Football media rights and EU competition law: the 3G concerns

Miguel Mendes Pereira,
Partner at Vieira de Almeida & Associados, Lisbon, former administrator at DG Competition, European Commission, former Lead Legal Counsel at the Portuguese Competition Authority

The first decade of this century witnessed a flurry of cases in Europe confronting professional football leagues with the requirements arising from EU competition law as regards the disposal of media rights. Issues such as joint-selling, joint-buying, vertical integration and barriers to entry, along with media convergence and the emergence of new technologies, pushed leagues, clubs and media companies into the arms of competition authorities across Europe.

Football bosses struggled to maximise revenues in a dramatically changing environment while competition enforcers scratched their heads in the pursuit of the best deal for consumers.

The intense scrutiny to which media rights deals have been subjected over the past ten years seems to somehow have diminished, although the outcome of the appeal by British Telecom in the case opposing Sky to OFCOM in respect of the wholesale offer obligation of its premium sports channels in the UK is keenly awaited. At the same time, signs of a more lenient approach seem to suggest that economic conditions may have a role to play in the way competition enforcement agencies apply the rules. The decision by the Dutch Competition Authority to authorise in 2012 the acquisition of the media unit of the Premier football league in the Netherlands by Fox, a broadcast subsidiary of News Corporation, and to clear a 12 year-long arrangement to exploit its media rights, caught many by surprise.

Looking back, two waves of regulatory intrusion into the legal competition dynamics of the football world are recognisable. Are we now experiencing a case of enforcement fatigue or a mere (some would argue, long due) reality crash?

The particular economics of football

Team sports are known to be based on a particular type of economics. In most industries a producer will benefit from the exit of a competitor from the market. The reduction in competition resulting from such exit may allow the remaining firms to increase market share, raise prices and increase profits. The same, however, cannot be said of rival teams in a football league.

Competition among the teams is the very product sold by this industry. Exit from the market by one or more teams may undermine the quality (i.e. the intensity) of the rivalry and harm more than benefit the remaining teams. No matter how much FC Barcelona fans may dislike Real Madrid, their team critically requires an opponent.

This counter-intuitive, but nevertheless ontological, feature widens the possibilities for cooperation between teams that in other industries are deemed unacceptable from a competition law point of view. Agreement on the rules of the game, definition of the length of seasons, scheduling of matches or harmonization of the colors of uniforms require constant coordination among teams. From this perspective, a football league pretty much functions as a joint-venture[1].

Moreover, a successful football joint-venture requires excitement. The thrill of the game is uncertainty but a close match requires balanced teams. In football this means that members of a league may pool resources

1. See Stefan Szymanski, Collective selling of broadcast rights to sporting events, Sweet and Maxwell, 2002.

such as to achieve minimum balance. One of the main resources likely to be pooled is media rights in view of subsequent sharing of the resulting revenues. Again, this is unlike most other industries, hence the scrutiny that commercial practices such as joint-selling have attracted over the years from competition authorities.

First generation concerns

The European Commission started looking into broadcast licensing agreements at the end of the 1980s, at the time private broadcasters were emerging in Europe and initiating a decisive, although uphill, struggle against public broadcasters, most of which were former monopolists.

In 1988 the private broadcaster Screensport (later TESN) filed a complaint with the European Commission against the EBU (European Broadcasting Union) concerning the refusal of the EBU and its members to sublicense Eurovision rights. A second complaint followed shortly against the joint venture between a consortium of EBU members and News International/Sky Channel establishing the television sports channel Eurosport. In the 1993 and 2000 EBU/Eurovision decisions the Commission found that the Eurovision rules on the joint negotiation, buying and sharing of sports broadcasting rights were restrictive of competition but could be exempted subject to the setting-up of a sublicensing scheme to non-EBU members and to changes to the EBU membership criteria. The General Court of the EU annulled both decisions. In 2007 the Commission resigned itself to closing the case on grounds of declining buying power of the EBU as a result of new market entrants and of the increased capacity devoted to sports broadcasts.

The EBU/Eurovision saga illustrates what could be considered a first generation competition concern as regards sports media rights. Private broadcasters were emerging in a landscape largely dominated by public broadcasters and the pay-TV business model was at its infancy in Europe. Allowing powerful public broadcasters to cooperate with each other without limits such as to transform themselves into a single buyer vis-à-vis right holders would have raised serious questions. Controlling market power on the side of public broadcasters and removing impediments to the launch of pay-TV seemed reasonable endeavours from a competition policy perspective.

Second generation concerns

A second generation of cases was initiated in 2002 by mergers and acquisitions rather than by mere licensing agreements. In Spain, Sogecable, the owner of the then dominant pay-TV platform CanalSatélite Digital, acquired Vía Digital, the second pay-TV operator. In Italy, The News Corporation, co-owner with Telecom Italia of the then second satellite pay-TV platform Stream, acquired full control of the whole of Stream and of Telepiù, then the dominant pay-TV satellite platform. Apart from issues regarding vertical integration, the European Commission also expressed in both cases vivid competition concerns in respect of the way media rights were to be traded[2].

Although preserving the possibility of media rights being licensed on an exclusive basis for exploitation on pay-TV, the Commission set clear limits as to the reach of such exclusivity in terms of both the scope and the duration of the agreements covering premium content. Premium content was understood as including broadcasting and new media rights on the main football events.

The approach adopted in the Sogecable/Via Digital and Newscorp/Telepiù decisions was refined by the Commission in the paradigmatic 2003 UEFA Champions League decision and reiterated in the subsequent German Bundesliga (2005) and FA Premier League (2006) decisions. The main principles arising from this set of decisions were the split of rights into different packages in order to avoid the emergence of monopolists in the downstream pay-TV markets, the limitation of the duration of exclusive agreements to 3-4 years and the avoidance of under-exploitation of new media rights such as Internet and mobile rights.

These second generation concerns are understandable in light of the growing success of (private) pay-TV operators and the fade-out of public free-to-air broadcasters as regards the transmission of premium football events. The fear of universal access to major sports events being hampered was actually a concern anticipated by the EU legislator in the Television Without Frontiers Directive (now Audiovisual Media Services Directive) by means of allowing Member States to impose free-to-air broadcast of events of 'major importance for society'. On the other hand, the emergence of powerful pay-TV operators acting as

2. For a more detailed account see Miguel Mendes Pereira, Recent Consolidation in the European pay-TV sector, Competition Policy Newsletter, 2003, Nr. 2.

monopsonists vis-à-vis football leagues and clubs and as monopolists vis-à-vis retail customers seemed to justify the imposition of limits in view of diluting their market power.

Third generation concerns

Media and telecom companies drummed glorious aspirations into everyone's minds about the limitless prospects of digitization since the end of the 1990s. Gargantuan projects such as AOL/Time Warner or Vivendi/Universal were heralded as the bright new tomorrow but results of the mythical media convergence were painfully slow to materialize and in some cases things went terribly wrong. Broadband dissemination within the residential segment faced the unavoidable constraints of the physical world and reliable mobile technology (as well as affordable consumer prices) for enticing football video transmission took its time.

Some would argue that competition law enforcement may have been too keen on curtailing first-mover advantages to the point of converting first moves into first hara-kiris. That has not prevented, however, mavericks or reconverted incumbents from getting a decisive foot in the door to fast-moving sports media rights markets.

Take the case of Al Jazeera in France upon the exit of Orange, or Benfica TV in Portugal internalizing the home matches of Benfica as well as snapping the FA Premier League from long-standing Sport TV or, in the pedigree-vested turf of senior league, British Telecom showing their teeth to Sky Sports in the UK or Mediaset disrupting the idyllic Italian pay-TV landscape through DTT. Not to mention Deutsche Telekom forcing Sky Deutschland to pay a handsome premium to keep exclusivity on the Bundesliga.

As with successfully finishing a line of Tetris, the pieces of digitization, fixed and mobile broadband, and convergence in Europe seem to have now fallen into place. What does this entail from a competition law standpoint?

The available elements (at the time of editing) seem to indicate a less dogmatic approach to the trade in media sports rights. The UK Competition Appeal Tribunal reversed the decision by OFCOM to impose on Sky a wholesale must-offer obligation in respect of its premium sports channels and considered that Sky's engagement in constructive negotiations was sufficient grounds to disallow the mandatory licensing of its premium sports contents to competitors. It remains to be seen how the Court of Appeal deals with the uncompromising stance taken by British Telecom but a finding of anticompetitive behaviour in this field certainly seems to now require a more nuanced approach.

The duration of exclusivity agreements also seems to now require a more granular assessment as to where the exclusivity is to be found. The twelve years covered by the decision of the Dutch Competition Authority authorising the acquisition by Fox International Channels of a majority stake in the media and commercial arm of the main football league (Eredivisie) do concern the exclusivity of broadcasting rights held by its own branded pay-TV channel Eredivisie Live. But the channel is available for non-exclusive distribution by all interested platforms (including cable, satellite, terrestrial and IPTV).

In the planned Vodafone's buyout of Kabel Deutschland the European Commission is currently investigating whether triple play (pay-TV, Internet access and fixed telephony) or quadruple play (same combination with the addition of mobile telephony) services constitute distinct markets. In case they do, market definitions, market shares and, consequently, market power assessments may gain a whole new colour and a new competition chart may have to be drawn in the field of media rights.

Technological accomplishments arrive hand in hand with a financial crisis that has fallen with particular harshness on media companies (and business associates such as football leagues) struggling with sharply declining advertising revenues. On the other hand, and as with any other market strongly influenced by technological evolution, dominant positions in media markets may not be as unassailable as it may have seemed at a time when the mantra of convergence sounded like Never Never Land.

Third generation concerns may therefore be closer to wondering whether economic conditions allow for a fully-fledged enjoyment of the art by Messi and Ronaldo anywhere than to questioning whether the technology is at hand.