The application of Articles 81 and 82 EC in the sport sector

Philip KIENAPFEL and Andreas STEIN (1)

I. Introduction

On 11 July 2007 the Commission adopted a White Paper on Sport (2). The White Paper on Sport is the first comprehensive initiative on sport undertaken by the Commission and aims at providing strategic orientation on the role of sport in the EU. It addresses a host of sport-related issues ranging from public health aspects to corruption and money laundering. Competition law, which has figured prominently in the public debate preceding and following the adoption of the White Paper, is only briefly touched upon. However, competition issues are addressed in more detail in the accompanying Staff Working Document “The EU and Sport: Background and Context” (3) and particularly in Annex I of that document, specifically dedicated to “Sport and EU Competition Rules” (hereinafter the "Annex"). The Annex provides an overview regarding the principal case law of the Community Courts and the decisional practice of the Commission with respect to the application of Articles 81 and 82 EC in the sport sector.

The importance of the application of Articles 81 and 82 EC in the sport sector has increased proportionally to the growing economic significance of professional sport (football in particular), a trend largely driven by the ever-rising prices paid by media operators for sport rights. Professional sport has become “big business” involving billions of Euros. As a result, in recent years the Commission and the Community Courts have had to deal with an increasing number of antitrust cases in this sector.

The purpose of this article is to summarize the Annex (4). The article makes a distinction between the application of Articles 81 and 82 EC to (i) organisational aspects of sport, notably sporting rules and (ii) revenue-generating aspects of sport, notably the sale of sport media rights.

The first aspect concerns the compatibility with Articles 81 and 82 EC of sporting rules, i.e. rules regulating a given sporting activity. Such sporting rules are normally adopted by the respective sport associations that are traditionally in charge of regulating “their” sport. The second aspect concerns the conditions under which sport media rights may be sold by right owners or acquired by media operators without infringing Articles 81 and 82 EC.

II. The application of Articles 81 and 82 EC to rules governing the organization of sport

1. The application of Articles 81 and 82 EC and the “specificity of sport”

It has long been established by the Commission and the Community Courts that sport is subject to EC Treaty provisions, notably Articles 81 and 82 EC in so far as it constitutes an economic activity (5). While the presence of economic activity is the point of departure for any legal analysis under EC competition rules, it is also undisputed that sport features some particular characteristics that set it apart from other economic activities. These distinctive qualities of sport are frequently referred to as the “specificity of sport”. They have been consistently taken into consideration by the Community Courts and the Commission and include, most notably, the following aspects:

— Sport events are a product of the contest between a number of teams or athletes. This interdependence between competing adversaries is specific to sport and distinguishes it from other industry or service sectors. Since sport events are of interest to the spectator only if they involve uncertainty as to the result, the interdependence leads to the requirement of a certain degree of equality or, in other words, competitive balance. As opposed to other economic sectors where competition serves the purpose of eliminating inefficient firms from the market, sport clubs and athletes have a direct interest not only in there being other clubs and athletes but also in their sporting and economic viability as competitors.

— Sport fulfils important educational, public health, social, cultural and recreational functions which require a certain degree of

(1) Directorate-General for Competition, units A-5 and F-2. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.


(4) The Annex also includes a chapter on the compatibility of ticketing arrangements with Articles 81 and 82 EC which is not summarized in this article.

(5) This is established case-law of the European Court of Justice since case C-36/74, Walrave, [1974] ECR 1405.
redistribution of financial resources from professional to amateur sport (principle of solidarity).

— The organizational level of sport in Europe is characterized by a *monopolistic pyramid structure*. Traditionally, there is a single national sport association per sport and Member State, which operates under the umbrella of a single European and a single worldwide federation (6). The Community Courts and the Commission have both recognized the importance of the freedom of internal organization of sport associations.

2. The Meca-Medina judgment

   a. The rejection of a concept of “purely sporting rules” falling outside the scope of Articles 81 and 82 EC

In the landmark *Meca-Medina* ruling of 18 July 2006, the European Court of Justice (ECJ) for the first time had to deal with the application of Articles 81 and 82 EC to sporting rules (7). The case concerned a challenge of the anti-doping rules of the International Olympic Committee under Articles 81 and 82 EC by two professional long-distance swimmers who alleged that the prescribed maximum level of the substance for which they had been tested positive was too low and that the penalties for a violation of the rules were excessive.

The ECJ held that the qualification of a rule as “purely sporting” (8) is not sufficient to remove the sport association adopting the rule in question from the scope of Articles 81 and 82 EC. The exclusion *a priori* of the anti-doping rules at issue from the scope of Articles 81 and 82 EC by the Court of First Instance (CFI) due to their purely sporting nature was considered an error of law that entailed the annulment of the CFI’s judgment (9). The ECJ further held that whenever the sporting activity in question constitutes an economic activity and thus falls within the scope of the EC Treaty, the conditions for engaging in it, such as the anti-doping rules in question, are subject to obligations resulting from the various provisions of the Treaty, most notably Articles 81 and 82 EC (10). The broad scope of this statement indicates that the vast majority of sporting rules are subject to scrutiny under the EC anti-trust provisions inasmuch as they determine the conditions for athletes, teams or clubs to engage in professional sport which undoubtedly constitutes an economic activity.

The *Meca-Medina* judgment has therefore contributed to legal certainty by clearly establishing that no category of “purely sporting rules” exists that is excluded from the scope of Articles 81 and 82 EC. Instead, it must be determined, on a case-by-case basis and irrespective of an alleged “purely sporting” nature of the rule, whether the specific requirements of Articles 81 or 82 EC are met. This is not to say, however, that the ECJ did not take into account the specificity of sport referred to above when assessing the compatibility of sporting rules with Articles 81 and 82 EC. Rather, it ruled that this cannot be done by way of declaring certain categories of rules *a priori* exempt from the application of Articles 81 and 82 EC.

   b. The methodology of applying Articles 81 and 82 EC to sporting rules

The second important aspect of the *Meca-Medina* ruling enhancing legal certainty is the establishment of a clear methodological framework for the examination of the compatibility of sporting rules with Articles 81 EC and 82 EC. The ECJ specified that not every sporting rule that is capable of restricting competition infringes Article 81 or 82 EC. In assessing the compatibility of sporting rules with EC antitrust rules, account must be taken of

— the **overall context** in which the rule was adopted or the decision was taken or produces its effects, and more specifically, of its objectives; and

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(6) The pyramid structure results from the fact that the organization of national championships and the selection of athletes and teams for international competitions often require the existence of one umbrella organization.

(7) Case C-519/04 P, *Meca-Medina*, [2006] ECR I-6991. In prior judgments cases were decided on the basis of other provisions of the EC Treaty, most notably those on the freedom of movement for workers and the freedom to provide services.

(8) The Court of First Instance had differentiated between (i) sporting rules concerning the economic aspect of sporting activity and thus falling within the scope of the Treaty and (ii) sporting rules concerning questions of purely sporting interest and having nothing to do with economic activity and therefore falling outside the Treaty. The Court of First Instance considered the anti-doping rules to be “purely sporting” in nature (Case T-313/02, *Meca Medina* [2004] ECR II-3291, paras. 40–41). The concept of “purely sporting rules” had appeared in previous Court judgments but the criteria to identify a purely sporting rule and the precise consequences of such classification (i.e. whether it removed the rule from the scope of the EC Treaty provisions or not) had remained vague.

(9) *Meca-Medina*, supra, par. 33.

(10) *Meca-Medina*, supra, par. 28.
— whether the restrictive effects are *inherent* in the pursuit of the objectives; and
— are *proportionate* to them \(^{(1)}\).

In applying those principles, the *Wouters* test \(^{(2)}\), to the case at hand, the ECJ held that the anti-doping rules were capable of restricting competition under Article 81(1) EC because of adverse effects on competition resulting from a potentially unwarranted exclusion of athletes from sporting events \(^{(3)}\). The Court then found that the objective of the challenged anti-doping rules was to ensure fair sport competitions with equal chances for all athletes as well as the protection of athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport. The restrictions caused by the anti-doping rules, in particular as a result of penalties, were considered by the ECJ to be “*inherent in the organisation and proper conduct of competitive sport*”. The ECJ also carried out a proportionality test examining whether the rules went beyond what is necessary to achieve those objectives as regards (i) the threshold for the banned substance in question and (ii) the severity of the penalties; however, the Court failed to identify such disproportionate effects, and thus failed to find a breach of Articles 81 and 82 EC. The methodology of applying Articles 81 EC and 82 EC to rules adopted by sport associations as established by the ECJ in *Meca Medina* can be summarized as follows:

**Step 1:** Are the EC anti-trust rules, i.e. Articles 81 and/or 82 EC applicable to the sporting rule?

1. Is the sports association that adopted the rule in question an “undertaking” or an “association of undertakings”?
   a. The sports association is an “undertaking” to the extent it carries out an “economic activity” itself (e.g., the selling of broadcasting rights).
   b. The sports association is an “association of undertakings” if its members carry out an economic activity. In this respect, the question will become relevant to what extent the sport in which the members (usually clubs/teams or athletes) are active can be considered an economic activity and to what extent the members exercise economic activity. In the absence of “economic activity”, Articles 81 and 82 EC do not apply.

2. Does the rule in question restrict competition within the meaning of Article 81(1) EC or constitute an abuse of a dominant position under Article 82 EC?

3. Is trade between Member States affected?

**Step 2:**

If the EC anti-trust rules are applicable, does the sporting rule fall outside the prohibition of Articles 81(1) and 82 EC taking into account

a. the overall context in which the rule was taken or produces its effects and its objectives;

b. whether the restrictions caused by the rule are *inherent* in the pursuit of the objectives; and

c. whether the rule is *proportionate* in light of the objective pursued.

**Step 3:**

Can the rule be considered compatible with EC anti-trust rules because it fulfils the conditions of Article 81(3) EC or because of an objective justification under Article 82 EC?

The case-by-case approach adopted by the ECJ in *Meca-Medina* and particularly the requirement of a proportionality test to be carried out for each sporting rule under the *Wouters* principles prevent any general categorisation of sporting rules as to their compatibility or non-compatibility with Articles 81 and 82 EC. The variety of sporting rules is almost limitless and even the same type of sporting rule may vary greatly from sport to sport and from Member State to Member State, each rule requiring a separate legal assessment.

At the same time, *Meca-Medina* demonstrates that Articles 81 and 82 EC provide sufficient flexibility as to duly take into account the specificity of sport and illustrates how the distinctive features of sport play an essential role in analyzing the compatibility of sporting rules with Articles 81 and 82 EC.

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\(^{(1)}\) *Meca-Medina*, supra, par. 42. The material parts of the judgment in that respect make reference only to Article 81(1) EC but the logic of the methodology established by the ECJ would appear to be transferable to Article 82 EC.

\(^{(2)}\) These principles were established by the ECJ in case C-309/99, *Wouters*, [2002] ECR, I-1577 concerning rules of the Dutch bar association prohibiting lawyers from entering into professional partnerships with accountants.

\(^{(3)}\) *Meca-Medina*, supra, par. 47.
3. Examples of sporting rules

In view of the case-by-case approach adopted by the ECJ in *Meca-Medina*, guidance on the compatibility of sporting rules with Articles 81 and 82 EC can be drawn mainly from the increasing body of case law at European and national level. The Commission has carried out in the Annex a detailed stocktaking of the existing relevant case-law of the Community Courts and decisional practice of the Commission. It has, on that basis, identified an indicative list of rules that are more likely to comply with Articles 81 and 82 EC and an indicative list of rules that are less likely to comply with Articles 81 and 82 EC (14).

a. Sporting rules that are more likely to comply with Articles 81 and 82 EC

- **Selection criteria for sport competitions** (15). As the number of athletes or teams that may participate in sport competitions is inherently limited, certain limitations are necessary for the proper organisation of a sport competition.

- **“At home and away” rules** (16). Such rules are commonly applied for club competitions such as football and provide that, in principle, each club must play its home match on its own ground. The objective of this rule is to ensure equality of chances between clubs.

- **Transfer periods** (17). Many club/team sports have rules that only allow the transfer of players within a certain time period during the season (“transfer windows”). The objective of such rules is to ensure the regularity of competitions since, for example, transfers late in the season may upset the competitive balance and damage the effective functioning of a championship.

b. Sporting rules that are less likely to comply with Articles 81 and 82 EC

- **Rules shielding sports associations from competition** (18). In many cases sport associations not only act as regulators but also as commercial exploiters of a sport. In order to protect their commercial interests they may adopt rules that prohibit clubs or athletes from participating in competitions other than those organised by themselves under threat of penalties.

- **Rules regulating professions ancillary to sport**. In *Piau* the Commission dealt with a complaint against rules imposing a number of restrictions under Article 81 and 82 EC on the profession of football players’ agents (e.g., the requirement to deposit a bank guarantee). As a result of the Commission’s investigation, the most restric-

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(14) It is important to note that apart from the anti-doping rules discussed above, the *Meca-Medina* methodology was not applied in any of these cases and that previous Court rulings, with the exception of *Meca-Medina* and *Piau*, did not apply Articles 81 and 82 EC. The categorization of the rules below does therefore not constitute a final assessment as to their compatibility or their non-compatibility with Articles 81 and 82 EC.

(15) Joined Cases C-51/96 and C-191/97, Christelle Deliège v Ligue francophone de judo etc., [2000] ECR, I-2549 concerning the selection rules applied by the Belgian judoka federation to authorise the participation of professional and semi-professional athletes in an international judoka competition.

(16) Commission decision of 9 December 1999, Case 36851, C.U. de Lille/UEFA (Mouscron), decision not published (see Commission press release IP/99/965 of 9 December 1999). It is noteworthy that the Commission considered the rule in question to fall outside the scope of Articles 81 and 82 EC. Following *Meca-Medina*, this case would more likely be decided on the basis of the Wouters test.


- **Nationality clauses for national teams** (19). Most sports have rules limiting the participation in national teams to the citizens of the respective team. The objective is to enable the proper organisation of meaningful competitions with national teams.

- **Rules prohibiting the multiple ownership of clubs** (20). Such rules provide that two or more clubs/teams participating in the same competition may not be directly or indirectly controlled by the same entity or managed by the same person. The objective of this rule is to ensure the uncertainty of the outcome and to guarantee honest sporting competitions.

- **Anti-doping rules** (21). Anti-doping rules prohibit the use of certain performance enhancing substances. As mentioned earlier, the objective of these rules is to ensure fair sport competitions with equal chances for all athletes as well as the protection of athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport.

- **“Rules of the game”**. Rules of the game are regulations establishing the elementary rules of a sport (e.g., the rules fixing the length of matches or the number of players on the field) (22).

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(22) To the extent that rules of the game do not involve economic activity they would, as such, fall outside the scope of application of EC competition law.

(23) See, for example, the Commission’s FIA (Formula 1) investigation (XXXIst Report on Competition Policy 2001, para. 221 et seq. and Commission press release IP/01/1523 of 30 October 2001).

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tive limitations were removed and the complaint was rejected (23).

- **Rules excluding legal challenges of decisions by sport associations before ordinary courts** (24). Legal challenges of sporting rules before ordinary courts must not be excluded as a result of existing internal challenging procedures or arbitration to the extent that the denial of access to ordinary courts facilitates anti-competitive conduct or agreements.

In addition, the following points, which the ECJ in *Bosman* found to be violations of Article 39 EC, could also potentially fall to be assessed under Articles 81 and 82 EC.

- **Rules limiting the number of foreign players** (25). The *Bosman* ruling took objection to a rule which limited the number of foreign players with EU nationality that football clubs could field in their national championships.

- **Rules requiring transfer payments for players in case of expired contracts** (26). The ECJ in *Bosman* found that transfer rules requiring payment of international end-of-contract transfer fees within the EU with respect to football players who are nationals of an EU Member State violated Article 39 EC.

III. The application of Articles 81 and 82 EC to the sale of sport media rights

1. **Introduction**

Sport media rights constitute one of the main factors that have driven economic growth in the sport sector. For many media operators, sport rights are must-have content and the Commission has recognized in various decisions that sport rights constitute “vital input” and “key sales drivers” in the media sector. Live football rights in particular have proven to be “make or break” content especially for pay-TV operators (27). Unsurprisingly, the prices paid for these rights have soared in recent years (28). In view of the economic significance of sport media rights, it is clear that the application of Articles 81 and 82 EC is of fundamental importance in this sector.

The main antitrust issue in the area of sport media rights in recent years has been the question if and under what circumstances the collective sale of media rights is compatible with Article 81 EC.

2. **Market definitions and the specific features of sport media rights**

As regards **product market definition**, a distinction is usually made between the upstream markets (i.e., the markets where rights-owners and, increasingly, sport rights agencies sell rights to media companies) and downstream markets (i.e., the markets where media companies such as TV operators are active).

Separate **upstream product markets** have been identified in previous Commission decisions for certain audiovisual content on the basis of specific criteria such as brand image, the ability to attract a particular audience and advertising/sponsoring revenues. The Commission has defined upstream markets for, e.g., (i) the broadcasting rights for certain major sport events (29), (ii) the broadcasting rights (and new media rights(30)) for football events played regularly throughout every year (31) and (iii) the broadcasting rights for football events that do not take place regularly where national teams participate (32). In the recent **CVC/SLEC decision**, the Commission left open the question,

(23) Upheld on appeal by the CFI in Case T-193/02, Piiau v. Commission, ECR (2005) II-209. The appeal to the ECJ was rejected as being partly manifestly inadmissible and partly manifestly unfounded by order of 23 January 2006, Case C-171/05P, [2006] ECR I-37.

(24) This was the case in the FIA investigation (Commission press release, IP/01/1523 of 30 October 2001) and the investigation concerning FIFA transfer rules in case of valid contracts (Commission press release, IP/02/284 of 6 June 2002).


(26) Bosman, supra, par. 114.

(27) For example, BSkyB’s strong position in the pay-TV market in the United Kingdom has largely been the result of its acquisition of the football Premier League rights. The importance of sport media rights is also illustrated by the fact that the shares of the leading German pay-TV operator Premiere fell by more than 40% when it lost the football Bundesliga rights to a competitor in December 2005.

(28) For example, at the creation of the English Premier League in 1992, the media rights were acquired by BSkyB for around £280 million for five seasons, i.e., around €56 million per season. In 2006, BSkyB and Setanta paid around €2.5 billion only for the live rights in the UK for three seasons, i.e., more than €830 million per season. The total revenues generated by the Premier League from the latest round of tenders in 2006/2007 including international rights, highlights etc. amounted to around €4.1 billion for three seasons.

(29) See Commission decision of 10 May 2000, Case 32150 Eurovision, paras. 42-43 where the Commission considered that there was a strong likelihood that distinct markets existed for the acquisition of broadcasting rights for some major sporting events such as the Olympic Games. This decision was annulled by the CFI, but the CFI accepted the market definition.


(31) UEFA CL, supra, par. 62 (national leagues and cups, the UEFA Champions League and the UEFA Cup); also see Commission decision of 2 April 2003, Case M.2876 Newscorp/Telepiu, OJ 2004 L 110/73, par. 66.

(32) Newscorp/Telepiu, supra, par. 65 (e.g., the Football World Cup or the European Football Championship).
with respect to Italy and Spain, whether an upstream market for major motor sport events (Formula One and Moto Grand Prix) exists or whether the relevant market includes all regular major sport events (excluding football) \(^{(3)}\).

The Commission has defined separate \textbf{downstream product markets} for free-TV and pay TV on the basis of the different trading relationships involved, the different conditions of competition, the price of the services, and the characteristics of the two types of television \(^{(3)}\). The Commission also identified separate downstream markets for on-demand sport content services delivered via wireless mobile devices or via the Internet \(^{(3)}\).

With regard to the \textbf{geographic markets} the Commission has held thus far that the downstream markets are of a national character or at least confined to linguistic regions \(^{(3)}\). The geographical borders of the upstream markets also tend to be national not only for national events (e.g., rights for national football leagues) but also for international sport events since such rights are normally also sold on a national basis. This is due to the national character of distribution as a result of national regulatory regimes, language barriers and cultural factors \(^{(3)}\). At least as regards the sale of rights for national sport events (e.g., national football leagues), future cases will therefore normally be dealt with by the national competition authorities.

Any legal analysis of cases involving sport media rights must take into account their \textbf{specific features} including in particular the fact that (i) the media sector evolves rapidly and requires a constant review of market definitions, (ii) the most important sport media rights are concentrated in the hands of few rights owners (usually sport associations) and, following their sale, in the hands of few rights owners (usually sport associations) and, following their sale, in the hands of few powerful media operators and (iii) sport media rights are most valuable when broadcast live.

\footnote{Commission decision of 20 March 2006, Case M.4066, CVC/SLEC, par. 30. The decision confirmed that regular major sport events, i.e., sport events that take place throughout the year or throughout a significant time period each year such as Formula One races are not in the same market as major irregular sport events (e.g., Olympic Games) which take place for a few weeks every four years (see paras. 33 to 37).}

\footnote{Commission decision of 21 March 2000, Case JV.37 BSkyB/Kirch, par. 24; Newscorps/Telepiu, supra, paras. 18-47.}

\footnote{UEFA CL, supra, para. 82. Also see in this respect the concluding report on the sector inquiry into the provision of sports content over third generation mobile networks of 21 September 2005, available at http://ec.europa.eu/comm/competition/sectors/media/inquiries/final_report.pdf.}

\footnote{See, e.g., UEFA CL, supra, para. 90.}

\footnote{See, e.g., UEFA CL, supra, para. 88.}

### 3. Competition concerns resulting from the behaviour of sellers (joint selling)

The Commission’s decision making practice is limited thus far to cases relating to the joint selling of sport media rights under Article 81 EC. No decisions have been adopted with regard to the behaviour of a single seller (e.g., sport associations or sports rights agencies) under Article 82 EC. The Commission has taken decisions in three cases involving the joint selling of football broadcasting rights on the basis of Article 81 EC, namely UEFA CL \(^{(38)}\), German Bundesliga \(^{(39)}\) and FA Premier League \(^{(40)}\).

\begin{itemize}
  \item \textbf{Joint selling may constitute a restriction under Article 81(1) EC}
  \end{itemize}

The Commission’s consistent policy has been that joint selling constitutes a horizontal restriction of competition under Article 81(1) EC. Joint selling describes the situation where sport clubs (e.g., football clubs) entrust the selling of their media rights to the respective sports (league) association which then sells the rights collectively on their behalf. Joint selling arrangements are horizontal agreements which prevent the individual clubs each having a relatively small market share from individually competing in the sale of their sports media rights. One uniform price is applied to all rights collectively which constitutes price-fixing. In addition, the number of rights available in the upstream acquisition markets is often reduced which may create barriers to entry on downstream broadcasting markets and may lead to access foreclosure in these markets.

\begin{itemize}
  \item \textbf{Joint selling may fall under Article 81(3) EC}
  \end{itemize}

The Commission has recognised that joint selling creates efficiencies and accepted joint selling arrangements under Article 81(3) EC \(^{(41)}\). Joint selling arrangements have the potential of improving the media product and its distribution to the advantage of football clubs, broadcasters and viewers. The Commission in its decisions has in particular identified three types of benefits:

\begin{itemize}
  \item The creation of a single point of sale provides efficiencies by reducing transaction costs for football clubs and media operators.
  \end{itemize}

\footnote{Supra.}

\footnote{Commission decision of 19 January 2005, Case 37214 joint selling of the media rights to the German Bundesliga, OJ 2005 L 134/46.}

\footnote{Commission decision of 22 March 2006, Case 38173 joint selling of the media rights to the FA Premier League, available at http://ec.europa.eu/competition/antitrust/cases/decisions/38173/decision_en.pdf.}

\footnote{See in particular the detailed analysis of Article 81(3) EC in UEFA CL, paras. 136 et seq.}
• **Branding** of the output creates efficiencies as it helps the media products getting a wider recognition and hence distribution.

• **The creation of a league product** means that the product is focused on the competition as a whole rather than the individual football clubs participating in the competition. This is attractive to many viewers.

In this context, it may be interesting to note that while the Commission in **UEFA CL** stated that it was in favour of the principle of **financial solidarity** (i.e., an equitable distribution of revenues among richer and poorer clubs of a league in order to ensure a competitive balance), this consideration had no impact on the Commission’s assessment under Article 81(3) EC (**42**).

**c. Remedies applied to address competition concerns**

In the cases decided thus far, the Commission limited the negative effects of joint selling through a number of remedies which will be presented below. This list of remedies is, however, not exhaustive or binding for future cases and different or new remedies may be adopted depending on the specific circumstances of a given case. It is also important to note that any remedies have to be examined on a case-by-case basis taking into account the specific market situation which may vary considerably from Member State to Member State.

• **Tendering.** The Commission in all cases required the collective sellers on the upstream market to organise a competitive bidding process under non-discriminatory and transparent terms, thereby giving all potential buyers an opportunity to compete for the rights.

• **Limitation of the duration of exclusive vertical contracts.** The Commission also required the collective selling entities to limit the duration of the exclusive rights offered in vertical contracts to no more than three football seasons. It considered that longer contract duration would risk creating a situation where a successful buyer would be able to establish a dominant position on the downstream market reducing the scope for effective *ex ante* competition in the context of future bidding rounds.

• **Limitation of the scope of exclusive vertical contracts.** The Commission further sought to limit the risk of market foreclosure — resulting from a single buyer acquiring all the valuable rights — by obliging the collective selling entity to unbundle the media rights in separate packages, thereby limiting the scope of the exclusivity. In this context, the Commission required the creation of two or more independently valid packages for the most important rights, notably the exclusive live rights. These packages were to be balanced and meaningful and not so large so as to only allow the most powerful operators to bid. The Commission also earmarked packages for certain distribution platforms in order to enable mobile operators and internet service providers to acquire rights. However, a careful analysis of the specific market conditions is necessary in order to determine whether such earmarking is appropriate in a given case (**43**).

• **No conditional bidding.** In **FA Premier League**, an obligation was imposed on the seller to accept only stand-alone unconditional bids for each individual package (**44**). The rights would be sold to the highest standalone bidder. Such unconditional selling is aimed at preventing a powerful buyer interested in acquiring the most valuable package(s) from offering a bonus on condition that all the valuable rights are sold to it, thus inciting initial rights owners not to sell at least some packages to competitors in the same market or operators in neighbouring markets.

• **Fall-back option, use obligation, parallel exploitation.** In order to limit the risk of output restrictions caused by the collective sale of exclusive rights, the Commission required in **UEFA CL, German Bundesliga** and **FA Premier League** that there be no unused rights. Rights not sold by the collective entity within a certain time period would fall back to the individual clubs for parallel exploitation (“no hoarding). In addition, the Commission ensured market availability of less valuable rights such as deferred highlights and new media rights by imposing the parallel exploitation of these rights by individual clubs and **UEFA in UEFA CL**.

• **No single buyer obligation.** In order to prevent that all packages of valuable live rights were sold to the incumbent pay-TV operator in the United Kingdom, BSkyB, which had held the

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**(42) UEFA CL, supra, par. 165.**

**(43) In the German Bundesliga decision, three separate packages for live rights were earmarked for (i) TV (pay-TV and free-TV), (ii) internet and (iii) mobile phones. In the FA Premier League decision one year later, on the other hand, only two separate packages for live rights were earmarked for (i) audio-visual rights on a “technology neutral basis” (including pay-TV, free-TV and internet) and (ii) audio-visual mobile rights. This was a result of the increasing convergence of the TV and internet platforms (e.g., as a result of IPTV).**

**(44) FA Premier League, supra, para. 40 and points 7.5 to 7.7 of the commitments.**
live rights since 1992 the Commission considered it necessary to impose no single buyer obligation on the collective selling entity in the FA Premier League decision. In the absence of such remedies there was a risk that competition would remain eliminated well beyond the duration of any on-going contract as due to the long-term presence of the dominant buyer competition was ineffective. It is noteworthy that the issue did not arise in the UEFA CL and German Bundesliga cases (45).

- Trustee. The Commission in FA Premier League required that the tender procedure was overseen by a trustee that reported back to the Commission to ensure and guarantee that the tender procedure was undertaken in a fair, reasonable and non-discriminatory manner.

4. Competition concerns resulting from the behaviour of buyers (joint acquisition)

The Commission’s decision-making practice is limited thus far to cases relating to the joint acquisition of sport media rights under Article 81 EC. No decisions have been adopted with regard to the behaviour of a dominant acquirer under Article 82 EC.

In cases involving joint acquisition agreements under Article 81(1) EC it is important to assess, on a case-by-case basis, whether the joint acquisition agreement forecloses competitors from accessing the sport rights at the upstream acquisition market (a question which will largely depend on the market definition upstream) and, as a result, competition is restricted on the downstream markets (a question which will largely depend on the importance of the rights concerned). The Commission found in EBU that the joint acquisition agreement operated by the European Broadcasting Union (an association of mainly public national broadcasters) and relating, inter alia, to sport media rights, restricted Article 81(1) EC under the prevailing market conditions at the time (46).

The Commission in EBU exempted the joint acquisition agreements under Article 81(3) EC in view of certain improvements (reduction of transaction and other costs benefiting in particular smaller

channels from smaller countries) and by imposing sublicensing obligations (annulled by the CFI) (47). The NewsCorp/Telepiù (48) merger decision is interesting also from an antitrust perspective as the remedies for the approval of this merger included a limitation of the duration of exclusive football rights to two years to take into account the fact that the merged entity (holding a near monopoly in the Italian pay-TV market) would have combined for a long duration an unparalleled portfolio of exclusive premium content, thereby foreclosing access to third parties.

IV. Conclusion

Since modernisation of the EC antitrust enforcement rules in May 2004 undertakings must assess themselves whether they comply with Articles 81 and 82 EC. This applies notably to sport associations adopting sporting rules and to those undertakings selling or acquiring sport media rights. In view of the enormous variety of different sporting rules, the fast-changing and very country-specific market conditions of the media sector and in view of the case-by-case approach that needs to be adopted in this area, it is impossible to categorise definitively and in advance rules and practices in sport as to their compatibility or non-compatibility with Articles 81 and 82 EC. Regarding sporting rules, the increasing body of jurisprudence and decisions of the Commission as well as case law at national level provide useful guidance. The Meca-Medina judgment also establishes a clear methodology as to how to assess sporting rules under Articles 81 and 82 EC and clarifies how to take into account the specificity of sport in the process. Concerning the collective sale of media rights, the three decisions adopted by the Commission to date as well as case law at national level provide equally useful guidance.

The Annex to the White Paper aims to facilitate the difficult task of assessing, on a case-by-case basis, whether a given rule or practice infringes Article 81 or 82 EC by summarizing the existing case law at the European level in the sport sector. Finally, it should also be emphasized that with respect to sporting rules the Commission has no intention of becoming a sport regulatory body or to take over the role of sport associations which are best placed to organise a sport.

(45) In UEFA CL there was no need to examine the individual national market situations. In German Bundesliga no such issue arose considering the value of the different packages and the distribution of market players (also taking into account the bankruptcy of Kirch which had previously acquired the Bundesliga rights).


(47) The two decisions were annulled by the CFI in Case T-528/93 Eurovision I [1996] ECR II-649 and Case T-185/00 etc Eurovision II, [2002] ECR II-3805. Following the CFI’s judgment, the Commission is currently reviewing the Eurovision Rules under Article 81 EC.

(48) Supra.
The Commission will only intervene in cases where

(1) economic activity is involved (which would typically, for example, exclude certain “rules of the game”);

(2) the sporting rule in question does not fulfil the Wouters criteria applied in Meca-Medina;

(3) there is a significant impact on competition on a commercial market; and

(4) there is a sufficient Community interest to deal with the matter in question at the European level.