressure even more.

There is no doubt that the financial sums at stake in these transactions have put event organisers on edge. Last year, in July 2013, FIFA and UEFA suffered a major set-back at the Court of Justice of the European Union when the latter ruled that Member States could freely determine what events were of high interest and, therefore, had to be broadcast free-to-air (see Judgment of Case C-201/11 P, C-204/11 P and C-205/11 P, UEFA and FIFA v Commission). This decision effectively stopped in its tracks a plan to remove several football games of general high interest from the sphere of universal access and sell them off, on a truly exclusive basis, to the highest bidder.

As could be expected, the upcoming FIFA World Cup in Brazil is once more causing tension in the media sector. In Portugal, this friction has become particularly evident. Talks between broadcasters on the broadcasting of football games, in which the Portuguese squad would play, ended abruptly in public reciprocal recrimination. In the cold-war climate that has ensued, it has become clear that the focus has shifted to the so-called “right to access news” or the “rules of

news access". On both sides of the barricade, legal teams and editorial staff are now preparing to arm-wrestle the proper interpretation and implementation of this right.

### **The Rules of News Access**

The right to produce short news extracts has existed in European Union law since the entry into force of Directive 2007/65/EC on 19 December 2007, although the origins stretch much further back in the national laws of many European countries. The rule exists in order to provide balance between the right and duty to inform (see article 11 of the Charter of Fundamental Rights of the European Union), on the one hand, and, on the other, the pragmatic awareness that, in some circumstances, events can only be financed if the organisers provide a broadcaster with exclusive television rights. The European Union legislature has even signalled out some of these important events in the recitals of the Audiovisual Media Services Directive (Directive 2010/13/EU, as consolidated and hereinafter referred to as AMS Directive), most notably the Olympic Games, the football World Cup and the European football championships.

As the Court of Justice of the European Union has recently summarised in its recent judgment of Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, the right in question "puts any broadcaster in a position to be able to make short news reports and thus to inform the general public of events of high interest to it which are marketed on an exclusive basis, by guaranteeing those broadcasters access to those events. That access is guaranteed to them irrespective of their commercial power and financial capacity, on the one hand, and the price paid to acquire the exclusive broadcasting rights, the contractual negotiations with the holders of such rights and the scale of the events at issue, on the other".

### **News Access in Portugal**

It would seem that the right to produce short news reports would be a relatively straight-forward matter, as indeed it generally seems to be in most other European Union Member States. The rule is present in article 33 of the Portuguese Television Law (PTL) and its paragraph three clearly states that when a broadcaster under the jurisdiction of the Portuguese State has exclusive broadcasting rights for the territory of Portugal of events occurring in another Member State of the European Union, it must allow other national broadcasters interested in broadcasting short news reports of those events access to the signal.

This national legal rule is based on article 15(1) of the AMS Directive which stipulates that "Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction". However, Portuguese national law deviates from the Directive on one extremely important detail. Indeed, upon a closer look at the text of article 33(3) of the PTL, one discovers that the right to access news in Portugal seems to be limited to events occurring in other EU Member States. Therefore, under a literal interpretation of this legal rule, should the event of high interest occur outside the borders of the European Union (e.g., the recent Sochi Winter Olympics), the Portuguese broadcaster with no-exclusive television rights would not be able to produce short news reports of that event. This baffling situation had essentially gone unnoticed up to now, but the upcoming FIFA World Cup in Brazil (once more in a territory outside the EU) had suddenly brought this legal provision under the spotlight. What is most puzzling is that, despite the current version of the PTL being a self-confessed transposition of the AMS Directive, article 33(3) of the PTL does not conform to either the text or spirit of articles 14 and 15 of said Directive on this important point of territorial scope. Furthermore, there is no historical explanation for this discrepancy. The limitation to events occurring in the EU first appeared in Portuguese legislation in May 2011 with the entry into force of Law 8/2011, almost a year after the 2010 South Africa World Cup. None of the previous versions of the PTL contained such a limitation.

How then should this contradiction be resolved? Are Portuguese broadcasters really limited to producing short news extracts of high interest events only when these happen to be in the European Union?

The answer seems to lie in the basic tenets of European law, most notably in the doctrine of consistent interpretation. According to this legal principle, rules that result from the transposition of an European Directive into national law must be interpreted and applied in accordance with that Directive. To quote but one example, the Court of Justice of the European Union has stated in the *Océano Grupo Editorial* case that “the national court is obliged, when it applies national law provisions predating or postdating the said Directive, to interpret those provisions, so far as possible, in the light of the wording and purpose of the Directive. The requirement for an interpretation in conformity with the Directive requires the national court, in particular, to favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term” (paragraph 32, ECJ judgment of 27/6/2000, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v. Rocío Murciano Quintero and Salvat Editores SA v. Jos M. Sánchez Alcón Prades and others*, [2000] ECR I-4941).

It is probable that the territorial limitation contained in article 33(3) of the PTL was an oversight on the part of the Portuguese legislator. Or perhaps the belief was that national law based on a piece of European law should not take into consideration facts occurring outside the borders of the European Union. In any case, until the error is corrected with a legislative amendment - and we are convinced that it was indeed a mistake - some uncertainty will unfortunately remain. However, should the attempt be made to enforce the aforementioned legal provision, the most likely outcome will be the Portuguese courts recognising and declaring the lack of conformity with the AMS Directive and thus abstaining from applying the limitation. Naturally, it is also possible that the European Commission exercise its monitoring mandate and initiate a case against the Portuguese State for the faulty transposition of a directive. This can be done on its own initiative or following a complaint by a business or individual.

Furthermore, it is necessary to note that when faced with a denial of access to an exclusive broadcast for the purpose of producing short news extracts, a national broadcaster may also resort to other measures. Indeed, under the terms of recital 55 *in fine* of the AMS Directive: “The right of access to short extracts should apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster should first seek access from a broadcaster established in the same Member State having exclusive rights to the event of high interest to the public”. This recital and the content of article 15(1) of the AMS Directive imply that the national broadcasters may always turn to the broadcasts outside their territory in situations of extreme necessity.

It must also be stressed that a holder of exclusive television broadcasting rights that denies other broadcasters from making short news reports of the events in question runs a significant risk. Under Portuguese law, the unlawful denial of the right to access news and produce news reports is considered a very serious misdemeanour (see article 77(1)(a) of the PTL). This type of misdemeanour carries a penalty that can range from EUR75 000 to EUR375 000. Although the incorrect transposition of the AMS Directive by the Portuguese government, creating confusion as to the correct interpretation of the law, would probably be a mitigating factor, one cannot rule out the denial resulting in a heavy fine for the exclusive right holding broadcaster.

In conclusion, despite Portuguese law having been changed in 2011 so as to apparently limit the right to produce short news reports to events of high interest occurring in the territory of another EU Member State, in practice, this national legal rule will, in all likelihood, be unenforceable since it does not conform to the spirit or text of the AMS Directive that it was supposed to respect.

Portuguese broadcasters that have not acquired exclusive television broadcasting rights for the upcoming FIFA World Cup in Brazil can thus rest relatively at ease given that in practice things should continue as before. In other words, they may continue to broadcast news reports of the “Copa do Mundo 2014” provided they comply with the following requirements: (a) the duration of the reports be limited to what is strictly indispensable to convey the essential facts of the event in question, taking into consideration its nature, said duration not exceeding, in any circumstance, ninety seconds; (b) the news report being included solely in regular news programmes of a general nature; (c) the news report being broadcast in the 36 hours that follow the end of the event featured in the report, unless its inclusion in future general news programmes is justified under the duty to inform; (d) the news report identify the source of the

images when then are obtained from the signal of the broadcaster that holds the exclusive television rights.

## BIOGRAPHIES

**Tomás Vaz Pinto** joined the firm in 1994 and became a partner in 2006. He coordinates one of the corporate and commercial teams. Tomás is highly experienced in the areas of M&A and has been involved in several high level transactions, both at a domestic and international level. He is also an expert on private equity and assists various clients in this sector. Tomás Vaz Pinto is currently responsible for the non-litigation practice of all intellectual property and media law matters, dealing notably with copyrights, trademarks, licensing, software, data protection and related issues. Winner of the 2009 “40 under Forty Award” organised by Iberian Lawyer magazine which distinguishes the best 40 lawyers under the age of 40 in Iberia.

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