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COMMERCIALISING SPORT

Understanding the TV Rights debate

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Introduction

Thank you for inviting me to make some remarks at this conference. I would like to concentrate on three aspects:

- *First*, a few remarks on the general principles that we apply to the commercialisation of sport rights and the applicable Competition Law Principles.
- *Secondly*, the recent case law setting out these principles in more detail, particularly the UEFA Champions League Decision adopted two months ago.
- *Thirdly*, the checklist that we would recommend to sport associations of any kind to ensure that their rights marketing activities comply with EU Competition Rules.
- And, I will link in some general remarks on likely future developments.

I will concentrate in my remarks on the commercialisation of sports in the media markets.

General principles

Access to premium content is decisive for the new TV and video markets as nobody in this room will contest. In most Member States 40% of audience confirms a strong interest in football, and other sports such as Formula One have caught up with this level of interest over the last decade in a number of Member States—even if there are, of course, variations over time. Other sports have their own audience and occupy important niche markets, as is evident from this Conference's contributions.

Broadcasters spend major parts of their programme budgets on their sport portfolios, both pay- and free TV, though, of course, in varying degree. All of this explains that sport rights have become the major battlefield for market positions, and sometimes survival, in the EU's television and media markets.

We realise of course that income from television rights now accounts for some 30% — and sometimes much more—of income of sports and have become the major revenue source besides ticket sales and sponsoring. We recognise, in line with the Nice Declaration, the value of sports for the cultural and social development of Europe. The Commission takes full account of this specificity of sports, as it has said on many occasions.

We have, however, also said on many occasions, such as on the occasion of the Formula One Settlement, that there must be a clear separation between sports regulation and the commercialisation of sports,

And

Income from the media cannot be artificially inflated by using anti-competitive practices for maximising revenue for sports. *A cartel remains a cartel even if it works on the commercialisation of sport rights*—and it remains subject to scrutiny under the Competition Rules.

Everything else is bad for the consumer who will pay too high rates for looking at sports. It is bad for competition and the broadcasting markets because it can lead to unhealthy concentration of market power—and it is ultimately bad also for sports because any short-term increase in income is based on shaky ground that can collapse any time. Events of the last year in certain Member States have abundantly proven this.

We mainly analyse two aspects:

1. Exclusivity in premium content rights
2. Effects of the exercise of such rights on downstream markets, i.e. the broadcasting and the New Media markets.

We are faced with a complex web of effects—and often restrictions:

- Horizontal effects;

- Vertical effects;
- A combination of horizontal and vertical effects.

Horizontal effects, where sporting associations pool the rights of the participating clubs, and thereby restrict price competition, competition on features and often limit output in an attempt to maximise revenues and for fear of cannibalisation of their core TV income by the New Media.

Vertical effects, whereby the pooling upstream, or the simple excessive exercise of exclusive rights in case of a single owner, leads to a single buyer on the downstream television markets creating or reinforcing dominant positions those markets, and closing these markets to competitors by withholding from them a vital input.

Combination of horizontal and vertical effects, the worst kind of situation, where we are facing the combination of dominant positions in the upstream *and* downstream markets leading to very strong market foreclosure, particularly in the area of TV live rights—as we are now facing in some national football TV rights markets.

Even if I realise that the audience at this conference are the doers in the arena of the sport rights markets and not so much the lawyers, let me recall briefly the more legal terms of EU anti-trust.

The anti-trust provisions involved are mainly:

- **Article 81:**

Anti-competitive agreements: prohibition of price cartels, output restrictions and market partitioning.

- **Article 82:**

Abuse of dominant positions: prohibition of unfair pricing, discrimination and unfair foreclosure of competitors by actors dominant in their markets.

And, I should, of course, also mention the EU Merger Control, which has been of major influence in shaping the environment of the sports rights markets via its Decisions, in particular the recent Telepiú / Stream Decision¹ that allowed the creation of Sky Italia. In this, as in a number of other Decisions, the creation of platforms of major market positions has only been allowed to go forward after acceptance by the actors of conditions for the purchasing of football and film rights that limit exclusivity both in duration and reach, in order to avoid market foreclosure. This has set standards for sport rights contracts across Europe for what is acceptable under Competition Rules in similar situations—as have national Decisions such as the Decision by the Spanish Competition Authority giving the green light for the Sogecable / Via Digital merger².

Let me then return to the major competition problems that we most frequently encounter in the sport rights markets:

Horizontal restraints: excessive pooling in upstream markets.

- **Joint selling**, of particular relevance in the top leagues such as in the Champions League, and the big national leagues such as the Premier League in the UK and the Bundesliga in Germany;
- **Joint purchasing**, a problem well known here in Spain through the original joint purchasing consortium of Sogecable and Via Digital—Audio-visual Sports—that has been overtaken by the merger of the two main parties, and the conditions accepted on the occasion of this merger allowing us to close the case³; but also at European level, in the field of public broadcasting, such as the joint purchasing by the European Broadcasting Union, the EBU, of the Olympic Games' rights.

¹ Available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2876_en.pdf. Press release IP/03/478 of 2 April 2003

² Decision del Consejo de Ministros de 29 de noviembre de 2002, available at <http://www.mineco.es>

³ Press release IP/03/655 of 8 May 2003, Commission closes its probe of Audiovisual Sport after Sogecable/ViaDigital merger

Vertical restraints: exclusive licensing to downstream TV operators. Major issues have been:

- The **duration** of the agreements,
- The **scope** of the exclusivity,

all of them of key importance as regards foreclosure effects and concentration in the downstream broadcasting markets.

Of growing importance are:

- Restrictions affecting **neighbouring markets**; and
- **Embargoes and holdbacks** of New Media Rights.

This concerns in particular the abuse of market power by the core actors by holding back rights for the New Media (Internet and UMTS) for fear of cannibalisation—a blatant output restriction that blocks technical and social progress and is the direct route into market stagnation.

Summarising, our list of main Competition Law issues that we encounter in the sport rights arena and in current cases:

1. Joint selling (or purchasing);
2. Excessive duration or scope of exclusivity, and related vertical foreclosure effects;
3. Hold-back of New Media rights.

Recent cases

Let me then come to my second point: where are we — recent cases.

Many of you will have heard about recent cases in the field dealt with by the European Commission, both European and national, as we have redesigned and re-focused our action in the media sector over the last two years.

Many of these procedures are on-going and I must limit myself to referring to the public statements made by the Commission on some of them. This week, Commissioner Monti has made it clear that we are determined to apply Competition Law principles firmly—such as to the Premier League.

Let me concentrate here on the major EU Decision of the year published in this area, the Decision on the UEFA Champions League. I refer to the Commission Decision of 23rd July 2003⁴ on the notification of the joint selling scheme of media rights in this leading European football competition, giving green light after having requested and achieved a complete reform of the selling process that allowed to exempt the selling scheme under Article 81(3) from the prohibition according to Article 81(1).

The Decision sets out the basic principles, which we intend to follow in similar situations in the sports rights area.

Let me first quote a few figures that explain the economic reasoning underlying our approach. Football is significant for broadcasters. It represents 30 - 65% of their total rights expenditure. It is indispensable for high ratings. Football accounts for nearly 80% of all sports programming and, most important, in nearly all Member States, is a key driver for TV development. In the UK, 65% of subscribers have indicated that sports are a major reason for subscribing to pay-TV, in Spain this figure is even 85%.

This explains, of course, why we have allocated such a high priority to our work on the top league football cases. As I have said, TV is of high significance for football clubs. 30 to 70% of football clubs' revenue come from TV, and this explains why sometimes our efforts to bring joint selling into line with Competition Law requirements meet a certain anxiety— and even bitterness—on the side of some leagues, and are initially sometimes misunderstood.

One should also mention that the New Media effect, even in football, is still small. At this stage, New Media only accounts for some 1% of revenues; however, just looking back, the 2003 New Media revenue corresponds to the 1993 global revenue from TV of football clubs. New Media will grow, and it is important that the clubs and the leagues adjust their selling procedures in time. We cannot accept that important innovative markets are foreclosed by withholding inputs instead of formulating new positive strategies to develop these markets—and to allow sports its fair share of the future revenues.

Let me recall some of the special features that had to be taken into account in the Champions League Decision:

Sports in general, and football in particular, are essentially an ephemeral live product. There are no real substitution products available and is a scarce resource often concentrated in few hands. It achieves high viewer ratings and reaches an identifiable audience. All this makes it a major developer of channel brand image.

We have found that there is effectively a separate relevant market for the acquisition of TV broadcasting rights of football events that are played regularly throughout every year. This is true for the UEFA Champions League and the UEFA Cup, and for the top national leagues and cups. There seem to be parallel separate New Media markets emerging.

Market definition is, of course, the basis of any competition analysis because it provides the framework within which market power and anti-competitive conduct must be analysed and assessed.

Let us then have a look at the original Champions League scheme:

- One TV broadcaster in the respective national market got all rights for 3+ years. There were only rudimentary sub-licensing arrangements in place.

⁴ Available at <http://www.europa.eu.int/comm/competition/antitrust/cases/decisions/37398/en.pdf>. See also Press release IP/03/1105 of 24 July 2003, Commission clears UEFA's new policy regarding the sale of the media rights to the Champions League.

- There were a number of unused rights, and therefore clear signs of an output restriction.
- There was no exploitation of New Media rights.
- And, there were no rights for individual football club rights that would mitigate the effect of the central selling scheme.

Compare this to the new scheme that resulted after our negotiations with UEFA on a settlement and that is now underlying the positive Decision. The new Champions League scheme is characterised by:

- An open tender procedure;
- No unused rights;
- Fourteen separate rights packages;
- Three live packages;
- New Media rights co-exploited by both the leagues and the clubs;
- Football clubs exploiting certain TV, New Media and archive rights individually.

This shows the type of structure of the offering that we have to see in order to view a pooling agreement of major importance in the sports arena as compatible with Competition Rules.

These changes allowed us to give an exemption to the joint selling scheme of the Champions League. For recall: for giving an exemption we have to prove clear efficiencies and consumer benefits of the scheme. In this case we recognised the economic advantages and the saving in transaction costs generated by a single point of sale (the "one stop shopping" advantage), the advantage of packaged league media products and, more generally, the advantage of the joint selling scheme for branding.

With the changes in the selling scheme we were able to accept the indispensability of the remaining restrictions that the joint selling scheme implied.

The Checklist

This then takes to my *third* point: what is the checklist that emerges from the case—even if each case will need separate consideration depending on the circumstances.

We need:

- An open tender;
- An unbundling of the offer to allow more than a single buyer;
- No excessive exclusivity—duration of the order of three years will often be acceptable;
- No automatic renewal, which is often just a disguised extension of the duration of exclusivity.

All of these will be *necessary* conditions to limit vertical foreclosure effects on the broadcasting markets. However, let me emphasise that in many cases these will be necessary conditions only but *not sufficient* ones. We have to make a general reserve concerning the downstream concentration effect in cases where we are faced with very large pooling agreements—such as pooling of all top league games, for example where as a consequence a single buyer can snap up *all* of the live packages. A joint selling scheme must not have as its effect an excessive concentration in the downstream market.

We were not faced with such a situation in the Champions League case. But we can be faced with such a situation in the top national league cases, or in the case of other very powerful pooling agreements, be they selling or purchasing, given their market effect. In these cases we will need *specific* conditions to ensure that the scheme will not result, in these very severe situations, in an excessive foreclosure of competitors by a single buyer in the respective downstream market. It is under this perspective that we will now investigate Premier League / BSkyB in the UK, as Commissioner Monti has announced.

In addition to the above, and to the checking of the vertical effect, there will be generally two other requirements:

- There can be no unused rights. Rights must fall back to the participating clubs for individual selling if central selling does not achieve this goal. A joint selling scheme must not pool excessively,

And

- Joint selling must not lead to holding back rights from the New Media.

Central selling can take place only where it does not lead to unused rights, i.e. unacceptable output limitations. Unused rights must revert to the clubs for individual selling to limit the horizontal effects—as must other rights, as far as they can be sold either centrally or individually without undermining the benefits of the scheme that we acknowledge. And, we will not allow holdback of New Media rights, as I have said. Or in other words, we will not allow the carry forward of restrictive agreements into the New Media markets, *the Internet and the UMTS*.

New Media

This takes me to my last remark: the New Media.

Let me here refer to the general framework of the current debate on the New Media at EU level. As most here will know, the general framework for television in the EU is set by the Television Without Frontiers Directive that covers particularly certain requirements on advertisement and sponsoring, European content and protection of minors, and other rights.

It also allows Member States to make transmission on free TV mandatory in the public interest for certain types of sporting event, the so called "listed events"—and half of the Member States have used that possibility for certain events such as the finals of the Olympic Games.

All of these provisions are now under review in a public hearing process that has taken place over the year and the results of which are published on the Commission's website. An underlying mover of the review have been the New Media, particularly future broadband—both fixed Internet and mobile (3G/UMTS). The question at stake is the future reach of the provisions of the Directive and changes that are required.

For the review under Competition Rules of the rights markets, this means that there is a new focus on the New Media. Current penetration of Broadband Internet is only a few percentage points in the Community—both Internet via cable and xDSL. 3G/UMTS has still not taken off. But according to forecasts, broadband penetration could rise to 50% of households by the end of the decade. If that happens and if the Internet's structures and capabilities adjust to the new mass audiences, we will live in a very different media world.

As I have made clear, we cannot admit that withholding content from these New Media prevents that development. Sport rights will, again, play a key role. This is why New Media rights have played a major role in the UEFA Decision and, I am sure, more will be said about this at this conference. It is also now playing a key role in the national cases.

On 1st May of next year, we will see the new EU antitrust regime enter into force that will decentralise the enforcement of antitrust. The new regime will bring substantial new powers for the national antitrust regulators.

We expect that this will intensify market scrutiny further and we hope that this will favour in this sector the take off of the new markets that the sector needs for new growth.

At the EU level we hope to free resources for focusing on key cases of Europe-wide relevance, and for a new emphasis on sector wide investigations.

One focus of these investigations that we will undertake Europe-wide will be the New Media—particularly nascent technologies and media such as the new 3G/UMTS mobile generation.

Conclusion

Let me conclude. Sports are of key importance for the media, as are media for sports. Recent case law has set signposts that give guidance. But this is work in progress, as major case developments are ahead over the coming months. We are confident that the final outcome will be positive: for sports, for the media, and, most important, for the sports fan and the consumer.