



EUROPEAN COMMISSION

Competition DG

Information, Communication and Media
Media

Brussels,
Comp/C.2/TT/hvds D(2005)

Sport and Competition **Law**

Torben Toft¹

Broadcasting Competition Law
23 February 2005
London

¹ The views expressed are the author's only and do not in any way represent an official position of DG Competition or the European Commission.

TABLE OF CONTENTS

1.	INTRODUCTION	3
2.	JOINT SELLING OF MEDIA RIGHTS.....	3
2.1.	Background for the Commission's interest in joint selling.....	3
2.2.	Joint selling and Article 81	5
2.2.1.	What is joint selling?	5
2.2.2.	How does joint selling restrict competition?	5
2.2.3.	Is it possible for joint selling arrangements to fulfil the requirements of Article 81(3)?	5
3.	THE CASES	6
3.1.	The UEFA Champions League	6
3.2.	DFB	7
3.3.	The FAPL case	7
3.4.	National cases	8
4.	EXCLUSIVE MEDIA RIGHTS DEALS: HOW LONG IS TOO LONG?	8
5.	SECTOR INQUIRY	9
6.	CONCLUSION	10

1. INTRODUCTION

Ladies and gentlemen,

It is a great pleasure for me to participate here today and talk about EC competition and the sports media markets.

Over the recent years, the Commission has found itself in the position of a referee in many sports cases. Today, I would like to discuss what the Commission considers to be fair play regarding the joint selling of sports media rights.

First, I will make a few remarks about the Commission's enforcement environment and the general principles we apply to sports media rights.

Secondly, I will talk about the Commission's case law setting out these principles in practice and the relationship to national enforcement in the context of modernisation.

Thirdly, I will talk about the duration of exclusivity in sports media rights contracts.

Finally, I will talk about the Commission's sector inquiry in to sports content for 3G mobile telephony.²

2. JOINT SELLING OF MEDIA RIGHTS

2.1. Background for the Commission's interest in joint selling

Before discussing the Commission's interest in joint selling of sports media rights under EC competition law, it is worthwhile setting the scene for its action.

There is an important social and cultural function of sport in society. The Commission therefore fully recognises the specificity of sport as outlined in the Nice Declaration on the value of sport. However, this recognition of sport's specificity finds some limits in the Treaty.

The Commission is not concerned with genuine 'sport rules' that are applied in an objective, transparent and non-discriminatory manner. The Commission decides on a case-by-case basis what must be regarded as a genuine sports rule. The Court follows this approach. In this first ruling on the application of EU competition law to sport (excluding media rights), the CFI agreed with the Commission that the anti-doping rules do not fall under 81/82 because they are pure sporting rules.³ In a more

² IP/04/134.

³ Judgment of the Court of First Instance in Case T-312/02 *David Meca-Medina and Igor Majcen v Commission of the European Communities* of 30 September 2004 appealed to the Court of Justice and registered under C-519/04 P.

recent judgement in the PIAU case⁴ about FIFA's rules on players' agents the CFI held that the issuing of rules for players agents is an economic activity.

The liberalisation of the TV markets and the technical developments in the TV and new media markets has created new opportunities for private operators to provide media services to the public. This has created new unprecedented demand for sports media rights.

I am sure that you are well aware of the rise in the value of TV rights. Some 30% or more of income of major sports come from TV rights and is the big source of revenue alongside ticket sales and sponsoring.

The Commission can therefore not close its eyes to the economic aspects of sport. A cartel remains a cartel even if it works in the sale of media rights of sports events and must remain subject to Commission scrutiny.

The concentration of rights in the hands of sports federations reduces the number of rights available. Availability of rights is reduced still further by rights contracts being concluded on an exclusive basis for a long duration, and or covering a large number of events.

This strengthens the market position of the most important broadcasters because they are the only operators who are able to bid for all the TV rights sold in large packages.

Our investigation of the relevant product market has led us to conclude that the relevant market is rather narrow. A viewer who wants to see a given sports event is unlikely to be satisfied with coverage of another event. This applies in particular in respect of top events. We have therefore come to define a market as narrow as a market for the acquisition of TV rights of football, which is played regularly throughout every year.⁵ This gives the holder of specific TV rights a significant market power that competing broadcasters cannot easily rival.

Here, one can find all the ingredients typical for anti-competitive effects impeding the access to the TV markets and the development of new media markets.

⁴ "The Court observes...The object of the occupation of players' agent is, for a fee and on regular basis, to introduce a player to a club with a view to the conclusion of a contract of employment, or to introduce two clubs to one another with a view to the conclusion of a transfer contract. It is therefore an economic activity for the provision of services, which does not fall within the special nature of sport as defined by the case-law." PRESS RELEASE No 08/05 of 26 January 2005. Judgment of the Court of First Instance in Case T-193/02 *Laurent Piau v Commission of the European Communities* of 26 January 2005.

⁵ COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League, Commission decision of 23 July 2003, OJ L 291, 8.11.2003, p. 25, and COMP/C.2-37.214 - Joint selling of the media rights to the German Bundesliga, Commission decision of 19 January 2005 (not yet published), IP (05)62 and DG Comp's website.

2.2. Joint selling and Article 81

2.2.1. *What is joint selling?*

Joint selling describes a situation where clubs assign the selling of their media rights to their association. Traditionally, the association sell all media rights in one large exclusive bundle and to a single broadcaster in each territory.

2.2.2. *How does joint selling restrict competition?*

A joint selling arrangement is a horizontal restriction of competition. It prevents clubs from competing in the sale of rights. This may restrict price competition and limit output. As a consequence, in turn it may restrict competition between media operators and lead to consumer harm.

Joint selling can also facilitate other restrictive practices on the vertical level. Contracts may be granted on an exclusive basis for a long duration leading to market foreclosure. Certain rights may be given preferential treatment at the expense of another. This often happens to new media rights.

The effect on competition has to be evaluated in its economic and legal context, taking into account, for example, the feasibility of participants selling their rights individually. On this basis the Commission concludes that joint selling arrangements are clearly caught by Article 81(1).

2.2.3. *Is it possible for joint selling arrangements to fulfil the requirements of Article 81(3)?*

The Commission considers that the conditions of Article 81(3) could be fulfilled where there is a proportionate balance between the restrictions created by the joint selling arrangement and its benefits.

A joint selling arrangement has the potential of improving production and distribution to the advantage of football clubs, broadcasters and viewers, since it leads to the creation of a single point of sale for the acquisition of a branded league media product.

A single point of sale provides efficiencies by reducing transaction costs.

Branding creates efficiencies in helping the media products in getting a wider recognition and hence distribution.

A league product is a product, which is focused on the competition as a whole, and not the individual football clubs participating in the competition. Many viewers wish to have the opportunity to follow the development of the competition as such rather than an individual club. Enabling the creation of league media products seems to be the best way of achieving this.

Moreover, the restrictive effects of a joint selling arrangement are *inter alia* remedied when the media rights are unbundled and sold in several individual packages – hence permitting several media operators to compete for the rights.

Moreover, a joint selling arrangement must not unduly restrict football clubs in exploiting club related rights nor must it lead to a situation where restrictions in the

joint selling arrangement create unused rights. If there is consumer demand for rights, the rights owners should be at liberty to satisfy this demand.

New media rights should not be held back in a manner which prevents the development of new media.

How the Commission applies these principles in practice is illustrated by the UEFA Champions League and DFB cases.

3. THE CASES

3.1. The UEFA Champions League

As you know, the Commission adopted an exemption decision pursuant to Article 81(3) of the Treaty in the UEFA Champions League case in 2003.⁶

Prior to the Commission's intervention a single broadcaster per Member State would acquire all media rights in a bundle for at least three years or more. There was a rudimentary sublicensing scheme and many unused rights including new media rights. Individual football clubs had no rights to exploit.

In response to the Commission's statement of objections⁷, UEFA came up with proposals for a new joint selling arrangement which in a modified form satisfied the requirements of Article 81(3).

UEFA's new joint selling arrangement included a segmentation of the media rights in 14 different rights packages. This applied not only in respect of the TV rights but also all the other media rights including radio, Internet, UMTS and physical media rights (DVD, VHS, CD-ROM). Hold backs of rights were reduced significantly – to make the rights relevant for market demand – and I understand that UEFA is becoming increasingly enthusiastic about new media rights.

These several individual rights packages would be sold separately by means of a public bidding procedure. For example UEFA made three live TV packages. Several different media operators therefore get an opportunity to bid for and acquire different individual packages. This resulted in more media operators being able to screen UEFA Champions League action.

UEFA's proposal meant a reduction of UEFA's exclusive right to sell the UEFA Champions League media rights. The football clubs were allowed to sell certain media rights in parallel with UEFA on a non-exclusive basis. This permits football clubs to promote their own club related brands. This should also prevent that rights are unused, as the football clubs can exploit rights which UEFA fails to exploit.

As you will realise, the UEFA Champions League case was focused on the horizontal aspects of joint selling.

⁶ COMP/C.2-37.398 - Joint selling of the commercial rights of the UEFA Champions League, Commission decision of 23 July 2003, OJ L 291, 8.11.2003, p. 25.

⁷ 19 July 2001.

Nevertheless we also paid attention to the vertical aspects while with out going into individual rights contracts. Vertical exclusivity was limited not only in scope by splitting the rights up into several different packages but also in length of time of rights contracts as they would be concluded for no longer than 3 years.

The Commission's view was that the competition concerns expressed in the statement of objections would be remedied by UEFA's proposal. And I think we were right about this. There have been a larger number of TV broadcasters broadcasting the UEFA Champions League and it seems that new media rights are being exploited more intensely.

3.2. DFB

The same general approach was followed in the DFB case.⁸ Also in this case, the media rights were segmented into separate rights packages with a view to give several broadcasters the opportunity to successfully compete for the rights. New media rights were also segmented into separate packages and hold backs significantly reduced.

The DFB decision is not an exemption decision, but a commitments decision, which is adopted pursuant to Article 9 of the Regulation 1/2003. The commitments given by DFB have consequently been made legally binding.

There are of course differences in the composition of the various packages compared to the UEFA Champions League case, which are taking into account the fact that the Bundesliga are national tournaments and the UEFA Champions League is a pan-European football competition. Like the UEFA Champions League case the DFB case basically only concerns the horizontal aspects of joint selling.

3.3. The FAPL case

Let me finally briefly mention the FAPL case. However, I need to recall that the Commission has not yet adopted any formal decision in this case. Therefore, I will be restricted in commenting on the Commission's perspective on this case. I can only refer you to the notice 19(3), which was published in the Official Journal⁹.

The case began as an own initiative case in 2001 and the Commission issued a statement of objections to the FAPL in December 2002. In its reply to the statement of objections the FAPL denied that the arrangements restricted competition on any market. Notwithstanding this the Commission and the FAPL began settlement discussions. This led to a number of changes being put in place in June 2003 when the FAPL presented a preliminary outline of a possible new commercial policy for the exploitation of all media rights of the FA Premier League.

⁸ COMP/C.2-37.214 - Joint selling of the media rights to the German Bundesliga, Commission decision of 19 January 2005 (not yet published), IP (05)62 and DG Comp's website.

⁹ Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453 - joint selling of the media rights of the FA Premier League on an exclusive basis. OJ C 115, of 30.4.2004, p. 3.

In July 2003 the FAPL issued an invitation to tender for a number of media rights for the 2004-2007 seasons, most notably four packages of live TV rights, all four of which were ultimately won by B SkyB. The Commission raised certain concerns about the rights that were offered, as well as the conduct and the outcome of the tender procedure. Further settlement discussions took place in the second half of 2003, culminating in a provisional agreement involving commitments from both the FAPL and B SkyB in December 2003. For the results, I refer you to the Commission's press release of 16 December 2003.¹⁰

3.4. National cases

In the spirit of modernisation, the Commission puts emphasis on corporation with national competition authorities in the framework of the new anti-trust procedures of May 2003. The Commission encourages national competition authorities to intervene in cases where they seem better placed to do so and as a matter of fact they have done so in a number of cases. The Commission and the national authorities are keeping in close contact about the handling of these cases and to ensure that their outcome is generally in line with the Commission precedents.

Coordination among authorities is among others ensured in the context of the European Competition Network working groups. It is foreseen that this Media Subgroup will hold bi-annual meetings. The Commission held its first meeting in the Media Subgroup on 5 December 2004 where joint selling of media rights of sport featured on the agenda.

Other than the Commission's own cases in the field, the Media Subgroup discussed *inter alia* the decision of the Danish Competition Authority in the 2002 Handball case¹¹ permitting the joint selling of the TV rights of the Danish Handball association, the January 2003 interim-decision of the French Conseil de la concurrence about the sale of the LFP media rights to the French pay-TV broadcasters¹² and finally last years opinion of the Dutch competition authority regarding 1st division Dutch football in which it indicated it would not block the joint sale of the packages through Eredivisie CV¹³.

These national cases are generally in line with the Commission's thinking about joint selling and can be considered as variations on a theme.

4. EXCLUSIVE MEDIA RIGHTS DEALS: HOW LONG IS TOO LONG?

The two aforementioned Commission decisions have essentially dealt with the horizontal aspects of joint selling. However, the vertical aspects are equally important.

¹⁰ IP/03/1748.

¹¹ Journal nr.3/1120-0301-0128/Industri/mvn - Aftale mellem DR, TV2, Team Danmark og Dansk Håndboldforbund om tv-, radio-, og internetrettighederne til dansk håndbold of 27 November 2002.

¹² http://www.conseil-concurrence.fr/html/article_240.htm

¹³ 18 November 2004: http://www.nmanet.nl/en/nieuws_en_publicaties/persberichten/0426.asp

The granting of exclusive rights contracts is an established commercial practice. It may enhance the value of TV rights. However, the granting of excessive exclusivity in terms of scope and duration to important events to a single buyer is likely to lead to market foreclosure by withholding them from important input.

The Commission is seeking remedies against such excess in two ways:

Exclusive rights should be reduced in scope – hence the segmentation of rights and the requirement that there are no unused rights.

Duration of exclusivity: In practise in the UEFA Champions League and DFB cases you have seen that the Commission has accepted contracts of 3 years duration in a context where the rights have been unbundled and sold to different rights owners.

However, let me remind you about the Commission's Telepiu/Stream merger decision¹⁴ that gave rise to the creation of *SkyItalia* where the Commission only accepted 2 years duration of the exclusive football contracts and only accepted a limited scope of the exclusive rights to DTH transmission.¹⁵ The Commission considered a limitation of the maximum duration of contracts with football right owners of two years was appropriate in view of the creation of a very strong market position held by *SkyItalia*.

Exclusivity of a longer duration and for a wider range of rights than those referred to in the cases could restrict competition disproportionately by creating dangers of market foreclosure.

So let me conclude with a rule of thumb which is that 3 years would seem acceptable – of course taking the market situation and the position of the contracting parties into account as well as the scope and nature of the rights.

5. SECTOR INQUIRY

Let me finally mention the sector inquiry which the Commission launched in January 2004 into the availability of sports content for 3G mobile devices.¹⁶

The Commission identified several types of behaviour that could restrict access to key sports content for new media operators, such as: refusal to supply, bundling of TV rights with new media rights, embargoes favouring TV coverage over new types

¹⁴ Case No COMP/M.2876 – Newscorp/Telepiu', Commission Decision of 2 April 2003.

¹⁵ See case COMP/M.2876 – Newscorp/Telepiu, Commission decision of 2 April 2003, §231, that records that Newscorp undertook in respect of ongoing exclusive contracts to waive exclusivity and other protection rights for non-DTH transmission for football and other sport events. This will allow operators competing on other means of transmission (for example, cable, Internet and UMTS.) to have direct and immediate access to premium sport contents. Regarding future exclusive contracts §233 records as regards football rights, the limitation of the duration of future exclusive contracts for DTH transmission with football teams to two years and the unilateral termination right granted to football right owners are effective undertakings, in that they will make premium football contents contestable on the market at regular intervals.

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

of coverage, and the purchase of new media rights on an exclusive basis by established players.

The sector inquiry has been chosen as an instrument to assess existing and potential restrictions, and understand the particular economics of this new sector.

The first stage of the sector inquiry was completed in August 2004, with a first wave of questionnaires to a sample of 50 operators, consisting of major 3G operators, rights holders and television channels. The second stage involves 235 operators and is currently under way, on the basis of in-depth questions sent to the operators already addressed plus an additional 185 addressees. The majority of responses have now been received, and are currently being analysed by the Commission.

The final report will focus on three aspects: key infringers, patterns of abuse and the corresponding operators, and policy questions raised by the investigation.

A public presentation of the results of the sector inquiry will be held in Brussels in May with a view to invite broader comments.

6. CONCLUSION

Let me conclude.

Sport is of key importance for the media markets as well as media is of key importance for sports.

This has raised many new issues for the application of European competition law. Recent case law has set signposts that provide guidance.

Our objective is to contribute to maintain open and competitive media markets and a level playing field for all parties.

We are confident that this will be positive for the sports, the media and at the end the consumer.

Thank you for your attention.