Football: joint selling of media rights

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1. Introduction

On 23 July 2003, the Commission adopted a formal decision exempting the joint selling of the media rights of the UEFA Champions League. \(^1\) The Commission concluded that the joint selling of the TV, internet and mobile telephone content rights of an international football tournament such as the UEFA Champions League was restrictive of competition as it reduced output and limited price competition. But an exemption was justified as joint selling can provide efficiencies and consumer benefits within the meaning of Article 81(3) of the Treaty, in particular by enabling the creation of a single point of sale for a league branded product. \(^2\)

Unlike UEFA’s former joint selling arrangement notified in 1999, the new joint selling arrangement, which UEFA notified in 2002 following intensive negotiations with the Commission, ensures that all media rights are sold via a tender procedure in several separate packages for up to 3 years. The scope and length of the exclusivity granted is thereby reduced and allows more media operators to win interesting football rights.

The outcome of UEFA’s tender for the 2003-6 season shows that the Commission’s intervention successfully achieved this aim. During the last contract round (1999-2003) there were 14 licensees and 10 sublicensees in the EU. For 2003-2006 there are 22 licensees even though the rights have not yet been sold for all Member State. Moreover, in countries where UEFA has finished its selling process all matches will be broadcast on live free-TV or pay-TV compared to the previous position earlier where only a small number of the matches were broadcast live.

Some media rights are exploited exclusively by UEFA. If UEFA fails to sell such rights, the football clubs will then have the right to sell the rights themselves. Other media rights are exploited by both UEFA and/or the football clubs. The combination of these two elements is likely to eliminate the problem of unused rights for which there is demand. It moreover limits the scope of joint selling arrangement to areas where joint selling is demonstrably more efficient than individual selling.

UEFA’s new joint selling arrangement remedies the Commission’s main concerns i.e. that the granting of long-term exclusive contracts covering a large number of rights restricts competition in the broadcasting markets to the benefit of large incumbent broadcasters. In addition the far-reaching liberalisation of new media rights for football will provide business opportunities for nascent Internet and mobile services.

2. The background and Commission’s policy

Competition in the markets for the sale of TV rights of football events is one of the Commission’s priorities. Effective competition in these markets is likely to improve the functioning of broadcasting markets and give viewers access to TV services that are reasonably priced, innovative, of good quality and with a variety of offers.

There are particular types of content which significantly determine broadcasters’ — and in particular pay TV broadcasters’ — ability to attract subscribers and advertisers. Football content rights, in particular, but also a limited number of other sports rights as well as first run feature film rights fall into this category.

TV rights of football events which are played regularly throughout every year have unique characteristics: first, football is an ephemeral product as viewers are often only interested in live broadcasts. Next, substitution is very limited, because viewers who want to see a given football event are unlikely to be satisfied with the coverage of another event. Finally, the exclusive concentration of rights in the hands of sports federations reduces the number of sellers on the market. Availability of rights is reduced still further by the volume of TV rights contracts being concluded on an exclusive basis for a long duration and/or covering a large number of events. Only large incumbent broadcasters therefore have a realistic chance of

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\(^1\) IP/03/1105
\(^2\) UEFA’s joint selling arrangement also comprises the selling of sponsorship, suppliership and IPR licensing relating to the UEFA Champions League, but this activity has only played a minor role in the Commission’s investigation and a negative clearance has been issued in respect of these activities.
acquiring the rights. Furthermore, new media rights are often held back to protect the value of TV rights.

The joint selling arrangement which UEFA initially notified meant that all TV rights were sold to a single free-TV broadcaster in each Member State and on an exclusive basis for periods up to four years. Some rights could be sub-licensed to a pay-TV broadcaster, subject to UEFA’s prior consent and against payment of 50% of the sublicensing fee to UEFA. Sub-licensing arrangements can do little to alleviate the restrictive effects of a joint selling arrangement. Football clubs had no access to exploit any TV rights. Neither UEFA nor the football clubs exploited Internet or mobile telephone rights. The notified arrangement thereby contained most of those negative aspects of joint selling which it is the Commission’s policy to counter.

The packaging and manner of sale of football TV rights can distort the competitive process by favouring the business methods of particular broadcasters or by raising barriers to entry on the market. It is therefore the Commission’s policy that the TV rights of football leagues should be sold in smaller separate packages using open tender procedures. The packages must be designed in a manner which ensures that at least some packages are within reach of most broadcasters in a Member State, so that the above distortions are reduced and rights are likely to be sold to more than one broadcaster. Where this is insufficient to avoid an elimination of competition, the Commission will have to think about alternative measures such as limiting the quantity of rights that a single broadcaster is allowed to acquire.

A properly conducted tender procedure adds fairness to the selling procedure and ensures that all interested parties are aware that the sale is taking place and on which conditions. The contracts should be no longer than three years so that there will be regular and frequent opportunities for broadcasters to compete for the rights. While sublicensing arrangements can in some circumstances help to remedy competition problems, it is preferable to have direct contractual relationships between the original rights owners rather than contractual relationships among competitors.

The scope of a joint selling arrangement should not extend further than is necessary to create a single point of sale for a league product. Football clubs should be free to exploit media rights that are most relevant for the promotion of the club brand, such as in particular Internet, mobile and archive rights. Moreover, when a joint selling body fails to sell a right within a given time, the football clubs should have an opportunity to sell the rights individually. Where appropriate there should be parallel exploitation of rights both by the joint selling body and the football clubs. Such limitation in the scope of the joint selling arrangement is likely to ensure that there will be no unused rights, which is a typical feature of traditional joint selling arrangements. Moreover, the competition between the joint selling body and the football clubs is likely to lead to further competitive innovation of the media rights.

Another important aspect for the Commission in relation to joint selling arrangements is the tendency of the joint selling bodies to hold back new media rights i.e. Internet and mobile rights. The Commission considers that these rights currently form separate product markets from that of the TV market and that there is no justification for the non-exploitation of those rights.

These policy considerations had to be reconciled with the arguments in UEFA’s notification regarding the specific characteristics of sport and financial solidarity, which is required to maintain uncertainty as to the result of the sport competition. UEFA suggested that the Commission to adopt a lenient approach towards the restrictions of competition inherent in UEFA’s joint selling arrangement i.e. maintain status quo. While the Commission understands that financial solidarity could help maintain a certain balance among the football clubs playing in a league which is likely to provide better football, the Commission insisted that competition law should be respected. The Commission has managed to reconcile these diverging interests, as it has done in other cases. (1) Since the Commission approved the joint selling arrangement with reference to the creation of a branded league product which is sold in packages via a single point of sale in a manner which left UEFA’s solidarity mechanism untouched, it was not necessary for it to analyse the solidarity argument under Article 81(3).

3. UEFA’s new joint selling arrangement

As a result of the Commission’s objections, UEFA proposed a new joint selling arrangement which is operational starting with the 2003/2004-football

season. According to the new system all UEFA Champions League media rights are split into 14 different rights packages which are exploited by UEFA and/or the football clubs. The rights are awarded following a tender procedure and the rights contracts will be no longer than 3 years.

3.1. TV rights

UEFA will continue to jointly sell the rights to live transmission of the Tuesday and Wednesday matches to free- or pay-TV broadcasters. The main rights will normally be split into two separate rights packages (1) giving the winning broadcasters the right to pick up to the two best matches. Generally, the respective rights packages will be sold to a free-TV and a pay-TV broadcaster so that at least two different broadcasters per Member State will acquire the rights. UEFA will initially have the exclusive right to sell the remaining live rights, but, if it does not manage to do so within a certain cut-off date, the individual clubs will be able to sell the rights themselves in parallel with UEFA.

UEFA wanted to allow football clubs to sell these live TV rights only to pay-TV or pay-per-view. However, such a restriction achieved no additional benefits and was not indispensable to the joint selling arrangement. It therefore imposed a condition that football clubs should not be restricted from selling live TV rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster. The Commission considers that this condition ensures that free-TV broadcasters will not be impeded from acquiring such rights.

Individual football clubs will also, for the first time, have the right to exploit TV rights on a deferred basis in parallel with UEFA one day after the last matches of the match week (Thursday midnight) and to use archive content, e.g. for the production of DVDs/videos, and therefore provide their fans with a better and more varied individualised offer. The individually sold matches must be “club branded” and must not be bundled with rights of other clubs to create an alternative UEFA Champions League branded product.

3.2. New media rights

The new joint selling system also affords opportunities to new media operators as both UEFA and the football clubs will be able to offer UEFA Champions League video content on the Internet and mobile phones (where operators are seeking to launch or boost the new generation of mobile phone services using the UMTS technology). Internet exploitation is subject to a 1½-hour embargo after the match finishes. Live streaming on the Internet does not currently permit the maintenance of a high picture quality. This will of course change over time, making it necessary to revisit the embargo in the foreseeable future. UMTS services are available within a maximum of 3 minutes; some delay is inevitable due to the need to package the content for mobile delivery. Both UEFA and the football clubs may choose to provide their services themselves or via Internet Service Providers. UEFA will offer ‘competition specific’ or ‘UEFA branded’ products whereas the football clubs will offer ‘club specific’ or ‘club branded’ products in respect of matches in which they participate.

4. The relevant markets

4.1. The market for the acquisition of TV broadcasting rights of football events played regularly throughout every year

The Commission’s investigation (2) of the Community markets gathered evidence suggesting the existence of a separate market for the acquisition of TV broadcasting rights of football events that are played regularly throughout every year. This definition would, in practice, mainly involve matches in national league and cup events as well as the UEFA Champions League and the UEFA Cup. This conclusion represents an expansion of the conclusions reached in previous cases. (3) The Commission determined that a separate market might exist for such rights as they have particular characteristics; they are able to achieve high viewing figures and reach an identifiable audience, which is especially targeted by certain advertisers; they are able to act as a developer of a brand image

(1) The precise format of the packages may vary depending on the structure of the TV market in the Member State in which the rights are being offered.

(2) Some 65 European broadcasters, rights agents and advertisers received a very extensive questionnaire in 1999. Their answers enabled the commission to establish the relevant market definition.

of a channel. The TV rights of UEFA Champions League represent on average only 20% of the rights in the relevant market.

4.2. The markets for the acquisition of new media rights of football

New media markets such as Internet and mobile rights are in their infancy largely due to the fact that these technologies are currently at an early stage of development. Therefore, there is no clear empirical evidence on which to base market definitions. Since new media rights affect emerging markets, it is not yet possible to ascertain the market position of the UEFA Champions League content, but it is not likely to be more significant than its position in the traditional TV rights markets.

It is nevertheless possible to draw some conclusions which would permit a realistic appraisal of the restrictive effect of UEFA’s joint selling arrangement on the new media markets. First, content rights will be necessary for the development of the new services in the same way as content rights are necessary for TV services. It is likely that new media operators will wish to acquire football content to attract advertisers and subscribers. Secondly, it is likely that each different form of exploitation will provide a specific service to specific consumers. On demand services delivered via wireless mobile devices or via the Internet will not compete with live TV broadcasting. Likewise mobile clip services will not compete with television highlights packages. (1) It is therefore likely that new media markets will emerge at both the upstream and downstream levels, which parallel the development of markets in the pay-TV sector.

5. The restrictions of competition

The joint selling arrangement grants UEFA the exclusive right to sell certain media rights on behalf of the football clubs participating in the UEFA Champions League, and therefore prevents the football clubs from individually marketing such rights. This prevents not only competition between the football clubs but also between UEFA and the football clubs in supplying in parallel media rights to the UEFA Champions League to interested buyers. Third parties therefore only have one single source of supply and are therefore forced to purchase the rights under conditions jointly determined by the joint selling body. The joint selling body thereby restricts competition in that it determines prices and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. In the absence of the joint selling agreement the football clubs would set such prices and conditions independently of one another and in competition with one another. The reduction in competition caused by the joint selling arrangement therefore leads to uniform prices compared to a situation with individual selling. UEFA’s joint selling arrangement also imposes restrictions on football clubs regarding the exploitation of media rights that are sold individually or in parallel with UEFA.

5.1. Scope of the procedure – the vertical aspects

UEFA’s initial notification also comprised UEFA’s standard form agreements used in its vertical relationships with broadcasters, sponsors and advertisers. However, under the new joint selling arrangement the rights are no longer all offered to a single operator but are split up into a large number of rights packages. The Commission exempted this proposed packaging as being part of the horizontal agreement, but did not examine vertical contracts concluded pursuant to that agreement. The competition assessment of such contracts would require analysis of the facts of each contract and market on which it was concluded. Nor would it be possible for the Commission to ascertain in the context of that procedure whether competition would be restricted if a single operator acquired all or several packages of rights. The decision therefore does not deal with individual rights contracts. However, the Commission will do so if it in the concrete circumstances would identify problems in any given Member State under Community competition law.

6. The exemption

6.1. The creation of a single point of sale for a league branded product

The Commission found that the benefits generated by the modified joint selling arrangements outweighed the negative effects that it deploys since joint selling enables the creation of a single point of sale. A single point of sale is of particular interest for an international tournament such as the UEFA Champions League, because this tourna-

ment involves a great number of football clubs from many different countries. In addition to the practical difficulties that it may create, there is moreover the issue that the ownership structures vary from Member State to Member State. Furthermore, there is varying demand from broadcasters who are likewise of different nationalities and operating in many different national markets.

Joint selling also enables the creation of a UEFA Champions League branded product (1), which allows media operators to provide coverage to consumers of the league as a whole and over the course of an entire season, including the most interesting matches. This would be difficult in the absence of joint selling in view of the hybrid character of the UEFA Champions League which is a combination of a league and a knock-out competition where only a limited number of football clubs reach the final stages of the competition.

No individual football club could enter into a commercial agreement, which would give a broadcaster any guarantee of being able to plan its programme schedule for the whole UEFA Champions League season right to the final round. It is conceivable that media operators could put such a package together even without joint selling. However, this would require the acquisition of significantly more rights than is currently the case, which is less efficient and puts a higher financial risk on the broadcaster. The joint selling of the rights solves this problem, as the broadcaster does not buy the rights of particular football clubs, but the right to broadcast the matches that are played on certain days.

Viewers benefit from being offered multiple forms of coverage of the UEFA Champions League. The viewer is interested in having a choice between various forms of broadcasts of the matches of a league. A viewer is likely to wish to have a choice of being able to watch a match live in its total length and also to be informed about several matches in brief on a delayed basis at several different times.

Football clubs benefit from the sale of the commercial rights via a joint selling agency as they avoid having to build up own commercial departments of the magnitude that is necessary to deal with the complexity of developing a commercial policy and executing the rights deals in a large number of countries. It is likely that it would be very difficult for many football clubs to be able to deal with such tasks. It is therefore likely that an outsourcing of such function would be necessary in any circumstances.

6.2. Football clubs individual sale of media rights

The Commission insisted that in exempting UEFA’s joint selling arrangement a certain balance between joint and individual selling had to be found. The philosophy behind the Commission’s insistence in giving the football clubs an opportunity for individual sale of such live TV rights and other media rights is twofold. First, the efficiencies and benefits of joint selling no longer exist where the joint selling body fails to find demand in the market for such rights. Secondly, maintaining competition between UEFA and the football clubs in bringing such rights to the market helps to avoid rights to the UEFA Champions League remaining unused, where there is demand for them.

The new joint selling arrangement therefore provides that the football clubs can sell live TV rights that are not sold by UEFA. Moreover, deferred TV rights, as well as new media rights will be exploited not only by UEFA but also by the individual clubs in parallel.

Football clubs exploiting UEFA Champions League footage individually must present the footage in a club-focused manner and relating only to matches in which they are participating. Football clubs or the broadcasters exploiting the media rights in question may not package the rights from several football clubs into a single product which would appear as an UEFA Champions League branded product.

7. The UEFA Champions League decision as a precedent for cases relating to national leagues

The Commission is currently investigating two other cases relating to the national football leagues of Germany and England. The Commission’s approach to these investigations has been inspired by the UEFA Champions League case. However, the investigations are of course adapted to the specific circumstances prevailing in the countries in question.

(1) UEFA also undertakes a number of specific tasks - including the ‘dressing-up’ of the stadium facilities, the recording of the match and the on-screen presentation, on-screen signage, music, etc. – to create a brand image for the UEFA Champions League, which is associated with a uniform and high quality TV coverage underpinned by a homogeneous presentation that increases the attractiveness for the broadcaster and the viewer.
The most advanced of the two investigations is the one relating to the new joint selling arrangement for the German Bundesliga. (1) Subject to third party comments, (2) the Commission is planning to exempt the new marketing system for the rights to broadcast first and second Bundesliga matches (3) along the principles of the UEFA Champions League decision.

8. Conclusion

The changes to the sports world and particularly its commercialisation raise many new issues for the application of Community competition law. The Commission will clarify the scope of application of Community competition rules in the context of sport through its case law. The Commission’s objective is to maintain open and competitive TV markets and a level playing field for all parties. The objective is also to remove obstacles to the development of new media markets. This will be to the benefit of the consumer by increasing his or her choice. In doing so the Commission will fully take into account the particular characteristics of the sector. The UEFA Champions League decision is good example on this and will serve as a role model for future cases.

(1) See IP/03/1106.
(2) Before the Commission can take a final decision on the exemption of the new joint selling arrangement, it will publish a summary thereof in the Official Journal in accordance with Article 19(3) of EEC Council Regulation No 17/1962. Publication is expected to take place shortly.
(3) The TV aspects of the new marketing system will enter into force in July 2006. All the other provisions will apply as of July 2004.