

## Joint selling of Bundesliga media rights — first Commission decision pursuant to Article 9 of Regulation 1/2003

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### Introduction

On 19 January 2005 the Commission adopted the first commitment decision pursuant to Article 9 of Regulation (EC) No 1/2003. In case COMP/C-2/37.214 — *Joint selling of the media rights to the German Bundesliga* the Commission declared the commitments on the German football league binding and ended the proceeding. <sup>(1)</sup>

### Media, sports and joint selling — previous EU competition policy

The media and the sports sectors are closely related. Premium content, such as first division football, is a key driver for the roll-out of new and innovative media services in the EU. Joint selling, i.e. the pooling of media related club rights and marketing by a single entity, typically the league association, constitutes a recurrent pattern used by UEFA and most national football leagues.

In its exemption decision *Joint selling of the commercial rights of the UEFA Champion League* of 23 July 2003 <sup>(2)</sup> under Regulation No 62/17, the Commission followed a balanced approach and exempted UEFA's liberalised joint selling policy:

It found the joint selling scheme to restrict competition within the meaning of Article 81(1) of the Treaty and highlighted the negative effects on prices, innovation and media concentration to the detriment of the consumers. Joint selling hinders competition between the clubs in terms of prices, innovation and fan services and products. It additionally leads to the league selling the rights in a single bundle or very few packages on an exclusive basis, typically to the incumbent broadcasters that have little or no incentive to innovate and put their traditional TV business at risk.

The Commission identified efficiencies within the meaning of Article 81(3) of the Treaty related to a liberalised and appropriately tuned joint selling scheme, in particular the reduction of transaction costs due to a one-stop-shop for media operators and clubs and advantages for the branding of a uniform league product.

<sup>(1)</sup> Full text published in German, English and French on the DG COMP website [http://europa.eu.int/comm/competition/antitrust/cases/index/by\\_nr\\_74.htm#i37\\_214](http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_74.htm#i37_214).

<sup>(2)</sup> OJ L 291, 8.11.2003, p. 25.

UEFA liberalised its joint selling mechanism to take into account the Commission's concerns and introduced modifications such as a transparent tender, the sale of smaller packages, additional marketing by the clubs and a prohibition to hold back rights through joint selling.

### Commitment decisions — a new tool

Article 9 of Regulation 1/2003 creates a new type of decisions: decisions accepting commitments. This tool gives the Commission the power to make the commitments given by the companies under investigation binding on them and subsequently end the proceeding pursuant to Article 9(1) of Regulation 1/2003 if, in light of the commitments, there are no longer grounds for action.

The tool can be applied in all antitrust cases where it is justified by reasons of procedural efficiency and unless a fine would be appropriate (Recital 13 of Regulation 1/2003). The instrument requires the co-operation of the company under investigation which can at any time opt for the formal prohibition procedure. The Commission is also free to use the formal prohibition procedure.

In a first step, the Commission notifies its preliminary assessment in which the Commission specifies its competition concerns. Subsequently, the company offers commitments aimed at removing the Commission's concerns. If the Commission considers that the commitments are sufficient to terminate the proceeding it publishes the commitments in a notice pursuant to Article 27(4) of Regulation 1/2003 giving all interested third parties the opportunity to comment and to point to weaknesses and insufficiencies of the commitments. The advisory committee is consulted on the draft decision (Article 14 of Regulation 1/2003).

The company to whom the decision is addressed must respect the conditions of the settlement. Otherwise the Commission can impose a fine of up to 10% of their turnover (Article 23(2) of Regulation 1/2003), and also periodic penalty payments are possible until it complies with the commitments (Article 24 of Regulation 1/2003). Moreover, national courts must enforce the commitments by any means provided for by national law, including the adoption of interim measures.

If there is a material change in any of the facts on which the decision is based, the Commission may, upon request or on its own initiative, reopen proceedings (Article 9(2) of Regulation 1/2003).

### Transition from the old to the new legal framework

The *Bundesliga* case started as a notification procedure under Regulation 17/62 and was carried over into the new legal framework.

The German Football Federation (Deutsche Fußball-Bund) and later the League Association (Ligaverband) applied for negative clearance or, failing this, an individual exemption under Article 81(3) of the EC Treaty in respect of the joint selling of television and radio broadcasting rights and rights to other technical forms of exploitation for matches in the first and second national football divisions (Bundesliga and 2. Bundesliga respectively) <sup>(1)</sup>. The Commission started investigations and entered into negotiations with the German league leading to a preliminary settlement.

On 30 October 2003, pursuant to Article 19(3) of Council Regulation No 17, the Commission announced in a notice in the Official Journal of the European Union its intention to take a favourable view of an amended joint selling system <sup>(2)</sup>. It subsequently received numerous comments from interested third parties which made it necessary to re-open the discussions.

With the entry into force of Regulation 1/2003 on 1 May 2004, the application made by the league lapsed in accordance with Article 34(1) of that Regulation. Accordingly, the Commission acting on its own initiative, continued with the proceedings with a view to adopting a decision under Chapter III of Regulation 1/2003.

### Competition concerns in respect of joint selling by the German football league

The Commission informed the League Association by letter dated 18 June 2004 of its preliminary assessment within the meaning of Article 9(1) of Regulation 1/2003. According to the Commission's preliminary assessment, the problems lie in the transfer of the media rights to the Bundesliga and 2. Bundesliga from the clubs to the German League Association and the subsequent central selling. In the selling agreements, the League Association determines the price and the nature and scope of exploitation. Through the agreement on central marketing and the subsequent joint selling, the Bundesliga clubs are prevented from dealing

independently with television and radio operators and/or sport rights agencies. Competition in the sale of rights is excluded. The clubs are prevented in particular from taking independent commercial decisions about the price or structuring the nature and scope of the rights sale differently from the joint selling system.

In addition, according to the preliminary assessment, joint selling has an adverse effect on the downstream relevant television markets and markets in the new media, since the possibility of supplying football content plays an important role in competition between programme suppliers for advertising revenues and subscribers or pay-per-view customers.

The Commission's market definitions and competition concerns related to joint selling by the German league are in line with the competition policy set out in the UEFA Champions League decision for the international football competition.

### Commitments given by the German football league

The league offered commitments which significantly change its joint selling policy: <sup>(3)</sup>

- The league rights are offered in several packages in a transparent, non-discriminatory procedure. Agreements concluded with the agents and sub-license holders will not exceed three seasons.
- Live broadcasts of the Bundesliga and the 2. Bundesliga are offered by the League in particular in two packages, available to both for free TV and for pay TV programme suppliers. A third package entitles the buyer to broadcast deferred highlights on free TV, and also to live broadcasts of at least two Bundesliga matches.
- One package contains the League right to broadcast Bundesliga and 2. Bundesliga matches live and/or near-live on the Internet. From 1 July 2006, the package contains the right to broadcast the matches live and near-live. The League Association will, on every day on which games are held, offer a total of at least 90 minutes live coverage of the matches on the Internet, e.g. in the form of a conference channel. Coverage per game will not be less than five minutes and will contain all important match events, e.g. goals and penalty kicks.
- A different package contains the League right to broadcast Bundesliga and/or 2. Bundesliga matches live and/or near-live and/or after the event on mobile phones.

<sup>(1)</sup> Carlsberg notice, OJ C 6, 9.1.1999, p. 10.

<sup>(2)</sup> OJ C 261, 30.10.2003, p. 13.

<sup>(3)</sup> MEMO 05/16 contains a comprehensive summary of the commitments and different packages.

- Every club can sell its home games to a free-TV broadcaster 24 hours after the match for one-off free-TV broadcasting of up to the full match within the EEA. One and a half hours after the end of a match, every club can exploit a summary of its home and away games of up to 30 minutes on the Internet. From 1 July 2006, immediately after the end of the match every club can cover its home and away games on its homepage or that of a third party without restriction as to length. Every club can sell the coverage of its home games on mobile phone networks within the EEA to the operators of those networks.
- The above-mentioned club rights may not be sold in such a way that a product can be devised by a buyer which clashes with the interests of the League or the acquirers of league packages in having a uniform product and jeopardises the advantages of branding and the one-stop shop.
- Unused rights may be exploited by the clubs following a defined procedure. However, the League Association remains entitled to parallel, non-exclusive marketing of the corresponding package. This applies when the Association has failed to sell certain rights covered by the joint selling procedure. Clubs are also entitled to sell rights where the holder of those rights, for no objective reason, fails to use them.
- The changes relating to television and, as set out, partly relating to the Internet, will enter into force on 1 July 2006. All other changes apply

from 1 July 2004. The transitional stage ensures that the arrangements are brought into line with the competition rules without jeopardising the operation of the Bundesliga and the 2. Bundesliga.

### Scope of the decision and conclusion

The decision solely deals with the marketing policy of the central marketing body and excludes the competition implications of future licence agreements. The decision contains the explicit reservation that a separate examination under Community law cannot be ruled out, in particular if more than one jointly sold package with exclusive exploitation rights is acquired by one purchaser. The decision is binding until 30 June 2009.

The decision highlights the improvements in respect of competition in the marketing of Bundesliga and 2. Bundesliga rights between the league and the clubs which allow for new, in particular club branded products. The commitments improve the accessibility of content for TV, radio and new media operators, make sure that all rights are being made available to the market and thereby contribute to innovation and dampen the concentration tendencies in the media markets.

The decision reconfirms the EU competition policy vis-à-vis joint selling of media rights for national leagues. It applies the new tool of commitment decisions for the first time and marks one additional step towards full implementation of the modernisation of antitrust rules.