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Commission Decision

of 22/III/2006

relating to a proceeding pursuant to Article 81 of the EC Treaty

(Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League)

(Only the English text is authentic)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission Decision of 17 December 2002 to initiate proceedings in this case, and to the Statement of Objections of this date,

Having given interested third parties the opportunity to submit their observations pursuant to Article 19(3) of Regulation (EC) No 17/1962, of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty²

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

WHEREAS:

¹ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

² OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 121/1999 (OJ L 148, 15.6.1999, p. 5). This Regulation has since been replaced by Regulation (EC) No 1/2003 under which this Decision is adopted.

1. SUBJECT MATTER

- 1) This Decision is addressed to the Football Association Premier League Limited ("FAPL"). The subject matter of the proceeding is the horizontal joint selling arrangements put in place by the football clubs in the Premier League (the "clubs") for the exploitation in the United Kingdom of media rights to Premier League matches. For the purpose of this Decision, "media rights" means the rights to make available audio-visual content of play during Premier League matches in any form and using any method of transmission or distribution. Pursuant to these arrangements, the FAPL, as the body representing all of the individual clubs, sells the media rights pertaining to Premier League Matches – notably television ("TV"), radio, internet and mobile rights – on the clubs' behalf, both in the United Kingdom and throughout the world. In its Statement of Objections of 17 December 2002 addressed to the FAPL, the Commission considered that certain aspects of these horizontal joint selling arrangements raised concerns as to their compatibility with Article 81 of the Treaty.
- 2) This Decision, in line with the preliminary assessment of the Commission, as set out in the Statement of Objections addressed to the FAPL, has as its sole subject matter the horizontal joint selling arrangements and does not concern vertical agreements to licence the rights concluded pursuant to that joint sales agreement.

2. PARTIES

- 3) The FAPL is a private limited company incorporated in 1992, registered in the UK register of companies under company number 02719699. Its registered office is in London. The FAPL is governed in accordance with its Articles of Association and the Rules and Regulations adopted by it. The shareholders of the FAPL are those clubs which from season to season participate in the Premier League competition.
- 4) The Board of the FAPL comprises a Chief Executive and a non-executive Chairman, both of whom are appointed by a resolution of the clubs in general meeting. The powers of the Board are governed by the Articles of Association.

3. INVESTIGATED PRACTICES

- 5) The Rules and Regulations of the FAPL grant the FAPL the exclusive right to negotiate media rights agreements on behalf of the clubs. Article 48 of the Articles of Association provides that the FAPL may not enter into any broadcast contract without the prior approval by resolution of the clubs in a general meeting.³ A resolution of the clubs requires two thirds of the votes cast.

³ Article 48 of the Articles of Association of the FAPL provides that "[t]he Board shall not in relation to any dealings relating to television, broadcasting, sponsorship or like transactions or other matters materially affecting the commercial interests of the Members enter into any contract or agreement or conduct themselves in any way as would bind the [FAPL] to any contract or agreement without the prior authority or approval by Resolution of the Members."

- 6) The FAPL usually carries out the joint sale by issuing one or more Invitation(s) to Tender ("ITT(s)") every three years specifying in each ITT the rights that it intends to sell for the following three seasons. For example, the FAPL issued ITTs in 2000 (for the 2001-2004 seasons) and 2003 (for the 2004-2007 seasons), and intends to issue an ITT in 2006 (for the 2007-2010 seasons). The Articles of Association, the Rules and Regulations of the FAPL, and the implementing decisions taken by it will be referred to in this decision as the "arrangements".
- 7) The FAPL's ITTs specify what rights are to be made available for sale, and under what conditions. Interested operators respond to an ITT with offers for rights, and there may be amendments to the ITT and additional rounds of bidding as the FAPL seeks to maximise its revenues from the ITT. The most valuable media rights are those sold for exploitation in the United Kingdom, notably the live TV rights, but the FAPL earns significant revenues from the media rights it sells around the world.
- 8) In determining what rights to sell and how the rights should be sold, the FAPL takes into account a number of different considerations. These include external constraints over which the FAPL has little or no control, such as clubs playing in fixtures in other competitions, and policing requirements, both of which impose limits on the timing of Premier League matches. Other considerations reflect rather more "internal" objectives of the FAPL and its clubs, such as the need for all of the clubs to be part to a greater or lesser degree of any media product that is sold to consumers, the desire to maximise stadium attendance, and the desire to maximise revenue from the sale of media rights.
- 9) The details of the rights made available tend to vary from contract round to contract round but, as regards the UK domestic market, include in particular the following elements:
 - (a) one or more exclusive packages of live TV rights for use on free, pay or pay per view TV services;
 - (b) one or more packages of live audio rights for national radio broadcast;
 - (c) one or more packages of audiovisual rights for use on mobile phones.
- 10) The FAPL also defines certain rights which can be used by the clubs. These include deferred TV rights, subject to an embargo of a certain period after the match has taken place, regional radio rights, and internet rights. Rules set by the Football Association – the relevant football governing body, and a separate entity to the FAPL – implementing the broadcasting regulation of the Union of European Football Association ("UEFA") prevent the live broadcast of matches on Saturday afternoons. This is an external constraint on the FAPL, compliance with which does not give rise to competition concerns.

4. PROCEDURAL STEPS UNDER REGULATION NO 17 AND REGULATION (EC) NO 1/2003

- 11) On 23 June 2001, the Commission opened an investigation, on its own initiative, into the arrangements surrounding the FA Premier League competition. After contact

with the FAPL, the latter agreed to notify these arrangements. By letter of 21 June 2002, the FAPL applied, in accordance with Articles 2 and 4 of Regulation No 17, for negative clearance or, failing this, an individual exemption under Article 81(3) of the Treaty in respect of the arrangements.⁴

- 12) On 17 December 2002 the Commission addressed a Statement of Objections to the FAPL, in which it analysed the arrangements. The Commission concluded that the arrangements restricted competition within the meaning of Article 81(1) of the Treaty and did not fulfil the criteria set out in Article 81(3) of the Treaty.
- 13) On 18 March 2003, the FAPL submitted its formal reply to the Statement of Objections, denying that the arrangements restricted competition on any market.
- 14) Notwithstanding the FAPL's submission that the arrangements did not restrict competition, the FAPL began discussions with the Commission following its reply to the Statement of Objections. This led to some changes being put in place in June 2003, which were refined in the following months, leading to a consolidated provisional set of commitments being proposed by the FAPL in December 2003.
- 15) On 30 April 2004, the Commission published a Notice pursuant to Article 19(3) of Regulation No 17 inviting comments on the commitments offered by the FAPL⁵ ("the Article 19(3) Notice"). A number of third parties replied to this consultation, and copies of these responses were provided to the FAPL. The responses raised two main issues. Respondents considered that the commitments did not go far enough in ensuring that rights would be put on the market, and that the commitments were not specific enough to ensure that the commitments that the FAPL had entered into would be carried out in practice.
- 16) In accordance with Article 34(1) of Regulation (EC) No 1/2003, the application made by the FAPL lapsed on 1 May 2004, the date from which that Regulation applies. However, in accordance with Article 34(2) of Regulation (EC) No 1/2003, the initiation of proceedings under Article 9(3) of Regulation No 17 (which corresponds to that under Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty⁶), continued to have effect.
- 17) Following the third party comments on the Article 19(3) Notice, the Commission raised a number of issues with the FAPL, and discussions over several months led to the submission of a revised set of proposed commitments in November 2005, which are set out at recitals 36 and 37 below.

⁴ In addition, the FAPL also applied for a negative clearance or exemption for the pay TV and pay per view contracts entered into between the FAPL and BSkyB for the 2001-2004 seasons. These contracts were not the subject of the December 2002 Statement of Objections and have now expired.

⁵ OJ C 115, 30.4.2004, p.3

⁶ OJ L 123, 27.4.2004, p.18.

- 18) For the purposes of this Decision, the Statement of Objections of 17 December 2002 constituted the preliminary assessment of the Commission as referred to in Article 9(1) of Regulation (EC) No 1/2003, and the Article 19(3) Notice constitutes a procedural step equivalent to a notice pursuant to Article 27(4) of that Regulation.
- 19) On 14 March 2006 the Hearing Officer issued her final report.

5. PRELIMINARY ASSESSMENT

5.1. Relevant markets

- 20) The Commission's preliminary assessment was that the arrangements affected various markets for the acquisition of media rights of premium football matches. Premium football denotes the top tier of football games, that is to say, matches involving clubs that play in the Premier League competition, whether or not that match is played in the context of the Premier League competition.
- 21) There are several markets for the acquisition of media rights, of which the most commercially significant is the market for the acquisition of live TV rights. Broadcasters acquire rights on this upstream market and use these rights to create football programming which they include in channels made available to consumers (on a free to air, pay, or pay per view basis). Other upstream markets are relevant for other categories of rights – such as mobile, internet, TV highlights and various forms of archive rights.
- 22) The Commission's preliminary view was that the markets for the acquisition of media rights are all closely linked to the downstream markets on which those rights are used, alone or in conjunction with other rights, to provide media services to consumers and that the restriction in the upstream markets is likely to affect downstream markets as well. The most commercially important of these downstream markets are the TV markets, where, for example, free-TV broadcasters compete for advertising and pay-TV broadcasters compete for subscribers and – usually – advertising. Football has not only proven to be a driving force for the development of pay-TV services but is also an essential programme item for free-TV broadcasters. In line with the UEFA Champions League exemption decision,⁷ and the DFB commitment decision,⁸ as well as a number of similar decisions at national level in the United Kingdom and elsewhere, the Commission's preliminary conclusion is that the broadcasting rights to premium football events played regularly throughout the season constitutes a distinct relevant product market.
- 23) The Commission's preliminary view was that geographic markets for the acquisition and the exploitation of media rights are usually defined on the basis of national or

⁷ Commission Decision 2003/778/EC in Case COMP C.2-37.398 – Joint selling of the commercial rights of the UEFA Champions League, OJ L 291, 8.11.2003, p. 25.

⁸ Commission Decision 2005/396/EC in Case COMP/C.2/37.214 – Joint selling of the media rights to the German Bundesliga, OJ L 134, 27.5.2005, p. 46.

linguistic criteria, and are therefore national in scope. This Decision is concerned with the sale of rights for the UK market.

5.2. Practices raising concerns

- 24) In its preliminary assessment, the Commission expressed the view that the arrangements whereby the FAPL is granted the sole and exclusive right to sell the media rights of the FA Premier League are caught by Article 81(1) of the Treaty.
- 25) Joint selling prevents clubs from taking independent commercial action regarding the exploitation of the media rights pertaining to Premier League matches. In place of twenty clubs, each having a relatively small market share and each pursuing its own media rights policy, the arrangements result in a single (joint) sales organisation with exclusive rights, enjoying significant market share, and pursuing a single sales policy. Markets on which no-one possesses market power and whose development would typically be dictated by the demand for rights become subject to the commercial choices made by a joint sales organisation with a significant market share. Markets that would be demand-led thus become supply-driven. As a consequence, the joint sales organisation can, depending on how and to whom the rights are sold, restrict output and create foreclosure problems on downstream markets.
- 26) One example of such a foreclosure problem is in the exclusive sale of large packages of media rights. The FAPL has so far sold exclusive live TV rights in packages that were comparatively large in relation to that which would be sold by an individual club and to the demand from many broadcasters on the market. This is likely to create barriers to entry on downstream television markets in the United Kingdom leading to access foreclosure in these markets. Advertising-funded TV –and pay-TV are the most commercially important of the markets affected by the arrangements.
- 27) Given the importance of football for pay TV and free TV services, a restriction of competition on an upstream market for the acquisition of media rights is likely to have significant effects on the corresponding downstream markets.
- 28) Other concerns could arise through the sale of all of the Premier League live TV rights to a single buyer, given the likelihood that this would also lead to foreclosure on the downstream television markets, and through the existence of output restrictions in respect of various classes of rights.
- 29) Without the arrangements the rights would have been sold by individual clubs, creating greater scope for *ex ante* competition on the upstream market for the acquisition of media rights and consequently for competition in the downstream markets.
- 30) The Commission also expressed the preliminary view in the Statement of Objections that the conditions of Article 81(3) of the Treaty were not satisfied since the alleged benefits stemming from the arrangements did not seem to outweigh the adverse effects caused by the various restrictions of competition identified.

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5.3. Effect on trade between Member States

- 31) In its preliminary assessment, the Commission considered that the arrangements apply over the whole territory of a Member State and therefore have, by their nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about.⁹ This is all the more so in this case where the alleged restrictions of competition create a barrier to entry.

6. COMMITMENTS PROPOSED BY THE FAPL IN DECEMBER 2003

- 32) The FAPL introduced changes to the arrangements in the ITT that it issued in July 2003 and supplemented these changes with a set of commitments in December 2003 (the "December 2003 commitments"), which were the subject of a public consultation in 2004 (see in recital 15 above). Taken together, these two sets of changes covered the following main areas:
- (a) output: the overall output of media rights would be increased, in particular by increasing the number of matches made available for live TV transmission;
 - (b) TV rights: these would be sold in a number of balanced packages, each showcasing the League as a whole, and would be designed to create the conditions for competition; no one buyer would be able to buy all of the rights;
 - (c) UK and Ireland rights would be sold separately;
 - (d) the embargoes (time after which the rights are made available) for mobile and internet rights would be reduced;
 - (e) the duration of the agreements would not exceed three years;
 - (f) the rights would be sold in a transparent and non-discriminatory tendering procedure; and
 - (g) unused or unexploited rights would revert to the clubs for their exploitation.
- 33) These changes focused on reducing the various output restrictions both in terms of the number of matches for which different categories of rights were made available, and in terms of the embargoes to which the rights were subject. In addition, following these changes, the tendering process would enhance the scope for ex ante competition for the rights, and rights which were either not sold by the FAPL or which were sold but not used by the purchaser would revert to the clubs so as to avoid a harbouring of rights resulting in a restriction of output. Finally, no purchaser, acting alone or in association with others, would be able to buy all the packages of Premier League live TV rights.

⁹ See Case C-309/99 *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, paragraph 95.

7. COMMISSION NOTICE PURSUANT TO ARTICLE 19(3) OF REGULATION NO 17 AND AMENDED COMMITMENTS

- 34) The comments made by third parties following the Article 19(3) Notice largely confirmed the Commission's preliminary assessment as to the market definition, the restrictions of competition and the potential benefits of the arrangements for consumers. However the comments also indicated widespread concerns that the December 2003 commitments did not address the issues that the Commission had raised. The provisions as to the packaging and sale of TV rights were deemed to be insufficiently precise. The commitments were also considered to allow the FAPL substantial discretion over the packaging of the rights, the terms and conditions of sale of the rights, and the maximum amount which any one buyer would be allowed to purchase.
- 35) Following the public consultation, the UK communications regulator OfCom assisted the Commission in conducting additional research relating to consumer demand and the market situation in the United Kingdom. OfCom submitted its report on 11 October 2005. This report highlighted the continued strong demand for Premier League content in the United Kingdom, particularly on TV. The market research confirmed the main elements of the Commission's case and suggested additional commitments that could be imposed on the FAPL in order to address the concerns identified by the Commission. The Commission considered the research and discussed with the FAPL what additional commitments were considered appropriate.
- 36) Following further discussions, the FAPL submitted amended commitments. These strengthened the December 2003 commitments in the following ways:
- (a) the live TV rights will be offered in six packages, more evenly balanced in terms of the order of selection of the matches (the pick mechanism¹⁰) than was previously the case; no purchaser – acting alone or in association with others – will be allowed to buy all six packages;
 - (b) mobile rights will be made available during matches in so far as this is allowed by the national provisions implementing Article 48 of UEFA's broadcasting regulations; UEFA has separately confirmed to the Commission that Article 48 does not prevent the transmission of match clips to mobile phones;
 - (c) an increased number of radio rights will be made available in a larger number of packages than previously, and the number of these packages will be increased if a single buyer buys all of the packages and there remains unmet demand on the market;
 - (d) clubs will continue to exploit certain TV, internet and mobile rights on a deferred basis;

¹⁰ See Schedule 1 of the Commitments. Essentially each package of live TV rights provides the purchaser with a right to select ("pick") 23 matches over the course of the season subject to certain constraints that are set out in that Schedule.

(e) the rights marketed by the FAPL will be sold to the highest standalone bidder; bids including any form of direct or indirect link to other packages will be disregarded; the sales process will be overseen by an independent Monitoring Trustee, selected by the Commission on the basis of a shortlist drawn up by the FAPL, who will report to the Commission on the conduct of the auction.

37) The commitments that are the subject of this decision are therefore the December 2003 commitments, as subsequently amended by the FAPL in the light of the conclusions drawn as a result of the publication of the Article 19(3) Notice ("the commitments"). The Commission's objective is to ensure that the arrangements do not restrict output or result in competitors being foreclosed from the relevant markets, to the detriment of consumers. The Commission takes the view that the commitments adequately seek to ensure that this objective is met by:

- (a) requiring the joint seller on the upstream market for the media rights to Premier League matches to organise an open and competitive bidding process subject to scrutiny by an independent Monitoring Trustee;
- (b) limiting the scope of the exclusive rights offered by requiring FAPL to un-bundle the rights into a number of smaller and more evenly balanced packages;
- (c) guaranteeing that no purchaser could buy more than five of the six live TV rights packages on offer;
- (d) balancing the live TV packages more evenly and ensuring that each of these packages is meaningful – so as to avoid a situation where the "no single buyer" rule can in effect be bypassed through the sale of a package of rights which would not enable the purchaser to compete effectively on the downstream broadcasting market;
- (e) enhancing the scope for individual clubs to exploit rights that are not sold by FAPL or used by the purchaser.

8. CONCLUSION

38) On 16 March 2006, the FAPL confirmed that the commitments in respect of the arrangements, as reproduced in the Annex, are to be construed as commitments within the meaning of Article 9(1) of Regulation (EC) No 1/2003. The commitments have been offered by the FAPL to meet the concerns expressed to it by the Commission in its preliminary assessment as set out in its Statement of Objections. The Commission can therefore proceed to adopt a Decision pursuant to Article 9(1) of Regulation (EC) No 1/2003.

39) By adopting this decision the Commission makes these commitments binding upon the FAPL. Recital 13 of the preamble to Regulation (EC) No 1/2003 states that such a decision should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement, and that such a decision is without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. The Commission's assessment of whether the commitments offered are sufficient to meet

its concerns is based on its preliminary assessment as set out, in this case, in the Statement of Objections, which represented the *preliminary* view of the Commission based on the underlying investigation and analysis. The Commission's assessment is also based on the observations received from third parties following the publication on 30 April 2004 of the Article 19(3) Notice

- 40) In the commitments, the FAPL has undertaken to modify its market conduct in the United Kingdom in various ways. The Commission considers that these commitments are sufficient to address the concerns identified in its preliminary assessment. In assessing the commitments offered by the FAPL, the Commission has, in particular, sought to ensure that the offer of media rights and the process for the sale of such rights will be adequate. The commitments considerably improve the scope for *ex ante* competition for the rights and contain a much more specific formulation as to the packaging of the rights than in their initial version. In addition, the increase in the number of live TV rights packages that will be put on sale as a result of the commitments – from four to six – will permit greater competition in the acquisition of those rights, allowing potential purchasers the opportunity to combine packages to address differing customer segments. The ban on conditional bidding makes a further contribution to levelling the playing field allowing competition to play in the distribution of the rights.
- 41) The commitments ensure that all rights to Premier League matches will not be sold to the same purchaser: there is now a guarantee that no more than five packages of live TV rights will be sold to any single entity. Even just one package of rights, properly balanced against the other packages, will be sufficient to give an overview (or “showcase”) of the FA Premier League’s season.
- 42) The commitments also improve the accessibility of content for TV, radio and new media operators and make sure that all rights are being made available to the market, thereby contributing to its development and the satisfaction of consumer demand. The commitments also allow for the marketing of new products, including club branded products.
- 43) In the light of the commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- 44) This Decision should apply from the date on which it is notified to the FAPL until 30 June 2013. This Decision is limited to the period which is reasonably sufficient for the commitments to deploy their effects in the markets.
- 45) The Commission retains full discretion to investigate and open proceedings under Article 81 or 82 of the Treaty as regards practices that are not the subject-matter of this Decision.

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HAS ADOPTED THIS DECISION:

Article 1

The commitments set out in the Annex shall be binding on Football Association Premier League Limited.

Article 2

This decision shall apply from the date on which it is notified to Football Association Premier League Limited until 30 June 2013.

Article 3

The proceeding in this case are hereby brought to an end.

Article 4

This Decision is addressed to:

Football Association Premier League Limited
30 Gloucester Place
London, W1U SPL
United Kingdom

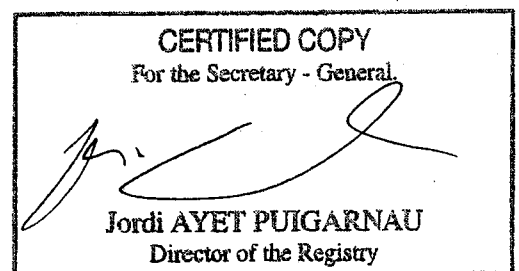
Brussels, 22 III 2006



For the Commission

Neelie KROES

Member of the Commission



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