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TV Rights of Sports Events

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¹ This opinions expressed are purely personal and purely engage the author.

TABLE OF CONTENTS

1.	WHAT ARE THE SPECIFIC CHARACTERISTICS OF SPORT?	3
1.1.	Social and cultural function	3
1.2.	Sport is also business	4
1.3.	Sport rules and Article 81 of the EC Treaty.....	4
1.4.	Particular notion of competition	4
1.5.	Solidarity.....	5
2.	WHAT IS THE COMMISSION’S INTEREST IN TV SPORT RIGHTS?	5
2.1.	Liberalised TV markets.....	5
2.2.	Digitalisation.....	5
2.3.	A content driving TV markets	6
3.	HOW IS SPORTS COVERAGE ON TELEVISION SPECIAL?	6
3.1.	An ephemeral product.....	6
3.2.	A narrow relevant product market	6
3.3.	A scarce resource concentrated on few hands.....	7
4.	WHAT ARE THE MAIN COMPETITION LAW ISSUES RELATING TO TV RIGHTS OF SPORT EVENTS?	7
4.1.	Joint selling.....	7
4.1.1.	No case law - only pending cases	7
4.1.2.	What is joint selling?	8
4.1.3.	How does joint selling restrict competition?	8
4.1.4.	Is an exemption of joint selling possible?.....	8
4.1.5.	National competition authorities and joint selling?	9
4.2.	Exclusivity	10
4.2.1.	Duration and scope	10
4.2.2.	Hold back of new media rights	10
4.3.	Combination of joint selling with exclusivity.....	11
5.	THE UEFA CHAMPIONS LEAGUE.....	11
5.1.	The Commission’s statement of objections	12
5.2.	UEFA's proposal for a new joint selling arrangement	12
6.	OTHER COMPETITION LAW ISSUES.....	14
6.1.	Automatic renewals and preferential renewal clauses	14
6.2.	Sublicensing arrangements	15
7.	CONCLUSION.....	15

Ladies and gentlemen,

It is a great pleasure for me to participate here today and to talk to you about the application of European competition law to TV rights of sports events.

Over the recent years the Commission has often found itself in the position of referee in sports related matters. Today, I would like to explain what the Commission considers to be fair play from a European competition law perspective.

However, before getting into the subject matter, I need to recall that the Commission has not yet adopted any formal decision in respect of the UEFA Champions League case. Therefore, I will be restricted in giving the Commission's perspective of the implications of this case.

My remarks today will therefore be based on more general considerations regarding the application of European competition law to TV rights of sports events. Nevertheless, before concluding today, I will provide some reflections regarding the UEFA Champions League case. I will do so on the basis of the 19(3) notice, which was published in the Official Journal on 17 August 2002.

1. WHAT ARE THE SPECIFIC CHARACTERISTICS OF SPORT?

1.1. Social and cultural function

Everybody will agree that today sport performs a very important social, integrating and cultural function. The Commission therefore fully subscribes to the Declaration on the specific characteristic of sport adopted by the European Council in Nice in 2000. However, this explicit recognition of sport's specificity finds some limits in the Treaty, as the Heads of Governments also made clear in Nice.

1.2. Sport is also business

We can therefore not close our eyes to another new phenomenon, which is that sport has increasingly become big business. I am sure that you are well aware of the most striking examples: the increase in salaries and transfer fees of professional sportsmen and – not least - the rise in the value of TV rights. An example: In 1992, broadcasters paid € 434 million for the TV rights of the English Premier League for five seasons. In 2000 they paid € 2.6 billion for only three seasons.

As a result of the breathtaking economic growth in sports-related activities, many European football clubs have been transformed into companies listed on the stock exchange and managed like industrial organisations.

1.3. Sport rules and Article 81 of the EC Treaty

The Commission is not, in general, concerned with genuine 'sport rules'. Genuine 'sport rules' are rules without which a sport could not exist - that is rules that are necessary for the organisation of sports competitions. Genuine sport rules applied in an objective, transparent and non-discriminatory manner should not, in principle, be subject to European competition rules.

However, the nature and impact of sport rules are subject to constant and rapid change. Over time, some sport rules may have significant economic consequences as a result of the development of the economic aspects associated with sport. The Commission therefore has to decide on a case-by-case basis what must be regarded as a rule inherent to sport and whether Article 81 is applicable.

1.4. Particular notion of competition

The Commission is of course aware that there is a difference between the manner in which competition works in sport and in other economic sectors. In sport, the aim of the game is not to eliminate the weaker competitors.

There is interdependence between competing adversaries and a need to maintain a degree of equality and a balance between them to preserve uncertainty as to results in order to maintain the spectators' interest.

1.5. Solidarity

This interdependence may require certain solidarity measures to be applied among the participants in a sport – including financial solidarity measures. The Commission accepts such solidarity measures as part of the special character of sport. The Commission would not as such interfere with the manner in which solidarity measures are financed – except to say that it does not find that joint selling of TV rights of sport events, is indispensable for solidarity measures.

2. WHAT IS THE COMMISSION'S INTEREST IN TV SPORT RIGHTS?

The Commission's interest in TV rights of sports events is caused by the important role they play in the development of the TV markets.

2.1. Liberalised TV markets

These markets have - at least until recently - experienced an unprecedented growth. This growth resulted principally from liberalisation of the access for private operators to create TV channels.

2.2. Digitalisation

Also, the technological development of TV has contributed to the growth. We have seen the appearance of cable and satellite distribution of TV. We are experiencing digitalisation of broadcasting technology. Digitalisation opens up new possibilities to create pay-TV services. Digitalisation also significantly enhances broadcasting capacity. It is for example possible for digital broadcasters to offer multi-channel services with several football matches being broadcast live simultaneously.

2.3. A content driving TV markets

This new multitude of TV operators all compete for bait to persuade viewers to pay for TV services, which they used to be getting for “free” by simply paying an annual license fee. Sport content and first run major box-office feature films seems to be the most efficient type of content to persuade viewers to pay for the new TV services.

In the near future operators may also wish to convince consumers to subscribe to new services such as the Internet or UMTS. Sports content will most likely be a powerful driver for the rollout of these new technologies.

Consequently, TV rights for very popular sports such as football has experienced a strong demand and have become subject of highly competitive bidding wars between media operators. This has resulted in unprecedented price increases to the benefit of sport federations and clubs.

This trend seems to be persisting even now where especially the pay-TV market is experiencing a certain consolidation. In such a situation it is necessary that the Commission defends viewers’ interests.

3. HOW IS SPORTS COVERAGE ON TELEVISION SPECIAL?

Sports coverage on television has certain particular characteristics.

3.1. An ephemeral product

First, sport is an ephemeral product. Viewers are mainly - if not only - interested in live broadcasts.

3.2. A narrow relevant product market

Next, substitution is difficult. A viewer who wants to see a given sports event is unlikely to be satisfied with coverage of another event. Our investigation of the relevant product market therefore lead us to conclude

that the market is as narrow as a market for the acquisition of TV rights of football, which is played regularly throughout every year. This definition would in practice mainly involve matches in national 1st league and cup events as well as the UEFA Champions League and the UEFA Cup.

3.3. A scarce resource concentrated on few hands

Finally, the concentration of rights in the hands of sports federations reduces the number of rights available. Moreover, availability of rights is reduced still further by an increasing number of TV rights contracts being concluded on an exclusive basis for a long duration, or covering a large number of events. This strengthens the market position of the most important broadcasters because they are the only operators who are able to bid for all the TV rights sold in large packages.

Here, one can find all the ingredients typical for anti-competitive effects impeding the access to the TV markets and the development of new media markets. As you know, we aim at enhancing consumer choice.

4. WHAT ARE THE MAIN COMPETITION LAW ISSUES RELATING TO TV RIGHTS OF SPORT EVENTS?

Currently, the Commission is concentrating efforts on two particular issues in relation to TV sports rights. They are joint selling of the rights and the exclusivity granted in TV rights contracts.

4.1. Joint selling

4.1.1. No case law - only pending cases

The issue of joint selling of TV rights of sport events is raised in several pending cases. The investigation concerning in particular the UEFA Champions League, the German Bundesliga and the English Premier League, where a statement of objections was issued on 19 December 2002,

will provide the Commission with an opportunity to set out case law on this issue.

4.1.2. What is joint selling?

Joint selling of TV rights describes a situation where sports clubs assign their media rights to their association, which sell the rights on behalf of the clubs. Traditionally, the association would sell all media rights in one large exclusive contract and to a single broadcaster in each territory.

4.1.3. How does joint selling restrict competition?

Such joint selling arrangement is a horizontal restriction of competition, which prevents clubs from competing in the sale of any rights – even club related rights. As a consequence, it may limit competition between broadcasters and thereby consumer choice.

The effect on competition has to be evaluated in its economic and legal context, taking into account, for example, the feasibility of participants selling rights individually. On this basis the Commission concludes that where Article 81(1) applies, joint selling arrangements are caught by the prohibition. The Commission therefore has to see whether they could be exempted under Article 81(3).

4.1.4. Is an exemption of joint selling possible?

The Commission considers that an exemption pursuant to Article 81(3) would be possible where there is a proportionate balance between the restrictions created by the joint selling arrangement and its consumer benefits.

A joint selling arrangement has the potential of improving production and distribution to the advantage for football clubs, broadcasters and viewers, since it leads to the creation of a single point of sale for the acquisition of a packaged league media product. A league product is a product, which is

focused on the competition as a whole, and not the individual football clubs participating in the competition. Many viewers wish to have the opportunity to follow the development of the competition as such and enabling the creation of league media products seems to be the best way of achieving this.

Although a league product could probably be established in a situation with individual selling by the football clubs, the Commission considers joint selling to be a more efficient way in doing so.

However, a joint selling arrangement must not unduly restrict football clubs in exploiting club related rights nor must it lead to a situation where restrictions in the joint selling arrangement creates unused rights. If there is consumer demand for rights, the rights owners should be at liberty to satisfy this demand.

4.1.5. National competition authorities and joint selling?

I recall that some national competition authorities have already reached their own conclusions on the question of joint selling of football TV rights. Their approach seems much stricter than that of the Commission as several national authorities seem to prefer individual sale by the football clubs of TV rights. The most recent example is from the Netherlands, where the Dutch competition authority in November 2002 prohibited the joint selling of the TV rights of the Dutch Eredivisie. I think that one of the triggers of this prohibition was that only a very small proportion of the games played was available on TV. The decision will take its effect as of 1 August 2003 after which date the clubs must sell the TV rights individually.

4.2. Exclusivity

Joint selling can additionally facilitate practices, such as the granting of exclusivity of a long duration and preferential treatment of one set of rights at the expense of another.

4.2.1. *Duration and scope*

The granting of exclusive TV rights of sport is undoubtedly an established commercial practice. It enhances the value of TV rights, particularly as interest in and therefore the value of sport events is ephemeral. We consider that in many cases exclusive contracts for a single sport event or for one season in a given championship would not normally pose any competition problem. A 3 years period would often seem acceptable. However, exclusivity of a longer duration and for a wider range of rights can restrict competition, as it is likely to lead to market foreclosure. This is particularly the case if the broadcaster is in a dominant position.

This does not mean that contracts of a longer duration are never justified. Such is the case when a new operator needs TV sports rights to ensure the successful entry into the television market. It is also the case when an operator wishes to develop a new technology, which requires heavy investments. However, in line with the general principles indicated in the guidelines on vertical restraints, the Commission will not normally accept exclusivity periods exceeding 5 years.

4.2.2. *Hold back of new media rights*

We have for example seen a reluctance of sports associations in granting Internet and UMTS-rights because broadcasters fear that the Internet will undermine the value of their TV rights. The Commission does not share this concern and does not find it acceptable, because we consider these services

to be complementary rather than substitutable. Viewers should be given a free choice in how they want to follow sports events.

4.3. Combination of joint selling with exclusivity

The cases relating to TV sports rights, which the Commission is dealing with, are characterised by a combination of joint selling with exclusive rights contracts.

The combination of these two types of restrictions aggravates the competition problems because it traditionally results in only one broadcaster getting all valuable TV rights to the exclusion of all other broadcasters. Moreover, in such situations all rights are often not exploited. The availability of TV rights is limited by output restrictions. This is not acceptable – a point of view which the Court of First Instance has confirmed in its recent decision in the Eurovision case, where one of the important reasons for the annulment was the presence of unused rights.

Let me illustrate with an example from England: Nearly 400 games are played each season in the English Premier League. Only ca. 100 games are broadcast live. The remaining games are only shown as highlights - if at all. The example clearly shows that a restriction of output limits the consumer's choice in sport-related services and broadcasts.

5. THE UEFA CHAMPIONS LEAGUE

Having now outlined some of the principles of European competition law, which the Commission is applying to the TV rights of sports events let me make some comments in respect of the UEFA Champions League.

5.1. The Commission's statement of objections

As you will have had the opportunity to see in the Official Journal, the Commission issued a statement of objections to UEFA on 19 July 2001 finding that the notified joint selling arrangement infringed Article 81(1) and that it was not eligible for exemption under Article 81(3).

The statement of objections concluded that the joint selling arrangement regarding the sale of the TV rights prevents the individual football clubs participating in the UEFA Champions League from taking independent commercial action in respect of the TV rights. It excludes competition between them in individually supplying TV rights to interested buyers.

The statement of objections moreover found that the possible efficiencies and benefits that the joint selling arrangement could provide for the broadcasting market were negated by the commercial policy pursued by UEFA. The reason was that UEFA sold all TV rights on an exclusive basis in a bundle to a single broadcaster per territory for several years in a row. In the Commission's view, UEFA's sub-licensing system did not provide a satisfactory mitigating effect.

5.2. UEFA's proposal for a new joint selling arrangement

UEFA replied to the Commission's statement of objections with the submission of an outline of a new joint selling arrangement including a rights segmentation table for the exploitation of not only the TV rights but in addition also all the other media rights of the UEFA Champions League. These include content rights for radio, television, Internet, UMTS and physical media rights (such as DVD, VHS, CD-ROM, etc.). You can see the rights segmentation table on UEFA's homepage.

I would like to stress that the design of the rights segmentation and number of packages was a proposal made by UEFA. The Commission is not in a

position to design the commercial policy of a joint selling body. There may have been various possible sets of packages that would have satisfied the Commission's competition concerns. The Commission will only examine whether competition concerns have been remedied.

The Commission's preliminary view was that the competition concerns expressed in the statement of objections would be remedied by UEFA's proposal. The reasons for this is among others that:

UEFA's proposal implied a splitting up of the rights into several individual packages that would be sold separately by means of a public bidding procedure. Several different media operators would thus have an opportunity to bid for and acquire different packages. This should ideally result in more media operators being able to screen UEFA Champions League action.

UEFA's proposal meant a reduction of UEFA's exclusive right to sell the UEFA Champions League media rights, allowing also the football clubs to sell certain media rights in parallel with UEFA on a non-exclusive basis. This will allow football clubs the opportunity to promote their own club related brands and it should contribute to the avoidance of rights being unused, as the football clubs can exploit rights which UEFA fails to exploit.

Exclusivity was limited not only in scope by the splitting up into several different packages but also in length of time, as UEFA proposes to conclude rights contracts of a duration of no longer than 3 years.

UEFA's proposal would allow for a more efficient production and distribution of a UEFA Champions League media product. It gives viewers easier access to all interesting action representing the UEFA Champions League as a whole. It does not impose disproportionate restrictions on the football clubs participating in the UEFA Champions League or the

exploitation of the various media rights that can be derived from the UEFA Champions League.

Maintaining a certain degree of joint selling enables UEFA to maintain the uniformity, quality and consistency of the “league product” at a level, which would not be possible to achieve without joint selling. This is essential for the maintenance of the distinctive UEFA Champions League brand, which is of particular interest to UEFA’s commercial partners.

As indicated in the Article 19(3) notice in the Official Journal, the Commission intends to take a favourable view in respect of UEFA’s revised joint selling arrangement, however, subject to giving third parties the opportunity to comment. More than 10 third parties submitted comments to the Commission. We are currently reviewing details of UEFA's proposal in the light thereof together with UEFA. I shall therefore not comment on this case any further at this stage.

6. OTHER COMPETITION LAW ISSUES

Before I finish today, I would like to mention some of the other competition issues that the Commission is dealing with.

6.1. Automatic renewals and preferential renewal clauses

Sometimes joint selling arrangements are garnished with provisions about automatic renewal of the rights contracts or preferential renewal clauses. The Commission considers such provisions to be anti-competitive. We have for example told the Premier League and BSkyB in the past that BSkyB’s right to match the financial terms of the highest bid from any third party, when renewing the agreement, was not acceptable.

In the Dutch Sport 7 case a preferential renewal clause was also held to be anti-competitive. The Commission considered that the granting by the

Dutch football association of an exclusive licence to a new broadcaster, Sport 7, for the duration of seven years was caught by article 81(1) and could not be exempted as it eliminated competition for the rights for too long a period. In addition, the re-negotiation process foreseen at the end of the contract gave Sport 7 an advantage because it had the right to match the bid of its competitors. This kind of provisions distorts competition and makes a reallocation of the rights at the expiry of the exclusive contract nearly impossible.

6.2. Sublicensing arrangements

When exclusivity is likely to lead to foreclosure of access to TV rights, remedies can be envisaged to limit the damage caused to third parties' market access. A sub-licensing system may be a possible remedy. However, the mere establishment of a sub-licensing system is not in itself a satisfactory solution. Terms must be fair, reasonable and non-discriminatory so that the sub-licensees get a real chance to compete on the market.

7. CONCLUSION

The changes of the sports world and particularly its commercialisation raise many new issues for the application of European competition law.

The Commission will clarify the scope of application of European competition rules in the context of sport through its case law.

Our objective is to maintain open and competitive TV markets and a level playing field for all parties.

The objective is also to remove obstacles for new media markets to develop.

This will be to the benefit of the consumer by increasing his or her choice.

In doing so we will fully take into account the particular characteristics of the sector.

The UEFA Champions League case is good example on this and I hope the decision can serve as a role model for future cases.

Ladies and gentlemen, I hope you can sympathise with and support this approach. Thank you for your attention.