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1. INTRODUCTION

Ladies and gentlemen,

It is a great pleasure for me to speak at this Congress today.

I will give a review of the most important events regarding the trading of sports media rights in Europe from an EC Competition Law perspective.

The Commission's enforcement activities have in particular dealt with the joint selling of media rights and exclusive media rights deals.

The Commission has adopted a number of decisions on sports media rights and so have the national competition authorities.

The Commission has moreover made a sector inquiry into the availability of sports content for mobile telephony. The study showed us that many of the competition problems known in the traditional media markets may also cause problems in the new media markets and may slow down the developments of these markets.

I will finally look at what the future may bring us from an EC Competition Law point of view.

2. THE ISSUES FOR THE EUROPEAN COMMISSION

The liberalisation of the TV markets in the 1980-1990s has led to a proliferation of TV channels. Now, new media services are beginning to crowd the media market too. The result is an unprecedented demand for sports media rights - as a minimum portfolio of sports rights seem to be crucial for most media operators.

The concentration of valuable media rights in the hands of very few sports federations limits their availability.

Availability of media rights is reduced still further by the fact that media rights contracts are typically being concluded on an exclusive basis for a long duration.

The rights are often sold in a large bundle, cover a whole event and all modes of exploitation.

This is generally to the advantage of the largest operators, because they are the only companies that are able to bid for these large rights packages.

These are market circumstances where anti-competitive practices can thrive. We see behaviour such as output restrictions, market foreclosure or hampered development of certain markets such as new media markets.

This is likely to cause consumer harm in terms of higher prices, reduced access to services and media content.

3. THE COMMISSION'S COMPETITION LAW ENFORCEMENT ACTIVITIES

3.1.1. *The relevant markets*

Any starting point in an anti-trust investigation is defining the relevant product and geographic markets.

The test is set out in the Commission's notice on the definition of the relevant market for the purposes of EC Competition Law.² It is basically a test of substitutability of products.

When we talk about the substance of the substitutability of sports media content - in plain language – it means that a viewer who wants to see a given sports event is unlikely to be happy with the coverage of any other event. This applies in particular in respect of top sports events. This limited substitutability of events, and hence the media rights, has an impact on the ability of an operator having acquired sports media rights in selling advertising space and subscriptions.

In determining the relevant product market, we have therefore looked at the ability of the content to attract an audience; the configuration of that audience; advertising revenues; and brand image.

The evolution of the Commission's practice has led to the definition of distinct relevant product markets as narrow as the media rights to premium football events played regularly throughout the season.³

In the media sector, products and services are not always clearly separable. Questions arise to what extent technological convergence affects the Commission's analysis with regard to the market definition.

² OJ C 372, 9/12/1997.

³ In BIB/Open (Case IV/36.531 OJ 1999 L 312/1, 28) the Commission defined separate markets for the wholesale supply of film and sports channels observing that movies and sports are “key sales drivers” for pay-TV operators.

In TPS I (Case IV/ 36.237 OJ 1999 L 90/6, 34) the Commission found it universally acknowledged that film and sports are the most popular television products are able to achieve high viewing figures and reach an identifiable audience, which is especially targeted by certain advertisers.

In the UEFA Broadcasting Regulations case (Case IV/37.576 OJ 2001 L 171/12) hinted that a separate market for the broadcasting (and new media) rights for football events played regularly throughout every year could exist.

This view was confirmed in the cases Newscorp/Telepiu (Case COMP/M.2876), EC — TPS (OJ L 90, 2.4.1999, p. 6), Canal+/RTL/GJCD/JV (COMP/M.2483)(IP 01/1579), COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League, Commission decision of 23 July 2003, OJ L 291, 8.11.2003, p. 25. COMP/C.2-37.214 - Joint selling of the media rights to the German Bundesliga, Commission decision of 19 January 2005, OJ L 134, 27.05.2005, p. 46. Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453 - joint selling of the media rights of the FA Premier League on an exclusive basis, OJ C 115, 30.04.2004, p. 3-6.

When we first looked at football cases in the late 1990's, Internet was a dial-up 56 K modem. Now it is broadband with an amazing transmission capacity and very sophisticated software that permits audio-visual streaming of TV like services and much more. Such technological development is likely to lead to a refinement of market definitions.

Our original rather technological platform oriented approach is valid as long as each platform displays distinctive characteristics with respect to the service offered, such as in respect of new media rights. Converging technologies are likely to make us focus more on the actual service provided and much less on the technological platform used to distribute the service.

Example: A Cable TV network service using an IP based technology cannot be called an Internet service, if the service actually provided carries the characteristics of a Cable TV service.

Therefore you will be able to see in the commitments made by the English Premier League that: *“the FAPL shall award the Live Audio-Visual and the Near-Live Audio-Visual Packages on a technology neutral basis in respect of the delivery systems and technologies by which the Core Rights in those Packages are capable of being exploited.”*⁴

Another important aspect of this issue is the situation in which the media service is consumed. Our sector inquiry into 3G mobile services has pointed to the significance of this aspect. A viewer who has access to a home cinema TV is unlikely to substitute that viewing experience with that of a mobile handset.

Therefore let me simply state that at present DG Competition notes that sports media rights can be consumed via very different distribution modes and providing services each displaying their own characteristics which may be consumed in very different circumstances.

The market definition of converging services and technologies provide a moving target, where we will have to put more and more emphasis on the service provided and the circumstance in which it is consumed.

I think that the trend of focusing on the service rather than the technology is moreover illustrated by the proposal for the new Television without Frontiers Directive⁵ which does not put emphasis on the distribution mode but on the actual service provided.

⁴ Paragraph 2.5 of the FAPL's commitments:
<http://europa.eu.int/comm/competition/antitrust/cases/decisions/38173/commitments.pdf>

⁵ The Commission adopted the legislative proposal for the revision of the “Television without Frontiers” Directive on 13 December 2005. This proposal provides a set of basic rules for all audiovisual services and modernizes the rules of the current Directive for television services, COM (2005) 646 final.

Article 1c): *“television broadcasting’ or ‘television broadcast’ mean a linear audiovisual media service where a media service provider decides upon the moment in time when a specific programme is transmitted and establishes the programme schedule”;*

Our case by case approach, under which we each time undertake a careful market research is a guarantee that we will continue to update our market definitions so that they remain valid at any relevant time.

3.1.2. *How does joint selling restrict competition?*

Let me now turn to the Commission's investigations of joint selling arrangements. Joint selling describes the situation where Clubs entrust the selling of their media rights to their Association.

A joint selling arrangement is a horizontal agreement. It is caught by the prohibition in Article 81(1) of the EC Treaty, as the agreement prevents the individual clubs each having a relatively small market share from individually competing in the sale of media rights. Instead we have a joint sales organisation with a significant market power. Markets that would be demand-led thus become supply driven.

In the cases we have investigated, we have typically identified the following types of restrictions causing consumer harm:

- Foreclosure: The joint selling entity sells all media rights in a single bundle on an exclusive basis to one single operator in a certain downstream and geographic market. Other retailers in this market and in neighbouring markets are foreclosed from accessing the product.
- Output restrictions. They occur when the joint selling entity gives preferential treatment of certain media rights at the expense of other types of media rights which are withheld from the market – e.g. new media rights are held back to protect the value of pay-TV rights. This is likely to hamper the development of new media services as it may prevent players in neighbouring markets from acquiring meaningful rights.

The Association (the joint selling body) may either internalise the marketing function by investing in an own sales organisation – or it may outsource this function to a Marketing Agency.⁶ The relationship between the Association and the Marketing Agency can often be characterised as a real agency relationship where the Association carries the economic risk and the Marketing Agency acts in the name of the Association. Real agency relationships are not caught by the prohibition in Article 81 of the EC Treaty.

Article 1 e): “non-linear service’ means an audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media service provider”;

⁶ E.g. *Television Event and Media Marketing AG (T.E.A.M.)*, an independent marketing company, assists UEFA in the implementation and follow-up of the commercial aspects of the UEFA Champions League. As an agent under UEFA's control and responsibility, T.E.A.M. conducts negotiations with the commercial partners. The agreements are signed and executed by UEFA, which assumes all legal responsibilities. See paragraph 14 of Commission Decision of 23 July 2003 relating to a proceeding under to Article 81 of the EC Treaty and Article 53 of the EEA Agreement concerning Joint selling of the commercial rights of the UEFA Champions League.

If the Association sells the rights to the Marketing Agency it is a transaction in the sense of Article 81 of the EC Treaty.⁷

The Commission is neutral with respect to the marketing model chosen by the Clubs and the Associations.

3.1.3. Do joint selling arrangements create efficiencies?

The European Commission considers that joint selling arrangements do create efficiencies within the meaning of Article 81(3) of the EC Treaty. They can be carefully balanced so that the pro-competitive effects outweigh the negative effects. A joint selling arrangement has the potential of improving the media product and its distribution to the advantage of football clubs, broadcasters and viewers.

The Commission has in particular identified three types of benefits:

- The creation of a single point of sale, which provides efficiencies by reducing transaction costs for football clubs and media operators.
- Branding of the media output by a single entity creates efficiencies as it helps in the media products getting a wider recognition and hence distribution.
- The creation of a league product: This is a product that is focused on the competition as a whole rather than the individual football clubs participating in the competition. This is an attractive product to many viewers.

3.1.4. Remedies to address competition concerns

The question is then how to balance a joint selling arrangement so that it becomes pro-competitive.

The Commission applies a number of standard remedies when addressing competition concerns resulting from joint selling arrangements and exclusive media rights deals. These may be intensified, if required, by the concrete market situation:

3.1.4.1. Standard approach: Remedy foreclosure by tendering

The risk of foreclosure effects may be reduced by the organisation of a competitive tender process under fair, reasonable, non-discriminatory and transparent terms at regular and frequent intervals. This approach is being used in all our cases, as it gives all potential buyers an opportunity to compete for the rights.

⁷ On this market, see the Commission's decision in Case No COMP/M.2483 - GROUP CANAL + / RTL / GJCD / JV

3.1.4.2. **Standard approach:** Remedy foreclosure by limiting duration of exclusive vertical contracts

The Commission acknowledges the need for a certain degree of exclusivity to protect the value of rights. We therefore address the risk of long-term market foreclosure by requiring the joint selling entity to limit the duration of the exclusive rights contracts to no more than 3 seasons. This is a “sun setting” mechanism.

A longer duration creates a risk of a successful buyer being able to establish a dominant position on the market, which reduces the scope for effective *ex ante* competition in future bidding rounds.

In the SkyItalia merger case we even went further. The merged entity undertook to buy football rights for no longer than 2 seasons at the time and only for DTH satellite distribution.⁸

3.1.4.3. **Standard approach:** Remedy foreclosure by limiting scope of exclusive vertical contracts

The Commission seeks to reduce the risk that a single buyer acquires all valuable rights by obliging the joint selling entity to unbundle the media rights in separate packages. This is a limitation of the scope of exclusivity. More specifically, the Commission requires:

- A reasonable amount of different and independently valid rights packages. Too long embargoes and similar restrictions on the use of the rights are not tolerated.
- Earmarked packages for special markets. Due to the strong asymmetric value of the media rights, access to sports rights may be foreclosed for market operators in certain evolving markets, for example mobile networks. By earmarking certain packages for certain use, as we did in the UEFA Champions League case, we obtained that mobile operators were enabled to acquire rights.
- If necessary, this approach could be supplemented with a requirement of “*blind selling*”. This means an obligation of accepting only stand-alone unconditional bidding for each individual package. The rights will be sold to the highest standalone bidder. Blind selling is likely to prevent a powerful buyer from acquiring the most valuable package(s) by offering a bonus, which is payable if certain rights are sold to only him (conditional bidding).

3.1.4.4. **Standard approach:** Remedy output restrictions: fall-back option, use obligation, parallel exploitation

The risk of output restrictions is reduced by a requirement that unused rights should not be tolerated. This means that where a joint selling body has not managed to sell rights by a certain cut-off date, the entitlement to sell the rights fall back to the individual clubs (“no hoarding”). The club is then at liberty to sell the rights to any interested buyer in competition with the joint selling body.

⁸ Case No COMP/M.2876 – Newscorp/Telepiu’, Commission Decision of 2 April 2003.

A use obligation prevents an operator from acquiring rights with a view to keep them off the market to protect another type of rights which he exploits.

In addition, we may require parallel exploitation. In the UEFA Champions League case, the Commission ensured market availability of deferred highlights and new media rights by imposing the parallel exploitation of these rights by the individual clubs and UEFA.

3.1.4.5. **Intensified approach:** No single buyer obligation

If a serious foreclosure risk exists already *ex ante* due to the presence of a dominant undertaking which is likely to acquire all valuable rights packages, an intensified approach may be required as a safety net under the standard approach.

The imposition of a no single buyer requirement would normally only be justified where a single buyer would secure a dominant position extending beyond the duration of the contract in question. In these circumstances, the standard approach is insufficient to ensure that effective competition is maintained on the market.

It would also be possible to address the no single buyer issue on the basis of Article 82 of the EC Treaty, which prohibits the abuse of a dominant position.

3.1.4.6. **Intensified approach:** Limitation of exploitation platform

In the *SkyItalia* merger case, the European Commission not only required a limitation of the maximum duration of contracts with rights owners to two years, but it also limited the scope of the exclusive football rights to be exploited by SkyItalia to DTH satellite transmission.⁹

I would not exclude that such approach could be applied with respect to new media rights in converging markets, if there would be a risk that a dominant operator in one market would extend this dominant position into a neighbouring market.

3.1.4.7. **Intensified approach:** Trustee

The Commission may also require that the tender procedure is overseen by a trustee that reports back to the Commission to ensure and guarantee that a tender procedure is undertaken in a fair, reasonable and a non-discriminatory manner.

3.1.4.8. **Intensified approach:** Sublicensing

Where dominant downstream players have acquired exclusive rights for neighbouring markets full sublicensing of such rights would be a feasible solution.

⁹ See case COMP/M.2876 – Newscorp/Telepiu, Commission decision of 2 April 2003, §231, that records that Newscorp undertook in respect of ongoing exclusive contracts to waive exclusivity and other protection rights for non-DTH transmission for football and other sport events. This will allow operators competing on other means of transmission (for example, cable, Internet and UMTS.) to have direct and immediate access to premium sport contents. Regarding future exclusive contracts §233 records as regards football rights, the limitation of the duration of future exclusive contracts for DTH transmission with football teams to two years and the unilateral termination right granted to football right owners are effective undertakings, in that they will make premium football contents contestable on the market at regular intervals.

In the SkyItalia merger case a system of “wholesale offer” of premium content was put in place, whereby SkyItalia had to sublicense acquired “premium content” rights on a non-exclusive basis to third parties using on other means of transmission than DTH.

4. THE LATEST CASES

There have been a few cases during the past years. The leading precedent is the UEFA Champions League case from July 2003 in which the Commission first accepted joint selling of football rights and laid out the principles for a pro-competitive rights structure and sales procedure.

While the Commission's intervention was originally seen as very controversial, it turned out to become a positive experience. I would like to refer to Richard Worth, managing director of TEAM Marketing, who acknowledges the big positive impact that the European Commission's intervention has had on the marketing of the UEFA Champions League media right.¹⁰

4.1. DFB – The German Bundesliga case

The next decision after the UEFA Champions League case was the decision in January 2005 on the Bundesliga.¹¹

The Bundesliga case concerned a classical joint selling arrangement where the clubs sell their media rights via a joint selling company, DFL.

The proposal for commitments contained the classical way of segmenting the rights into separate rights packages for TV broadcasting, Internet and mobile platforms. Rights were to be disposed of using a public tender procedure and exclusive rights contracts were not to exceed 3 years.

According to what I have read in the press, the first tender procedure under the new regime has been terminated. From the European Commission's point of view the result seems satisfying. There seems to have been fair competition for the rights and it has led to a good distribution of rights on the German market.

4.2. The FAPL case

The Commission has just made a formal decision in the English Premier League case.¹²

Following the Commission's statement of objections in December 2002, the Premier League presented a new commercial policy. In July 2003, an invitation to tender was launched for the 2004-2007 seasons. Most notably four packages of live TV rights were offered, which were ultimately won by BSkyB.

¹⁰ See Sportbusiness international, the December/January 2006 issue, page 47, in the article “*In a league of its own.*”

¹¹ OJ L 134, 27.05.2005, p. 46.

¹² IP/06/356: Competition: Commission makes commitments from FA Premier League legally binding, 22 March 2006.

The Commission raised certain concerns about the rights that were offered, as well as the conduct and the outcome of the tender procedure.

Further settlement discussions took place.¹³ The provisional result, which followed the Commission's standard approach, was market tested in April 2004:

- The league rights were to be offered in several packages in a tender procedure. The duration of the agreements should not exceed three seasons.
- Clubs would have certain television, internet and mobile rights on a deferred basis.¹⁴
- Unused or unexploited rights would revert to the clubs for their own exploitation.¹⁵

The reaction to the market test led to a new round of negotiations. The commitments were improved with the following substantive elements:

- An explicit no single-buyer provision for live TV rights was introduced.
- More balanced rights packages were created.
- The availability of rights to broadcast via mobile phones was increased.
- The rights will be sold to the highest standalone bidder.
- The sales process will be overseen by a Monitoring Trustee.

The first time the amended sales process will come into practical test will be for the 2007/2010 football seasons. I understand that the procedure has been launched - let us wait and see what happens.

4.3. National cases

As you know, in the spirit of modernisation, the Commission puts emphasis on corporation with the national competition authorities in the framework of the new anti-trust procedures that are applied as of 1 May 2004. The Commission encourages national competition authorities to intervene in cases where they seem better placed to do so and they have done so in a number of cases.

One of the more exciting national cases was the sale of the Belgian football rights in 2005. The Belgian League organised a tender procedure for the sale of six different television rights packages for three seasons. Belgacom, the Belgian telecoms operator bought up all

¹³ For the results, I refer you to the European Commission's press release of 16 December 2003, IP/03/1748.

¹⁴ Essentially, clubs can: (i) exploit their matches on their own club TV channels a certain period after the match has been played (depending on when the match is played); (ii) exploit their matches on club web-sites from midnight of the day of the relevant match; and (iii) offer mobile clips on club mobile subscriptions (from 12 hours following the end of the relevant match).

¹⁵ Essentially, in case any of the live TV packages remains unsold at the beginning of the season, then the relevant matches can be exploited by clubs.

rights with a view to launch a new IP based TV service. I am not so worried about Belgacom acquiring all rights this time around. Belgacom is a newcomer in this market. Therefore no *ex ante* dominance exists.

I know that some of the bidders are unhappy with the conduct of the tender procedure. There is currently litigation before the Belgian courts, so it would not be pertinent for me to speculate further from this podium.

5. SECTOR INQUIRY

Let me finally mention the sector inquiry into the availability of sports content for 3G mobile services, which the European Commission launched in January 2004.¹⁶ The Sector Inquiry is now concluded.¹⁷

The Sector Inquiry concluded that there are general characteristics that make the viewer experience of sports content watched over mobile devices fundamentally different from TV, such as cost of usage, the content available – and in particular the length of time that consumers want to spend viewing the content and the ability to personalise the viewing experience. It seems that mobile platforms will be used when the viewer has no access to TV as the viewer generally prefers watching the action on a bigger screen.

The Sector Inquiry found four main bottleneck problems that may risk limiting the access to sports content on mobile devices:

1. Cross-platform bundling - which refers to practices where a rights owner sells bundled audiovisual rights for various retail platforms to one or a few operators.
2. Overly restrictive conditions - A second business practice that was reported by mobile service operators, concern coverage limitations that are put upon mobile sports rights in terms of the length of the event that can be transmitted or the timing of the coverage.
3. Joint selling – mobile operators also voiced concerns that joint selling result in less supply when all mobile rights to a sports event remain unsold by the joint selling body.
4. Exclusive access - Anti-competitive effects could arise when exclusive access to sports content contributes to 3G operators' obtaining or protecting positions of market power.

The Sector Inquiry has enabled us to get a clearer view on the prevailing commercial behaviours in the value chain of sports content for mobile platforms. The European Commission advocates a competition policy that assures that access to sports rights for distribution over mobile platforms is not unduly restricted through anti-competitive practices resulting in output limitations. Market players are invited to address possible anti-competitive conduct and effects resulting from their business practices. The European Commission will take account of the findings of the Sector Inquiry in future proceedings in this area.

¹⁶ Commission decision of 30 January 2004, see IP 04/134.

¹⁷ http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/

6. THE FUTURE - CONCLUSION

I do not anticipate revolutions in EC Competition Law enforcement with respect to the sports media markets in the near future.

Converging media markets raise new issues for the European Commission's enforcement activities. However, convergence has been around the corner for a long time. Convergence has not happened as fast as predicted, but has moved along in a rather moderate pace with respect to the broad consumer market.

Operators will certainly want to provide converged services and to be present on all markets and platforms. That is OK as long as it does not lead to the extensions of any dominant positions, market foreclosure or output restrictions.

As I said in relation to the definition of the relevant market, we will see a gradual change from a technological platform based approach to a more purely service characteristics approach, as illustrated by the English Premier League case. However, since we approach the sector on a case by case basis, we are able to make a fresh analysis of the markets and therefore also to adopt our analysis to new developments in converging media markets.

However, our fundamental approach, as I have outlined it, will also stand the test of convergence, I think. Our objective is to maintain open and competitive media markets and a level playing field for all parties without market foreclosure and output restrictions, so as to maintain a culture where innovation can thrive to the benefit of consumers, business and the sports.

Thank you for your attention.