

Collective sale of sports television rights in the European Union: competition law aspects

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OPSOMMING

Kollektiewe Verkope van Televisieregte vir Sport in die Europese Unie: Mededingingsfasette

Televisieregte vir sport word wêreldwyd vir astronomiese bedrae verhandel. In die Europese Unie (EU), word hierdie regte gewoonlik deur sportliggame en -ligas op 'n kollektiewe rondslag verhandel, ten einde die waarde daarvan te verhoog. Sulke reëlings is egter onderhewig aan EU Mededingingsmaatreëls, wat daarop gerig is, nie om mededinging te verhoed nie, maar om onregmatige mededinging te verbied en die spreekwoordelike speelveld gelyk te maak. Hierdie artikel oorweeg die maatstawwe, soos neergelê deur die mededingingsdirekoraat van die Europese Kommissie en uitgewys in regspraak van die Europese geregshof, om te bepaal of sodanige kollektiewe verhandelinge van geval tot geval regmatig is. Dit oorweeg ook die beperkings wat die sogenaamde EU "Television Without Frontiers" Directive plaas op die verhandeling van TV-regte deur sportliggame, en wat vereis dat bepaalde sportgeleenthede van sosiale belang in elkeen van die 28 lidstate van die EU algemeen beskikbaar moet wees op "gratis-oor-die-lug-televisie". Die artikel fokus ook op die onlangse appêlsake wat in die Europese geregshof ten aansien van die FIFA sokker-wêreldbeker en UEFA Europese kampioenskap beslis is.

1 Introductory Remarks

At first sight, one may reasonably ask, what has sport got to do with the European Union (EU); and what has the EU got to do with sport? Any connection between the two might seem bizarre. Sport is a social and leisure activity, while the EU is essentially a single market for business, comprising some 505 million people. But apart from the social and health aspects, sport has an important economic dimension too.

In fact, sport is big business globally, representing more than 3% of world trade, and in the EU sport accounts for 3.7% of the combined GNP of the twenty-eight member states and employs 5.4% of the EU labour force. So there is much at stake both on and off the field of play in Europe, which, as far as sport is concerned globally, punches well above its size and weight!

Apart from the importance of sport in the EU from a health and social point of view, where sport involves an economic activity, EU Law in general, including the internal market rules and especially the freedom of movement of employees' provisions, and EU Competition Law in particular, including restrictive agreements and abuse of dominant positions and their "extra-territorial" effects, kicks in, as the famous – or, depending upon your point of view, infamous – Jean-Marc Bosman and subsequent related cases demonstrate.

As many sporting events take place on a European-wide basis, such as the UEFA Champions' League, for example, it is vital for all those involved in the organisation, administration, marketing and broadcasting of such events and their professional advisers to have a clear understanding of the application of a developing EU Sports Law (both "soft law" and formal decisions ("hard law")) to all of these activities. It should be noted that breach of the EU competition law can result in hefty fines of up to 10% of the world-wide turnover of a company or organisation involved in such "offences".

Although there was no specific provision in the founding European Community Treaty of 25 March 1957 giving the European Union (EU) – as it is now known – any competence in the field of sport, the EU, since the *Walrave & Koch v Union Cycliste Internationale* decision of the European Court of Justice in 1974,¹ has been ready to intervene in those cases in which "the practice of sport ... constitutes an economic activity". And it often does nowadays!

More recently, however, the signature in Rome on 29 October, 2004 of the Treaty establishing a Constitution for Europe was a significant milestone, not only for the European Union, but also for European sport. For the first time in its history, sport became an integral part of the primary law of the EU. There is now a specific legal basis for sport. The so-called Sport Article is to be found in Article 165 of the new Treaty on the Functioning of the European Union (TFEU).

Sub-paragraph 2 of paragraph 1 of Article 165 makes the following provision:

The Union shall contribute to the promotion of European sporting issues, which taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

In effect, the Article recognises the social and political role and importance of sport at the European level.

Sub-paragraph 2 of the Article makes further provision as follows:

Union action shall be aimed at:

¹ Case 36/74 [1974] ECR 1405.

- (i) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

Finally, sub-paragraph 3 of the Article looks at the wider relationship between sport in the Union and beyond its borders and provides as follows:

The Union and Member States shall foster cooperation with third countries and the competent international organizations in the field of education and sport, in particular the Council of Europe.

In fact, it may be mentioned, *en passant*, that the Council of Europe has been very active over the years in the sporting arena – not least in the area of doping in sport.²

2 The Sale of Sports Television Rights in the European Union

The rise of sport as a global industry is largely the result over the years of the marketing of sports, sports persons, teams and events, originally in the United States of America (USA), and subsequently in Europe and elsewhere. This has led to the establishment of a world-wide discrete sports marketing industry, due to the vision and pioneering work of Mark McCormack in the USA, through his company, International Management Group; and in Europe, by Horst Dassler, of the German sports goods manufacturer Adidas, through his Swiss company International Sport Leisure and Culture, which he founded. Sadly, neither of these pioneers is alive today to see the extent to which sports marketing has grown and enjoy the full fruits of their work.

Of the sports marketing mix, which includes sports sponsorship, merchandising, endorsement of products and services, and corporate hospitality, perhaps the most important and lucrative one is the sale and exploitation of sports broadcasting rights, especially sports television rights, around the world,³ which contribute mega sums to many sports and sports events, including the Summer and Winter Olympic Games and the FIFA World Cup. Indeed, it is fair to say that, without the mega sums generated by sports broadcasting, such major events – and, in fact, many others – could not take place and consequently sport – and sports

2 For further information on the scope of the activities of the Council of Europe in sport, see the Siekmann & Soek (eds) *The Council of Europe and Sport: Basic Documents* (2007).

3 For a comprehensive view of the importance and the scope of sports TV rights in several major sporting countries around the world, see the Blackshaw, Cornelius & Siekmann *TV Rights and Sport Legal Aspects* (2009).

fans – would be the losers.⁴ In this respect, the commercialisation of sports broadcasting rights may be considered as the oxygen of sport. There is a symbiotic relationship between sport and television broadcasting. Indeed, according to Griffith-Jones⁵ “[t]his marriage between sport and television is one made in heaven” and according to Parrish⁶ “[t]he broadcasting sector and sport have ... revolutionised each other”.

And the significance of new technology – especially broadband and quicker access to the Internet and web-streaming of sports events – in the development and financial importance of sports broadcasting rights cannot be over emphasised as Verow, Lawrence and McCormick⁷ rightly point out:

In many ways, the rise of new platforms for the dissemination of media products and the inevitable rise of sport as the global media property it now is have been intertwined. Just as the formation of the FA Premier League and the rise of satellite pay television through BSkyB seemed inextricably linked, so when new platforms, such as the proliferation of digital television channels or the exploitation for broadcast or quasi broadcast purposes of internet and mobile telephony platforms, come to the fore, their usual test bed in terms of content is in sport. It seems that only sport has the pulling power nationally and internationally to justify the sort of investments needed to bring new media platforms to market, and maybe sport is alone considered sufficiently popular for the uptake by new customers properly to reflect the potential of the medium rather count simply as a commentary on the first content offered through it.

For example, the English FA Premier League – the world’s most popular and most financially successful football league – have recently sold their live broadcasting rights to their matches for the seasons 2013-2016 for a record sum of £3.018 billion. The sale of additional rights packages, comprising overseas rights, highlights and mobile phone and internet rights, is expected to increase this amount to a staggering sum of £5 billion!

Again, the lion’s share of these rights has been sold to the satellite broadcaster, BSkyB, which will be shown as part of its *Sky Sports* package on a subscription basis. BSkyB is owned by the Australian media magnate, Rupert Murdoch, through his Group, News International, who, incidentally, considers “sports as a battering ram and a lead offering” in all his pay television operations around the world.⁸

Sports bodies and leagues have traditionally sold their television rights on a joint basis on behalf of their constituent members, in order to

4 See Blackshaw “Sports Marketing, Sponsorship and Ambush Marketing” in *Sports Law* (2006) (ed Gardiner).

5 Griffith-Jones *Law and the Business of Sport* (1997) 289.

6 Parrish *Sports law and policy in the European Union* (2003).

7 Verow, Lawrence & McCormick *Sports Business* (2005) 321.

8 Address at the AGM of News Corporation on 1996-10-15 in Adelaide, Australia.

leverage the value of these rights, and this practice has raised a number of competition law issues over the years, which continue to the present day.

Indeed, the collective purchase and sale of sports broadcasting rights, particularly television rights, has occupied the attention of national and EU competition law authorities for many years: for example, the EBU (European Broadcasting Union) Sports television rights; the UEFA Champions League Football Competition; the German Football Federation (DFB); and BBC/BSkyB English Premier League cases.

In 1998, A.M. Wachmeister, a member of the Competition Directorate of the European Commission at that time, issued some helpful guidelines on the application of EU Competition Rules to Sports Broadcasting. Although to some extent dated, these guidelines are still valid today and can be applied to new media situations.

Subsequently, the EU Commission investigated the arrangements for the sale of the television and commercial rights to the popular UEFA European Champions' League Football Competition. The Commission issued a Notification (IP/01/1043) and Background Note (MEMO/01/271) on 20 July 2001. The situation in this case may be summarised as follows:

The European Competition Commission was essentially concerned about the following elements of the way the television broadcast rights to the European Champions' League were being sold:

- (i) Exclusivity
- (ii) Single Broadcaster
- (iii) On a Territory by Territory Basis
- (iv) Long-term Contracts

The aim of the European Commission's intervention was "(t)o ensure that the European sports fans can benefit from a wider coverage of top European football events".⁹ According to the Commission, the form of joint selling of the television rights by UEFA had "(a) highly anti-competitive effect by foreclosing television markets and ultimately limiting television coverage of those events for consumers".¹⁰ The Commission also considered that joint selling of television rights is "(n)ot indispensable for guaranteeing solidarity among clubs participating in a football tournament".¹¹ And furthermore "[i]t should be possible to achieve solidarity without incurring anti-competitive effects".¹²

9 EU Commission Notification IP/01/1043 and Background Note (MEMO/01/271) of 2001-07-20.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

Indeed, in many submissions by third parties, including broadcasters and sports rights agencies, made to the Commission, UEFA's solidarity measures were characterised as "inefficient, insufficient and conducted in a non-transparent way".¹³ In other words, a sham!

The Commission's stance was that by furthering competition in the broadcasting market this will lead "[t]o better quality television coverage and lower subscription fees".¹⁴

Also, the Commission considered that, in joint selling arrangements, there is a reluctance to give licences to apply new technologies, such as the Internet and UMTS, because broadcasters fear that it will devalue their television rights.

The Commission, therefore, called on UEFA to submit "constructive proposals [in order] to guarantee open access to television coverage of football".¹⁵

After many discussions and negotiations between the parties, new selling arrangements were put forward by UEFA to the Commission, which were acceptable, and the matter was settled amicably (so-called "soft law") in December 2003. The new arrangements came into force as from the 2003/2004 football season.¹⁶

More recently, the EU Commission investigated the broadcast selling arrangements for the English FA Premier League (EPL) and, after protracted negotiations between the parties, extracted a number of important concessions from the EPL. These included from 2007 onwards that no single broadcaster will be able to buy all the rights of the centrally marketed live rights packages; both the EPL (in respect of all matches) and the clubs (in respect of those matches in which they participated) will have the right to provide video content on the Internet as of midnight on the night of the match; clubs will be able to provide mobile content as of midnight following the match; the EPL has increased radio broadcasting; and has also allowed two matches to be broadcast live nationally on Saturday afternoons.¹⁷

Mention should also be made of the German Bundesliga (DFB) case, also involving the collective sale of broadcasting rights. The same EU competition law considerations as in the UEFA and EPL cases were applied in the DFB case. These included:

- (i) The unbundling of rights into separate rights packages for television broadcasting and mobile platforms;
- (ii) The possibility for individual clubs to exploit certain unsold rights and rights unused by the initial purchaser;

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See Case 37398, OJ 2003 L291/25.

¹⁷ See Case 38173, OJ C 7.

- (iii) As well as the exploitation of deferred rights and rights for internet broadcasting and telephony broadcasting markets.¹⁸
- (iv) Also, the rights were to be sold by way of a public tender process and exclusive contracts were not to exceed three football seasons.¹⁹

3 Some Further EU Competition Law Issues on the Sale of Sports Television Rights

The leading 2003 Decision of the European Commission involving the collective selling of the broadcasting rights to the UEFA European Champions' League (mentioned above),²⁰ which has been used as kind of "template" in subsequent sports broadcasting cases at the national level, and also the unresolved legal questions regarding the matter of the so-called "organisational solidarity" in sport²¹ – considered to be legally and politically sensitive – are of crucial importance and worthy of further critical analysis and study.

Following this Decision, the Commission requires the following conditions for the sale of sports television rights to be satisfied:

- (i) An open tender;
- (ii) An "unbundling" of the offer allowing more than a single buyer;
- (iii) No excessive exclusivity (a term of three years being regarded as a general norm); and
- (iv) No automatic renewal (regarded as a disguised extension of the term of the exclusivity).²²

The Commission's aims and critical factors in relation to opening up competition within the single EU market in the field of sports broadcasting rights may be summarised in the following remarks of the

18 With the introduction of 3G and 4G mobile phone technology allowing the delivery of sport content to smart and iphones, these rights are also in demand and have also increased in value!

19 See Case 37214, OJ 2005 L 134/46.

20 Dec 2003/778.

21 The concept of "solidarity" in sport in general and in football in particular is that the revenues generated by the sale of sports rights, especially TV rights, should "trickle down" to and be available to be used for the benefit of the so-called "grass roots" constituents and programmes of the sport concerned. This has tended so far, for example, in the case of the UEFA European Champions League to be more of a theoretical concept rather than a practical one!

22 Ungerer "Commercialising Sport: Understanding the TV Rights Debate" speech delivered in Barcelona on 2003-10-02, in which, *inter alia*, Ungerer argued that "there must be a clear separation between sports regulation and the commercialisation of sport". And added: "TV is of high significance for football clubs, 30-70% of football clubs' revenue come from TV, and this explains why sometimes our efforts [the Commission] to bring joint selling into line with Competition law requirements meet a certain anxiety – even bitterness – on the side of some leagues, and are initially misunderstood."

Competition Commissioner at the time, Neelie Kroes, in the context of the 2005 Commission Decision in the German *Bundesliga* case:²³

The decision benefits both football fans and the game. Fans benefit from new products and greater choice. Leagues and clubs benefit from the increased coverage of their games. Readily available premium content such as top football boosts innovation and growth in the media and information technology sectors. Moreover, open markets and access to content are an essential safeguard against media concentration.²⁴

In the EU White Paper on Sport, published on 11 July, 2007, Article 4.8 provides on the subject of the collective selling of sports television rights as follows:

The application of the competition provisions of the EC Treaty to the selling of media rights of sport events takes into account a number of specific characteristics in this area. Sport media rights are sometimes sold collectively by a sport association on behalf of individual clubs (as opposed to clubs marketing the rights individually). While joint selling of media rights raises competition concerns, the Commission has accepted it under certain conditions. Collective selling can be important for the redistribution of income and can thus be a tool for achieving greater solidarity within sports.

And pertinently adds:

The Commission recognises the importance of an equitable redistribution of income between clubs, including the smallest ones, and between professional and amateur sport.

The essential point here is that the EU will be looking for a “robust solidarity mechanism” to be put in place by sports bodies in order for them to justify the selling of their television rights on a collective basis! In other words, paying “lip service” to the idea/concept of “sporting solidarity” will not be sufficient for Competition Law clearances.

4 The FIFA and UEFA “Crown Jewels of Sport” Television Cases

For the sake of completeness, it should be mentioned that the sale of sports television rights in the European Union is not only subject to restraints imposed by the EU Competition Rules, for the benefit of consumers of sports programmes, but also to the important provisions of the so-called “Television Without Frontiers” EU Directive.

On 17 February 2011, the General Court (formerly the Court of First Instance) (Seventh Chamber) of the European Court of Justice (ECJ) handed down two landmark Judgements in the so-called “Crown Jewels” cases brought by FIFA, the World Governing Body of Football, and UEFA, the European Governing Body of Football.

²³ COMP/C.2/37.214.

²⁴ IP/05/62, 2005-01-19.

Article 3a of Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities,²⁵ generally known in shorthand as the “Television Without Frontiers” Directive, provides in paragraph 1 as follows:

- (1) Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

In the present cases, The United Kingdom and the Belgian Governments had decided to list all the FIFA World Cup matches and the UEFA European Championship as sporting events considered to be of “major importance for society” in the UK and Belgium and, as such, should, therefore, be shown on “free-to-air” television. The effect of these listings was to preclude these sports events from being sold exclusively to subscription and “pay-per-view” channels, thus affecting the revenues of the sports bodies concerned.

FIFA and UEFA argued that the listing of these events, which are money-spinners for them, as “free-to-air” under the “Television Without Frontiers Directive” restricted their bargaining rights with television companies for football content, which, as noted in this article, is much and widely in demand, and were contrary to EU Law; in particular, the Competition Rules under the renumbered articles 101 and 102 of the Lisbon Treaty.

The ECJ held that the World Cup and the European Championship were single sporting events and could not, therefore, be divided up (known, in the jargon, as “siphoning off”) at the will of FIFA and UEFA. In other words, a “pick and mix” approach could not be followed. The Court also held that the governmental measures, taken after full public consultation, to list these events as ones to be broadcast on “free-to-air” television were proportionate and served the public interest; and, moreover, did not go any further than was necessary to attain that objective. In other words, they were not anti-competitive and, therefore, compatible with EU Law.

25 Council Directive 89/552/EEC of 1989-10-03 (OJ 1989 L 298 23), as inserted by Directive 97/36/EC of the European Parliament and of the Council of 1997-06-30 amending Directive 89/552/EEC (OJ 1997 L 202 60).

Not surprisingly, FIFA and UEFA have appealed against this ruling to the Grand Chamber of the ECJ. On 12 December, 2012, Niilo Jaaskinen, the Advocate General in these cases, rendered an Opinion to dismiss the FIFA and UEFA Appeals, supporting the Rulings of the ECJ.²⁶

The Court normally follows the Opinion of the Advocate General, when rendering its final judgement, which the Court did in the FIFA and UEFA Appeal Cases, dismissing them on 18 July, 2013 “in their entirety”.²⁷ In particular, the Court held that it was “for the member states alone to determine the events which are of major importance” to their viewing public; and also that the tournaments (the World Cup and the Euros) “in their entirety have always been very popular among the general public and not only viewers who generally follow football matches on television.”

Thus, the listing by the UK and Belgian Governments of the entire FIFA World Cup and the entire UEFA ‘EUROS’ as “free-to-air” sporting events under the “Television Without Frontiers” Directive was upheld by the European Court.

5 Concluding Remarks

This exciting and technology-led brave new media world²⁸ is undoubtedly having an appreciable effect on the sporting world in general and, in particular, presents further challenges to sports broadcasting rights holders, sports governing bodies, sports persons and teams and other stakeholders, as well as their professional advisors, not least their lawyers.

This inevitably leads to all kinds of conflicts that will need to be resolved by public authorities – at the national and supra-national levels – and sports bodies and administrators themselves. As Weatherill has pertinently observed:

[s]ome of the most intriguing tensions in the years to come are likely to centre on the attempts of governing bodies to satisfy the commercial aspirations of the most powerful participants while also maintaining vertical

26 See CJEU Press Release No 164/12.

27 For the full texts of the CJEU judgements in these Appeal Cases, see C-201/11 P, C-204/11 P & C-205/11 P, which are published on the official website of the Court at ‘www.curia.europa.eu’.

28 See Report by Market Analysts Forrester entitled, “The Battle For The Digital Home”, referred to in Fry “Delivering Outside The Box” June 2005 *SportBusiness International* 41. In this Report, various scenarios that might arise in the so-called “converged sports world” are suggested, including a possible “joint venture between the NFL and Fox to create an immersive experience where sports fans can choose viewer-selected camera angles and split-screen content ... and Disney’s acquisition of Electronic Arts. With EA’s sports games, Disney/ESPN becomes the premier sports brand on PCs, TV and consoles”.

solidarity within the sport and preserving the broader integrity of the character of the event.²⁹

This is a rather difficult balancing act to perform. As Weatherill further points out:

[t]he prominence of EC law's intervention in sport in recent years is above all the consequence of the 'commercialisation' of the sector, in particular as a result of its close association with the helter-skelter development of the broadcasting industry. In fact, much of the economically significant sports-related material that tumbled into the Commission's in-tray in the late 1990s was concerned directly or indirectly with broadcasting. In some respects the Commission's recent preoccupation with sport has been driven by its need to monitor the commercially much more important broadcasting sector, in which it is profoundly anxious to forestall practices that will facilitate existing incumbents' anxiety to impede new entrants. And it is highly plausible that the pace of technological change will increasingly throw up new forms of rapid mass communication, generating intensified fragmentation in the pattern of audiovisual services. This will fuel yet more demand for rights to broadcast sports events, and bring with it yet more challenges for EC competition law.³⁰

Therefore, interesting and challenging times lie ahead for all those involved in any way and at any level in the sports broadcasting field, not least concerning the world's favourite game, football. In this respect, it will be interesting to see how the law at the EU and the national levels develops, including country initiatives, like the new Sports Broadcasting Regulations in Italy, designed to ensure transparency and efficiency of the broadcasting rights market, while improving the competitive balance among participating clubs. A continuing dichotomy and conflict in the sports law field.

The sale of television and new media rights in respect of national and international sports events already provide a significant source of revenue to international and national sports federations alike, and will, no doubt, continue to do so for the foreseeable future, especially for commercial exploitation on new media platforms, notwithstanding the present economic climate in the global economy. Indeed, hardly a day passes without some announcement of a major sale of television rights having been made in respect of a particular sporting event somewhere in the world.

Despite all this economic preoccupation and doom and gloom in the financial markets, sport is now a multi-billion dollar industry worldwide and will continue to be so. As such, some would argue, that perhaps sport has lost touch with its Corinthian roots and values, as well as its Olympian ideals and *raison d'être*, since nowadays it seems to be the winning rather than the taking part that motivates sports persons and teams and what really counts – and there is certainly a lot to play for!

29 Weatherill *European Sports Law Collected Papers* (2007) 246.

30 *Idem* 296.

Nevertheless, it must be said that, without the mega sums generated by the sale of television rights, sporting spectacles like the Olympics, the FIFA World Cup and the UEFA Champions' League (to mention but a few) could not take place – the costs of organising and staging them would be prohibitive. And, accordingly, athletes and sports fans alike throughout the world would be the losers!