

Sports and competition law: An overview of EU and national case law

Anticompetitive practices, Agreement, Consumers protection, Remedies (antitrust), Bundling, Exclusive right, Discriminatory practices, Absolute territorial protection, Foreword, Licensing agreement, Vertical restrictions, Joint selling, Judicial review, Copyrights, Exemption (individual), Dominant position, Abuse of dominant position, Bid rigging, Sanctions/Fines/Penalties, Long term contract, Market sharing, Cooperation agreement, Parallel imports, Preliminary ruling (Art. 267 TFEU), Sports

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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1. Introduction

This invaluable *e-Competitions* special issue on sports brings together more than 60 case summaries arising from the different EU Member States over the last five years.

Practitioners and others with an interest in the interface between sports and competition law are only too aware of the scarcity - until now - of effective resources to monitor and understand the multitude of parallel developments arising in the EU and the EU's member states.

Resources such as these are vital: while the European Commission's decisions have far reaching effects and are well publicized, they are relatively few in number and sports bodies, teams, rights owners, and sport practitioners (or those advising them) have a need to learn and draw from national practices, cases and decisions. Such national cases have also increased in number and importance since the advent of decentralized competition law enforcement in 2004 [1].

The breadth of topics covered in this *e-Competitions* special issue is testament to the ever increasing commercial stakes and legal complexity that affect both amateur and professional sports. Issues addressed in these case summaries include ticketing, doping, free movement and transfer of players, supply of sports equipment and online betting.

In addition, one of the most common themes addressed relates to the many complex aspects of the commercialization of media rights. The central or collective selling of broadcasting rights (e.g. by leagues or federations) routinely raises competition issues. Such issues arise in particular when the rights to premium content are concentrated in the hands of a central body (e.g. joint selling by the sports league or governing body) coupled with a vertical restriction on competition (exclusive licensing of broadcasting rights granted to a single broadcaster).

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What follows is a brief overview of some of the EU law issues that arise in relation to the sale of media rights, together with descriptions and references to a number of the many interesting articles contained within this *e-Competitions* special issue which, taken together, illustrate perfectly how interconnected national and EU law developments are, and how invaluable it therefore is to have a resource such as this to rely upon.

2. Collective selling of media rights

In the *UEFA Champions League* case [2], the Commission for the first time expressly recognised that joint selling of broadcasting rights by sports leagues could create efficiencies, and therefore laid out the governing principles for a pro-competitive rights structure which, in the Commission's view, would meet the requirements of EU competition rules.

In that case, the *Union of European Football Association (UEFA)* was granted the exclusive right to sell media rights (both free and pay-TV) on behalf of the football clubs participating in the *UEFA Champions League*. It proposed to sell the media rights on an exclusive basis, in a single bundle to one broadcaster per defined territory, and for several years.

The Commission expressed the view that such a collective selling arrangement would result in only one source of supply for buyers and would lead to a single large broadcaster per territory acquiring all free and pay-TV rights, to the exclusion of all other broadcasters, which would be likely to lead to (i) anti-competitive output restrictions, and (ii) the potential for a number of rights to be left unexploited.

Following the Commission's intervention, the arrangements were duly amended to unbundle the rights into fourteen packages, making it possible for multiple broadcasters to acquire rights to the *UEFA Champions League*. The Commission assessed the agreements under Article 101 TFEU and concluded that they had the effect of improving the distribution of rights, which justified an individual exemption pursuant to Article 101 (3) TFEU.

In reaching this conclusion the Commission considered the following pro-competitive justifications for the arrangements: a single point of sale: since *UEFA* had the right to sell all of the packages of broadcasting rights, the ability for broadcasters to purchase rights for an entire season (rather than on a match by match basis) ensured that programming could be planned in advance, ensured the full coverage of sports events for the season, and reduced broadcasters' financial risks; limited time periods: rights would be awarded through a public tender procedure for periods not exceeding three years, which the Commission viewed as not excessively long; the creation of a quality branded product, exploited exclusively by *UEFA*, independently of the interests of individual clubs; and the ability for individual clubs to sell any rights that *UEFA* had not sold within one week after the draw for the first round for *UEFA Champions League*.

The decision of the Commission in the *UEFA Champions League* case has served as a template, and later case law relating to other leagues and sports, both at the EU level and in various jurisdictions, have taken account of it.

3. Remedies - how competition issues have been resolved in practice

The outcome of the *UEFA Champions League* case (and the national cases that have followed it) highlight a preoccupation at European Commission and National Competition Authority levels with avoiding competition risks on the upstream market for the acquisition of broadcasting rights and also on the downstream market for exploitation and resale of such rights. The mechanisms that have been deployed to resolve competition concerns mirror in part the *UEFA* approach, but also include many national features.

a. Unbundling

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One of the common themes relating to the collective selling of broadcasting rights is the concern that rights should be unbundled into several packages in order to give a fair opportunity to broadcasters to compete for them (as opposed to allowing a structure which tends to result in a single broadcaster acquiring all of the rights).

In Germany, the centralised marketing of the *Bundesliga* broadcasting rights by the DFL (German Football League) was individually exempted under Article 101 (3) TFEU provided that such rights would be unbundled into separate rights packages for TV broadcasting (pay TV and free TV), internet service providers and mobile phone operators [3].

More recently, the German Federal Cartel Office (FCO) refined this analysis by requiring that the central marketing scheme subject to its scrutiny ensure that consumers receive a fair share of the benefits resulting from that scheme [4]. In that case *Sirius*, a company belonging to the *Kirch* media group, was awarded *Bundesliga*'s rights to show matches in Germany for 2009 to 2015. The FCO considered that consumers would only receive a fair share of the benefits if they had an opportunity to choose between combined pay TV live coverage of the matches and prompt free-to-air coverage of the highlights of the games.

The direct consequence of a single entity gathering broadcasting rights or packages may be the creation of a dominant position in the market for the sale of those rights. Pursuant to Article 102 TFEU, a dominant undertaking holds a special responsibility on the relevant market not to abuse its dominant position.

In March 2011, the Spanish Competition Authority (CNC) fined *Mediapro* and its subsidiary for an abuse of a dominant position in the market for resale of audiovisual rights [5]. Following its acquisition of different packages of TV broadcasting rights, *Mediapro* held broadcasting rights for football competitions for all the teams in the first and second league divisions in Spain for several seasons. The CNC found that this gave *Mediapro* a dominant position in the market for resale of these media rights and that an abuse had occurred because *Mediapro* offered preferred treatment to its own subsidiary *Go! TV* for the licensing of these rights. This led to discrimination against competing broadcasters seeking rights to distribute the football league games, in breach of Article 102 TFEU.

Similarly, the Italian Competition authority opened an investigation in November 2010 in connection with the acquisition by *Sky Italia* of the rights to broadcast the *FIFA World Cup 2010 and 2014* on pay TV platforms [6]. The concerns publicly expressed so far revolve around *Sky Italia* holding an excessive concentration of rights. The investigation is ongoing and in August 2011 was expanded to include an investigation into *Sky Italia*'s acquisition of rights to *UEFA's Champions League*.

b. Non discriminatory and transparent tendering

Another common issue arising is whether collective sellers must organise a competitive bidding process and offer rights on non-discriminatory and transparent terms, or whether they may simply choose their commercial partners without going through such processes.

A case in Poland suggested that such a process was mandatory to ensure that all potential buyers have an equal opportunity to compete for rights [7]. In that case the *Polish Football Association* had agreed to inform *Canal+* of the terms of its competitors' offers under an "English clause", or "most privileged treatment clause" to allow them to try to match competing bids. The Polish Supreme Court upheld the judgment of the Office of Competition and Consumer Protection that this was an anticompetitive mechanism because it offered *Canal+* information which it would not be able to obtain in the normal course.

Similarly, the Italian Football Association *Lega Calcio* was considered to have infringed the competition rules by declining to negotiate the sale of media rights with certain broadcasting companies and trying to prevent the individual sale of media

rights by one of its associated football clubs [8]. The apparent aim of *Lega Calcio* was to reaffirm its central role for those sales but the authority found that the effect was that all packages were not offered on a non-discriminatory basis. Consequently, in 2008, the Italian Competition Authority started an investigation into *Lega Calcio* to assess the attempt of the Football Association to preserve its role of exclusive negotiator both in the light of Articles 101 and 102 TFEU.

Conto TV, a broadcasting company in Italy, requested injunctive relief, but the Tribunal of Milan refused [9]. In doing so, however, the Tribunal clarified that the powers of the Court were limited to (i) declaring null and void the tender and the resulting contracts formed in violation of competition rules, or (ii) asking the parties to refrain from executing such contracts. The Judge explicitly stated that it could not order specific performance, such as calling for a new tender in relation to the relevant broadcasting rights packages.

c. The limited period of exclusive rights

The European Commission's approach to reducing the risk of long-term market foreclosure is to impose a limit on the duration of the grant of broadcasting rights on an exclusive basis. This approach has been followed closely in several member states.

For instance, the Austrian Competition Authority considered that an award of broadcasting rights to skiing events for ten years was excessive and should be reduced to a period of five years [10].

Similarly, the French competition authority considered that the rights that were awarded to the French marketing agency *Sportfive* by the *French Football Federation (FFF)* for periods of four to six years were excessive [11]. In addition, the investigation found that the market was foreclosed due to the ability of parties to renew their agreements before the term of the contract. Consequently, the French Competition Authority imposed a fine of €6.9 million.

d. Pooling agreements for the joint exploitation of broadcasting rights

Pooling agreements by which broadcasters jointly exploit rights have been found to constitute horizontal agreements which can hinder competition.

In Spain, the CNC considered that a pooling agreement between broadcasters automatically led to a market sharing agreement between the parties that allocated the supply of the pay TV and free TV markets and other media amongst themselves [12]. On the facts of that case, the terms of Art 101(3) TFEU and its Spanish law equivalent were deemed to be met, but solely on the basis that the pooling agreement would last no longer than three years.

In Germany, the FCO tolerated the cooperation between two pay-TV operators (*Premiere* and *Arena*) for the joint exploitation of broadcasting rights in connection with the German *Bundesliga* matches [13]. The agreement provided that one TV operator (*Arena*) would have the exclusive right to exploit its broadcasting rights in a certain territory whilst the other TV operator (*Premiere*) would have the exclusive right to exploit its broadcasting rights for all other German regions as well as on satellite. Although this agreement led to market sharing and fell within the prohibition contained in the competition rules, the FCO tolerated it because, had the FCO prohibited the agreement, *Arena* would have had to return the broadcasting licence to the *DFL (German Football League)* due to financial difficulties. Consequently, the only broadcasting company which would have been in a position to license these rights from *DFL* would have been *Premiere*. In light of these particular circumstances, the FCO considered that the cooperation agreement actually prevented the elimination of competition on the market.

e. Prohibition of territorial restrictions

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The Court of Justice of the European Union (ECJ) has recently considered territorial restrictions and in particular whether a prohibition on the use of satellite decoder cards and equipment outside a national territory, infringes, *inter alia* Article 101 TFEU.

The *Football Association Premier League (FAPL)* granted broadcasters, under a competitive tender procedure, an exclusive live broadcasting right for Premier League matches on a territorial basis. Broadcasts are made by way of encrypted satellite signals and customers gain access through satellite decoder cards. The licence agreement between the *FAPL* and broadcasters included a requirement that broadcasters put in place the necessary contractual mechanisms to ensure that the relevant signal is transmitted only to subscribers within the licensed territory.

A number of pubs in the UK purchased Greek decoders and cards, enabling them to show English Premier League matches, arguing that they had the right, under EU law, to buy goods and services offered in other EU countries and that contractual provisions and copyright law preventing them from doing so contravened both free movement and competition rules. The English Court referred a series of questions to the ECJ [14].

In her opinion of 3 February 2011, Advocate General Kokott argued that territorial restrictions in a licence agreement had the same effect as an agreement to restrict parallel trade which amounted to a restriction by object of competition, pursuant to Article 101 TFEU [15].

The long awaited judgment was delivered on 4 October 2011 [16].

The ECJ found that a system of licences for the broadcasting of football matches which grants territorial exclusivity on a Member State basis and which prohibits television viewers from watching the broadcasts with a decoder card in other Member States is contrary to EU law. It also found that national legislation which prohibits the import, sale or use of foreign decoder cards is contrary to the freedom to provide services. The restrictions in question were described by the Court as "irreconcilable with a fundamental aim of the Treaty, which is completion of the internal market" [17].

The Court observed that the *FAPL* cannot claim copyright in the Premier League matches themselves, as those sporting events cannot be considered to be an author's own works which qualify for copyright protection. It therefore concluded that copyright in the matches cannot be relied upon to justify territorial exclusivity. However, the Court did note that the opening video sequences, the *Premier League* anthem, pre-recorded films showing highlights of recent *Premier League* matches and various graphics can be regarded as original 'works' which are protected by copyright. For this reason, the Court found that transmission in a pub of the broadcasts containing those protected works would require the authorisation from the copyright owner.

The result is that, under competition and free movement rules, purchasers cannot be prevented from acquiring satellite decoder equipment from other Member States and viewing content made available on those platforms, including *Premier League* matches. However, the showing of the *Premier League's* matches in a pub (or other public place) without the necessary permission to display the *Premier League's* logos and other original content would amount to a copyright violation and can therefore be prohibited on that basis.

4. Conclusion

Although it is true that sport can, in some circumstances, fall outside the realm of competition law entirely, as can be seen from the wide variety of issues described above and covered in the *e-Competitions'* special issue on sports, competition can and does have a major impact on the commercial aspects of sport.

There continues to be both diversity and complexity in how individual Member States have sought to apply the EU's common competition rules. This is likely to continue. The ability to study national trends and developments adds greatly to the depth of understanding of this still nascent area and *e-Competitions* has therefore created an invaluable resource which is to be highly commended.

[1] Council [Regulation \(EC\) n 1/2003](#) , of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([OJEU L 1, 4 January 2003, p. 1-25](#)), Articles 5 and 6 which gave the power to National Competition Authorities and National Courts to apply ex-Articles 81 and 82 TEC (now Articles 101 and 102 TFEU).

[2] European Commission, 23 July 2003, [Case 37.398](#), *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25.

[3] European Commission, 19 January 2005, [Case COMP/C.2/37.214](#), *Joint selling of the media rights to the German Bundesliga*.

[4] German Federal Cartel Office (*Bundeskartellamt*), 24 July 2008, *German Football League*. See [Thorsten Winkler](#), *The German Federal Cartel Office rules that the proposals on the centralized marketing of broadcasting rights football matches are insufficiently competitive (Bundesliga)*, 24 July 2008, *e-Competitions*, n 21828 .

[5] Spanish Competition Commission (CNC), 17 March 2011. See [Luis Blaquez Palasi](#), *The Spanish Competition Authority fines the holder of football TV rights for abusing its dominant position in the resale of these rights and in the pay TV market (Mediapro)*, 17 March 2011, *e-Competitions*, n 36126 . See also [Santiago Rossi](#), *The Spanish Competition Authority fines a broadcasting company and its subsidiary for abusing their dominant position in the market for audiovisual retransmission rights of football matches (Mediapro and Gol TV)*, 17 March 2011, *e-Competitions*, n 36698 .

[6] Italian Competition Authority, 3 November 2010, Case A429, *RTI/Sky*. See [Valerio Torti](#), *The Italian Competition Authority starts investigation in the market of football audiovisual rights for alleged infringement of Art. 102 TFEU (RTI/Sky)*, 3 November 2010, *e-Competitions*, n 33891 . See also [Valeria Graziussi](#), *The Italian Antitrust Authority starts investigation against a media producer and distributor for infringement of art. 102 TFEU and national equivalent (R.T.I./Sky - Mondiali di Calcio)*, 17 March 2011, *e-Competitions*, n 36121 .

[7] Polish Supreme Court, 7 January 2009, Case n III SK 16/08, *Canal+/Polski*. See [Robert Gago](#), *The Polish Supreme Court confirms the NCA's decision on illegality of an "English clause" on the market for football broadcasting rights*, 7 January 2009, *e-Competitions*, n 28368 . See also [Robert Gago](#), *The Polish Competition Court confirms the NCA decision finding that an "English clause" in an agreement between a pay-TV operator and a football association restricted competition (Polish Football Association/Canal+)*, 7 January 2009, *e-Competitions*, n 13759 and [Robert Gago](#), [Aleksandra Czekaj-Dancewicz](#), *The Polish Competition Authority fines the pay-TV operator and a football association for exclusive broadcasting rights (Canal+/Polish Football Association)*, 7 January 2009, *e-Competitions*, n 12438 .

[8] Italian Competition Authority, 10 April 2008, Case A403, *Lega Calcio/Chievo Verona*. See [Valerio Torti](#), *The Italian Competition Authority opens proceedings in the market of football audiovisual rights for alleged violation of Art. 81 and/or 82 EC (Lega Calcio / Chievo Verona)*, 10 April 2008, *e-Competitions*, n 19549 .

[9] Tribunal of Milan, 24 May 2010. See [Paolo Caprile](#), [Alessandro Marra](#), [Cesare Pozzi](#), *The Tribunal of Milan rejects a request for injunctive relief against the Italian soccer association for illegitimate award procedures of TV rights for live broadcast of soccer matches (Conto TV/Lega Calcio)*, 24 mai 2010, *e-Competitions*, n 31796 .

[10] Vienna High Court in competition matters, 18 January 2008. See [Hanns Peter Nehl](#), *An Austrian Court declares*

behavioural commitments concerning broadcasting rights of the skiing world cup binding upon the public TV/radio provider and the Austrian skiing association (ORF/OSV), 18 January 2008, e-Competitions, n 22338 .

[11] French Competition Authority (*Autorité de la concurrence*), 30 September 2009, *Case n 09-D-31*. See *Sandrine Behague, The French Competition Authority fines a football association and a rights for sports management agency 6.9 M for anticompetitive agreements in the market for audiovisual rights (FFF-Sportfive), 30 September 2009, e-Competitions, n 31741 .*

[12] Spanish Competition Commission (CNC), 14 april 2010, *Case AVS, Mediapro, Sogecable y Clubs de Futbol 1 y 2 Division*. See *Antón Tresandolanco , The Spanish Competition Commission limits the duration of contracts concluded between broadcasters and football clubs for the acquisition and resale of football broadcasting rights for Spanish League and Cup matches, as well as a pooling agreement between broadcasters, to three years (AVS, Mediapro, Sogecable y Clubs de Futbol de 1 y 2 Division), 14 April 2010, e-Competitions, n 31417 .*

[13] Federal Cartel Office (*Bundeskartellamt*), 18 July 2007, *Premiere and Arena*. See *Daniel von Brevern, The German Federal Cartel Office tolerates cooperation between Pay-TV operators for sport events broadcasting (Premiere / Arena - Bundesliga), 18 July 2007, e-Competitions, n 13984 .*

[14] High Court of Justice, Chancery Division, 16 June 2008, *Case n CO/7295/2007, Karen Murphy vs Media Protection Services Limited*. See *Anthony Dawes, The High Court of England and Wales refers questions to the ECJ regarding whether the prohibition on the use of foreign satellite decoder equipment and cards in the UK infringes, inter alia, Art. 81 EC (Football Association Premier League / QC Leisure), 16 June 2008, e-Competitions, n 21520 .*

[15] *Cases C-468/06 to 478/06, Sot. Lelos kai Sia and Others [2008] ECR I-7139*. See also *Collette Rawnsley, The ECJ Advocate General Kokott considers that territorial exclusivity agreements relating to the transmission of live football matches are contrary to European Union law (Football Association Premier League), 3 February 2011, e-Competitions, n 36119.*

[16] *Cases C-403/08 and C-429/08, FAPL and Others v QC Leisure and Others and K. Murphy v Media Protection Services Ltd, ECR 2011 I-0000.*

[17] *Ibid.*

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