

# EU Competition Policy for the Sports Broadcasting Industry

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**Abstract:** In the last twenty years, there has been a tremendous increase in salaries and transfer fees of professional sportsmen. In addition, the values of TV broadcasting rights for sporting events have risen sharply and many sports teams have developed in full-fledged businesses or are even traded on the stock market. This means that sport has developed from pure entertainment to entertainment industry. These changes in the world of sports raise many new and complex issues for the application of competition law to sports. In the sports broadcasting industry, for instance, the argument for the central marketing of TV rights is that it allows a governing body to redistribute income in a fair and balanced way, helping to maintain healthy competition between clubs. However, the argument against central marketing is that it prevents, restricts or distorts competition. This paper presents an overview of the aspects of competition law in the collective selling and buying of exclusive TV rights. Particular focus is on the role of the European Commission to protect sports from anti-competitive pressures threatening the social and cultural function of sport. Two cases relating to TV sports rights further clarify the dangers from the combination of joint selling with exclusive rights contracts. Finally, some reasonable alternatives to the collective selling and buying of TV rights are presented.

## 1. Introduction

In the last two decades, there has been a tremendous shift from sport being pure entertainment to the sports sector becoming an entertainment industry. The increase in salaries and transfer fees of professional sportsmen, the increase in ticket prices, and the rise in the value of broadcasting rights as well as the increase in sponsorship and advertising costs are some of the most striking examples

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of such growth.<sup>3</sup> For example, the value of television rights for the Olympic Games jumped from 287 million dollars for the Los Angeles games in 1984 to 907 million dollars for the Atlanta games in 1996 and 1.4 billion dollars for the Sydney games in 2000. A similar explosion of television rights has been experienced in Europe for soccer. For instance, the value of television rights for the Italian League has increased from 29 billion liras for the period 1984-1987, to 571 billion liras for the period 1993-1996, and to 1.278 billion liras for the period 1996-1999. Another example is that in 1992 broadcasters paid 434 million euro for the TV rights of the English Premier League for five seasons, whereas in 2000 they paid 2.6 billion euro for only three seasons. These examples obviously show that sport has become big business.<sup>4</sup>

This breathtaking growth results principally from a liberalization of the access for private operators to create TV channels – a challenge that many incumbent telecommunication operators took up. Also, the technological development of TV with the appearance of cable and satellite distribution of TV signals, digitalization, the opening up of new possibilities to create pay-TV channels, and the Internet have contributed to the growth. The growth in the number of subscription channels and package subscriptions, the increased competition within television, and the pressures from advertising and sponsorship have all resulted in a search for more attractive programs, notably for live broadcasts of high-profile sports events, such as the Olympic Games, important football matches, and Formula 1 motor racing.

The tremendous growth in economic activities connected with sport has resulted in a trend towards an increasing number of sports related cases before the courts. The importance of sport in competition law has also become evident within the EU. For many years there have been disputes between sports associations and the European Commission concerning different sports and divergent opinions in several aspects, such as the sale of tickets, the broadcasting rights for

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<sup>3</sup> For example, in the Premier League in the United Kingdom the average ticket price has increased by over 300% during the last ten years. According to Quirk and Fort (1992), average real baseball and professional basketball salaries in the US increased nine-fold between 1960 and 1991 and real football salaries increased by nearly 400% over the same period.

<sup>4</sup> The European Commission has estimated that trade in sports-related activities now constitutes 3% of world trade and it has become particularly big in terms of the sale of broadcasting rights by individual teams or leagues. This strong growth has been accompanied by a transformation in the structure and behavior of large professional clubs and their federations; they are more and more managed as large industrial organizations. For example, in 1999, 18 football clubs in the UK were quoted on the stock exchange, with a total capital value on 30 June 1999 of around 1.6 billion euro.

championships, the monopoly of federations, the ownership of clubs, transfer rules, the conditions for qualification for competitions, etc.

This paper focuses on disputes concerning broadcasting rights, because the many anti-trust cases in the sports sector show the new importance of sports rights for the whole of the media sector. The next section delves further into the sports sector involving competition issues and section 3 deals with the special characteristics of sport to be taken into account when analyzing such sports cases. Section 4 focuses on EU competition policy for the sports broadcasting industry, whereas section 5 gives a detailed overview of the sports broadcasting sector in the UK. Sections 6, 7 and 8 deal with very specific anti-competitive concerns in sports cases. Section 9 concentrates on the definition of the relevant market. Two practical sports cases are analyzed in detail in section 10 and 11. Section 12 presents some valuable alternatives to deal with anti-competitive concerns in the sports broadcasting sector and, finally, section 13 recalls the main findings.

## **2. The importance of sport in competition law**

Nearly a third of all current media competition cases, dealt with under anti-trust, i.e. agreements or abuse of dominant positions, concern now sports rights, and the selling and buying of those rights. These cases demonstrate that the agenda of an effective and modern media policy and anti-trust action is now largely dominated by rights to content issues.

More specifically, in recent years, arrangements for the central marketing of TV rights, i.e. the sale of TV broadcasting rights to sporting events for a fixed period by the organizer of a competition rather than the individual participating clubs, have attracted increasing attention from many competition authorities. For example, in 2001, ITV paid about 300 million euro for the right for three years to broadcast highlights of matches played in the English football Premier League. The collective exploitation of sports broadcasting rights is not, of itself, a dominantly negative factor in determining legality under competition law. However, the most important reason for this regulatory interest is that these arrangements often involve exclusivity, where certain rights are allocated to only one broadcaster. The existing case law clarifies that most, if not all, objections were raised against the additional conditions of such practices, such as the excessive duration of the rights packages and, in

combination with the extensive exclusivity, its blocking effect on the development of new broadcasting services.

### **3. The special character of the sports sector**

Not surprisingly, some sports federations call for the exemption of the sports sector from the fundamental freedoms and competition rules. Even the European Court of Justice had to deal with several cases concerning the relationship between professional sport and competition law and policy within the EU.<sup>5</sup>

Indeed, when dealing with competition cases in the sports sector the competition authorities must take into account the special character of sport in at least three respects. First, the rules for the organization of sporting competitions are very different from those for competition between industrial firms. For example, contrary to industry, the aim of a sports game is not to eliminate the weaker competitors. The members of a sports league clearly require the participation of their competitors to make the competition both possible and attractive for the audience. Another difference between the manner in which competition works in sport and in other economic sectors, is the fact that in sport it is essential that no clubs participating in a championship should drop out prematurely, for instance because of business difficulties, as this would distort the final results. Rules are then necessary to ensure a minimum level of solidarity and equality between the strongest and the weakest teams in a championship and to guarantee the uncertainty of the results. According to this view, the combination of competitive and cooperative arrangements distinguishes members of a sports league from the members of an industrial cartel.

Second, sport is not only an economic activity but it is also a social and cultural activity practiced by millions of amateurs. Practicing sports improves health, stimulates recreation, and brings people together. The European Council's conference in Nice in December 2000 recognized that the social and cultural dimensions of sport should feature more prominently in national and community policies. A part of these social aspects of sport is financed by resources coming from the strongest clubs,

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<sup>5</sup> See cases C-415/93 *Union Royale Belge des Sociétés de Football Association (ASBL) v. Bosman* [1995] E.C.R. I-4921, C-176/96 *Lehtonen* [2000] E.C.R. I-2681, and C 51/96 & 191/97 *Deliège* [2000] E.C.R. I-2549.

television rights, and sponsoring. Thus some form of redistribution of resources from the top to the bottom of the sporting pyramid is to be welcomed.

Finally, sports federations have a role of regulation in the production of rules and the organization of competitions as well as an involvement in economic activities, such as the selling of television rights and tickets, licensing of their logos, etc.

#### **4. The role of the European Commission in sports cases**

The huge sums of money now available within the sporting industry imply the recognition of sport as an economic activity and thus justify the application of the competition rules to the sporting industry. Therefore, in so far as the practice of sport constitutes an economic activity within the meaning of Article 2 of the EC Treaty, it comes under competition law.<sup>6</sup> It follows that sporting activities as well as the rules set by sports associations are inside the scope of the EC Treaty. Under Article 81(1) EC, "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market" are prohibited as incompatible with the common market.<sup>7</sup>

On the other hand, Article 81(3) EC implies that in order to fall outside the scope of application of EC law a sporting rule must concern a question of sporting interest only, having nothing to do with economic activity.<sup>8,9</sup> For example, genuine sports rules applied in an objective, transparent and non-

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<sup>6</sup> "The Community shall have as its task [...] to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

<sup>7</sup> An indication that sport clubs are undertakings is their financial resources. Clubs increasingly finance themselves from their market activities. Some of them are even quoted on the stock exchange in the form of public limited companies. For more on the applicability of Community law to sports, see Egger and Stix-Hackl (2002).

<sup>8</sup> For example, a restriction on the nationality of those entitled to play in national representative teams is purely a sporting rule having nothing to do with economic activity, whereas a restriction on the nationality of those entitled to play in a club side is not. Jean-François Pons, the Deputy Director General of the DG Competition, expects the following practices to fall outside the scope of Article 81(1) EC: the rules of the game, i.e. rules that are necessary for the organization of a sport or its competitions, nationality clauses in competitions between national teams, national quotas governing the number of teams or individuals per country participating in European and international competition, rules for the selection of individuals on the basis of objective and non-discriminatory criteria, rules setting fixed periods for the transfer of

discriminatory manner are, in principle, not subjected to European competition rules. The European Commission therefore decides on a case-by-case basis what must be regarded as a rule inherent to sport and whether Article 81 EC is applicable or not.<sup>10</sup>

The European Commission and the national competition authorities therefore attempt to strike a balance between the obvious tension that exists between sport and its governing rules on the one hand, and the competition provisions in the EC Treaty and their national equivalents on the other hand. Despite the considerable time and effort devoted to sporting issues by the European Commission since the Bosman case<sup>11</sup>, the Commission stresses that it is the role of the member states and their national competition authorities, where possible, to take responsibility for sporting matters at national level and to deal with other related matters such as collective selling of sports broadcasting rights themselves. This is in consistence with the Commission's general desire to decentralize the competition process in the EU and to concentrate on high-profile cartel cases.<sup>12</sup>

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players, provided that they ensure some balance in the general structure of the relevant sports, and rules needed to ensure uncertainty as to results, where less restrictive methods are not available.

<sup>9</sup> In principle, the sporting activity itself has nothing to do with an economic activity and fulfils a purely social, integrating and cultural role. For example, in the Final Act of the conference at which the text of the Treaty of Amsterdam was decided, Declaration 29 on sport states: "The Conference emphasizes the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport". These sentiments are echoed in the Helsinki Report on Sport prepared by the Commission for the European Council on December 1, 1999. See <http://europa.eu.int/eur-lex/en/treaties/selected/livre491.html> and [http://europa.eu.int/comm/sport/doc/key/a\\_doc\\_en.html](http://europa.eu.int/comm/sport/doc/key/a_doc_en.html).

<sup>10</sup> Interestingly, in the view of the Court of Arbitration for Sport, even the traditionally accepted rules of sporting interest only such as a restriction imposed on the number of players in a team, or the size or shape of the ball used could have an economic effect on those manufacturing larger-sized footballs or on those who wish to field twelve in a football team in order to increase the chance of that team's success. See Usher (2002).

<sup>11</sup> Marc Bosman, a Belgian football player, was the main character of this case. He wanted to leave his former club after his contract expired and transfer to a new team. His former club demanded a transfer fee, which the other team refused to accept. Bosman decided to take his case to court, where it after many years, when Bosman's career as a football player was already over, was decided that football players also are covered under the freedom of movement in Article 39 EC. Since he was under no contract he was free to go to any team he wanted without any transfer fee. The judgment in 1995 of the European Court of Justice in this case, which in fact concerned transfer rules of footballers, has had important repercussions on that sport in Europe. More significantly, it marked, in the eyes of the sporting and political world as well as in those of the general public, the intrusion of Community rules into sport. The judgment contributed also to the significant increase in the mobility of athletes as well as to the spectacular growth of the number of the transfers and salary levels. See case C-415/93 Union Royale Belge des Sociétés de Football Association (ASBL) v. Bosman [1995] E.C.R. I-4921.

<sup>12</sup> Viviane Reding, the Commissioner responsible for culture, education and sport, has indicated that there are a number of possibilities for the future regulation of sport, moving towards the next intergovernmental conference in 2004. These suggestions are a general exemption for sport, the harmonization of sports systems in Europe, or the encouraging of action by sporting organizations and the reinforcement of the international dimension. The Commissioner favors the latter

However, in order for a decentralized approach to be effective, the national rules of the member states which largely mirror EU provisions should be applied on a consistent basis and this system should be effectively guided at the EU level.

## 5. The sports broadcasting sector in the United Kingdom

Before going into depth on competition rules for the sports broadcasting sector, it is instructive to have a closer look at the sports broadcasting industry in the UK. In general, broadcast rights of sporting events are owned by the sports governing body, the sports rights trader or the club itself.<sup>13</sup> These owners of broadcasting rights to sports events sell the rights to broadcasters or to sports rights agencies. The broadcasters and/or advertising agencies sell advertising time or sponsorship to companies that want exposure on radio and television during sports programs. The recent trend has been for clubs to cede their rights to the national sporting body, which sells the broadcast rights collectively.

Table 1 shows the 1999 value of sports broadcasting rights in the UK. The data indicate that the broadcasters' payments for sports rights are heavily skewed in favor of live soccer rights. This dominant role of soccer rights in general and of Premier League rights in particular is illustrated by the fact that soccer rights in 1997 and 1998 accounted for over three quarters of the annual expenditure on sports rights of British Sky Broadcasting (BSkyB).

The values of the sports rights for live league matches in the first division of the UK are displayed in Table 2.<sup>14</sup> The revenues from the broadcast rights remained low until 1992, when BSkyB entered the market and won a substantial package of live rights for about £38 million per year. When the rights were re-auctioned for the period 1997-2001, the annual payment went up fourfold.

In the new audio-visual landscape created by the digital revolution, the supply of programs has become increasingly important as the number of channels has grown. Broadcasters know that once

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approach, believing that sport should be organized in accordance with the principle of subsidiarity, i.e. in accordance with national and regional traditions and practices.

<sup>13</sup> For example, Manchester United has its own channel MUTV, which broadcasts news, highlights and other facts about the team. See [http://sportsillustrated.cnn.com/soccer/world/news/1998/08/10/manu\\_tv](http://sportsillustrated.cnn.com/soccer/world/news/1998/08/10/manu_tv).

<sup>14</sup> In the UK, live broadcasts of sporting events began in 1983. The two broadcasters BBC and ITV acted collusively and the fact that there was no formal investigation of the apparent duopoly illustrated the lack of interest shown by competition authorities in televised sport.

viewers have switched on to one channel they are less likely to switch to another. The rights for certain very popular sports, such as football matches and Formula 1 grand prix, or the coverage of the Olympic Games have been particularly sought after. These sports rights were therefore the subjects of highly competitive bidding wars between channels, which resulted in a price explosion, from which the sporting federations and the clubs have profited.

Table 1: The 1999 value of UK live sports rights (Cave and Crandall, 2001)

Sport	Competition	Broadcasters	Annual charge (£m)
Cricket	Domestic Tests	BSkyB, C4	26
Motor sport	Formula 1	ITV	12
Rugby League	Super League	BSkyB	11
Rugby Union	England Internationals	BSkyB	18
Snooker	Embassy World Championship	BBC	10
Soccer	Premier League	BSkyB	167
Soccer	Champions League	On Digital, ITV	87
Tennis	Wimbledon Championships	BBC	7

Table 2: The costs of the rights to live league matches in the UK (Cave and Crandall, 2001)

	1983	1985	1986	1988	1992	1997
Length of contract (years)	2	0.5	2	4	5	4
Broadcaster	BBC, ITV	BBC	BBC, ITV	ITV	BSkyB	BSkyB
Rights fee (£m)	5.2	1.3	6.2	44	191.5	670
Annual rights fee (£m)	2.6	2.6	3.1	11	38.3	167.5
Number of matches per season	10	6	14	18	60	60
Fees per match (£m)	0.26	0.43	0.22	0.61	0.64	2.79

## 6. Broadcasting of sports events

Sports coverage on television exhibits certain particular characteristics that define sports rights as a separate product. First, the broadcasting of sports is an ephemeral product. This means that

audiences are only interested if the sporting event is broadcast live. Second, it is difficult to find a suitable substitute because the viewer who wants to see a given event is unlikely to be satisfied with coverage of another sport. Finally, the strong concentration of rights in the hands of certain sports federations reduces the number of rights available, and these are reduced still further by an increasing number of contracts being concluded on an exclusive basis for a long duration, or covering a large number of events. This strengthens the market position of the most important broadcasters because they are the only operators who are able to bid for all the TV rights sold in large packages. Here, one can find all the ingredients typical for anti-competitive effects impeding the access to the TV markets and the development of new media markets.

In order to deal with these anti-competitive concerns, in 1997, Directive 97/36/EC of the European Parliament and Council amended the 1989 "Television without Frontiers" Directive to enable individual member states to "ensure wide access by the public to television coverage of national or non-national events of major importance for society".<sup>15</sup> Member states were invited to draw up a list of such events according to a series of general criteria set by the European Commission, wishing to protect these specific events from migrating to subscription television. For example, in the UK the rights in question cover events such as the Olympic Games, the Soccer World Cup, and the finals of soccer, rugby and tennis competitions. The holders of rights to such events must first of all offer them to free-to-air broadcasters with universal coverage on fair and reasonable terms. Once this requirement has been satisfied, additional rights may be sold to pay broadcasters. According to Article 3a(1) of the amendment,<sup>16</sup> the member state concerned may apply measures taken in this context only to broadcasters under its jurisdiction and Article 3a(3)<sup>17</sup> requires other member states to take steps to ensure that such measures are not circumvented by broadcasters under their

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<sup>15</sup> The "Television without Frontiers" directive (89/552/EEC), adopted on 3 October 1989 by the Council and amended on 30 June 1997 by the European Parliament and the Council Directive 97/36/EC, establishes the legal frame of reference for the free movement of television broadcasting services in the EU in order to promote the development of a European market in broadcasting and related activities, such as television advertising and the production of audiovisual programs. See [http://europa.eu.int/comm/avpolicy/regul/regul\\_en.htm](http://europa.eu.int/comm/avpolicy/regul/regul_en.htm).

<sup>16</sup> "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 [...]."

<sup>17</sup> "Member States shall ensure [...] within the framework of their legislation that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters [...] in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State [...]."

jurisdiction. So far, only five member states, namely Austria, Denmark, Germany, Italy, and the UK, have ever given official notification of measures taken under Article 3a(1) of the 1997 Directive. A few others, such as Belgium, the Netherlands, and France, have indicated that they intend to give notification in the near future.

## **7. Collectivity and exclusivity in sports broadcasting**

There are two particular issues related to the marketing of broadcasting rights: the collective selling and purchasing of broadcasting rights and the exclusivity granted in respect of those rights. The broadcasting cases the European Commission is dealing with are characterized by a combination of joint selling with exclusive rights contracts.

### **7.1. Collectivity**

One of the crucial issues that the European Commission is keen to have resolved at a national level is the question of the collective licensing of broadcasting rights for sporting events. National leagues tend to have been assigned exclusive broadcasting rights by their members, the rationale being that collective selling increases the bargaining power of the individual members, in particular, for the benefit of smaller and more impoverished clubs. Traditionally, the association would sell all media rights in one large exclusive contract and to a single broadcaster in each territory.

The selling of TV rights often provides the major source of income and this revenue tends to be maximized through the ability to grant exclusivity in all matches in one particular league or competition. For example, the UEFA Champions League earns more than 530 million euro each year from the sale of TV rights. Of this, about 66% goes to the participating clubs, 15% is redistributed between the clubs through a solidarity mechanism, 13% is taken up by the costs of organizing the championship and 6% is retained by UEFA.<sup>18</sup>

However, collective selling gives a high degree of market power to the collective seller and restricts competition in three ways. First, it is a price fixing mechanism, leading to vastly inflated prices because of the "winner takes all" nature of the collective sales process; the winning operator has no

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<sup>18</sup> UEFA argues that the income it has derived from the marketing of the Champions League enabled it to pay for financial and technical assistance to poorer countries in Eastern Europe through its East European Assistance Bureau.

competition once the rights are secured. Next, it limits the availability of rights to football events. Finally, it strengthens the market position of the most important broadcasters because they are the only operators who are able to bid for all the rights in a package. In short, in cases where Article 81(1) EC applies, joint selling arrangements are caught by the prohibition.

However, the Commission also has to see whether these agreements could be exempted under Article 81(3) EC.<sup>19</sup> This would be possible when there is a proportionate balance between the restrictions created by the joint selling arrangement and its consumer benefits. More specifically, a joint selling arrangement has the potential of improving production and distribution to the advantage for sports clubs, broadcasters and viewers, since it leads to the creation of a single point of sale for the acquisition of a packaged league media product. The creation of league media products seems to be the best way to offer many viewers the opportunity to follow the development of the competition as such. In general, the Commission therefore considers joint selling to be an efficient way in doing so.

The question of whether TV rights belong to the clubs or to the sporting federations cannot be answered by competition law. This issue usually falls to each member state's legislation governing the ownership of property and certain national competition authorities have already reached their own conclusions. Their approach seems much stricter than that of the Commission as many of them seem to prefer individual sale by the clubs of TV rights. The most recent example is from the Netherlands, where the Dutch competition authority in November 2002 prohibited the joint selling of the TV rights of the Dutch Eredivisie. The decision will take its effect as of 1 August 2003 after which date the clubs must sell the TV rights individually.

This does not mean that the Commission doesn't intervene in cases where a joint selling arrangement unduly restricts clubs in exploiting their club related rights or when the joint selling arrangement creates unused rights. The Commission's intervention in the selling of TV rights of sports events is also driven by the increasing role these rights play in the development of the TV markets. The unprecedented growth in TV channels and the technological development of TV towards digitalization, pay-TV services, and new services such as Internet and UMTS, make it necessary for the Commission to intervene and defend the viewers' and subscribers' interests. The

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<sup>19</sup> "The provisions of paragraph 1 [of Article 81 EC] may, however, be declared inapplicable in the case of any agreement [...], any decision [...], any concerted practice [...] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit [...]."

Commission will intervene when the marketing by the national leagues of the national championships has an effect on trade between member states. For example, collective selling of broadcasting rights reduces the number of individual rights available on the market for broadcasters. This practice could affect the operation of the market by allowing rights to become available only periodically, and by linking the products in global offers. In this context, it is important to consider how far the collective selling of rights by a sports association, when combined with a balanced distribution of the resulting revenue, can be seen as justified to promote sporting activities within the population, as well as providing for interesting sporting competitions.

Another very important issue related to the marketing of broadcasting rights is the collective purchasing of broadcasting rights. Broadcasters sometimes join together to acquire the right to broadcast sports events. Such collective purchasing arrangements will normally not pose any competition problems when a group of operators join forces, which individually would not have the resources to acquire the rights. In such a situation, collective purchasing could even prove pro-competitive. In other situations it is advisable to examine the specific circumstances of the case. In the first place, the restrictive character of a purchasing agreement depends on the position occupied on the market by the parties to the agreement; the stronger position they occupy, the more appreciable any possible anti-competitive effect. Next, the duration of the contract and the scope of the acquired rights must also be examined. An example of a joint buying arrangement raising competition concerns relates to Audiovisual Sport in Spain. It is a joint venture between Telefónica and Sogecable, which brought together the two most powerful competitors for the acquisition of all football TV rights in Spain. The interim intervention of the European Commission in 2000 obliged the parties to sub-license the pay-TV rights to all interested broadcasters. A significant reduction of the consumer prices for pay-per-view was recorded following this intervention.

## ***7.2. Exclusivity***

A second important issue related to the marketing of broadcasting rights is exclusivity. For sports organizers, the sale of exclusive rights is a way of ensuring the maximum short-term profitability of the event organized as the price paid by one broadcaster is generally higher than the sum of the

amounts that would be paid by several broadcasters for non-exclusive rights.<sup>20</sup> Exclusivity allows a single operator to determine the broadcast of the entire event. The broadcaster can either use some of the rights and withdraw the remainder from the market or sub-license some of the rights to other broadcasters. In many cases exclusive contracts for a single sports event or for one season in a given championship would not normally pose any competition problem.<sup>21</sup>

However, exclusivity of a longer duration and for a wider range of rights can restrict competition, as it is likely to lead to market foreclosure.<sup>22</sup> This is particularly the case if the broadcaster is in a dominant position. In such a situation often not all rights are exploited. For example, nearly 400 games are played each season in the English Premier League, whereas only 100 games are broadcast live. The remaining games are only shown as highlights, if at all. This clearly shows that a limitation of output is to the detriment of the consumer since it immediately limits his or her choice in sport-related services and broadcasts.

Exclusivity can also hamper actual or potential competition between broadcasters. For instance, the joint sale of free-TV and pay-TV rights, on an exclusive basis to a single broadcaster in each country, distorts competition. Since the winner takes all, broadcasters compete fiercely for these rights. This pushes prices up to a level that only the largest broadcasters can afford. This may further promote media concentration and reduce competition by making it difficult for broadcasters to establish or further develop themselves. For example, in the Screensport case, it was the scope of the exclusivity that created a competition problem.<sup>23</sup> Sky Television concluded an exclusive agreement with a consortium of European Broadcasting Union (EBU) members. On an exclusive basis, EBU members provided to Eurosport programs produced or acquired by EBU. Screensport, a competitor of Eurosport, challenged the agreement. The Commission took the view that Eurosport had a competitive advantage over Screensport since it had unlimited access to all programs to which EBU had exclusive rights whilst Screensport could only acquire limited access to those programs through

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<sup>20</sup> With this in mind, it is interesting to remember that at the end of 1999 Commissioner Viviane Reding proposed that the Commission might be prepared to waive the applicability of competition rules to exclusive football broadcasting deals if the greater level of revenues from exploitation of the rights were directed towards training and education for the benefit of young players.

<sup>21</sup> Roughly speaking, an exclusivity contract with duration of up to three years does not seem to create serious problems.

<sup>22</sup> In line with the general principles and guidelines on vertical restraints, the European Commission will not normally accept exclusivity periods exceeding 5 years.

<sup>23</sup> See Commission Decision of 19/2/91 OJ L63 9.3.91 p.32.

sub-licenses and for deferred transmission. The Commission refused to grant an exemption because the main effect of the agreement was to create a disproportionate distortion of competition in the market in question.

However, this example does not imply that contracts of long duration are never justified. Such is the case when a new operator requires a contract to ensure successful entry into the television market or when an operator wants to develop a new technology that requires heavy investments. For example, in the 1998 case of Audiovisual Sport the Commission informed the parties that it considered a three-year period of exclusivity for the pay-per-view rights to Spanish football in Spain to be acceptable, because it involved the introduction of new technology by the broadcaster and was related to the level of risk involved.<sup>24</sup>

When exclusivity is likely to lead to the foreclosure of access to the television market, remedies can be envisaged. This involves limiting the damage to third parties' access to this market. For example, faced with the entry of the Murdoch group into the Italian pay-TV market, which had stated its intention to purchase all the broadcast rights for premiere Italian club football, the Italian authorities limited the amount of pay-TV rights for Italian football matches that could be held by the same operator to 60% of the total. Another possible remedy could have been to require broadcasters to share the rights they have obtained with third parties, in order to reduce the anti-competitive effect (see section 8.2).

A final danger of exclusivity is the preferential treatment of one set of rights at the expense of another. An example is the reluctance of sports associations in granting Internet and UMTS-rights because broadcasters fear that the Internet will undermine the value of their TV rights. For example, the European Commission has started an investigation into the policy of the International Olympic Committee (IOC) regarding the non-exploitation of new media rights.<sup>25</sup> The Commission does not share this concern because it considers these services to be complementary rather than substitutable. Viewers should be given a free choice in how they want to follow sports events.

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<sup>24</sup> The parties initially wanted the exclusivity to cover a period of up to 11 years, but this would have foreclosed the market for too long a period.

<sup>25</sup> In this context, the IOC marketing chairman Dick Pound says: "We are not going to replace television with a medium [such as the Internet, wireless technology and other electronic sports media] that has no power and economic model". See <http://www.newsfactor.com/perl/story/11304.html>.

## **8. Other issues of competition law**

Two other very important competition issues the European Commission is often dealing with include automatic or preferential renewal clauses and sub-licensing arrangements.

### ***8.1. Automatic renewals and preferential renewal clauses***

Broadcasting agreements often contain provisions about an automatic renewal of the contract after the expiry date. The European Commission considers such a clause to be anti-competitive. For example, in the Premier League and BSkyB case (see section 11), BSkyB's right to match the financial terms of the highest bid from any third party when renewing the agreement is not acceptable.

In the Sport 7 case, a preferential renewal clause was also held to be anti-competitive. The Commission considered that the granting by the Dutch football association of an exclusive license to a new broadcaster, Sport 7, for the duration of seven years was caught by Article 81(1) EC and could not be exempted as it eliminated competition for the rights for too long a period. In addition, the re-negotiation process foreseen at the end of the contract gave Sport 7 an advantage because it had the right to match the bid of its competitors. These so-called English clauses distort competition and make a reallocation of the rights at the expiry of the exclusive contract nearly impossible.

### ***8.2. Sub-licensing arrangements***

When exclusivity leads to foreclosure of access to TV rights, remedies can be envisaged to limit the damage caused to third parties' market access. A sub-licensing system may be a possible remedy. For example, the interim intervention of the European Commission in 2000 in the joint buying arrangement between Telefónica and Sogecable obliged the parties to sub-license the pay-TV rights to all interested broadcasters. The result was a drastic reduction in the consumer prices for pay-per-view. However, the mere establishment of a sub-licensing system is not in itself a satisfactory solution to all competition problems posed by the broadcasting of sports events; terms must be fair, reasonable and non-discriminatory so that the sub-licensees get a real chance to compete on the market.

## 9. Definition of the relevant market

There are considerable difficulties in applying the standard procedures for market definition in application to broadcast markets and till now, it is one of the main unresolved questions in the sports broadcasting industry.<sup>26</sup> A determination of the relevant markets calls for inquiries into the impact that restrictive agreements have on both sides of the market. First, the anti-competitive effects of restrictions of supply will be assessed in terms of whether the demand side does have reasonable supply alternatives to meet its needs, reasonable being defined by price and quality. This is done by asking about the effect on the choices of the enterprises that are the clients of the parties to a restrictive agreement.<sup>27</sup> Conversely, anti-competitive effects of restriction of demand, such as collective buying, will be assessed in terms of whether the supply side may reasonably turn to other enterprises or whether it may reasonably modify its offer. Rumphorst (2001) points out that applying these seemingly simple tests to the markets for sports rights meets with several difficulties.

First, collective buying by television organizations will have effects on both the up-stream market for the acquisition of sports rights and on the down-stream market for the exploitation of the acquired rights. It is primarily the latter aspect that interests anti-trust authorities. They are concerned with the question of whether the collectively acquired rights unduly weaken the position of competing broadcasters vis-à-vis their consumers, i.e. advertising agencies in the case of commercial television and television viewers in the case of pay-TV.

The second problem is that the substitutability of individual broadcast offers is not what really matters. For example, for an advertising agency, it is not the content of a program as such that matters but only its value in terms of attractiveness to viewers. This means that all programs are basically interchangeable if they attract the same number of viewers, whether or not the programs involve a sports event. Consequently, very different sports events may be substitutable as a matter of guaranteeing attractive television advertising space. This means that from the viewpoint of

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<sup>26</sup> See, for example, European Commission (1998).

<sup>27</sup> In 1997, the European Commission issued a notice for guidance on the definition of the relevant market for the purposes of competition law. In the notice, the Commission makes it clear that demand-side substitutability is given precedence before supply-side substitutability and potential competition. The test that is utilized by the Commission is referred to as the SNIP (Significant Non-transitory Increase in Price) test or the hypothetical monopolist test. It examines how customers would react to a hypothetical permanent price increase of approximately 5 to 10%. If the price increase would cause a significant amount of customers to switch to another product as to make the price increase unprofitable, the products must be seen as being part of the same market. See OJ 1997 C372/03 p.5.

broadcasters, the differences between each sport do not create as many separate markets for the corresponding broadcasting rights. On the contrary, from the point of view of the potential recipient of sports broadcasting services, the general public interested in sport as a whole, one type of sport is not likely to be a real substitute for another, and even a possible selection of the most popular sports will depend on the cultural background of that public. It is evident that the relevant market for sports broadcasting rights cannot be determined by the actual or potential spectator, as in that case not only different types of sports, but also individual matches will have varying degrees of spectator appeal. The demarcation of the relevant market for sports broadcasting rights would therefore be largely unpredictable if the emphasis were put on the potential audience.

Third, each sports event is characterized by its particular live value, which will completely diminish as soon as the event is over. This short-lived nature has special consequences for the different forms of use in broadcasting. The live broadcasting rights to sports events are therefore only attractive to the broadcaster on an exclusive basis.

Fourth, in assessing the relevant market test for the sports broadcasting industry the time factor has also to be taken into consideration besides other factors, such as the products or services concerned and the territorial limits of markets. Competition is a process and services are rendered over time. Therefore, relevant time periods must be determined. For example, there may be single events that by their nature also determine the relevant time window. Alternatively, broadcaster's programs may be specialized or they may be mixed program services. It is the mix over time that defines the service offered, and the time period defines the relevant market.

These consequences of the special nature of the relevant market for sports broadcasting rights imply that the demand side of this market has a certain level of choice available and, thus, there is no absolute necessity for any broadcaster or agency to acquire the live broadcasting rights to a particular batch of events of these sports.

In Hammargård (2001), a clear distinction is made between the product market and the geographic market in order to determine the relevant market. Basically, it would probably make most sense to see sports broadcasting as the product market, and then subdivide it into several submarkets such as football and depending on the country perhaps into more sub-markets like ice hockey, Formula 1 and rugby. On the other hand, there is the geographic market. In Europe, the language barriers will make

it necessary to define the geographic market very narrowly. The language the commentators use will, to a large extent, define the geographic market. Therefore, national markets can be considered as to be the relevant geographic market. Another factor that supports the national borders as the geographic market is the fact that different sports are popular in different countries. This distinction between different markets is what makes broadcasting cases quite complex to analyze, since the potential anti-competitive effects can be felt on more than one market.

## **10. The UEFA Champions League case**

In this section, a practical case from the sports broadcasting industry raising competition issues is treated in detail. Recently, the European Commission has completed the investigation of the sale by UEFA of the TV rights to the Champions League and has issued a statement of objections in the Official Journal of July 19, 2001 finding that the notified joint selling arrangement infringed Article 81(1) EC and that it was not eligible for exemption under Article 81(3) EC.<sup>28</sup>

The Commission is concerned by the way in which such rights are distributed to one broadcaster per member state. The sale of the TV rights prevents the individual football clubs participating in the UEFA Champions League from taking independent commercial action with respect to the TV rights. It excludes competition between them in individually supplying TV rights to interested buyers. There is a fear that it will become increasingly difficult for competing broadcasters to establish themselves in each national market, since the winner is invariably an established and therefore wealthy broadcaster, and this situation is likely to be perpetuated in the coming years. The statement of objections moreover found that the possible efficiencies and benefits that the joint selling arrangement could provide for the broadcasting market were negated by the commercial policy pursued by UEFA. The reason was that UEFA sold all TV rights on an exclusive basis in a bundle to a single broadcaster per territory for several years in a row. In addition, the Commission argues that UEFA's sub-licensing system did not provide a satisfactory mitigating effect.

UEFA replied to the Commission's statement of objections with the submission of an outline of a new joint selling arrangement including a rights segmentation table for the exploitation of not only the TV

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<sup>28</sup> See [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/01/1043|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1043|0|RAPID&lg=EN).

rights but in addition also all the other media rights of the UEFA Champions League.<sup>29</sup> These include content rights for radio, television, Internet, UMTS and physical media rights, such as DVD, VHS, CD-ROM, etc. UEFA's proposal implied a splitting up of the rights into several individual packages that would be sold separately by means of a public bidding procedure. Several different media operators would thus have an opportunity to bid for and acquire different packages. This should ideally result in more media operators being able to screen UEFA Champions League action. UEFA's proposal further meant a reduction of UEFA's exclusive right to sell the UEFA Champions League media rights, allowing also the football clubs to sell certain media rights in parallel with UEFA on a non-exclusive basis. This will allow football clubs the opportunity to promote their own club related brands and it should contribute to the avoidance of rights being unused, as the football clubs can exploit rights which UEFA fails to exploit. Exclusivity was limited not only in scope by the splitting up into several different packages but also in length of time, as UEFA proposes to conclude rights contracts of a duration of no longer than three years. Maintaining a certain degree of joint selling enables UEFA to maintain the uniformity, quality and consistency of the league product at a level, which would not be possible to achieve without joint selling. This is essential for the maintenance of the distinctive UEFA Champions League brand, which is of particular interest to UEFA's commercial partners.

The Commission's preliminary view was that the competition concerns expressed in the statement of objections would be remedied by UEFA's proposal. As indicated in the Article 19(3) notice in the Official Journal, the Commission therefore intended to take a favorable view in respect of UEFA's revised joint selling arrangement, however, subject to giving third parties the opportunity to comment. More than 10 third parties submitted comments to the Commission, which is currently reviewing details of UEFA's proposal in the light thereof.

<sup>29</sup> It is important to stress that the design of the rights segmentation and number of packages was a proposal made by UEFA. The Commission is not in a position to design the commercial policy of a joint selling body. There may have been various possible sets of packages that would have satisfied the Commission's competition concerns. The Commission will only examine whether competition concerns have been remedied.

## 11. The UK Premier League case

Another and particularly high-profile case was the action brought by the UK Office of Fair Trading (OFT) against the contracts between the UK football Premier League and the broadcasters BBC and BSkyB. The OFT correctly pointed out that the sale of rights to televise Premier League football matches departed from the competitive benchmark of a fragmented market with many competing sellers, and where sales are free from contractual restrictions. Football clubs in the Premier League do not each sell rights to televise their own games. Instead, the Premier League collectively sells rights to all the games played by its members and is the only supplier of broadcasting rights to these games. This collective selling represented a monopoly or cartel of the member clubs that would restrict output and raise prices above the competitive level. Another concern of the OFT was that the Premier League sold the rights to show live matches to a single buyer, BSkyB, under an exclusive contract which prevented the Premier League selling rights to any live matches to any other UK broadcaster.<sup>30</sup> Competition between channels would therefore be damaged if only BSkyB showed live Premier League matches.

However, on the basis of detailed evidence about the economic effects of the agreements, the UK Restrictive Practices Court rejected all arguments brought by the OFT in September 1999. The court ruled that neither the collective selling by the Premier League of rights to broadcast live football matches nor the exclusive purchase of those rights by BSkyB acted against the public interest.

First, concerning the practice of collective selling, the Restrictive Practices Court argued that teams in a sporting league must cooperate to some degree with one another to produce exciting games the customers want to watch and buy. In practice, this means that a sports league will often need to provide some form of financial support for less successful clubs to help them attract better players

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<sup>30</sup> In this context, it is important to mention the attempted take-over of Manchester United by BSkyB, which was blocked in 1999 following an inquiry by the Monopolies and Mergers Commission. This commission argued that as a result of the merger, BSkyB would gain influence over and information about the Premier League's selling of rights that would not be available to at least some of its competitors. The argument relies in part upon the so-called "toe-hold effect", saying that a firm bidding for a common value object of which it is already partial owner, will find that its net outlay on purchase will be reduced correspondingly, in relation to the highest unsuccessful bid. This interacts with the so-called "winner's curse" causing other bidders without a toe-hold rationally to aim off in their bidding for fear that they have overbid in a contest with a competitor which already has an advantage. The Monopolies and Mergers Commission concluded that a vertically integrated broadcaster would have an advantage in the process and therefore recommended that integration should not be permitted. More on the toe-hold effect can be found in Bulow et al. (1999).

and invest in better facilities. The Premier League is able to offer such financial support using the revenues it collects in its role as the collective seller of rights to televise all Premier League matches.

Second, the Restrictive Practices Court questioned the OFT's claim that the monopolistic behavior of the Premier League would be harmful for customers due to raised prices and restricted output. However, the Restrictive Practices Court argued that in the market for sports rights, the Premier League has no incentive to restrict the number of televised games. The key is that, unlike the textbook monopolist, the Premier League is not forced to charge the same price for each match sold. The Premier League sets a price for a bundle of rights taken together, rather than setting a fee per game. It follows that if the Premier League wants to sell rights to an additional game, it will set a new and higher price for the new and larger bundle of games in order to avoid affecting the income it receives from the existing games in the bundle. The Premier League has therefore an incentive to sell an additional game whenever the additional revenue available makes it worthwhile. As a result, there is no restriction in output.

Finally, on the basis of a detailed analysis of the facts, the Restrictive Practices Court found out that the exclusive sale of rights to broadcast Premier League games to one channel promotes rather than harms competition. To understand this, one must understand the nature of broadcasting markets. The broadcasting industry is the quintessential high-fixed-cost but low-marginal-cost industry, because television programs are expensive to produce but extremely cheap to supply to one more person. Economists argue that intense price competition in such a high-fixed-cost and low-marginal-cost industry is unsustainable. Intense price competition would lead to channels undercutting each other till the price level where they have difficulty earning enough revenue to cover the high production costs. As a result, some channels would decide to exit and other channels – anticipating that price competition will be intense – would be reluctant to enter the market. One way out of this paradox is for channels to compete on factors other than price. Channels can therefore raise their price without losing all of their subscribers and without prices being forced to an unsustainable level. More channels will therefore be able to stay in the market.

The simple lesson is that it is impossible to criticize existing market arrangements on the basis that they depart from some idealized competitive benchmark.<sup>31</sup> The heavily criticized and somewhat formulaic UK competition law legislation is an additional reason why the European Commission has retained an interest in the Premier League/BSkyB contracts.

## **12. Alternatives to deal with anti-competitive concerns**

In view of the extraordinary increase in the value of broadcasting rights for popular sports, it is realistic to assume that in many national sports leagues a strict system of individual negotiations by the clubs will steadily jeopardize the financial situation of the less successful clubs. A certain polarization effect is already visible in the extent and intensity of the commercial activities of individual sports clubs because only the most popular ones are capable of generating high income. Any individual selling regime must therefore include some restrictions in order to safeguard the competitive balance among the clubs and thus maintain the competition as a whole.

However, in my opinion, giving exemption on collective selling rights with the aim to promote the balance between rich and poor teams or sports clubs must, under no circumstances, justify a prevention of applying EC competition law. It is important to bear in mind that the actions undertaken by governing sports bodies always have an economic goal beyond their social and cultural dimensions. It is therefore advisable to ensure that the broadcasting rights are attributed according to objective and non-discriminatory criteria. I believe that collective selling of broadcasting rights is in fact not anti-competitive but it can become so if the broadcasting rights are granted on an exclusive basis to a single broadcaster.

Further, doesn't central marketing provide a legal framework to extract monopoly rents from the broadcasting companies and the fans? I am strongly convinced that there are valuable alternatives to the central marketing of broadcasting rights to ensure solidarity among the clubs concerned. One such alternative could be the taxation of profits of the richest clubs to support small and poorer clubs. It is obvious that such a practice by sports federations would be less prohibitive under competition law. Nevertheless, I admit that this alternative redistribution scheme can be difficult to implement in

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<sup>31</sup> However, Usher (2000) argues that it is very difficult to imagine that a four-year exclusive contract that effectively forecloses 80% of all live football matches might achieve the necessary exemption under Article 81(3) EC.

practice. The system would invoke a lot of discussion and it could be hard to reach consensus on the appropriate taxation percentage to be applied. In addition, there could be a real danger that most clubs would like to recoup their tax costs by raising the ticket price for their matches; unless there is a price ceiling set by, for instance, the European Commission.

Another system I present as an alternative for the collective selling of TV rights would be a mechanism in which the richest clubs negotiate themselves on broadcasting rights, under the important condition that they allocate a certain percentage of their incomes to a solidarity fund. Again, the European Commission could be assigned a significant role in the implementation of the mechanism, namely as a watcher over the centralized fund. However, the most critical point still remains the specific method for collecting and sharing the income from the television rights by the national federation.

A final solution I propose is the introduction of a limit on the amount of rights a broadcasting company can own. Such a system with a constraint on the buying of TV rights would certainly overcome the anti-competitive concerns in the collective selling and buying of TV rights in a very easy manner.

Roughly speaking, there is plenty of room to think of alternative and adequate mechanisms to deal with anti-competitive concerns raised by the central marketing of TV rights in the sports sector. I consider it as one of the European Commission's priorities to strengthen its role as central actor and to establish appropriate alternative schemes in order to prevent sport from being dominated by gigantic media concerns selfishly concentrated on profit maximization.

### **13. Conclusion**

In this paper, it has been made clear that competition law also applies to sports, however not without exceptions. These exceptions focus on the protection of the very specific characteristics of sports. The European Commission has, on numerous occasions, recognized that sports are in need of exceptions in order for them to survive as pure entertainment. Nevertheless, the questions that arise in the sports broadcasting sector relate especially to aspects of collective selling and purchasing of rights and exclusivity. An important area of frequent litigation in competition law involves the right of a league to control the marketing of its product itself rather than through individual licenses entered into by the teams. Other important competition issues in the sports broadcasting sector include sub-

licensing agreements and automatic and preferential renewal clauses once the rights agreement has expired. These issues can create serious anti-competitive harms and prevent clubs from competing in the sale of their rights. As a consequence, it may limit competition between broadcasters and thereby consumer choice. Even more reason for concern is added because of the emerging pattern of increased concentration in the media industry. It is therefore the task of the European Commission to clarify the scope of application of the Community competition rules in the context of sport, while fully taking into account the particular character of the sector. Its objective is to maintain open and competitive TV markets and to remove obstacles for new markets to develop. This will be to the benefit of the consumer by increasing his or her choice. As indicated by the UEFA Champions League case and the UK Premier League case, all agreements involving actual or potential anti-competitive concerns have to be treated on a case-by-case base. Though there are some reasonable alternatives for collecting and sharing the income from the television rights by the national federation, the most critical point still remains the specific method to be used.

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In the sports broadcasting industry, for instance, the argument for the central marketing of TV rights is that it allows a governing body to redistribute income in a fair and balanced way, helping to maintain healthy competition between clubs. However, the argument against central marketing is that it prevents, restricts or distorts competition. This paper presents an overview of the aspects of competition law in the collective selling and buying of exclusive TV rights. Particular focus is on the role of the European Commission to protect sports from anti-competitive pressures threatening the... TV rights of sports events, speech at Vision in Business Broadcasting Competition Law. Brussels. Usher, T. 2000.