

# Winner takes all: football rights and competition law

The sale of football rights has long been scrutinised by the European Commission and national competition authorities. Catriona Hatton and Christoph Wagner – partners at Hogan & Hartson in Brussels and Berlin, respectively, and Héctor Armengod – an associate in Brussels – analyse the commission’s current position and examine recent developments in Germany

Football is big business. Last season the combined revenue of Europe’s 20 highest-earning clubs topped €3.3 billion – much of it from the sale of media rights. Yet competition between clubs no longer takes place on the playing field alone. Football clubs and their associations are eager to get the best deals for the rights to broadcast their games. After all, money from these deals allows clubs to finance the acquisition of star players – who help clubs win competitions, sell more shirts and fill stadiums – which in turn pushes up the value of the clubs’ media rights.

Indeed, the sale of broadcasting rights has become a major, if not the principal, source of revenue for Europe’s top-flight clubs. Last season, Europe’s second-richest club, FC Barcelona, saw 36 per cent of its overall revenue come from the sale of its broadcasting rights. Broadcasting revenue is even more important for Juventus, Europe’s third-biggest moneymaker. It saw 68 per cent of its total revenue come from the individually-negotiated sale of its broadcasting rights to Sky Italia and Mediaset, along with revenue generated from its participation in the continent-wide Champions League. Broadcasting rights to the Champions League are negotiated by football’s European governing body, UEFA. It distributes revenue among the participating clubs according to criteria that include each individual club’s performance in the competition.

As well as generating revenue for clubs, the acquisition of rights to broadcast major football events is an essential element of competition for European pay-TV operators. As the European Commission stated in *NewsCorp/Telepiù*, “rights to recent premium films and most regular football events where national teams participate ... constitute the essential factor (the ‘drivers’) that leads consumers to subscribe to a particular pay-TV channel or platform.” Securing broadcasting rights for the major international, European and national football games is therefore crucial if pay-TV operators and platforms want to enter and stay in the market. In December 2005, Premiere, a German pay-TV group, lost 42 per cent of its market value and part

of its subscriber base after it failed to secure the rights for the Bundesliga, Germany’s top-flight football league. Meanwhile, the new Bundesliga rights-owner Unity/Arena attracted over 900,000 subscribers in just a few months.

Given the size of the cake, it is no wonder that the sale of football rights has long been scrutinised by the European Commission’s directorate general for competition and the national competition authorities of European member states. But what is the commission’s current position on the sale of football rights? And what have been the recent developments in one key member state – Germany?

## Football clubs and their associations are eager to get the best deals for the rights to broadcast games

### EUROPEAN COMMISSION

DG Comp has dealt with the acquisition of football rights in a number of cases, which might be put into the following three categories: joint purchasing, joint selling and merger cases.

#### Joint purchasing

Perhaps the most high-profile case involved the joint purchasing and sharing of rights for international sport events (including the Olympic Games, the World Cup and the European Championship) by the European

Broadcasting Union, an association whose membership then was mostly restricted to European public broadcasters. The internal provisions of the union concerning the joint acquisition of television rights, under the so-called Eurovision system, were originally notified to and approved by the commission in 1993.

In its decision, the commission stated that the joint acquisition of rights restricted competition between union members and commercial channels, yet benefited from an exemption under what was then article 85(3) of the EC Treaty (now article 81(3)). According to the commission, the joint acquisition of rights led to an improvement in purchasing conditions, reducing the cost of negotiating these rights on an individual basis.

The commission also examined the union’s rules on sub-licensing rights to non-members, which among other things only conferred rights to the deferred broadcasting of the games. These rules had been revised by the broadcasting union several times with the commission’s agreement following complaints by various private TV operators who considered them discriminatory. The commission found that the revised sub-licensing provisions complied with the competition rules of the EC Treaty. Consequently, the commission’s approval of the Eurovision system was made conditional on an obligation on the union to grant access to third parties to broadcast rights under the notified scheme or, subject to the union’s approval of the EBU, on conditions more favourable to the non-member.

The European Commission’s 1993 decision was challenged before the Court of First Instance by a group of private TV operators. The court assessed whether the membership rules were objective and sufficiently determinate to enable them to be applied uniformly and in a non-discriminatory manner to all potential active members. The court found that the commission had failed to carry out such an examination when applying the exemption and annulled the decision. However, the court did not rule on the restrictive nature of the membership rules.

Following the court’s judgment, the

European Broadcasting Union notified a revised Eurovision system to the commission. Once again, Brussels granted an exemption under article 81(3) subject to an obligation to grant access to non-members on reasonable terms not only for deferred transmissions, highlights and news, but also for live transmissions with regard to all events that union members did not broadcast live. Once again, the decision was challenged before the Court of First Instance, which annulled it on the grounds that the revised scheme was discriminatory and placed non-members at a competitive disadvantage. Among other things, the court considered that the provisions regarding the sub-licensing of rights for live broadcasts could only guarantee the transfer of residual rights in which members of the broadcasting union had expressed no interest. Further, the sub-licensing scheme prevented commercial free television channels from acquiring live broadcasting rights when these rights had been transferred to a union member pay-TV operator.

The *European Broadcasting Union* case supports the conclusion that the joint purchasing of football rights will generally restrict competition, but that the article 81(3) exemption could apply if the foreclosure brought about by the joint-purchasing agreement is compensated by mechanisms enabling third parties to acquire rights on a similar footing.

#### Joint selling

The European Commission's investigations of the sale and acquisition of football rights have focused mainly on the joint selling of these rights by European and national football associations. The commission considers that joint selling restricts competition because it prevents price competition between clubs and limits output. The negative effects of joint selling are aggravated by the sale of rights on an exclusive basis and for a long period of time. In particular, if exclusive rights are acquired by a single buyer, the acquisition can result in the reinforcement of the market position held by dominant pay-TV companies, because they alone have the sufficient financial capacity to offer the high prices demanded for football rights. This prevents the entrance of new players in the market and ultimately reduces customer choice. The joint selling of rights to a single TV operator can also reduce the availability of alternative forms of distribution of these rights using new technologies (eg, broadcasting through mobile phones or via the internet) because the incumbent TV operator might not be interested in sub-licensing these rights to mobile phone operators or internet providers, or in developing these technologies itself.

The commission's position on joint sell-

ing of football rights is exemplified by its 2003 decision on the joint marketing of the Champions League rights by UEFA. The joint-selling arrangements for the sale of the rights were originally notified to the commission in 1999. The commission took the view that the arrangements proposed by UEFA would result in the rights being acquired in a bundle by a single media group per country on an exclusive basis, thereby restricting competition between pay-TV operators and hampering the development of new forms of distribution. Revised arrangements were notified to the commission and, in 2003, it finally exempted them under article 81(3) – subject to a number of conditions. These conditions included an obligation to:

- split the rights into different packages (the so-called gold, silver and bronze packages);

## The sale of broadcasting rights has become a major, if not the principal, source of revenue for Europe's top-flight clubs

- grant individual clubs the possibility of individually selling the rights that UEFA was unable to sell jointly;
- offer a specific package of rights for internet and mobile phone distribution;
- use a public and transparent tender procedure for the sale of the rights; and
- limit the duration of the rights to three years.

Under the approved arrangement clubs would also be allowed to sell live rights to free-TV broadcasters where there was no reasonable offer from a pay-TV operator.

The approach taken by the commission has become standard. In its more recent discussions with the English Football Association (the FA), the commission appeared

to push for more far-reaching measures. In December 2003 the FA had given a provisional undertaking to the commission that no single broadcaster would be able to buy all of the packages of live match rights from 2007 onwards. After consultation, the commission issued a decision in 2006, which will remain in force until 30 June 2013. It provides for more rights, including television, mobile phone and internet rights, to be made available. Rights must be sold in an open and competitive bidding process subject to scrutiny by an independent 'monitoring trustee'. Live television rights are to be sold in six small, balanced packages, and no one buyer may buy more than five. The decision also forbids conditional bidding to ensure that each package of rights will be sold to the highest stand-alone bidder, and that bids for one package cannot be made conditional on the acquisition of other packages.

#### Merger cases

The European Commission has also dealt with the media rights to football events in a number of mergers involving TV operators and platforms. In 2002, the merger between Sogecable and Vía Digital, the two Spanish satellite pay-TV platforms, was notified to Brussels. The commission accepted the request of the Spanish competition authorities to refer the analysis of the case to them. The transaction was ultimately approved by the Spanish authorities subject to a series of commitments, many of which related to the acquisition of premium content. The Spanish Tribunal for the Defence of Competition defined a relevant market for the acquisition of the rights to the live broadcast of football events that take place every year, such as La Liga and Copa del Rey games and the Champions League and UEFA cup games in which Spanish teams participate. Together Sogecable and Admira (a subsidiary of Telefónica and Vía Digital's controlling shareholder) held the majority of rights to La Liga and Copa del Rey games. The tribunal considered that the merger resulted in a foreclosure of the market for the acquisition of rights to the main Spanish competition and made the transaction subject to a series of conditions which included:

- an obligation on Sogecable to surrender its pre-emption, buy-out, extension and option rights over La Liga and Copa del Rey games;
- an obligation to limit the duration of the contracts for the acquisition of these rights to three years;
- an obligation not to exercise or purchase on an exclusive basis the rights for the broadcasting of La Liga and Copa del Rey games over mobile phones and the internet; and

- an obligation on Sogecable to guarantee the sub-licensing of the free TV and pay-per-view distribution of La Liga and Copa del Rey games to third parties, whenever it acquired these rights on an exclusive basis.

The duration of these conditions was fixed by the Spanish government at five years, and will expire at the end of 2007.

Football rights also played an important role in the European Commission's assessment of the *Newscorp/Telepiù* merger. The transaction involved the acquisition by media conglomerate Newscorp of Telepiù, an Italian pay-TV platform. Newscorp intended to merge Telepiù with Stream, the other Italian pay-TV platform, which at that time was a 50–50 joint venture between Newscorp and Telecom Italia. The merged entity would be controlled by Newscorp, and Telecom Italia would retain a minority shareholding below 19.9 per cent.

The commission cleared the transaction subject to a series of conditions, some of which related to the acquisition of rights for football events. Interestingly, one of the reasons why the commission decided to clear the merger was that both TV platforms had failed to be profitable and were unable to recover the high cost of acquiring premium content (mainly Hollywood films and football rights) through subscription fees.

In terms of football rights, the commission limited the duration of the exclusivity provisions in future agreements for the acquisition of premium football rights to two years – one year less than in the UEFA decision. With regard to ongoing exclusive contracts with Italian football clubs, the parties agreed to grant them a unilateral termination right. In relation to the parties' agreements for the Italian football championships, the Champions League, the UEFA Cup and the Coppa Italia tournament, the merged entity agreed to waive any right of exclusivity, holdback or similar protection rights with respect to the exploitation of these rights in platforms other than digital satellite transmission (eg, cable, digital terrestrial UMTS and internet). Finally, the combined platform agreed to sublicense, on an unbundled and non-exclusive basis, the distribution of premium content, including football, for distribution in platforms other than digital satellite, based on a determined price scheme.

Both the *Sogecable/Via Digital* and *Newscorp/Telepiù* cases reflect the importance that competition authorities place on football rights when assessing increases in market power brought about by a merger. As with the joint-selling cases, remedies include measures aimed at reducing the scope and duration of football rights to prevent foreclosure.

**GERMANY**

In the case of the Bundesliga, the European Commission adopted the same general approach as in its investigation against joint-selling arrangements for UEFA's Champions League with regard to joint marketing of media rights. According to a preliminary assessment by the commission, the joint marketing agreement set up by the entity that conducts the operational business of the German League Association prevented clubs from dealing independently with television and radio operators as well as sports rights intermediaries. The joint marketing scheme could have an adverse effect on the relevant downstream television and new media markets. Possible efficiencies of joint

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selling, such as facilitating the branding of a league product and lowering transaction costs, would be outweighed by the possible restrictive effects.

The commission's legal investigation of the joint marketing of football rights was preceded by a prohibition decision by the German competition authority in 1994. The decision was directed against the Deutscher Fussball Bund (DFB), hitherto in charge of the joint television rights marketing for Bundesliga clubs. The DFB challenged the decision, but the German Supreme Court upheld it in 1997. In its ruling, the court held that the decision on joint rights marketing deprived football clubs of their right to negotiate licences for broadcasts of home matches individually and thereby appreciably restricted competition in the relevant market. The court held that there was an appreciable

restriction on competition as the DFB held the rights for two of four European tournaments. The joint selling procedure was not considered to generate sufficient consumer benefit to outweigh the disadvantages and so did not benefit from an exemption.

At the end of its investigation into the Bundesliga, the commission adopted an article 9 decision under EC Regulation 1/2003, declaring a set of commitments offered by the German League Association as binding. The media rights are now segmented into separate rights packages, giving broadcasters the opportunity to compete for them. New media rights were also unbundled and holdbacks significantly reduced. The commitments can be summarised as follows:

- The league rights are unbundled into nine different packages and offered in a transparent, non-discriminatory procedure. The duration of agreements with agents or sub-licence holders will not exceed three seasons.
- Live broadcasts of the top two divisions of the league are offered in two packages for free-TV and pay-TV stations.
- A third package confers rights for live broadcasts of at least two top division matches and deferred-highlight first coverage on free television. A fourth package covers live games of the second division and the rights to deferred-highlight first coverage on free television. Second and third exploitation rights are offered in a fifth package.
- Package six contains internet rights. A seventh package comprises deferred-highlights coverage, while package eight concerns rights for live or near-live transmission on mobile phones. Package nine contains mobile-TV rights to deferred broadcasts of excerpts of first or second division matches.
- Unused rights may be exploited by the clubs. The association also remains entitled to parallel, non-exclusive marketing. This applies when the association has failed to sell certain rights covered by the joint selling procedure.

The rules pertaining to television and the internet became effective on 1 July 2006. By taking such a decision, the commission not only aims to provide a transparent and non-discriminatory marketing procedure, but also seeks to guarantee that content for television, radio and new media operators will be made available to the market via different infrastructures, thereby promoting technical innovation (eg, broadband penetration) and dampening tendencies toward concentration in the traditional media markets.

Despite the commission's good intentions, though, the implementation of rules

based on different distribution mechanisms has encountered a number of difficulties. Technical convergence in the media, especially the introduction of IPTV over DSL (television distributed via the internet through the local telephone network), came sooner than expected and deprived some of the 'pay value' of the pay-TV rights granted for the traditional (satellite, cable, terrestrial) TV distribution mechanisms.

Increasingly, consumers are aware of the possibility of watching football games on their LCD screens via the internet rather than through satellite, cable or terrestrial pay TV. The internet could become another form of pay TV for premium content, and consumer demand could easily switch from pay TV to internet-based consumption – severely impairing further penetration of traditional pay TV on the relevant market.

Furthermore, because of unclear tender provisions, the blurring distinction between pay TV and IPTV over DSL distribution created significant confusion and almost resulted in litigation between the various licensees.

Joint buying of sports rights has also been a recurrent topic in Germany for more than 10 years. The problem first emerged when two German public-service television stations, ARD and ZDF, set up SportA, a joint buying consortium. The German Cartel Office cleared the merger case in 1996, but reserved the right to intervene if the future development of the sports rights market created competitive concerns.

That decision was taken against the background of a strong and competitive commercial television market in the mid-1990s, with participants competing for exclusive football rights. This created a disproportionate increase in sports rights prices compared to rather moderate increases in licence fees for public service broadcasters. As a result, public broadcasters were excluded from the bidding game.

The initial imbalance of power between public-service and commercial broadcasters has changed, however, because of an ailing advertising market. Commercial free television relies on the advertising market much more than public-service broadcasters who receive licence money, or pay-TV operators who have subscription revenues. Despite these changes in the audio-visual landscape, though, the German Cartel Office has not taken action against SportA to date. However, commercial broadcasters constantly call on the authority to eradicate anti-competitive restraints arising from the joint buying procedure. SportA's acquisition of the rights to the 2006 World Cup aroused particular concern because SportA had agreed to pay an additional €50 million for the 2002 World Cup if it subsequently managed to buy the rights for

the 2006 World Cup. Commercial TV operators criticised the competitive advantage of public service television stations ARD and ZDF which arose from such a contractual agreement. It should be noted that, unlike the European Broadcasting Union, SportA has failed to set up a sub-licensing scheme

In late February 2007, the European Commission cleared the acquisition of Germany's second largest broadcasting group, ProSiebenSat.1 Media, by private equity groups Kohlberg Kravis Roberts and Permira. Both investors already control Dutch television group SBS Broadcasting, which is active in the Nordic countries, the Netherlands and Belgium. Permira also controls All3Media, a UK television production company and distributor of television rights. The commis-

## The commission's approach to encouraging competition in the sale of football rights may need to adapt quickly

sion did not uphold concerns about SBS and ProSiebenSat.1's increased joint buying power in the rights markets for sports events and feature films because both entities were active only in distinct regional markets. ProSiebenSat.1 operates five free television channels in Germany, four of which are financed by advertising. SBS is active in free-TV and pay-TV in non-German-speaking countries.

The commission held that rights owners appeared to sell their rights to television broadcasters on a country-by-country basis, rather than at a pan-European level. Such a strategy allowed owners to fully exploit their valuable rights. The joint bidding potential of ProSiebenSat.1 and SBS is unlikely therefore to alter the rights owners' established pattern of sales.

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A number of conclusions can be drawn from the recent scrutiny of the sale of football rights in Europe.

### SPIRALLING PRICES

The approach of the European Commission ever since its UEFA decision has failed to stop the increase in the price of broadcasting rights. Annual broadcasting revenue in the top-flight domestic football leagues in England, France, Germany and Italy has increased from €0.5 billion in 1996–1997 to €2.3 billion in 2004–2005. In November 2006, Real Madrid agreed a record €1.1 billion deal with Mediapro for the rights to televise their matches between the 2006/7 and the 2012/13 seasons.

### UNEVEN PLAYING FIELD

The increase in broadcast revenues has not been spread evenly across Europe. The *Bundesliga* decision, which ring-fenced deferred highlights on free-TV, has meant that German clubs receive less revenue from broadcasting than some of their European counterparts. This creates an uneven playing field across European clubs in terms of broadcasting revenue. While broadcasting is only one revenue stream for clubs, it is an increasingly important one. The Bundesliga packages have had a crucial impact on German clubs. Without the lucrative broadcasting revenue stream, German clubs will find it harder to compete for the best players. Only German fans can say whether the ability to watch highlights of league games on free-to-air is worth the drop in funds to the clubs.

### THE SCORE AT HALF-TIME: TECHNOLOGY 1, COMMISSION 0

The European Commission's approach to encouraging competition in the sale of football rights may need to adapt quickly to reflect rapid advances in media technology and user patterns. The solution proposed by the commission in the *UEFA* and *Bundesliga* cases was based on technology and patterns of usage in existence when the main threat to competition came from powerful satellite and cable pay-TV networks purchasing all premium rights and becoming dominant. As a result, the commission proposed a solution that created separate packages for television and the internet. This solution appears increasingly outdated as television and the internet converge. Although it is clear from the commission's sector inquiry into the availability of sports content for 3G mobile devices that the viewer's experience of football on handheld devices is fundamentally different from the TV experience, the same cannot be said of IPTV. There is increasing evidence that IPTV is becoming a substitute for television consumption over traditional distribution means such as satellite, cable and terrestrial. Watching football via the internet could emerge as a substitute for pay-TV viewing or as another form of pay-TV distribution.