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**EC Competition Law aspects:
Sports Rights in a converging media
technology environment**

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

TABLE OF CONTENTS

1.	INTRODUCTION.....	3
2.	THE ISSUE FOR THE EUROPEAN COMMISSION.....	3
3.	THE EUROPEAN COMMISSION'S EC COMPETITION LAW ENFORCEMENT ACTIVITIES IN THE SPORTS MEDIA FIELD	3
3.1.	Joint selling of sports media rights and Article 81 of the EC Treaty.....	3
3.1.1.	The relevant market	3
3.1.2.	How does joint selling restrict competition?	4
3.1.3.	Do joint selling arrangements create efficiencies?	5
3.1.4.	Remedies to address competition concerns.....	5
3.1.4.1.	Standard approach: Remedy foreclosure by tendering	5
3.1.4.2.	Standard approach: Remedy foreclosure by limiting <u>duration</u> of exclusive vertical contracts.....	6
3.1.4.3.	Standard approach: Remedy foreclosure by limiting <u>scope</u> of exclusive vertical contracts.....	6
3.1.4.4.	Standard approach: Remedy output restrictions by fall-back option	6
3.1.4.5.	Intensified approach: No single buyer obligation	7
3.1.4.6.	Intensified approach: Limitation of exploitation platform	7
3.1.4.7.	Intensified approach: Sublicensing	7
4.	THE LATEST CASES	7
4.1.	DFB – The German Bundesliga case	8
4.2.	The FAPL case.....	8
4.3.	National cases	9
5.	SECTOR INQUIRY	10
6.	CONCLUSION	11

1. INTRODUCTION

Ladies and gentlemen,

It is a great pleasure for me to speak at Sport Campus today.

I wish to give you a view on the trading of Sports Rights in a converging media technology environment from an EC Competition Law perspective.

2. THE ISSUE FOR THE EUROPEAN COMMISSION

The concentration of valuable media rights in the hands of very few sports federations limits their availability.

Availability of media rights is reduced still further by rights contracts being concluded on an exclusive basis for a long duration. The rights sold often comprise all or most of an event or a tournament and for all modes of exploitation. This is generally to the advantage of the largest operators, because they are the only operators who are able to bid for these large packages.

As a consequence, we see anti-competitive behaviour, such as output restrictions, foreclosure effects or hampered development of new media services in neighbouring markets.

3. THE EUROPEAN COMMISSION'S EC COMPETITION LAW ENFORCEMENT ACTIVITIES IN THE SPORTS MEDIA FIELD

The Commission has so far essentially dealt with horizontal joint selling agreements whereby sports associations are given the right to sell the media rights on behalf of participating clubs - as well as exclusive media rights deals.

However, also in the merger field, we have had the opportunity to investigate the trading of sports media rights and to adopt a decision that provides important guidance in converging media markets.

3.1. Joint selling of sports media rights and Article 81 of the EC Treaty

3.1.1. The relevant market

Any starting point in an anti-trust investigation is defining the relevant market.²

It is basically a test of substitutability of products.

In plain language, a viewer who wants to see a given sports event is unlikely to be happy with the coverage of another event.

² The starting point is normally the test as set out in the European Commission's notice on the definition of the relevant market for the purposes of EC Competition Law. Published in the Official Journal: OJ C 372 on 9/12/1997.

In determining the relevant product market, we have used criteria such as; the ability to attract a particular audience; brand image; advertising revenues.

The evolution of the European Commission's practice has led to the definition of markets as narrow as a market for the acquisition of TV rights of football, which is played regularly throughout every year.³

In the media sector, products and services are not always clearly distinct and separable. Questions arise to what extent technological convergence affects the analysis.

Sports can be consumed via different distribution modes each displaying their own characteristics, such as free-TV, pay-TV, Internet and mobile platforms. If a sports fan has the time and opportunity to watch a match in his home cinema installation, he is not going to be satisfied with the screen of a mobile handset.

In the new media markets, the Commission is currently distinguishing between Internet services and mobile services as separate product markets.

It should be noted that due to technological developments, market definitions may evolve in the future, warranting careful and continued market research on the accuracy of the market definition on a case by case basis.

Let me underline in this context that we look in particular at the services provided – not the delivery mode. For example cable-TV remains TV regardless whether it is delivered using an IP-protocol or by using another technology.

3.1.2. How does joint selling restrict competition?

Joint selling describes the situation where clubs assign the selling of their media rights to their association.

³ In BIB/Open (Case IV/36.531 OJ 1999 L 312/1, 28) the Commission defined separate markets for the wholesale supply of film and sports channels observing that movies and sports are “key sales drivers” for pay-TV operators.

In TPS I (Case IV/ 36.237 OJ 1999 L 90/6, 34) the Commission found it universally acknowledged that film and sports are the most popular television products are able to achieve high viewing figures and reach an identifiable audience, which is especially targeted by certain advertisers.

In the UEFA Broadcasting Regulations case (Case IV/37.576 OJ 2001 L 171/12) hinted that a separate market for the broadcasting (and new media) rights for football events played regularly throughout every year could exist.

This view was confirmed in the cases Newscorp/Telepiu (Case COMP/M.2876), EC — TPS (OJ L 90, 2.4.1999, p. 6), Canal+/RTL/GJCD/JV (COMP/M.2483)(IP 01/1579), 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. COMP/C.2-37.214 - Joint selling of the media rights to the German Bundesliga, Commission decision of 19 January 2005, OJ L 134, 27.05.2005, p. 46. 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, 30.04.2004, p. 3-6.

A joint selling arrangement is a horizontal agreement and is caught by the prohibition in Article 81(1) of the EC Treaty, as it prevents the individual clubs or constellation of clubs from individually competing in the sale of media rights.

We have identified the following types of restriction causing consumer harm:

- Foreclosure: A joint selling entity sells all media rights on an exclusive basis to one single operator in a certain downstream market. Other retailers in this downstream market and in neighbouring markets are foreclosed.
- Output restrictions. They occur when joint selling entities withhold certain parts of the jointly sold media rights from the market as certain rights may be given preferential treatment at the expense of another. This may for example hamper the development of new media services in neighbouring markets as it may prevent players in neighbouring markets from acquiring meaningful rights.

3.1.3. Do joint selling arrangements create efficiencies?

Yes, the European Commission considers that joint selling arrangements do create efficiencies within the meaning of Article 81(3) of the EC Treaty.

Joint selling may have pro-competitive effects when it leads to efficiency gains in the marketing of media rights and when it offers consumers a complete overview of the competition in question. A joint selling arrangement has the potential of improving production and distribution to the advantage of football clubs, broadcasters and viewers. The European Commission has in particular identified three types of benefits:

- The creation of a single point of sale provides efficiencies by reducing transaction costs.
- Branding of the output creates efficiencies as it helps in the media products 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.

3.1.4. Remedies to address competition concerns

The European Commission applies a number of standard remedies when addressing competition concerns resulting from joint selling arrangements. These may be intensified if required by the concrete market situation:

3.1.4.1. Standard approach: Remedy foreclosure by tendering

In order to prevent the risk of foreclosure in the downstream markets the European Commission is likely to require the joint sales body on the upstream market to organise a competitive “non-discriminatory and transparent tendering” procedure.

3.1.4.2. **Standard approach:** Remedy foreclosure by limiting duration of exclusive vertical contracts

Whilst the European Commission acknowledges the need for a certain degree of exclusivity to protect the value of sports rights, the risk of long-term market foreclosure is addressed by requiring the collective selling entity to limit the duration of the exclusive rights offered in vertical contracts to no more than 3 seasons (“sun setting”). Longer contract duration would risk creating a situation where a successful buyer would be able to establish a dominant position on the market reducing the scope for effective *ex ante* competition in the context of future bidding rounds. While 3 seasons were accepted in several cases, 3 seasons or 3 years is not an absolute. In the SkyItalia case the merged entity undertook to buy football media rights for no longer than 2 seasons at the time.⁴

3.1.4.3. **Standard approach:** Remedy foreclosure by limiting scope of exclusive vertical contracts

The European Commission seeks to limit the risk that a single buyer acquires all valuable rights by obliging the joint selling entity to unbundle the media rights in separate packages, thereby limiting the scope of the exclusivity. More specifically the European Commission requires:

- A reasonable amount of different and independently valid rights packages. Too long embargoes and similar restrictions on the exploitation of the rights are not acceptable.
- No combination of big and small packages: This avoids that a big operator in one of the downstream markets gobbles up all the available packages with a view to acquire total exclusivity.
- Earmarked packages for special markets/platforms. Due to the strong asymmetric value of rights for different distribution platforms access to sports rights may be foreclosed to market operators in certain evolving market platforms such as mobile networks or Internet markets.
- If necessary, this approach could be supplemented with the additional requirement of “*blind selling*”. This means the imposition of an obligation on the joint selling body of accepting only stand-alone unconditional selling per package (*i.e.* no conditional bids or cumulated reserve price). Such blind selling would prevent a powerful buyer wanting to acquire the most valuable package(s) from offering a bonus on condition that all the valuable rights are sold to him, thus inciting initial rights owners not to sell at least some packages to competitors in the same market or operators in neighbouring markets.

3.1.4.4. **Standard approach:** Remedy output restrictions by fall-back option

In order to limit the risk of output restrictions caused by joint selling of exclusive rights, the European Commission required in the UEFA Champions League and the DFB cases that there should be no unused rights. This means that rights that are not sold by the joint

⁴ Case No COMP/M.2876 – Newscorp/Telepiu’, Commission Decision of 2 April 2003.

selling entity within a certain time span shall fall back to the individual clubs (“no hoarding”). The club is then at liberty to sell the rights to any interested buyer.

In addition, in the UEFA Champions League case, the European 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 the clubs and UEFA.

3.1.4.5. **Intensified approach:** No single buyer obligation

In some cases an intensified approach may be required –a safety net as is seen in the FAPL case - in order to prevent that all packages of valuable rights are sold to a dominant player in one of the downstream markets. Such a remedy could be an obligation imposed on the joint selling body of not accepting a single buyer for all or certain types of rights.

The imposition of a no single buyer requirement upon the seller would generally only be justified where at the time of the tender a serious foreclosure risk already exists *ex ante* due to the presence of a dominant undertaking on the downstream market or where selling the rights to a single buyer would secure the winner a dominant position extending beyond the duration of the contract in question. In these circumstances the standard approach used thus far is insufficient to ensure that effective competition is maintained on the market.

3.1.4.6. **Intensified approach:** Limitation of exploitation platform

It would also be possible to address the no single buyer issue on the basis of Article 82 of the EC Treaty, which prohibits the abuse of a dominant position.

In the *SkyItalia* merger case, the European Commission not only required a limitation of the maximum duration of contracts with football right owners to two years, but it also limited the scope of the exclusive football rights to be exploited by SkyItalia to DTH satellite transmission.⁵ I would not exclude that such approach could be applied with respect to new media rights in converging markets.

3.1.4.7. **Intensified approach:** Sublicensing

Where dominant downstream players have acquired exclusive rights for neighbouring markets full sublicensing of such rights would be a feasible solution.

4. THE LATEST CASES

There have been a few cases during the past years:

⁵ 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.

4.1. DFB – The German Bundesliga case

The European Commission adopted a decision last year on 19 January 2005 making the commitments given by the German football association binding.⁶

The DFB case concerned a classical joint selling arrangement where the clubs of the 1st and 2nd division of the German club football tournament sell their media rights via a joint selling company, DFL.

The proposal for commitments contained the classical way of segmenting the rights into separate rights packages for TV broadcasting, Internet and mobile platforms. Rights were to be disposed of using a public tendering procedure on fair reasonable and non-discriminatory terms. Exclusive rights contracts were not to exceed 3 years.

According to what I have read in the press, the first tender procedure under the new regime has been terminated. From the European Commission's point of view the result seems satisfying. There seems to have been fair competition for the rights and it has led to a good distribution of rights on the German market.

The Bundesliga decision therefore seems to be working as well as the UEFA Champions League decision where there have been two tenders since the European Commission decision in 2003 and where the European Commission's impression is that the outcome has produced the desired results.

In this context, I would like to refer to Richard Worth, managing director of TEAM Marketing, who acknowledges the big impact that the European Commission's intervention has had on the marketing of the UEFA Champions League media right and is expressing satisfaction on the outcome.⁷

4.2. The FAPL case

The European Commission has just made a formal decision in the English Premier League case.⁸

The case began as an own initiative case in 2001. Following the Commission's statement of objections in December 2002, the FAPL began settlement discussions. As a result the FAPL presented a preliminary outline of a possible new commercial policy for the exploitation of all media rights of the FA Premier League in June 2003.

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 BSKyB.

⁶ OJ L 134, 27.05.2005, p. 46.

⁷ See Sportbusiness international, the December/January 2006 issue, page 47, in the article *"In a league of its own."*

⁸ IP/06/356: Competition: Commission makes commitments from FA Premier League legally binding, of 22 March 2006.

The European 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 BSkyB in December 2003.⁹ The provisional results, which followed the Commission's standard approach to joint selling, were market tested in April 2004:

- The league rights are offered in several packages in a transparent, non-discriminatory procedure for TV, Internet, mobile and radio services. The duration of the agreements will not exceed three seasons.
- Clubs will exercise certain television, internet and mobile rights on a deferred basis.¹⁰
- Unused or unexploited rights will revert to the clubs for their exploitation.¹¹

The comments received in reaction to the market test led to a new round of negotiations that were terminated in November last year. The main substantive elements where the commitments are improved relate to:

- Explicit no single-buyer provision for live TV rights.
- Create more balanced rights packages.
- Increase the availability of rights to broadcast via mobile phones.
- The rights will be sold to the highest standalone bidder.
- The sales process will be overseen by a Monitoring Trustee.

The first time the amended sales process will come into practical test will be for the 2007/2010 football seasons. I understand that the procedure has been launched - let us wait and see what happens.

4.3. National cases

Also at national level there are competition cases regarding sports media rights.

One of the most interesting developments concerns the Belgian market, where, in 2005, the Belgian League organised a tender procedure for the sale of six different television

⁹ For the results, I refer you to the European Commission's press release of 16 December 2003, IP/03/1748.

¹⁰ Essentially, clubs can: (i) exploit their matches on their own club TV channels a certain period after the match has been played (depending on when the match is played); (ii) exploit their matches on club web-sites from midnight of the day of the relevant match; and (iii) offer mobile clips on club mobile subscriptions (from 12 hours following the end of the relevant match).

¹¹ Essentially, in case any of the live TV packages remains unsold at the beginning of the season, then the relevant matches can be exploited by clubs.

rights packages for three seasons. Belgacom, the Belgian telecoms operator bought up all rights with a view to launch a new IP based TV service.

Belgacom has sub-licensed a number of rights to free-TV operators which give all Belgian citizens the opportunity to view some Premier League football matches for free.

I am not so worried about Belgacom acquiring all rights this time around. Belgacom is a newcomer in the market. Therefore no *ex ante* dominance exists.

This case shows that in today's converging markets new players may enter the market from unexpected corners and I am sure that it is not the last time we see new entry on the market of companies that are not traditional broadcasters.

I know that some of the bidders are unhappy of the conduct of the tender procedure. There is currently litigation before the Belgian courts, so it would not be pertinent for me to speculate further in this from this podium.

5. SECTOR INQUIRY

Let me finally mention the sector inquiry into the availability of sports content for 3G mobile devices, which the European Commission launched in January 2004.¹² The Sector Inquiry is now concluded.¹³

The Sector Inquiry concluded that there are general characteristics that make the viewer experience of sports content watched over mobile devices fundamentally different from TV, such as cost of usage, the content available – in particular the length of time that consumers want to spend viewing the content and the ability to personalise the viewing experience. It seems that mobile platforms will be used when the viewer has no access to TV as the viewer generally prefers watching the action on a bigger screen.

The Sector Inquiry found four main bottleneck problems that may risk limiting the access to sports content on mobile devices:

1. Cross-platform bundling - which refers to practices where a rights owner sells bundled audiovisual rights for various retail platforms to one or a few operators.
2. Overly restrictive conditions - A second business practice that was reported by mobile service operators as limiting their business opportunities concern coverage limitations that are put upon mobile sports rights in terms of the length of the event that can be transmitted (full broadcast or only highlights) or the timing of the coverage (live or deferred).
3. Joint selling – while both rights owners and mobile operators reported positive aspects of joint selling, mobile operators also voiced concerns that joint selling result in less supply when all mobile rights to a sports event remain unsold by the joint selling body.

¹² Commission decision of 30 January 2004, see IP 04/134.

¹³ http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/

4. Exclusive access - The last business practice that the Sector Inquiry has highlighted is that of exclusivity. The exclusive sale of rights to a certain market may be pro-competitive. However, anti-competitive effects could arise when exclusive access to attractive sports content contributes to 3G operators obtaining or protecting positions of market power.

The Sector Inquiry has enabled the European Commission, the EFTA Surveillance Authority and National Competition Authorities to get a clearer view on the prevailing commercial behaviours of the different market players active in the value chain of sports content for mobile platforms.

In order to maximise consumer choice, encourage innovation and foster competition, the European Commission advocates a competition policy that assures that access to sports rights for distribution over mobile platforms is not unduly restricted through anti-competitive practices resulting in output limitations.

Therefore, market players are invited to address possible anti-competitive conduct and effects resulting from their business practices. The European Commission will take account of the findings of the Sector Inquiry in future proceedings in this area.

6. CONCLUSION

Let me conclude.

Converging media markets raise new issues for the European Commission's enforcement of EC Competition Law in the sector.

You will know that the European Commission is approaching the sector on a case by case basis permitting it to make fresh analysis of the markets in question and therefore also adopt its analysis to new developments in converging markets.

However, our fundamental approach, as I have outlined it, will also stand the test of convergence, I think. Our objective is to maintain open and competitive media markets and a level playing field for all parties, so as to maintain a culture where innovation can thrive to the benefit of consumers, business and the sports.

The Commission, in close corporation with the National Competition Authorities, is currently preparing a working paper concerning the application of competition law in the sports area.

Thank you for your attention.