

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
RESPONSE TO THE E-COMMERCE SECTOR INQUIRY'S PRELIMINARY REPORT



1. Introduction

The Premier League (EU Transparency Register 20008164092-96) organises the top division of English football, with the twenty member clubs at any one time in the league being the shareholders. The competition comprises 380 games in a season and attracts in excess of 360,000 fans each match weekend. Media audiences for the competition are also buoyant both in the UK and internationally, with the Premier League reaching 12 million Followers on Twitter and being broadcast in 185 countries.

The Premier League is also very committed to football solidarity and corporate social responsibility. Over the three seasons 2016-2019, the Premier League have pledged that at least £1 billion will be shared outside of the 20 Premier League clubs, for solidarity and other purposes.

The Premier League is a member of the Sport Rights Owners Coalition (SROC) and fully supports SROC's submission. However, the Premier League feels it should provide a more detailed response to certain issues raised by the European Commission in its Preliminary report.

2. The ET Model

The European Commission has repeatedly stated that it recognises that benefits for consumers and businesses flow from the long-established model under which rights holders license audio visual content to broadcasters and other distributors on an exclusive territorial basis (the ET Model). Important features of the ET Model for consumers, broadcasters, rights holders and content producers include the ability to buy and sell rights to audio visual content on a technology neutral basis and for a fixed licence fee.

The Commission has also insisted that it is not seeking to remove the ability of rights holders and broadcasters to continue operating under the ET Model. As recently as 14 October 2016, Commissioner Ansip wrote in a letter to several CEOs (including the Executive Chairman of the Premier League) that *"broadcasters and right holders will remain free to decide on the territory of distribution of content in the EU and beyond. We fully appreciate the importance of the principle of contractual freedom for the funding and sustainability of the European audio visual industry"*.

However, the Preliminary Report suggests that the Commission is considering interventions in relation to e-commerce in digital content that would render meaningless any residual contractual freedom to enter into exclusive territorial licences on a technology neutral basis and for a fixed licence fee. This would fundamentally undermine the ET Model to the extent that it would no longer be workable, destroying the benefits to consumers, business, workers, innovation and cultural diversity in the EU that are achieved through the operation of the ET Model in its current form.

The Premier League believes that intervening to address at least three of the licensing practices the Commission has identified as raising potential concerns – the use of geo blocking/geo filtering clauses, bundling of online and non-online rights and the pricing and payment mechanisms used – would constitute an existential threat to the ET Model and the many benefits it brings. Each of these practices supports the ET Model in a different way and contributes to the benefits deriving from the ET Model. The ET Model operates successfully around the world and provides the structural foundation for the financing of audio visual works, including films and television series as well as sport, and is based on licensing practices that have been recognised as legitimate within the EU ever since the decision of the Court of Justice in Coditel and in certain cases have even been mandated by the Commission itself.

Although the Preliminary Report does not contain any decision on the part of the Commission to intervene in relation to these licensing practices through enforcement action or otherwise, it is clear that intervention is being considered. It is of crucial importance that the Commission understands all of the important benefits of the ET Model and appreciates that interventions in relation to these licensing practices would strike at the heart of the ET Model. In particular, the Commission needs to understand that, without meaningful and enforceable exclusivity, the notional ability to license rights on a territorial basis would be of little value.

The Premier League therefore requests that the Commission:

- re examines its assumption that harm to consumers, business and innovation is being occasioned by the long standing licensing practices that it has identified;
- balances any perceived harm identified against the wide ranging benefits resulting from the ET Model as it currently operates both within the EU and throughout the world; and
- explores fully the likely consequences of any potential intervention for the operation of the ET Model and examines whether benefits to consumers and innovation are likely to result or whether (as the Premier League contends) significant harm to consumers, cultural diversity and innovation (and the other beneficiaries and benefits of the ET Model) is likely to result, far outweighing any perceived benefits of intervention.

In order to assist the Commission, in the remainder of this note the Premier League describes the rationale for and the current benefits of the ET Model and explains how intervention in respect of the long standing contractual practices identified in the Preliminary Report could fundamentally undermine the ET Model, destroying the benefits it creates and causing significant harm.

In summary, as the Charles River Associates study commissioned by the European Commission (published in 2014) puts it, *"Policy changes which reduce the effectiveness of territorial licensing entail a risk of undermining the associated efficiencies which do not appear to be justified by the possibility to reduce the risk of harm"*.

3. Consumer preference as the basis of the ET Model

It is important to note that the adoption of the ET Model by audio visual rights holders is a product of the natural operation of the market in response to consumer and broadcaster demand and in order to facilitate the financing and production of audio visual content and services that are attractive to and valued by consumers and broadcasters. In particular, consumers in countries around the world, including in the EU, wish to receive services that are tailored to their particular tastes and preferences, while broadcasters wish to acquire exclusive rights to content in order to distinguish their offerings and compete for those consumers in the relevant local markets.

This is relevant in the present context because interventions that undermine the ET Model would undermine an existing licensing ecosystem that is consumer led and consumer focussed. It is important that the Commission recognises that consumer tastes and preferences are well served by the current system and that a compelling justification and a rigorous analysis of the potentially disastrous consequences of intervention are needed before any intervention is made.

According to a 2009 study from RBB Economics: *"the EU consists of Member States with distinct cultural, linguistic and viewing preferences. The European audio visual industry is organised to accommodate those differences and ensure that a targeted product is made available to European consumers so that stakeholders across the audio visual industry are more able to recoup their substantial and risky investment in the production and distribution of content. Territorial exclusivity is critical to the practice of accommodating the different viewing preferences within the EU because it enables audio visual products to be sold within Member States on an exclusive basis and in a way which meets demand in each member state within the EU."*

Indeed, the Commission has itself recognised that the relevant upstream and downstream markets for football media rights are national, or confined to linguistic regions (reflecting the way the Premier League sells rights within the EU), in a number of decisions by the European Commission, including the UEFA Champions League decision in which the Commission determined that:

"due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors. The Commission therefore considers the geographic scope of the upstream markets for the media rights to be national."

and

"The reasons for defining the geographic scope of the upstream markets as national, such as varying regulatory regimes, language barriers, and cultural factors, are also decisive in the downstream market. A pay TV broadcaster normally only sells subscriptions to viewers in a certain territory. TV advertising is normally adapted to fit the tastes and languages of a certain territory. The same would seem to apply to new media services. The Commission therefore considers the geographic scope of the downstream markets to be national or at least confined to linguistic regions."

As a result of these consumer tastes and linguistic preferences, a pan EU market in which broadcasters compete for subscribers to and/or viewers of audio visual content across the EU does not exist. The lack of pan EU or indeed any significant cross border demand is also reflected in the results of the Eurobarometer survey on Cross Border Access to Online Content published on 28 August 2015 which found only a very limited number of Internet users had tried to access content through online services generally meant for users in other Member States and, in the case of sports, just 2% of respondents.

Rather, broadcasters compete at a national and/or regional level through the provision of locally tailored content and production in order to meet the demand of local customers. This model is driven by the purchase of rights by broadcasters on an exclusive territorial basis, and typically on a technology neutral basis, in order to be able to attract subscribers and viewers in their local market. The content of the channels that are assembled by broadcasters will vary according to the preferences of their national audiences. In the context of sports, this involves, for example, packaging Premier League content with other sports content that is of interest in the relevant Member State as well as retailing sports channels as part of a wider bundle of content that is also tailored to the relevant national and/or regional market.

This consumer led model would be threatened by interventions in relation to geo blocking/geo filtering and the bundling of online and online rights, as these practices are critical to delivering meaningful exclusivity in national and regional markets and to enabling broadcasters to satisfy consumer demand for access to audio visual services across all platforms and on multiple devices. Without those benefits, broadcasters would have a significantly reduced incentive to invest in creating innovative and compelling content offerings that are attractive to consumers. The potential impact of interventions in these areas is discussed in more detail in sections 5 and 6 below.

The Premier League believes that the limited cross border demand for sports and other audio visual content that does exist is essentially restricted to the desire of some consumers, when temporarily present in the EU outside their home Member State, to access services to which they have subscribed in their home Member State. That demand will be fully satisfied by the Commission's proposed Portability Regulation, an instrument that the Premier League has supported on the basis that it is an evidence based policy intervention and also because it recognises the fundamentally territorial nature of consumer demand for audio visual services.

4. Benefits for consumers, broadcasters, rights holders and others from the ET Model

The Commission has suggested that the long standing contractual practices of including geo blocking/geo filtering requirements, of bundling online and non online rights and of licensing on a fixed fee basis (the Identified Practices) may be causing harm to consumers, businesses and innovation in particular. However, the Premier League believes that the opposite is true and that the Identified Practices are critical to delivering the benefits to consumers and businesses, and the levels of innovation, that are generated by the ET Model.

The ET Model enables producers of audio visual content to invest in the production of attractive content, to license that content on an exclusive territorial basis and to address the consumer led demand highlighted in section 3. The Identified Practices of geo blocking/geo filtering and bundling are critical to the successful operation of the ET Model, as explained in more detail in sections 5 and 6. The other Identified Practice, of licensing rights on a fixed fee basis, is also important because it enables rights holders to have the certainty of income necessary in order to finance the production of attractive and compelling content. This is explained in more detail in section 7 below.

In this section, the Premier League discusses the general benefits of the ET Model for consumers, broadcasters, rights holders and others. In the case of the Premier League, its adoption of the ET Model creates a virtuous circle of investment in quality, primarily in playing talent, coaching, youth development and academies, stadia and facilities. This leads to a consequential increase in the quality, attractiveness and competitiveness of the Premier League football competition, which in turn makes the product more desirable to consumers and helps to maintain or increase rights values, which in turn leads to a greater investment in quality and so on. This virtuous circle produces benefits for all the member clubs of the Premier League, the football clubs in the leagues beneath the Premier League, for grassroots football (in which the Premier League invests heavily) and in the multitude of community and social initiatives and good causes supported and funded by the Premier League. The same will hold true for other sports who reinvest their rights revenues in a similar way.

Similar principles also apply to other audio visual content that is licensed under the ET Model, such as films and television series. The revenues generated from sales of such content through the ET Model are invested into the production of that content for example, in hiring acting, directing and writing talent, as well as crew and production facilities. Exclusivity is at the heart of the ET Model because it incentivises broadcasters to invest in the production and delivery of high quality and attractive programming, channels and services and enables broadcasters to differentiate those channels and services from those of their competitors using the exclusive content they have secured. It is on this basis that broadcasters value the rights and deliver appropriate remuneration to the rights holders which is then invested in the production of high quality and attractive content for the benefit of consumers.

It is suggested in the Preliminary Report that the Identified Practices may be harming innovation. However, in our view, the available evidence points to the very opposite and our experience is that the Identified Practices, via their support of the ET Model and the virtuous circle of audio visual content production, have encouraged innovation in audio visual services, including online services.

European countries are world leaders in innovative OTT services, which are often developed alongside traditional broadcast platforms by broadcasters of all sizes. These services are supported by an ecosystem of small and large business to business technology service providers who help to develop delivery platforms and technologies in national markets across the EU. There is no sense in which the ET Model is holding innovation back in the EU. The Premier League's view is that removing the incentive to invest in innovative content and technologies by undermining the ET Model would set the EU on a regressive path and harm innovation, rather than foster it.

The ET Model also contributes to a diverse and competitive European audio visual industry that reflects the cultural and linguistic traditions of its Member States. Without the ability to enforce the exclusive territorial element of the ET Model effectively (something that would be put at risk, in particular, by intervention in relation to geo blocking/geo filtering), the result is likely to be a switch to a pan European rights selling model and the emergence of a small number of large pan European platform operators in whose hands all of the most attractive rights are consolidated. This would be undesirable per se and would have significant negative consequences (as discussed in section 5 below).

The practice of selling rights on a fixed fee basis plays a critical role in delivering the benefits of the ET Model outlined above. This is discussed in more detail in section 6 below but the fundamental point is that fixed fee selling is essential to the financing of the production and distribution of all forms of audio-visual content. The certainty of income for producers and other rights holders that is delivered by fixed licence fees enables them to embark on the risky endeavour of creating content, which requires significant levels of investment both prior to and during production. This applies as much to sport, with the significant levels of investment in infrastructure, playing and coaching talent, stadia and all the other facilities and staff needed to put on the football “show”. Moreover, fixed fee selling is a long-standing practice that has been mandated and/or sanctioned in the Commission’s own decisions on the sale of audio-visual rights to sporting events, including the Premier League, as explained in more detail in paragraphs below.

5. Impact of intervention in relation to geo blocking/geo filtering

In the Preliminary Report, the Commission states that:

"The preliminary results of the sector inquiry raise the question whether certain licensing practices may make it more difficult for new online business models and services to emerge and for new or smaller players to enter existing markets or to grow and expand their activities into other markets. This may be particularly true when online rights are sold exclusively on a per Member State basis....."

The Commission does not provide any analysis of how geo blocking/geo filtering requirements might have these effects but it is clear that the Commission considers them as a potential reason for intervention. As a result, the Premier League wishes to ensure that the Commission understands the impact that such an intervention would have on the ET Model and its associated benefits.

One of the principal aims of the ET Model is to give licensees of audio visual content the incentive to invest and innovate in the production of high quality and attractive audio visual content, channels and services. It does this through the grant to a licensee of exclusivity over transmission, reception and viewing of particular content in the territory in which that licensee provides its channels and services.

A degree of overspill (i.e. reception outside the territory licensed) has been traditionally tolerated within the ET Model. This is because, with traditional (i.e. not online) broadcast technologies, any overspill that does occur does not significantly undermine exclusivity in practice. This is due to a combination of factors, including the territorial footprint of transmissions and the way that packages are bundled for national markets (making, for example, satellite packages intended primarily for a particular Member State unattractive to consumers outside that Member State).

The Internet is different. The constraints that apply to traditional broadcast technologies which limit the impact of overspill on the ET Model do not apply in the online world. Content delivered via the Internet is potentially available on a global (and therefore pan EEA) basis because, without the use of geo filtering or equivalent technologies, transmissions made via the Internet licensed in a particular Member State are receivable via the Internet throughout the world including throughout the EEA. In order to preserve the integrity of exclusive territorial licensing and to ensure that copyright and related rights are not exploited outside the territorial scope of the licence granted, producers and broadcasters of premium audio visual content have overwhelmingly decided to adopt the reciprocal use of geo filtering and thereby protect all the consumer and other benefits that flow from the ET Model.

The ability to appoint a single licensee of audio visual content in a particular Member State is only part of the ET Model but is not on its own sufficient. It is exclusivity over reception in that Member State (and the consequent ability of the licensee to distinguish its offering from its competitors) which is essential in order to realise fully the benefits of the ET Model. The aim of geo filtering is to support the benefits of the ET Model. Without the ability to ensure a meaningful degree of territorial exclusivity, the ET Model ceases to work efficiently. The Commission has repeatedly stated that it is not looking to undermine exclusive territorial selling, but any intervention which would limit the contractual freedom to require the use of geo filtering technology in order to protect the integrity of the ET Model and the grant of exclusive territorial licences will at the very least significantly undermine the ET Model, if not render it entirely unworkable.

Any intervention that would impinge on rights holders' ability to grant territorial licences which are de facto exclusive would not only be unnecessary but would be counterproductive, as it would put at risk (if not destroy entirely) the many benefits of exclusive territorial selling. Indeed, any such intervention would be particularly harmful given that there is little or no consumer demand for cross border access (with the possible exception of portability).

One likely consequence of such an intervention in relation to geo blocking/geo filtering is that rights holders, who for the reasons explained in this section would no longer feel able to offer any meaningful level of territorial exclusivity to potential buyers of their rights, will see no alternative but to sell their rights on a pan EU or pan European basis instead of on a territorial basis. In that event, the considerable benefits of the ET Model will be lost with negative consequences for consumers.

In particular, if the switch to a pan-EU rights selling model were to result (as is likely) in the emergence of a single pan European broadcaster (or a very small number of such broadcasters), competition would in fact be harmed. Rather than a diverse number of operators servicing their local audiences, there would be one (or very few) pan European operators from whom consumers must now purchase. It is far from clear in these circumstances that consumers would benefit from lower prices: the converse may be true as the limited number of broadcasters in the new market seek to recoup the costs of a pan European licence, or the single licensee sets prices at a supra competitive level. Moreover, the fewer operators providing premium pay TV services across the EU (to whatever markets, national or otherwise), the less innovation there would be across the sector as a whole. This would, again, harm consumers.

To the extent that local, nationally focussed broadcasters and platforms are able to survive, they would be unable to compete for rights to premium properties with a broader international appeal which are sold on a pan EU basis and so would be forced to focus solely on local content with very limited international appeal. Moreover, the fact that these local broadcasters would be competing head to head for viewers and subscribers with pan European operators would reduce their ability to sustain their levels of investment in local content and would adversely impact the cultural diversity currently featured on their services. This would affect all programming genres, not just sport, to the detriment of consumers.

6. Impact of intervention in relation to the bundling of online rights with non-online rights

Being granted exclusivity over audio visual content is, by definition, meaningless if multiple licensees are able to make available the same content in the same territory at the same time. This is also true even if a particular licensee is granted exclusivity over online transmission with a different licensee granted exclusivity over traditional broadcast media. In that case, content could still be received by either means, so neither licensee would obtain the benefits of being the exclusive supplier of that content during the term of the licence.

Therefore unbundling would significantly undermine both the ET Model and also the incentive to invest in the creation of attractive content and services. That would in turn devalue the content being licensed and put at risk all of the benefits from the ET Model that have already been noted. Moreover, as explained below, there will be other material detrimental impacts for consumers and broadcasters if there is intervention to mandate the separate sale of online and non-online rights.

Consumers typically expect to be able to access content they have purchased on all of their devices. Someone who has paid for a subscription to a channel that includes satellite transmission together with an ancillary online service expects to be able to watch that channel on their television via satellite and also online via their connected tablet, rather than potentially having to obtain two subscriptions, or settle for only one delivery mechanism.

Requiring content to be sold separately on an unbundled basis would either force rights holders to run two or more separate sales processes and broadcasters to buy two or more sets of rights for both traditional broadcast and online transmission (which would be inefficient), or would force consumers to buy two subscriptions to obtain the same range and quality of services that they previously received via a single subscription.

Broadcasters would be likely to end up with a patchwork of rights, some of which they could exploit online and some of which they could not, with the result that content would have to be "blackout" of their channels depending on how they were distributed. This clearly would have a hugely deleterious impact on the attractiveness of their channels and services, splintering their services into online and non-online versions with different content.

The general impact on exclusivity and the specific impact on the attractiveness of broadcasters' channels and service offerings that would result from unbundling would disincentivise broadcasters from investing in innovative digital delivery products. This is a concern, as traditional broadcasters have been amongst the leading innovators in terms of developing OTT solutions and technology, through the creation of ancillary services and OTT only products. The EU has some of the most innovative services in the world and there is no evidence that it is lagging behind the rest of the world, nor that it would be further ahead if online and non-online rights were no longer bundled. In other words, the market is already working to deliver innovation without the need for any intervention.

The bundled selling of rights has demonstrably not resulted in Internet only services being unavailable or scarce. Broadcasters have themselves innovated in this sphere, Sky's NOW TV service being a good example. The Premier League's licensee in Germany, Perform Group, operates a primarily OTT only service. Perform is a new market entrant with a primarily OTT strategy and acquired bundled rights in Germany despite competition in the market.

Further, if bundling of rights did have an impact on innovation or the ability of new entrants to acquire rights, that impact would also be seen in countries outside the EU, given that the ET Model is adopted worldwide and bundling of rights is the international market norm. However, that is not the case. Innovation in Internet delivered services (both ancillary and OTT) and the introduction of new players are taking place around the globe. The obvious global examples are Netflix and Amazon Video (who nevertheless obtain much of their content on a territory by territory basis) but there are also many local players such as LeTV, who as a new entrant (operating a primarily OTT only service) obtained bundled Premier League rights in Hong Kong despite competition in the market.

Indeed, the Premier League expects OTT only exploitation to become increasingly common notwithstanding the bundling of rights, as technology continues to develop. This is a market led phenomenon in a market that is functioning well and delivering innovation and consumer choice. Just like traditional broadcasters, OTT only operators regard exclusivity across all delivery means as critical to giving them the incentive and ability to invest in their services and platforms. Innovation (in the EU and elsewhere) is a result of exclusive territorial licensing and is not held back because of it. It would be unfortunate (to say the least) if some regulatory intervention were to cause such innovation to slow down in the EU but gather pace in the rest of the world.

Technology neutral selling of rights is good for consumers. No doubt that is one of the main reasons why the sale of the Premier League's rights on a technology neutral basis (i.e. capable of exploitation by any and all delivery means) was required as part of the Commitments that were accepted from the Premier League by the Commission in 2006 in relation to the UK market.

7. Impact of intervention in relation to the practice of selling rights on a fixed fee basis

The selling of rights on a fixed fee basis, another contractual practice highlighted by the Commission as a potential concern, is central to delivering many of the benefits of the ET Model. Although it is not a defining characteristic of the ET Model itself, it forms a core part of the virtuous circle highlighted in section 3 above, giving certainty of income for rights holders and certainty of outlay for broadcasters.

This certainty of income is the basis of the financial models used for the production of most high quality content, including sport, television series and films. The fact that revenue streams are known in advance is relied upon by content producers to secure third party financing for the production of their content, to fund and/or recoup the investment made in the creation of their content and hopefully to generate additional revenues for reinvestment in the creation of new content.

To take the example of the Premier League, as a result of the certainty of income from the sale of rights on a fixed fee basis, the Premier League's member clubs are able reliably to budget for their costs over at least a three year period (being the length of the Premier League's agreements) and, on the assumption that the current model is not undermined, are able to forecast levels of future income as well. This means that Clubs can more safely make long term investments in playing talent and give long term job security to their non playing staff as well as invest in infrastructure, community outreach and youth development projects.

Similar considerations apply to the production of other types of audio visual content. For example, the certainty of fixed fees being paid to the producer of a television series by a commissioning broadcaster, co producer or distributor enables the producer to ensure that it will receive sufficient income to finance the cost of production and/or (if applicable) to cash flow repayments of any production finance arranged from third parties. Being able to pre sell exclusive rights (again, on a fixed fee basis) in other territories under the ET Model will often also play an important role in the financing of television programmes and feature films, particularly for high value productions.

Any intervention to undermine the practice of licensing rights on a fixed fee basis in favour of a highly uncertain "per subscriber" model has the potential fundamentally to undermine the operation of the ET Model within the EEA, which is relied upon to foster the production of high quality content that is attractive to consumers as well as to generate the benefits of the ET Model described earlier in this note.

If a rights holder were forced to sell on the basis of a per subscriber fee, the income of that rights holder would be entirely dependent on the ability of the licensee to generate subscribers, the number of which will fluctuate for a multitude of reasons other than the attractiveness of the content sold by the rights holder. The result would be variable levels of income, dependent on factors that are out of the rights holder's control. That would be likely to reduce materially the willingness of content producers to invest in the creation of attractive content and would cause significant damage to the ecosystem of content creation in the EU.

The effect of intervention, for example to force audio visual rights to be sold on a per subscriber basis, would be very damaging for rights holders, who could be left with huge holes in their budgets if a broadcaster did not deliver on anticipated subscriber numbers and in particular would make selling to new entrants with no track record extremely risky (and indeed very unattractive) for rights holders. In effect, rights holders would be subsidising new entrants. It is difficult to see how that would be a fair or justified intervention or one based on the proper application of competition law principles.

In practice, fixed fees are normally phased over the life of the contract, meaning a new entrant will not be required to pay the entire licence fee at the start of the term. As a new entrant gains subscribers throughout the term of the contract on the back of the attractive content which it has bought, it should be able to recoup the rights fee payments.

Despite the widespread practice of rights being sold for fixed fees, new entrants can and frequently do bid for and win valuable properties like the Premier League. This note has already referred to OTT focussed new entrants like Perform Group and LeTV, but Premier League rights are frequently acquired across the world by licensees with no previous relationship with the Premier League.

We would also note that the Premier League in the UK voluntarily continues to sell its rights based on the Commitments accepted by the Commission in 2006 and which involve the Premier League selling multiple packages of live rights, based on an open tender process whereby each package is awarded separately to the highest bidder, subject to a no single buyer rule. Such a tender process simply could not operate without the use of fixed fees, as it would be impossible meaningfully to compare bids based on per subscriber fees, as the overall value would be impossible to predict. This is not only relevant to the Premier League – similar interventions by the Commission or national competition authorities in relation to the sale of other audio visual rights/properties would similarly be unworkable without the use of fixed fee bidding.

Indeed, one of the principal requirements of the Commission as part of the Commitments it accepted from the Premier League was that there should be a prohibition on all forms of conditional bidding, i.e. bids whose total amounts are not fixed but are wholly or partly determined by other factors. Any intervention that looked to mandate the use of per subscriber fee arrangements would represent a form of conditional bidding, as the obligation to pay would be contingent on, and the value of a bid would vary according to, the number of subscribers that the bidder may have at a particular time or times in the future. This would seem a strangely inconsistent approach on the part of the Commission as its effect would be to sanction one form of conditional bidding contrary to the Commission's longstanding view that conditional bidding is anti-competitive.

8. Duration of contracts

The Premier League also notes that the Commission has identified the duration of contracts as a licensing practice which has a potentially adverse impact on consumers and innovation. The Premier League's agreements within the EEA are for three year terms and rights were most recently sold in 2015 (with the term commencing in August 2016) via competitive tender processes in the various European markets.

The length of contracts is not strictly relevant to the ET Model and, given that the standard length of the Premier League's contracts is very much at the shorter end of the range reported by the Commission, the Premier League does not address this issue in detail in this note.

However, the Commission should bear in mind that broadcasters acquiring premium sports rights do need a sufficient period of exclusive exploitation to recoup their investment in content and in the services used to deliver that content and that a period of longer than three years will often help to maximise the benefits of the ET Model. In any event, a rights term of three years is the absolute minimum required in order to deliver the benefits of the ET Model.

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