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SPORT AND EUROPEAN COMPETITION POLICY*
(Jean-François Pons – Deputy Director General)

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The number of antitrust cases opened in the European Commission has greatly increased in recent years. This development can be explained mainly by two reasons:

- The fast growth of economic activities linked to sport in Europe, most notably to the development of the broadcasting of sport events ;
- The consequences of the Bosman judgement of the European Court of Justice (December 1995) which liberalised transfer rules of footballers and, more importantly, confirmed to all interested parties that sport was subject to Community law (including competition law) insofar as it constitutes an economic activity.

The European Commission has taken a number of decisions in cases related to sporting activities, although the most important cases are still pending. While it is too early to describe how the Commission is going to deal with these cases, it is possible to give some general orientations on the implementation of European competition rules to economic activities relating to sport and to present decisions and preliminary orientations on a number of cases. Amongst these, cases relating to broadcasting of sporting events merit special attention.

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I. REASONS FOR THE INCREASING INTERVENTION OF EUROPEAN COMPETITION POLICY IN THE SPORTS SECTOR

In recent years the European Commission has opened around 60 cases relating to the application of Articles 81 and 82 of the Treaty (formerly Articles 85 and 86) to the professional sports sector or to activities connected with it (for example, broadcasting rights for sporting events), usually on the basis of notifications or complaints (the Commission is currently treating more or less an equal number of each).

The trend towards an increasing number of sports related cases results, on the one hand, from the strong growth in economic activities connected with sport and, on the other, the effects of the Bosman judgement of 1995.

(1) The strong growth in economic activities connected with sport:

Those with an interest in this sector will be well aware of the most striking examples of such growth : the increase in salaries and transfer fees of professional sportsmen, the rise in the value of broadcasting rights as well as an increase in sponsorship and advertising costs. This growth results principally from television's technological revolution, with the development of cable television, subscription channels and, more recently, of 'package' subscriptions and pay-per-view. That technological revolution has, of course, been accelerated with the advent of digital technology. The growth in the number of subscription channels and package subscriptions, the increased competition within television as well as the significant

investment which must be recouped, and the pressures from advertising and sponsorship have all resulted in a search for more attractive programmes, notably for live broadcasts of high profile sports events (Olympic Games, important football matches and Formula One motor racing, in particular). For example, the value of television rights for the Olympic games jumped from 287 million dollars for Los Angeles (1984) to 907 million for Atlanta (1996) and is estimated at around 1.350 million dollars for the forthcoming games in Sydney (2000). A similar explosion of television rights has been experienced in Europe for soccer : the value, for example, of television rights for the Italian League has jumped from 29 billion liras for the period 1984-87, to 571 billion for 1993-96, and to 1.278 billion for 1996/99.¹

According to the most recent global economic data (1997), sports' estimated world-wide turnover was in the region of 100 billion Euros, of which 44 billion resulted from ticket sales, 37 billion from the award of television rights and 13 billion from the award of sponsorship rights. European sport represented some 36% of those receipts against 42% for the United States. ²

The strong growth in sports-related economic activities in Europe has been accompanied by a transformation in the structure and behaviour of large professional clubs and their federations, which are now managed as large industrial organisations or services. For example, 18 football clubs in Britain are now quoted on the Stock Exchange, with a total capital value on 30 June 1999 of around 1 billion Pounds (1.6 billion Euros). In Europe, sport is organised on the basis of a single federation by discipline and by country ; together these national federations form a European federation.

Since 1974 (the Walrave judgement)³, the European Court of Justice has made clear on several occasions that 'the practice of sport is subject to Community law insofar as it constitutes an economic activity'.

The increasing application of competition rules of the Treaty of the European Union to sporting activities and undertakings results therefore from the development of sports-related economic activities, a number of which I have already mentioned.

However, Community competition rules clearly do not apply to the more traditional aspects of sport, in relation to which the economic impact is limited, including mass participation in sporting activities (involving one European in three) and the vast majority of the 545,000 sports clubs in the European Union. But it is necessary to underline that high level professional sport has links with amateur sport and a clear impact on it ; notably a part of the resources supporting the development of amateur sport come from professional one.

¹ Source : Lega Calcio (quoted in the decision of the Italian Competition authority in Telepiu/Lega Calcio)

² "Finding the right balance for sport" Stephen Townley, Sportdivision magazine of the GAIFS, January 1998.

³ Walrave and Koch. Case 36-74 ECR 1974 p.1405

(2) **The Bosman judgement:**

The judgement in 1995 of the European Court of Justice in the Bosman case,⁴ which concerned transfer rules of footballers, has had important repercussions on that sport in Europe. More significantly, it marked, in the eyes of the sporting and political world as well as in those of the general public, the intrusion of Community rules into sport.

(a) The principal aspects of the judgement are as follows :

- Having regard to the objectives of the Community, sport is subject to Community law insofar as it constitutes an economic activity within the meaning of Article 2 of the Treaty, as in the case of the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service ;
- Article 39 (ex-48) of the Treaty, which guarantees freedom of movement for workers inside the European Union, precludes the rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee. Such rules are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.

(The Court recognised “maintaining a financial and competitive balance between clubs and supporting the search for talent and the training of young players” as “legitimate aims”, “in view of the considerable social importance of sporting activities and in particular football in the Community”, but found that the transfer rules were not “adequate means” of achieving these aims and that other means exist which do not impede freedom of movement. In his opinion, Advocate General Lenz referred to the redistribution of resources coming from television rights as an example of such alternative means).

- Article 39 (ex-48) of the Treaty precludes the application of rules laid down by sporting associations under which football clubs may field only a limited number of professional players who are nationals of other Member States, because such rules are contrary to the principle of the prohibition of discrimination based on nationality.

(There also, the Court found that these rules could not be justified by reasons of sporting interest).

(b) The consequences of the Bosman ruling for European football and for other team sports have been very important. It contributed to the significant

⁴ Union Royale Belge des Sociétés de football association, Royal Club liégeois et UEFA -v- Jean-Marc Bosman. Case C-415/93 ECR 1995 p.I-4921.

increase in the mobility of athletes as well as to the spectacular growth of the number of the transfers and salary levels.

Many sport associations and European politicians have publicly regretted this judgement. The inclusion of an “exception sportive” in the Treaty (or of an article similar to Article 151-4 (ex 128-4) on culture) was discussed at the intergovernmental Conference in 1996-1997. In the event, while it was decided not to include an article on sport in the Treaty, the following declaration was made:

“The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sport associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport”.

The European Council of Dresden, in December 1998, has invited the Commission to consult European sport federations and to present a report on the most important issues for sport in Europe for the European Council of Helsinki in December 1999.

II. GENERAL ORIENTATIONS OF THE EUROPEAN COMMISSION ON THE APPLICATION OF TREATY COMPETITION RULES TO ECONOMIC ACTIVITIES RELATED TO SPORT.

Following the Bosman judgement, there is now no more doubt, even for the public at large, that Treaty rules (including competition rules) apply to the economic activities linked to sport. But the application of those rules must take into account the special character of sport.

- (1) When dealing with competition cases in the sports sector the Commission must take into account the special character of sport in at least three respects:
 - the rules for the organisation of sporting competitions (for example between clubs in the same championship) are very different from those for competition between industrial firms. For instance, it is essential that no clubs participating in an annual championship should drop out prematurely (for example because of business difficulties) as this would distort the final results. Rules are then necessary to ensure a minimum level of solidarity and equality between the strongest and the weakest teams in a championship and to guarantee the uncertainty of the results ;
 - sport is not only an economic activity, it is also a social activity practised by millions of amateurs and one which plays a positive role in society : improvement of health, recreation, bringing people together and also training for the young, notably in difficult social areas. A part of these social aspects of sport is financed by resources coming from economic activities: resources from the strongest clubs, television rights and sponsoring. Thus some form of redistribution of resources from the top to the bottom of the sporting pyramid is to be welcomed ;
 - sport organisations (federations) have a role of regulation (production of rules, organisation of competitions, etc...) as well as being involved in economic activities (selling of television rights, of tickets, licensing of their logos, etc...)

- (2) Therefore, in applying competition rules to sport, the Commission is seeking to distinguish as clearly as possible between compliance with the principle of competition and the requirements of a sports policy that meets the unique features described above : the interdependence between competing adversaries, the need to ensure the uncertainty of competition results and – last but not least – the socio-cultural objectives.

The Commission will try to put a stop to the restrictive practices of sport organisations, which have a significant economic impact and which are unjustified in the light of the goal of improving the production and distribution of sport events or with regard to the specific objectives of a sport. The Commission will, however, accept those practices of sport organisations which do not give rise to problems in the light of the competition rules of the Treaty either because they are inherent in the sport or necessary for its organisation or because they are justified in terms of the positive objectives referred to above.

It is not always easy to identify the intrinsic sporting nature of certain rules, either because they have significant economic consequences or because the rule, originally established for purely sporting reasons, has taken on more of an economic character as a result of the development of the economic activities associated with the sport. It may also be difficult to establish whether a rule is necessary to the organisation of a sport or to the organisation of competitions. For these reasons it is only gradually on a case-by-case basis that the Commission (subject to review by the Court of First Instance and the Court of Justice) and/or the Court of Justice on the basis of preliminary questions presented by national courts will be able to clarify what must be regarded as a rule inherent in sport or a rule necessary for the organisation of sport or sporting competitions. I would not be surprised if, in their future application of competition rules to sport, these institutions reached the conclusion that the following practices would fall outside the scope of Article 81(1) of the Treaty:

- The “rules of the game” ;
- Nationality clauses in competitions between teams representing countries (national teams) ;
- National quotas governing the number of teams or individuals per country participating in European and international competition ;
- Rules for the selection of individuals on the basis of objective and non-discriminatory criteria ;
- Rules setting fixed transfer periods for the transfer of players, provided that they ensure some balance in the general structure of the relevant sports ;
- Rules needed to ensure uncertainty as to results, where less restrictive methods are not available.

(3) Two examples illustrate this delimitation :

(a) The case of Ms Deliege is an interesting example of regulations that federations impose on their athletes and which do not seem to fall under the competition rules of the Treaty, at least according to the recent opinion of the Advocate General in this case.⁵ Ms Deliege is a judoka who claims that the Belgian federation has improperly impeded her career by not permitting her to take part in important competitions. The Advocate General gave the following opinion on this case :

- Amateur sport which is practised at an advanced level can be described as an economic activity ;
- But Community law is not opposed to regulation of international federations which impose certain limits on the activity of athletes for reasons which are purely related to sport (in this case, the interest of the national teams and the need to ensure the representative character of the competitions) ;
- Finally the Advocate General considered that there were insufficient factual and legal points raised in this case to allow the Court of Justice to come to a conclusion in relation to violations of competition law ; nevertheless, while he likened a judoka to a company and its federation to associations of companies, he did not state that there had been a violation of the rules on fair competition.

(b) In an answer to a written question by a member of the European Parliament, the Commission took a preliminary position about rules laid down by sports organisations to restrict the freedom of clubs with the same owner to take part in the same competition, whether national or international, within the European Economic Area (EEA). In the Commission's preliminary view, these rules remain limited to their original purpose, which is to ensure uncertainty as to the results of competitions and are proportionate to the sporting objective pursued. As such they would not be covered by the competition rules laid down in the EC Treaty.

The Commission has recently received a notification from UEFA on this issue. In order to take a definitive position the Commission must ensure that there are no less restrictive means than the notified rules to ensure uncertainty as to results of competitions when the participating clubs belong to the same owner.

⁵ Press release No.31/99 of 18.5.99 (concerning joined cases C-51/96 and C-191/97 '*Christelle Deliege v Asbl Ligue francophone de judo and others*')

III. ISSUES LINKED TO THE DISTRIBUTION OF SPORTING GOODS AND TO SPONSORING AND SPORTS EQUIPMENT

(1) Distribution of sporting goods

The approach taken by the Commission to-date shows that the competition rules apply to the distribution of sports goods in the same way as they apply to the distribution of any other product.

In two decisions, *Dunlop Slazenger*⁶(1992) and *Tretorn*⁷ (1994), both concerning rules relating to the distribution of tennis balls, the Commission confirmed that a system of exclusive distribution cannot be used as justification to prevent parallel imports. The aim of this policy is to ensure competition between manufacturers of sporting goods as well as consumer choice.

(2) Sponsoring

As long as the sponsoring is organised in an objective, open and transparent manner, there will in general be no worries of a competition law nature.

Sponsoring should not, however, result in the award of an exclusive right for a manufacturer to supply a market with his products, thereby shutting out competitors. Any such restrictions must be objectively justified and go no further than strictly necessary.

In 1998 a comfort letter was issued in a case concerning the Danish Tennis Federation (DTF), following changes made to its system of sponsorship agreements. As a result of these changes the DTF agreed to launch a transparent and non-discriminatory call for tenders every two years in order to select a sponsor.⁸

(3) Sports equipment

Problems may also arise in respect of competition law, in the context of rules and standards laid down to govern the specifications of sports goods. Such standards may be considered necessary, for example:

- in order to improve sporting performance or spectator appeal;
- to ensure that similar equipment is used by all competitors in the interests of fairness; or
- for reasons of safety.

⁶ Commission Decision of 18.3.92 OJ L364 12.12.92 p.58

⁷ Commission Decision of 21.12.94 OJ L378 31.12.94 p.45

⁸ Press release of 15.4.98 IP/98/355

As long as these rules remain objective, and as long as there is no difficulty in demonstrating that goods comply with the appropriate standards, there is no reason for the Commission to intervene on competition policy grounds. Nevertheless, where there appear to be arbitrary, discriminatory or otherwise abusive practices on the part of governing bodies in sport, or by tournament organisers, the rules on competition may be applicable and official action by national authorities or the Commission may become necessary.

IV. ISSUES LINKED TO THE ORGANISATION OF SPORT

(1) Ticketing :

The Commission took two decisions linked to ticketing :

- The Italia '90 Package Tours decision (1992)⁹ concerned the exclusive distribution of package tours including tickets, within the Community and elsewhere in the world, to the 1990 football World Cup held in Italy without the possibility of alternative sources of supply. The Commission took the view that this exclusive distribution system infringed Article 81 of the Treaty and that it could not be justified for safety reasons. Other agencies were equally able to compete on the market without jeopardising spectator safety.
- More recently, in July 1999, the Commission adopted a decision on another ticketing issue that had never been addressed before – discriminatory practices of the Comité Français d'Organisation in relation to ticket sales in 1996 and 1997 for matches of the 1998 Football World Cup finals competition in France.¹⁰ The Commission concluded that the CFO, by requiring consumers to provide an address in France, applied unfair sales conditions to consumers outside France resulting in an unjustified limitation of the market contrary to Article 82 ;

(2) Transfer rules

- (a) In its judgement in the Bosman case, to which I have already referred, the Court did not rule on the compatibility of regulations established by the 'Fédération Internationale de Football' (FIFA) relating to international transfers with Articles 81 and 82 of the Treaty. That judgement, as we have already seen, was based on Article 39 of the Treaty (free movement of workers), and declared as illegal the payment of fees relating to international transfers of footballers within the Community (EU and EEA member countries) at the end of their contract. Following the Bosman judgement FIFA amended its rules in order to comply with the Court's ruling. That said, FIFA has continued to apply its international transfer rules to situations not addressed by the Bosman judgement. In this respect the Commission has received a number of complaints contesting the compatibility of FIFA's international transfer rules with Article 81 of the Treaty. In the light of those complaints, the Commission initiated legal proceedings against FIFA on 15 December 1998 when it sent a formal statement of objections to the Federation.

⁹ Commission Decision of 27.10.92 OJ L326 12.11.92 p.31

¹⁰ Press release of 20.7.99 IP/99/541

- (b) The statement of objections relates principally to international transfers of footballers under contract (following termination of the contract either by mutual consent or on a unilateral basis by the player) as well as to transfers of footballers from non-member countries to member countries and vice-versa.

Transfers of footballers under contract, where the contract is terminated by mutual consent or where the player terminates on a unilateral basis, should normally be able to take place after the player has fulfilled his obligations under the appropriate national employment law (that is, the player should pay compensation for his breach of contract). However, FIFA continues on the one hand to forbid transfers under contract following *unilateral* termination by the player even if the player has compensated the club for his breach of contract, and, on the other hand, in cases involving international transfers following termination by *mutual* consent, to allow the old club the right to demand payment of a fee from the new club. In such cases the fee bears no relation to the training costs incurred by the old club in respect of the player in question. The criteria used in such situations is the same as that condemned by the Court for transfers taking place at the end of a player's contract.

In its statement of objections the Commission takes the view that both the prohibition on all transfers following unilateral termination (assuming compensation for breach of contract has been paid) and the obligation on a new club to pay a transfer fee to the old club in cases of termination by mutual consent, infringe Article 81(1) without being able to benefit from exemption under Article 81(3). Furthermore, the Commission takes the view that FIFA rules requiring the payment of a fee for international transfers of players (whether at the end of their contract or whilst they remain under contract) from non-member to member countries and vice-versa also infringe Article 81 of the Treaty. Insofar as transfers from member countries to non-member countries are concerned, however, the Commission believes that Article 81 is infringed only where the club in question plays on a regular basis in competitions involving the participation of clubs from member countries.

The Commission has taken the preliminary view that through the establishment of the above-mentioned rules clubs have agreed:

- to reject their freedom to take on players who have unilaterally terminated their contracts;
- not to recruit players without payment of a fee, and to decide who should be responsible for fixing and paying the fee.

According to the preliminary position taken by the Commission, these agreements have as their object and effect the restriction, to an appreciable extent, of clubs' freedom of action which represents a violation of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Treaty.

The Court of Justice, in a case currently pending before it (C-264/98 Tibor balog/Royal Charleroi Sporting Club), will be required to rule on the compatibility of FIFA's international transfer system as it applies to those situations addressed in the Commission's statement of objections.

- (c) Alternatives to existing transfer systems : since the Bosman ruling the Commission has encouraged sporting organisations to put in place alternative arrangements to transfer systems. Such alternative arrangements should be drawn up with a view to facilitating the recruitment and training of players as well as to protecting the equality of and solidarity between clubs.

The Commission is well aware of the need to ensure that the smaller clubs are not deprived of remuneration for their training of young players. It hopes that FIFA will shortly present it with an alternative to the current international transfer arrangements which takes account of these concerns. A system allowing payment of fees which reflect the costs of training players could represent a viable alternative. Similarly, the creation of a common solidarity pool which would allow for redistribution between clubs, in an objective manner, of a share of the revenues from sporting competitions may also be acceptable.

V. GENERAL APPROACH ON THE BROADCASTING OF SPORT EVENTS

In the new audio-visual landscape created by the digital revolution, the supply of programmes has become increasingly important as the number of channels, especially thematic channels, has grown. This is certainly true for films, but is even more applicable to sports rights.

The rights for certain very popular sports, such as football matches and Formula 1 grand prix, or the coverage of the Olympic Games have been particularly sought after. These sports rights were the subject of highly competitive bidding wars between channels, which resulted in a price explosion, from which the sporting federations and the clubs have profited.

Sports coverage on television exhibits certain particular characteristics that define sports rights as a separate product:

- It is, in the first instance, an ephemeral product. Audiences are only interested if the sporting event is broadcast live;

- Next, it is difficult to find a suitable substitute. The viewer who wants to see a given event is unlikely to be satisfied with coverage of another sport;

- Finally, the strong concentration of rights in the hands of certain sports federations reduces the number of rights available, and these are reduced still further by an increasing number of contracts being concluded on an exclusive basis for a long duration, or covering a large number of events.

One could find here all the ingredients necessary for anti-competitive effects. Moreover, this issue is highly important for television channels because this type of programme is extremely attractive and can win a significant number of viewers from a rival channel. These rights can also increase advertising revenue. For pay-TV, it is also an equally good means of attracting new subscribers.

The questions that arise at this point, with regard to broadcasting rights, relate especially to aspects of exclusivity and those of the collective selling and purchasing of rights.

1) Exclusivity

The granting of broadcasting rights for sporting events on an exclusive basis is an established and accepted commercial practice. It guarantees the value of a programme, particularly as interest in, and therefore the value of, sporting events is ephemeral.

- (a) The Commission has already had occasion to say that exclusive contracts for a sporting event or for one season in a given championship do not normally pose any competition problem. The situation has to be examined in more detail when the exclusivity is of a long duration or covers a large number of rights, because this might have an effect of foreclosing a competitors' access to these rights.

In the Screensport case¹¹, it was the scope of the exclusivity that created competition problem. Sky Television concluded an exclusive agreement with a consortium of EBU members. EBU members provided on an exclusive basis to Eurosport (the sports channel jointly owned by Sky and the consortium of EBU members), programmes produced or acquired by EBU. Screensport, a competitor of Eurosport, challenged the agreement. The Commission took the view that Eurosport had a competitive advantage over Screensport since it had unlimited access to all programmes to which EBU had exclusive rights whilst Screensport could only acquire limited access to those programmes through sub-licences and for deferred transmission. The Commission refused to grant an exemption because the main effect of the agreement was to create a disproportionate distortion of competition in the market in question.

In the case KNVB/Sport 7, the Commission considered that the granting by KNVB, the Dutch football association, of an exclusive licence to a new broadcaster, Sport 7, for the duration of seven years was caught by article 81(1) and could not be exempted because it eliminated competition for the rights for too long a period. In addition, the renegotiation process at the end of the contract gave Sport 7 an advantage because it could match the bid of its competitors; this kind of so called “English clause” distorts competition and does not allow a real reallocation of the rights at the end of the exclusivity.

This does not mean that contracts of long duration are never justified. Such is the case when a new operator requires such a contract to ensure successful entry into the television market. It is also the case when an operator wishes to develop a new technology, which requires heavy investments.

This rule was notably applied in 1993 to the agreements negotiated between the English Football Association, the BBC and BSkyB, according to which both broadcasters were granted exclusive rights to broadcast matches for a five-year period. The Commission exempted these agreements taking into account the fact that BSkyB, which had only been present on the market since 1990, needed a contract of such duration in order to facilitate its entry into the new satellite broadcasting market.

In the 1998 case of Audiovisual Sport the Commission informed the parties that it considered a three year period of exclusivity for the pay-per-view rights to Spanish football in Spain to be acceptable, because it involved the introduction of new technology by the broadcaster and was related to the level of risk involved. The parties initially wanted the exclusivity to cover a period of up to 11 years, which would have foreclosed the market for too long a period.

The situation in the UK and Spanish markets will be soon reconsidered because new contracts are envisaged and could raise competition concerns about the exploitation of rights.

- (b) When exclusivity is likely to lead to the foreclosure of access to the television market, remedies can be envisaged. This involves limiting the damage to third parties' access to this market. In this respect, the solution is not always found in the application of competition law. Community or national legislation seeks to protect

¹¹ Commission Decision of 19/2/91 OJ L63 9.3.91 p.32.

the public interest and the right of the largest number of viewers to have access to certain programmes. Such was the case when the European Parliament, in an amendment of the “Television Without Frontiers” Directive, introduced Article 3b. This provision was a measure to ensure that Member States could, at the national level, protect the right of the general public to watch broadcasts of sporting events of major importance for that country. Each Member State could establish a list of the events that must be broadcast on free access television.

Another, more recent example in Italy illustrates the possibility of achieving the same aim by legislation. Faced with the entry of the Murdoch group into the pay-TV market, which had stated its intention to purchase all the broadcast rights for premiere Italian club football, the Italian authorities took an Order in Council, limiting the amount of pay-TV rights for Italian football matches that could be held by the same operator to 60% of the total.

In other cases, competition law can require certain amendments. A possible remedy could be to require broadcasters to share the rights they have obtained with third parties, in order to reduce the anti-competitive effect. However, a sub-licensing system should not be regarded as a satisfactory solution to all the competition problems posed by the broadcasting of sports events.

2) Collective purchasing and collective sale of broadcasting rights

The second set of questions concerns collective selling and collective purchasing of sports rights. It is generally assumed that the more valuable broadcasting rights became, the more disputes emerge over ownership of those rights. The question of whether the rights in question belong to the clubs or to the sporting federations or to somebody else, is not, in theory, a question that could be answered by competition law. This question usually falls to each Member State’s legislation governing the ownership of property. It is not for Community directives to intervene in such matters.

a) Collective selling

With regard to the marketing by the national leagues of the national championships, it is only necessary for the Commission to intervene when the case has an effect on trade between Member States. When such effects are likely to occur, for example by sub-licensing or broadcasting outside the national territory, Community competence is clear.

I also recall that certain national competition authorities have reached their own conclusions on the question of collective selling. This has been the case in Germany, the Netherlands, the United Kingdom and Italy. Most of these authorities encouraged the individual sale of rights; nevertheless, in July 1999, the UK Restrictive Practices Court decided that the collective selling of broadcasting rights by the Football Association Premier League Ltd was a restriction within the terms of the 1976 Act, but that this restriction was not contrary to the public interest.

As the Restrictive Practices Court did not base its decision on Community competition law, the Commission has asked the parties to these agreements to notify them in order to consider if an exemption could be granted. This notification will be made shortly.

Collective selling of broadcasting rights reduces the number of individual rights available on the market for broadcasters. This practice could affect the operation of the market by

allowing rights to become available only periodically, and by linking the products in global offers. Consequently, the competitive situation has to be evaluated in its economic and legal context, taking into account, inter alia, the practicality of participants selling rights individually.

If collective selling agreements are likely to fall under the prohibition of Article 81(1), it must be considered as to whether the conditions of Article 81(3) are fulfilled. In reaching this view, I consider that the analysis must not be limited to simple economic considerations.

When considering the criteria for possible exemption, the characteristics of the sport must also be taken into consideration. It is often argued that it is important to take account the solidarity between the stronger and weaker economic actors or between the professional and amateur sides of the sport or that a sport is played by young people. It must also be considered how far the collective selling of rights by a sports association, when combined with a balanced distribution of the resulting revenue, can be seen as justified to promote sporting activities within the population, as well as providing for interesting sporting competitions.

As far as these factors are quantifiable and can be objectively defined, they could be taken into consideration in any evaluation under Article 81(3). However, it must be stressed that these commendable aims, achieved in the name of the development of the sporting movement, would, under no circumstances, serve as a pretext, or as a justification, to prevent the a priori application of Community competition law. It must never be forgotten that the activities of the sporting federations have, beyond their social and cultural dimensions, an economic dimension.

Moreover, it is also advisable to apply the principle of proportionality and to consider the indispensability of the restrictions on competition. It is also necessary to apply the principle of transparency and ensure that the rights are attributed according to objective and non-discriminatory criteria. An alternative model for collective selling, which is currently under discussion, can be found, for example, in the establishment of a solidarity fund for small clubs and for amateur and youth sport. Under such a mechanism the wealthiest clubs negotiate themselves their broadcasting rights and allocate to the solidarity fund a percentage of their incomes.

From this point of view, the proceedings concerning the collective selling of the commercial rights for UEFA's "Champions League", and the examination of the notification by the DFB, the German football federation, concerning broadcasting rights for the national football competitions, will provide the opportunity to establish better case law on this issue and the limits of acceptable behaviour.

At this stage, the preliminary opinion of the Commission services is that a joint selling agreement restricts competition in three ways; first, it is a price fixing mechanism, second, it limits the availability of rights to football events and third, it strengthens the market position of the most important broadcasters because they are the only operators who are able to bid for all the rights in a package.

b) Collective purchasing

With regard to the collective purchasing of broadcasting rights, it is also advisable to examine the circumstances of each case. In the first place, whether such purchasing is restrictive would depend on the position occupied on the market by the parties to the agreement. The stronger position they occupy, the more appreciable any possible anti-competitive effect. The duration of the exclusivity and the scope of the acquired rights must then be examined.

Agreements allowing the combination of purchasers who, individually, would not have the financial resources necessary to acquire the rights should not pose a problem. In such a situation, collective purchasing could even prove pro-competitive.

On 11 June 1993 the Commission adopted a decision¹² pursuant to Article 81 (3) EC granting a conditional exemption until 25 February 1998 to the notified EBU's provisions. The exemption was granted subject to the operation by the EBU of a scheme whereby the jointly acquired television rights to sport events could be sub-licensed to third parties. In its decision the Commission decided that the system was in breach of article 81(1) because it significantly restricted the extent to which members of the EBU competed among themselves for sports rights. In addition it placed members at an advantage over non-members unable to participate in the cost savings achieved by the Eurovision (EBU) system.

Nevertheless, an exemption was granted conditional upon the EBU and its members accepting an obligation to grant non-members sub-licences for a significant part of the rights and on reasonable terms.

On 11 July 1996, the Court of First Instance annulled the Commission's decision following an appeal by a number of European television channels¹³. The Court considered that the Commission had failed to analyse whether the criteria for membership were objective and non-discriminatory. The case is still pending on appeal before the Court of Justice.

In 1998, EBU informed the Commission that it had amended its membership rules in order to make them more objective and transparent.

The Commission intends to grant an exemption to the rules governing the EBU and the Eurovision/Sports systems. Those rules concern: (1) the joint acquisition of sport television rights (2) the sharing of the jointly acquired sport television rights (3) the exchange of the signal for sport events (4) the access scheme for non-EBU members to Eurovision sport rights. The Commission has issued a notice published under article 19(3) indicating that it intends to take a favourable view in respect of these agreements¹⁴.

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¹² OJ L 179/23, 22.7.93.

¹³ *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities*, joined cases T-528/93, T-542/93, T-543/93 and T-546/93.

¹⁴ OJ C 248 1.9.99 p. 4

In some cases, issues concerning the organisation of sports are linked with aspects of the broadcasting of sports events. This is notably the case where the Commission has to consider, under Article 82 of the EC Treaty, if an administrative sports body managing the commercial rights of a sport abuses its market power against its member organisations or broadcasters by imposing unnecessary limitations or prohibitions.

One pending case concerning Formula One illustrates this matter very well. In that case, the Commission sent a statement of objections on 29 June 1999 to the “Fédération Internationale de l’Automobile” (FIA) and to two companies controlled by Mr Ecclestone, FOA and ISC, to which the FIA has granted the exploitation of TV rights, respectively, of Formula One and of some other important international motorsport events¹⁵.

The Commission has primarily identified four competition problems:

- The FIA uses its power to block motorcar sports events, which compete with its own events.
- The FIA has used its power to force a competing series out of the market.
- The FIA acquired abusively all the television rights to international motor sports events.
- The FIA and FOA protect the Formula One championship from competition by tying up everything that is needed to stage a rival championship.

¹⁵ Press release of 30.6.99 IP/99/434.

CONCLUSION

One of the main goals of the Commission is to provide transparency in the implementation of the competition rules of the Treaty. It is particularly important to reach this goal in sport activities because of the growing economic importance of this sector.

The implementation of competition rules to sport raises new and complex questions. I have tried to explain the priorities of the Commission in this field and to bring you the preliminary answers to these questions.

I am convinced that within a few months the set of formal decisions, which are about to be adopted, will clarify the legal framework. For the benefit of all the actors.
