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European Competition Law and Its Enforcement in Sport Related Areas

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Introduction

This paper deals with the phenomenon of European competition law and policy and their application in the matters related to sports. The idea of the study is twofold: on the one hand we intend to present a comprehensive analysis of the interactions between the areas, related to sport and EC competition law. On the other – we are also interested in an explanation of the theory of competition as such, by using some scientific techniques, relevant to sports law.

The centre of gravity of this research is basing on the public regulation of sports rights by the medium of EC competition law. Both areas have their well-developed structure and abundant regulatory history. However, until very recently they did not intersect often enough and even if they did, this intersection had rather sporadic, non-systemic character. Over the last two decades the situation has changed drastically. The reason of this transformation is mainly related to the substantial paradigm shift of the very nature of sports rights. Being previously treated predominantly in the context of physical activity and healthcare, they were considered rather as public utility domain. However, in the course of time the professional sports activities gained more commercial features and now they are perceived as an indispensable part of an entertainment and media industries.

The commercial value of sports rights is increasing significantly and permanently on both sides of Atlantic. Six-figured sums of the revenues have been gradually transforming into seven-, eight- and even nine-figured incomes of the most successful sports rights holders (such as IOC, FIFA, UEFA, NFL, NBA, MLB, NHL, FAPL etc.). In 2006 the revenues of the five largest European football tournaments have reached record levels and constitute more than 7 billions US dollars[1]. Organizers of the European Football Championship-2012 in Ukraine and Poland foresee the value of its broadcasting rights as more than 1 billion US dollars (which constitutes about 35.000.000 US dollars per one football match on average).

[1] Deloitte, Annual Review of Football Finance, 2007, Deloitte, London, UK.

According to an estimation of the European Commission, sport generates a value-added effect of €407 billion representing 3.65% of the GDP and 15 million employees, which represents a share of 5.4% of the labour market.[2] These figures become possible, primarily as a result of the increase of the value of broadcasting rights, especially television rights to sport events. Premium sporting events, in particular European football, are considered as one of the main drivers of television, especially pay-TV, as well as new media platforms.

The main purpose of this research project is to draw a clear picture of the state of things in the area of intersection between European competition law and sport related commercial domains. We will pay a particular attention in our research on the broadcasting rights for sporting events in order to explore the multidimensional scale of the commercial practices of the main actors in sports industry between themselves as well as their relations with public regulatory authorities.

The central goal of this paper is in analysis of the traditional set of antitrust dilemmas through the prism of present-day challenges brought to the regulatory context by the aggressive development of media-related technologies. Digitalisation and universality of Internet usage together with vast broadband deployment and convergence of media platforms put on the agenda the necessity of reassessment the metaphysical essence of intellectual property in general and sports rights in particular. This task concerns the European regulatory policy and competition law in the relevant domain as well.

We leave outside the scope of this research project the analysis of European sports policy in the area of free movement of workers and, more broadly, regulatory issues related to human rights.

For the purpose of this paper, 'broadcasting' means the whole range of transmission of visual and audio signals in all commercially justifiable formats from provider to end-user (including 'point-to-multipoint' and 'point-to-point' communication). This classification allows us to include into analysis such highly growing segments of sports rights distribution platforms as 'video-on-demand' and 'video on pay-per-view principle'. We will pay particular attention to the new forms of sports rights consumption, such as Internet Protocol Television (IPTV) and signal

[2] Overview of the DG Competition policy areas
http://ec.europa.eu/comm/competition/sectors/sports/overview_en.html

transmission via third generation mobile phone technology (3GTV or 3G), by virtue of the fact that the proportion of sports rights, consumed by the end-users via these rapidly growing technologies is permanently increasing. The heterogeneous nature of these intermediaries poses new regulatory challenges and provides new impetuses for the theory of antitrust in particular.

In the course of the research project we apply 'moderate' methodological approach to competition law and policy, meaning that our understanding of competition is not as broad as it is in Austrian School. Such inherent factors as general regulatory environment as 'striving to gain consumers' loyalty', 'competition with other industries', 'dealing with challenges of innovation and welfare standards' and other similarly relevant to competition factors we do not consider as competition-related issues.

On the other hand, we do not limit our understanding of competition process solely to traditional antitrust. For this reason we elaborate a concept of two-dimensional competition meaning by this, in particular, mutually dependent economic interaction between two theoretical and regulatory instruments: positive competition and negative competition[3]. That makes the methodological scope of our research much broader and allows us to take into consideration such instruments of positive competition law as European regulatory policy in electronic communication sector and European audiovisual policy, not extrapolating, however, the area of research to the whole range of macroeconomic factors, which have to do with competition only in its Schumpeterian sense.

During the research we were not limited only on the pure legal side of the issue. It is both because of the wide social complexness and novelty of the present problem as well as because of relatively humble normative regulation of the issue on the level of the EC. The present continuation of the tension between platforms is considered by us as a big methodological advantage, because we have possibility to explore not only academic and legally 'canonized' sources (i.e. scientific texts and European case-law) but also to use the wider social communicative background, applying to our study interdisciplinary approach.

[3] We are presenting this theory in a relevant chapter of the paper.

Structurally this research composed of four parts. In the First part we present our theory of competition law and policy, delineating the main institutes and sources of European competition law as well as European regulatory instruments within the areas, which are central to the sports industries (i.e. electronic communication and audiovisual policies). We also provide there the general framework of the problem, analyse main institutes and offer some preliminary solutions from the academic perspective. The Second part is devoted to the study of the major intersections between sports and EC competition law. In part 3 we explore the central issue of the topic, which is EC competition law enforcement the area of sports broadcasting. Part Four scrutinize new media rights, since our methodological believes urge us to conclusions that current and future European regulation of new media rights will construct the central element in the paradigm of 'Sport and EC Competition Law'.

Over the last two decades the Commission has launched about one hundred cases which are related to intersection between sports and EC competition law. The metaphysical complexity of the European regulatory measures, which are the result of the multilevel nature of the European Communities still does not allowed to construct the proper and predictable constellation of the future development of sport related industries within EC. Another reason for such a lack of consistency has its roots in the technological development and digitization. From the perspective of innovation, each year brings some new fundamental challenges to the European regulators and fosters them to reassess existing regulatory policy. This leads to 'regular' paradigm shift within the legal environment. The trend towards an increasing quantity of cases related to sport also results from the commercialisation of sport in Europe.

The objective of the present research was to evaluate the current regulatory system of sport-related areas from the perspective of EC competition policy. We began with analysis of the essence of European competition law, offering an original definition of an European positive competition law and European negative competition law. Because of deep internal interdependence between *ex post* competition law and *ex ante* sector specific regulation (and because of the different legal nature of both economically similar instruments) we are offering and elaborating the concept of *positive* and *negative* competition law, meaning as *a positive* competition law sector specific regulation (i.e. proactive competition, fine-

tuning its most efficient model) and *a negative* competition law – antitrust *sensu stricto* (with the aim to protect the competition and eliminate the potential obstacles for its functioning). This terminology is applied by analogy with *negative* and *positive* integrations in the general theory of European law. We consider as important the usage of this terminology because it allows us, as lawyers to see these two regulatory instruments in their dialectical interdependence.

We look at the essence of antitrust, analysing its conceptual roots, doctrinal background, historical development, eventual controversies between major schools and thoughts and concluding by comparing pros and cons of two most influential theories of competition 'Invisible Hand vs./and Hard Hand' and looking at concept of legal paradox. Then we explore the unilateral conduct – an important abusive behaviour of a company in a dominant position. We are applying here the similar methodology as in the chapter, related to collusive practices. The attention was paid predominantly to exclusionary conduct – this is not because we don't consider exploitative abuses less harmful for competition (we are not in the position here to make a judgment about such fundamental antitrust issues), but rather because most of current and predictable unilateral distortions of competition in the sports rights area stream from the exclusionary abuses. We also tried to find an appropriate place for Essential Facilities doctrine, in particular to the certain parts of the sports rights (newly arisen markets such as parallel commentaries and parallel video-streaming). Our hypothesis here is that parallel commentaries may bring an additional value to existing rights and are go within the scope of IMS new product test.

After this we are analysing the *positive* competition law in the issues related to the regulation of infrastructure (i.e. European telecommunications policy) and content (European audiovisual policy). We are exploring both the current and reformed regulatory regimes in these areas, as well as analysing the most important legal institutes of these policies, which are related to obtaining, distribution and operating with broadcasting rights for sporting events.

After two decades of the Community liberalization policy in the telecommunications area, the domestic European markets are becoming relatively integrated and disclosed. This gives the chance for the world-wide leaders of the electronic communications industry to enter into the regulatory homogenous, rapidly growing European telecommunications environment without the necessity to comply

with 27 different administrative regimes of all the EU member states. The opening of the European telecommunications industry is a long-term process, which has to be seen in its three dimensions: 'incumbents v. new entrants', 'domestic telcos v. European vis-à-vis' and 'European telcos v. foreign competitors'.

After this we evaluate the 'Network Neutrality' case-law and legislation in the US and offer several suggestions about the future development of this phenomenon in the European dimension (in the context, related to our research). Our preliminary findings testify against 'Network Neutrality' positive competition law, since its goals can be successfully achieved by less interventionist and/or less unrealistic regulatory tools (such as local loops unbundling). We are not the big proponents of 'Network Neutrality' neither because of its essential contradiction with the constitutional property rights. In addition, the future technological development may limit the existing service monopoly of the current electronic communications companies, since they are facing the competitive challenge from the exponentially growing wireless data transmission technologies.

Then we described the main areas of the intersection between sport related industries and regulatory policies. This was followed by the study of the central issue of the research, which is the European regulatory regime of broadcasting rights for sporting events. Term 'broadcasting' we use in its broad scope, which includes also Internet-streaming, 3G-transmission, big-screen-performance and other eventual formats of showing the sporting events (predominantly live). More specifically, we describe the phenomenon of exclusivity in the premium content area and the applicability of 'winner-gets-all' formula for market relations between competitors. We continue with a study of platform neutrality concept, digital rights management, piracy paradox and scarcity paradox (the more digital contents are available the bigger is value of premium content).

The convergence of electronic communications, media and entertainment industries puts on the agenda the need for revisiting the existing formats to bring the content to the consumers. Technical possibility of high-speed data management impels both content-oriented and infrastructure-oriented industries for searching the new business models of advanced content delivery. Paradoxically, the higher capacity of the networks, the bigger scarcity the traffic becomes. This is the case,

because Internet-users increasingly prefer 'click-and-watch' over the previously dominating 'click-and-wait' model of content consumption.

This technological part is followed by historical overview of legal regulation of broadcasting rights for sporting events on the both sides of Atlantic. Then we demonstrated the direct and mediate objectives of the thesis, and described main methodological techniques (both related to exploring the concept of competition and those related to sports rights regulation). We are concluding the first part by analysing the general theoretical categories of antitrust law and policy and their interrelations with the specific areas of our research.

In the next part of the thesis we gradually analyse the core problems of the research – i.e. regulation of broadcasting rights for sporting events by the *negative* European competition law. The analysis implements the US experience in these issues as well. In the course of research we were not limit our attention to already existed case-law in the area of premium rights broadcasting but explored all eventually relevant jurisprudence of the European courts in order to comprehensiveness of the judicial understanding of antitrust and its future application in the issues, related to the present research. In particular we are concentrated on joint selling, joint buying, exclusivity and a proper definition of the markets.

The last part of the research is devoted to the case study of the European regulatory policy of selling of sports rights to new broadcasting media. This area is of the main importance, since rapid technological development is fostering media operators to adopt new strategies to satisfy the demand of their customers. There are many real and perspective points for interferences of the European regulatory policy, in particular because of (allegedly) anticompetitive conduct of initial holders of sports rights while selling them on the downstream market.

Current state of research

The different aspects of intersection between sport and EC competition law have their rich European literature. The commercial transformation of sport, driven by the technological and legal development, became an impetus for academic attention to sport related areas for many researchers. It is quite obvious that these two categories go in the direct interdependence. In the historical perspective the 'constitutional' questions of jurisdictions have been on the top of the scientific agenda within this domain. Afterwards many other elements of the topic have been elaborated by the academic community. Often the organizational rules, which are inherent for maintaining the competitiveness of professional sport, contradict to European competition policy and this tension leads to inveterate theoretical debates between the parties.

The area of intersection between EC law and sport has not to be confused with the sports law, which is *prima facie* similar subject. The latter has its long academic history and well established doctrine[4]. However while the area of sport and European law (and in particular European competition law) belongs to European trade law, sports law is a traditional branch of private law, with its well-elaborated scientific background (topics related to freedom of contract, pacta sunt servanda, force majeure, clausula rebus sic stantibus, good faith, protection of legitimate expectations, necessity of seeing the parties' intent, in dubio contra proferentem, doubt benefits the party assuming a contractual obligation, equal treatment, proportionality, good faith, the legal nature of sporting associations, rights and obligations created by contract, interpretation of the rules of sporting bodies), which also include several issues, related to European private law. On the contrary, sport within the context of European trade law (*largo sensu*) is a relatively new area of research. Despite of its short regulatory and doctrinal history, this subject has been deeply developed, particularly over the last decade.

[4] E.g. Beloff, Michael, Demetriou Marine, Sports Law, Hart Publishing, Oxford, 1999

Initially, in Walrave and Koch[5] case from 1974, the ECJ adjudicated one of the first decisions on sport as an economic activity within the EC context. In this case the ECJ pointed out that sport belongs to the competences of European regulatory bodies and rejected the notion of the party that 'the sphere of jurisdiction of the European law is limited to purely economic areas, to which sport does not belong'. On the contrary, the professional sport has been declared rather as an economic activity *sui generis*. In this case sport has been percept by the ECJ as 'another example of economic activity'. Consequentially, the well-elaborated doctrinal grounds of freedom to provide services just become extrapolated on the area of sport, regardless to the subject matter of the relations concerned.

The economic nature of European sport can be barely changed by the political declarations and other non-compulsory statements of the Member States. Furthermore, the legal status of professional sport in Europe would not be changed even after eventual amendment of the founding Treaties,[6] because of the fact that the competences of the Communities within the economic areas de facto constitute the European *'jus cogens'*. We obviously leave outside the scope of the present research the constitutional debates about the competences of national and European authorities, in their both ECJ' and national constitutional courts' dimensions, as well as the issues, related to subsidiarity doctrine. On the contrary, the intersection of sport and European law is explored in the present and most of the other existing studies from the doctrinal presumption of the jurisdictional legitimacy of the EC authorities over the matter concerned. This is despite the fact that for the time being there are some attempts of the interested parties to impugn the current state of affairs.[7]

In general there are two conflicting approaches to the role and place of professional sport in the EU regulatory constellation. The former, which is pro-market insists on commercial aspects of sport and proposes to include sport into the general European regulatory environment an a pair with other sectors of economy. The latter approach is culture-oriented. Its representatives insist on specificity of

[5] *Infra*

[6] This idea has been several times proposed by some actors in order to escape the regulatory burden of the EC law. It does not seems even technically plausible, since such amendment requires unanimity

[7] The vivid example of this trend is the current 'home-grown players' policy by the UEFA, which strives to challenge the EC freedom to provide services by means of obliging the football clubs to have in their composition of the team some amount of the players from the local area (i.e. indirectly discriminating players from other localities and to most extent, citizens of other Member States).

sport and its unique role in the European socio-cultural agenda. They propose to provide sport with special European status or leave the subject to be regulated by the national legislation. Both points of view have substantial amount of their proponents and political influence of both is relatively equal. The same can not be said about the 'alignment of forces' from the perspective of EC law, because the Community legislation, as well as existing case-law show substantial theoretical dominance of the market-oriented opinions.

Notwithstanding that several cases with relatively far reaching consequences have been already decided in the seventies and eighties, the comprehensive judicial evaluation of the sport within the context of European integration policies has been done by ECJ and Advocate General in the landmark Bosman[8] decision. In its decision the ECJ did not follow the theoretical rationale, offered by AG Lenz in his Opinion to case, founding its justification on the free movement of workers. However the very possibility to apply Articles 81 and 82 EC to the sport related issues has been manifested already at that time.

It is important to admit that this case undermined the foundations of the compromise between FIFA and the Commission, reached in the late eighties. Its essence concerned the 'foreign player's quota' rules in football and their inconsistency with the EC freedom to provide services. According to that compromise, so called '3+2 rule' has been introduced. Under these provisions each club has been provided with rights to involve into its games up to three foreign players (with another two for substitution). However, the existing agreement did not preclude the matter being argued by other legal tool, provided there was direct violation of the rights of individuals[9] and Mr. Bosman's action to protect his rights had no relation with the existing agreement between European and football regulators. Furthermore, the ECJ's ruling was in favor of the plaintiff and '3+2 rule' despite of its prior authorization by the Commission has been declared as conflicting with EC principles with the following requirement to dismantle these provisions from the European football immediately.

[8] *Infra*

[9] The doctrine of direct effect of Community law before national courts within this particular context has been elaborated by the CFI in its *Automec* case, T-24/90, 1992 ECR II 2223

The importance of Bosman case is not only doctrinal. This decision is also remarkable because it has been issued by the Court, rather than resolved by the parties themselves in a mutually acceptable way. As UEFA's officials confessed latter on, the impact of Bosman case on the future of European sport structure has been incomparable with the internal attention, which had been given to the case by the UEFA's legal service. This decision has not only determined the future constellation of the European profession football but also showed that the notion of cultural uniqueness and regulatory independence of sport has not to be perceived as an axiom. Despite of the big political support from several Member States the idea of the regulatory specificity of sport and did not receive the doctrinal justification from the ECJ. Quite the contrary, the Court adjudicated that sport as an economic activity has to fall within the scope of regulation of European law and policy.

The political controversy together with enormous media attention to Bosman case 'legitimized' this topic within the European scientific circles. This and following decisions of the European Courts together with the Commission's policy in the area of sport do not eliminate the importance and specificity of sport. As Weatherill says in its contribution to the panel 'Sports Under EC Competition Law and U.S. Antitrust Law' at the influential Annual Proceedings of the Fordham Corporate Law Institute, '[S]tudy of the pattern according to which sport is subjected to the rules of EC law is unusually interesting. The matter is of profound practical importance for sports lawyers, but it is also intriguing to the specialist in EC trade law and in competition / antitrust law. Sport is not immunized from the supervision of EC law and neither is it simply another industry that must abide by the requirements of the EC legal order. Sport is a special case, but acute difficulties perennially afflicts attempts to trace how 'special' sport really is and how that special status is properly reflected in the shaping of the relevant rules of EC law'.[10] He goes on, by pointing out that 'it was always surprising that the Court in Bosman chose to decide the case exclusively on the basis of Article 39, neglecting entirely the impact of the Treaty competition rules. This was perhaps a hint that the Court realized the complexity associated with the application of Articles 81 and 82 to sport and that, by focusing on violation of the

[10] Weatherill, Stephen, Introduction 'Sports Under EC Competition Law and U.S. Antitrust Law', Annual Proceedings of the Fordham Corporate Law Institute, 1999.International Antitrust Law & Policy, New York, 2000.

free movement rules alone, it preferred to leave consideration of competition law to another day and, perhaps better still from its perspective, to another institution'.[11]

European regulation of sports industries has relatively short history. However, over the last twenty years this topic has been comprehensively scrutinized in the European and US academia. The relevant researches have been also performed by some Czech scholars.[12] The biggest scientific attention to the relations between sport and EC competition law has been paid in the relevant British literature. This area however has been deeply explored also in German, Italian, French and Dutch studies. Some angles of the topic have been also analyzed by the researchers from the new Member States, in particular from Poland and Czech Republic.

Immediately after its doctrinal success in a Bosman case, the Commission launched the series of research on the issues, related to intersection between sport and European regulatory policy. This period is characterized by the following conceptualization of this subject. Not least because of the following investigation by the Commission of the some commercial practice in the area of sport, in particular, from the perspective of the EC competition law, but also because of the doctrinal elaboration of this subject by the leading experts of the EC trade and EC competition law and policy.

Speaking of the academic contribution into the research, it is also important to recognize the role of the European and national courts and competition authorities. Quite often the decisions and administrative practices of the respective authorities served as a genuine and original source for conceptual analysis of the matter. Their doctrinal elaboration of legal status of sport in the EU context goes arm in arm with the academic research of this domain, not least because of the close intellectual interconnection between the researchers and practitioners in this specific issues.

The most important impetus for the regulatory and academic attention to sport related areas within the context of the European law has been done by the rapid commercialization of this and ancillary industries. Alongside with digital switch

[11] Ibid

[12] e.g. Hamerník, Pavel, Rozsudek Evropského soudního dvora Simutenkov - definitivní konec cizineckých kvót ve sportu v EU?, Právní rozhledy : casopis pro vsechna právní odvetví 2005 p.795-799; Hamerník, Pavel The Impact of EC Law on Sport in the Czech Republic, The International Sports Law Journal 2004, No. 3-4; Pecina, Martin ÚOHS, Hospodářská soutěž a sport, 2007; Králík, Michal Právo ve sportu, C.H. Beck, Praha, 2001, 278 s.; Michal Králík, Právní odpovědnost za sportovní úrazy, Právní rádce, 15.12.2007

over, the commercial attraction of sport and in particular football became grow up significantly. At the beginning of nineties, the major TV operators started to compete for the audience. It is the case, because previously in most European countries there was a monopoly or duopoly of public television. In this race for consumers' preference premium sport content became a driving force. Its value is permanently increasing, but still remains a scarcity for TV operators. This trend consequentially leaded to the increasing attention of the European regulators and ECJ to the management of sports rights.

The next important threshold of the political and scientific elaboration of this subject was the investigation by the Commission, national competition authorities and European Courts the issues, related to joint selling and joint acquisition of sports rights to sporting events. This was followed on by the new development of visual data transmission via mobile phones and ancillary portative devices. The whole industry of mobile telecommunications is currently waiting and trying to predict the future regulatory development of the present matter.

Although this subject is still remains in its infancy, there is already well-elaborated doctrine, which is predominantly established by the parties concerned. In the last part of our paper we will offer the critical evaluation of the state of affairs in the area of new-media sports rights. We will also offer some theoretical proposals to these problems both from the legal and academic perspectives.

Part I

European Competition Law and European Regulatory Policies

1. European competition law

Competition law plays an important role in the area of regulation of sport-related industries. In this chapter we provide analysis of the main institutes of European competition law, justifying the importance of its methodological separation into *positive* and *negative* parts and offer appraisal of the optimal model of coexistence between sport and European competition law.

1.1. Positive and negative competition law

There are two principal tools to achieve the main tasks of European competition policy. These instruments are: European regulatory policy and European antitrust law. The first one (i.e. European *ad hoc* competition law) is much broader and is not limited to only competition-related matters. The second one (i.e. European competition law *stricto sensu*) is directed to the protection of the existing European competitive environment. In distinguishing of these two instruments there are direct methodological parallels with the institutes of *positive* and *negative* European integration. The purpose of the first one is, essentially *to establish similarities between the economies of all member states* whereas the task of the second one is *to eliminate differences between the economies of all member states.* By analogy, the aim of European *positive* competition law (i.e. European regulatory policy or *ad hoc* competition law) has the purpose *to create* and to *install properly* the European competitive environment. To achieve these tasks, European *positive* competition law applies wide range of legal, economic, diplomatic and political instruments. The purpose of European *negative* competition law (i.e. European antitrust law and policy or competition law *stricto sensu*) is more 'modest' and comes down to protection of the existing antitrust rules and principles. Both European and American legal and economic literature, speaking of 'competition/antitrust law' predominantly explore only *negative* competition/antitrust law, leaving aside the much wider issues, related to competitive economic policy, macroeconomic studies and political sciences. The cumulative combination of *positive* and *negative* competition law would constitute 'competition law *largo sensu*'.

The selected methodology of our research allows us to recollect the analysis predominantly upon the *negative* European competition law. The reason for this approach is that the scope of *positive* competition law is immensely broad, inasmuch as it embodies a wide range of regulatory instruments (such as *ad hoc* administrative intervention, political influence, macroeconomic justification of some exceptions etc.), which, by virtue of their political nature, are characterized of inconsistency and lack of legal certainty. Fully recognizing the political importance of these instruments, we, however, do not see the scientific value in trying to systematize something, which is ruled purely by rationale of practicality. That is why we narrowed down the domain of theoretical examination for this paper to the *negative* competition law, which although does not belong to the most predictable areas of law, yet is characterized by its legal certainty and to considerably higher extent. It is necessary to stress however that the distinction between *positive* and *negative* competition law is much higher in theory than in practice, where the most effective way to increase the competition within the European internal market is in combination of both.

1.2. Multitasking nature of the European competition law

Although the main goal of European competition law is to preserve and develop competition within European internal market, the European competition law is called to serve other numerous important aims. By impelling companies to abandon anticompetitive practices, European competition law contributes to such decisive economic domains as industrial development, the protection of small to medium sized enterprises and consumer welfare. It eliminates barriers to trade within and between EC member states thus strengthening national markets as well as European internal market. This promotes also political and economic integration and establishing the single European economic entity.

1.3. The fundaments of European competition law

The key task of the European competition law is protection of competition within internal market. The rules related to state aid, as well as vast European regulatory policy, belong to *positive* competition law. It means that the very rational

of these policies is based in the attempt of public authorities to *establish* and/or *improve* the competition within the market. European regulation of state aid, together with *ex ante* regulatory instruments of EC law, constitutes an essence of a proactive approach to competition. Whereas the classical tools of antitrust represent a core of *negative* competition policy. These two instruments are European law of collusive agreements between undertakings (European cartel law) and European law of abuse of dominance (European antimonopoly law).

1.4. Collusive conduct

Article 81(1) EC stipulates that '[t]he following shall be prohibited as incompatible with the common market: 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, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'[13]. All these practices are declared as 'automatically void'. Article 81(3) EC provides conditions under which the provisions of Article 81(1) EC may be considered as inapplicable. The non-exhaustive list of these circumstances includes, in particular, the agreement or category of agreements between undertakings; decision or category of decisions by associations of undertakings or the concerted practice or category of concerted practices 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, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives'; and '(b) afford such undertakings the possibility of eliminating

[13] EC Treaty, Article 81(1) Supra

competition in respect of a substantial part of the products in question'[14]. Hence, Article 81(3) provides four conditions, compliance with which may lead to immunization from the Article 81(2). This, however is possibly only if all four conditions (efficiency gains; fair share for consumers; indispensability of the restrictions; and no elimination of competition) are satisfied cumulatively (i.e. they must all be fulfilled for the exception rule to be applicable)[15]. If all these conditions are fulfilled the agreement does not harm competition within the relevant market in the broad sense. It is because its consequences lead the undertakings concerned to offer more efficient products to the end-users and/or to improve the competitive environment within relevant market. Given that these four conditions are cumulative, there is no necessity to evaluate any remaining conditions if it is found that one of them is not meet. These four conditions of Article 81(3) EC are also exhaustive.

With the purpose to provide more homogenous application of Article 81 EC the Commission issued Guidelines on the application of Article 81(3) of the Treaty[16]. In accordance with this document, the assessment under Article 81 EC consists of two steps. The first is to evaluate whether an agreement between undertakings that is capable of affecting trade between Member States has an appreciable anticompetitive goal or effect. If an agreement does not have as its object to restrict (i.e. actually or potentially[17]) the competition, it must be scrutinized whether this agreement has harmful effects on competition. Article 81(3) EC will only apply in the case of restrictive agreements. When an agreement between undertakings does not restrict competition (i.e. goes out of scope of Article 81(1) EC) there is no need in following examination of eventual benefits resulting from the agreement. It will be presumed to be legal automatically. If, however an agreement is found to be restrictive of competition, the pro-competitive benefits produced by that agreement have to be evaluated. It is important to see whether these positive effects outweigh the anticompetitive harms.

[14] EC Treaty, Article 81(3) Supra

[15] E.g. Case T-185/00 and others, Métropole télévision SA (M6), [2002] ECR II-3805, paragraph 86

[16] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty Official Journal C 101 , 27/04/2004 P. 0097 - 0118

[17] Case C-7/95 P, John Deere, [1998] ECR I-3111, paragraph 77

1.4.1. Efficiency defence

The Commission's Guidelines provides detailed analysis of all four conditions for applying Article 81(3) EC, basing the research not only on the current European legislation, adjudicated case law, but also on the economic theory. It pays particular attention to the concept of *efficiency,* since this notion plays the pivotal role during the evaluation of the validity of agreements. The assessment of efficiency is made on the case by case basis, within the actual circumstances in which the agreement concludes and must in particular consider the structure of the relevant market, the undertaking risks related to that commercial relation, and the incentives facing the relevant companies. The concept of efficiency constitutes the main theoretical battlefield between the mainstream legal and economic schools of competition law. The ambivalence in its definitions, as well as the subjects, allows various (often controversial or even mutually exclusive) interpretations of efficiency. Furthermore, it is quite likely the final results of a proper defining of the efficiency would be directly dependent on the aims of the party in question. In general, the borderline between different interpretations of efficiency in drawn based the existential conflict between *Harvard* and *Chicago* schools of law and economics.

Within the context of EC competition law, efficiency is an objective concept[18]. This implies that efficiencies are not evaluated from the subjective point of view of the undertakings. For example, such prima facie positive for consumers consequences of anticompetitive agreements as cost saving, do not lead to the efficiency gains from the perspective of the EC competition law. That is the case because the cost cuts in question do not offer any pro-competitive aftermaths for the markets, but merely allow the companies concerned to maximize their revenues and are therefore irrelevant within the context of Article 81(3) EC. According to the Guidelines, 'consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers'.[19] Thus the Commission strives to provide an intermediate approach to the definition of the scope of the category of 'consumer'. It goes beyond the narrow formula, which provides this status solely to 'end-users' or

[18] Joined Cases 56/64 and 58/66, Consten and Grundig, [1966] ECR 429
[19] Guidelines on the application of Article 81(3) of the Treaty, paragraph 84 Supra

even 'each-particular-end-user' and embodies also such ancillary categories as 'customers' and 'commercial partners'. However, it does not include such categories as 'total welfare' and 'industrial welfare', which might be relevant to the definition of 'consumer' under the certain circumstances. Some theoreticians include among the factors relevant to 'consumer welfare' such notion as 'legal certainty' (i.e. if the consumer is certain lives in a predictable legal environment he can be confident in his future transactions and, as a consequence, he can maximize his welfare).

According to settled case law, the determinative element is the general influence on consumers of the products and services within the relevant market and not the impact on individual members of this group of consumers[20]. Thereby if some fraction of total amount of consumers is dependent on the product to much higher extent than the main part of the consumers group, their interests will not be taken into account within the context of the proper definition of relevant product market (e.g. there will be no relevant market for 'New York Times' in Los Angeles city, since the overwhelming majority of consumers will switch to the local newspaper, although the tiny fraction would find this media irreplaceable). Furthermore, it is immensely important to define the proper period for testing of consumers' harms and benefits. If the diagram has been drawn up improperly, some temporary harms, which are indispensable parts of the way to final benefits may by wrongly deemed as unequivocal results of the agreements with the imperative consequences, provided in Article 81(2) EC.

That is why in some circumstances a certain time period may be allowed before the evaluation of efficiencies. Until such time the agreement may explicitly reflect only its negative effects. Usually this time lag has to be reasonably short. The greater it is the greater must be the proofs of efficiencies to recoup all preliminary expenses of consumers within the period preceding the pass-on, and, consequently, the greater the restriction of competition found under Article 81(1) EC the greater must be the efficiencies to consumers. It must also be taken into account that this element of measuring the efficiency also brings many discussions, since for example for the ordoliberal understanding of competition the circle 'act-externalities-result' is usually much longer and they are more ready to accept the preliminary negative

[20] Case T-131/99 Shaw and Falla v Commission [2002] ECR II-2023 paragraph 163

effects for some particular consumer, inasmuch as long-term benefits for the regulatory structure in whole overweight short-term harms.

It should also be noted that looking on this problem from the perspectives of Chicago school we will se that there is strong preference to short term approach to the consumer welfare. Hence even if the agreement is likely to harm the competitive environment in the long-term perspective but at the same time brings sufficient amount of benefits to the consumers, the protagonists of Chicago school would tend to immunize it from the Article 81(1) EC by applying to this behaviour the provisions of Article 81(3) EC. Within the context of sport a justification under Article 81(3) EC is very likely to perform where a sporting rule is not inherent in the organisation or proper management of sport so as to justify the application of *Wouters* principle but the beneficial effects of this rule outweigh its harmful consequences.

1.5. Abuse of dominant position

In accordance with Community case law, dominant position is characterized by economic power possessed by an undertaking which permit it to eliminate strong competition being maintained on the relevant market by allowing it the power to conduct relatively independently of other companies, its customers and consumers. A dominant position is essentially the symbiosis of different factors, which, taken separately, usually do not constitute economic harms.

Although the primary European law envisages the responsibility for an abuse of a dominant position by the undertaking with significant market power, the legal threshold for liability is substantially lower as compared to collusive conduct. This is explained by the very nature of abusive conduct and special responsibility which has an undertaking with significant market power. The concept of special responsibility has been established by the ECJ in its *Michelin*[21] case and substantially elaborated in its following judicature. Article 82 EC provides that 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

[21] Case 322/81 Michelin v Commission [1983] ECR 3461,[1985] 1 CMLR 282

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'[22].

The concept of dominance regulated by Article 82 EC relates to a position of economic strength on a market, it is therefore necessary to qualify whether the undertaking concerned is in a dominant position and, therefore, whether its behaviour may be abusive in terms of Article 82 EC. The main goal of definition of the market is to methodologically estimate the direct competitive limits faced by a company. The aim of defining a relevant product market and relevant geographic market is to detect all present competitors of the undertaking concerned that are likely to constraint its conduct.

1.5.1. Efficiency defence

Article 82 EC does not explicitly mention the efficiency defence conditions. However this option is currently highly discussed by the European legislators, academicians, patricians and enforcers of EC competition law and policy[23]. Since the Commission tries to establish consistent and sustainable position to the abuse of dominance, there is necessity to elaborate the general methodological approach to this policy. Unlike in the area of collusive agreements, the issues of abuse of dominance can not be immunize from the application of Article 82 EC (in other words there is no so called 'Article 82(3) EC', which would provide the conditions under which certain practices would be deemed legal per se). The situation may change significantly, if the public debates on the application of Article 82 of the Treaty will end up successfully. Although in a legislative sense it is still long process, already in present we have to discuss these issues from the doctrinal perspective, since the application of efficiency defence for abusive conduct may have

[22] EC Treaty, Article 82

[23] E.g. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Public consultation Brussels, December 2005 www.ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf

drastic effects for the European regulatory governance of broadcasting rights for sporting events.

Similar to the rationale of Article 81(3) EC, the efficiency defence for abusive conducts will be accepted if the dominant undertaking is able to show that the four excusing conditions are presented cumulatively. The first condition is the fulfilment of certain positive results for economy as a consequence of abusive practice – i.e. efficiency *stricto sensu* (to show that the abusive behaviour will contribute to enhancement the production of goods or their distribution and/or to stimulate macroeconomic development). In addition the dominant company must also demonstrate that this conduct has been indispensable to realise the efficiencies (i.e. it has to prove that there are no alternative reasonable economic choices to achieve similar results with less harm of competition).

Other two conditions concern the benefits of consumers and keeping not eliminated the competition in respect of a substantial part of the products concerned. In other words, the dominant undertaking has to demonstrate that efficiencies generated by the conduct concerned are likely to enhance the ability and incentive of the dominant undertaking to act for the benefit of consumers and the results of the this economic conduct outweigh the presumably negative consequences on competition and therewith the potential damages to consumers that the behaviour might otherwise provoke. In addition this behaviour has to be performed in a way to avoid the elimination of the competition in respect of a substantial part of the products concerned, since any short-term efficiency gains cannot cover long-term harm caused by anticompetitive behaviour of the undertaking in a dominant position.

It is also important to stress that the Commission recognizes that 'rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. Ultimately the protection of rivalry and the competitive process is given priority over possible pro-competitive efficiency gains... It is therefore, also when assessing the no-elimination-of competition requirement, highly unlikely that abusive conduct of a dominant company with a market position approaching that of a monopoly, or with a similar level of market power, could be justified on the ground that efficiency gains would be sufficient to

counteract its actual or likely anti-competitive effects '[24]. This is an indispensable conclusion, because the very nature of the *negative* competition is not in the development, improvement or evolving of the competitive process, but 'solely' in its protection. That is why any proactive actions (i.e. actions which improve for the future the competitive process) of the undertakings, if done at the expenses of the present competition as such (this is very important societal institute under protection of the law) cannot be prioritise by the European regulatory authorities.

1.5.2. Collective dominance

Although a concept of dominant position is envisaged for a one company, it is very possible to apply the relevant provisions of the Treaty to a collective dominance, as it is, eventually, the case with joint selling of the broadcasting rights for sports events by sports associations. In its *Compagnie maritime belge transports*[25] decision the ECJ confirmed that 'dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity. That is how the expression collective dominant position should be understood'[26]. It goes without saying that sports federations have de facto monopolies in a given sport and may thus usually be deemed dominant in the market of the organisation and management of sporting events under Article 82 EC. It is possible even where sporting federations are not performing significant activities on a given market, they may be considered to possess a dominant position if they act on those markets through the individual clubs or national sports associations. That would also be the case, for example, when sports leagues share revenues, gained by the individual clubs from the selling of their broadcasting rights for sporting events.

Thus in its *Piau* adjudication CFI pointed out that 'It seems unrealistic to claim that FIFA, which is recognized as holding supervisory powers over the sport-related activity of football and connected economic activities, such as the activity of players' agents in the present case, does not hold a collective dominant position on the market

[24] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Supra

[25] Joined cases C-395/96 P and C-396/96 P, Compagnie Maritime Belge Transports SA and. Others v. Commission [2000] ECR I-1365

[26] Compagnie Maritime Belge Transports Supra

for players' agents' services on the ground that is not an actor on that market...The fact that FIFA is not itself an economic operator that buys players' agents' services on the market in question and that its involvement stems from rule-making activity, which it has assumed the power to exercise in respect of the economic activity of players' agents, is irrelevant as regards the application of Article 82 EC, since FIFA is the emanation of the national associations and the clubs, the actual buyers of the services of players' agents, and it therefore operates on this market through its members'[27]. In order to define the collective dominance it is necessary to scrutinize the commercial links or factors which give rise to a connection between the companies concerned and to apprise whether the undertakings concerned together constitute a collective entity.

There is no need in existence of an explicit agreement or of other legal connections in order to identify a collective dominant position. It is sufficient to provide other theoretical or empirical evidences, in particular those based on a doctrine or assessment of the structure of the market in question. There are eventually various forms of coordination, which in the certain circumstances may to be deemed as collective dominance. In some economic context, the direct price coordinating in order to keep them above the competitive level is most common format of abuse. In other situations, coordination may strive to confine production or the amount of new capacity.

In accordance to Piau adjudication, 'three cumulative conditions must be met for a finding of collective dominance: first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardize the results expected from the common policy'[28].

One of the most widespread forms of a collective dominance is the exclusionary abuse, which is a foreclosure of market for the direct and potential rivals that hinders competition and thereby harms consumers. The undertakings

[27] Case T-193/02 Piau v Commission [2005] ECR II-209 paragraphs 115, 116
[28] Case T-193/02 Piau v Commission, paragraph 111 Supra

concerned follow a collusive policy of refusing current and hypothetical competitors access to infrastructure or to charge excessive prices to their customers. There is another way of coordination which is expressed in portioning the market by geographic border or consumer preference.

To decide whether the undertakings in question are in a position of collective dominance an enforcer has to evaluate the commercial nature of their relation as well as the economic context of the relevant market as a whole. Foreclosure not necessarily has a form of direct exclusion of competitors from the markets. It can have a form of encouraging their withdrawal from the competition. A foreclosure effect can also be implicitly included into other market behaviour such as presence of economies of scale and network effects. Anticompetitive conduct thus can be qualified even if the foreclosed competitors are not forced to leave the market. It is sufficed that the undertakings in a dominant position behave in a way which disadvantage their competitors (e.g. via direct raise rivals' expenses or artificially reduce demand for the rivals' supplies).

1.5.3. Objective justification

There are circumstances, under which the anticompetitive behaviour of the undertaking which is in dominant position, may escape the application of Article 82 EC. This will be the case if it can demonstrate an objective justification for its allegedly anticompetitive behaviour or it can provide sufficient evidence that its behaviour produces efficiency gains which outweigh the harm effect on competition. One of the most common forms of abusive behaviour, which falls within the scope of the concept of objective justification, is acting in the condition of commercial necessity ('objective necessity defence'[29]). In this case the dominant company is required to demonstrate that the behaviour concerned is objectively necessary (e.g. safety or health standards). The justification must be founded on objective evidences that are commonly applied for all companies in the certain market segment. In other words, that abusive conduct has been indispensable. Basing on these evidences the dominant undertaking have to demonstrate that without the behaviour the products concerned can not or will not be produced or distributed in that market under the

[29] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Supra

'normal' conditions. Another commonly used type of objective justification is where the dominant company is able to demonstrate that the allegedly abusive conduct is actually a loss minimising reaction to competition from others ('meeting competition defence'[30]). It stipulates that the dominant undertaking has to show that its behaviour is a response to decrease pricing by the competitors. For this second type of objective justification the dominant undertaking has to demonstrate that the selected behaviour is an appropriate route to reach the substantiated commercial goal (i.e. 'proportionality test').

1.6. Definition of a relevant market

According to antitrust theory the relevant market is the class of goods or services which supposed to be substitutable for consumer. If two products or services are found to be substitutable, there is high probability that they are competing.

Defining of a relevant market is a crucial element in the system of application of antitrust law into practical context. This is also the case in sport-related matters, in particular, in the regulation of the system of broadcasting rights for sporting events by EC competition law. The geographic and product dimension of the markets has direct impact on the all main subjects, since this analysis is supposed to show how big the share of the relevant company is and, consequently, to what extent the undertaking(s) concerned is likely to violate competitive balance within the European internal market.

The purpose of defining a market in both its geographic and product dimension is to identify the size and limits of the competitive environment in some particular place, time and context. By calculating market shares of undertaking one can approximately conclude if the undertaking concern is likely to substantially violate competitive environment and thus to what extent its behaviour has to be under scrutiny of the public administrative authorities for the purposes of identifying dominance or collusive conduct.

[30] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Supra

Commission Notice on the definition of relevant market[31] stipulates the main characteristics of market definition as follows: 'Market definition is a tool to identify and define the boundaries of competition between firms. It allows to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face'.[32] In accordance with Community legislation, a relevant geographic market is the area in which the companies concerned are involved in the process of supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. The relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

There are several ways to define the relevant market. They are applied generally for the assessment of the conduct in the market and for the assessment of structural changes in the supply of products. Usually this analysis does not lead to the homogenous outcomes. They are substantially depending on the competitive structure of the area being examined. The different time table of the analysis also might lead to the different outcomes. These features of market definition make this instrument very unstable. The final results are often dependant on the minor or subjective elements of the assessment. However this is the only effective mechanism to provide the clear and presumably objective characteristic of the markets concerned as well as the dynamic of their development.

There are two main criteria for defining the relevant markets: product and geographic. The narrower market is the higher is the probability to find a dominance or significant market share. Within European context Commission also takes into account the permanent process of market integration, since this goal is inherently presented in all main European policies. European integration is an implicit but indispensable part of the definition of the relevant markets. This is in particular relevant in the area of concentrations and structural joint ventures. The

[31] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372/5

[32] Commission Notice on the definition of relevant market, paragraph 2 Supra

administrative steps taken and implemented in the internal market programme to eliminate barriers to movement and further unify the Community markets cannot be ignored when assessing the influence on competition process.

1.6.1. Demand and supply substitution

The theory of antitrust provides several instruments for identification of the relevant market. The evaluation of demand substitution entails a designation of the range of products which are allegedly substitutable for the consumer. A demand substitution has to arising from small, constant changes in prices (i.e. whether consumers are ready to change their preferences after increase of price). This changes present evident proofs about the nature of the markets. Inversely, *mutatis mutandis* supply substitution test is applied.

According to Commission Notice on the definition of relevant market, 'these situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities are not substitutable, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in costs described above. In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas'.[33] It means that if an undertaking produces products 'a', 'b' and 'c', each of which constitutes separate market, but an undertaking can easily change its production of product 'a' to 'b' or 'c' if the situation on the market is appropriate for these changes, it is likely to consider all this three products as a one separate market.

It is important to point out that product characteristics are evaluated from the perspective of consumers as 'imagined communities'. Their attitude to a certain product has to be evaluated in terms of group's preferences. It is not enough that product concerned has its strong preferences from small fraction of the consumers and it is very unlikely that public regulator will consider this evidence as sufficient to

[33] Commission Notice on the definition of relevant market, paragraph 21 Supra

narrow down the relevant market. The reason for that is based on the impossibility to take into account every particular interest of the consumer. Thus if for some imagined viewer the match of his club being played in white uniform is not substitutable as compare to the match of the same team being played in blue one (it still may be the case for owners of black-and-white TV sets) it will by no means lead to narrowing down the relevant market. Essentially, each consumer giving preference to a certain product implies to it his own scale of values, in this terms each consumer would constitute a separate market. It goes without saying that competition law cannot and should not take into account any particularities on the individual level of the marketing, but only to operate with information relevant to all of consumers or the relevant fraction of them. It is important to point out, however, that the competition enforcer usually has an open approach to all empirical facts, which allow him to make effective assessment of available data which may be appropriate in individual cases. There is usually no structured *a priori* hierarchy of sources of facts or types of proofs.

1.6.2. SSNIP test

In order to evaluate if the product concerned is likely to constitute a relevant market, public authorities applies several economic techniques. One of the most efficient and widespread within European context is called SSNIP-test (Small but Significant and Non-transitory Increase in Price). Its essence consists in attempt to find the narrowest separate market within which eventual violators could charge a profitable substantial increase in price of the product or service.

The SSNIP test is often applied via assessment of the price elasticity of demand, which is the instrument that admeasures the essence and level of the correlation between the quantitative changes demanded of a good and their price changes. When the price of a tested product decreases, the consumers' demand will proportionally increase. It essentially estimates the responsiveness of a change in quantity demanded for a product to a change in price. By increasing price in the range of 5 to 10 percent it evaluates if sufficient numbers of buyers are likely to switch over to rival product or service. If it is the case the price increase would be at the end unprofitable and unreasonable, thus both these markets would suppose to be

considered as a one market and the hypothetical for analysis market should not be considered a separate market for the basis of antitrust administrative procedure.

1.6.3. Cellophane Fallacy

SSNIP test is widely applicable in the both European and US antitrust practices. However, this test is neither universal nor axiomatic mechanism. There are many cases in which its application is not always precise and appropriate. One of the most illustrative examples that demonstrate it is the *Cellophane Fallacy* concept. It has got its name after the famous US *Du Pont* case.[34]

The essence of this case was that the company which is exclusive producer of cellophane in the relevant US market, had established prices at the allegedly monopoly level, arguing that cellophane was not a separate market because it is substitutable by other packaging materials such as aluminium foil, was paper etc. However, the Court found that the issue of substitutability occurred only because of excessive prices established by *Du Pont*. If the market would be competitive the substitutability would not likely to have place.

It is essentially the situation when SSNIP test fails to work., if the price is already established by the monopolist on the higher than competitive level, the increase of price will lead to switching over of the consumer demand to the neighbouring product or just the supply of this product will proportionally decrease. Thus it may happen that two allegedly similar products appear to be substitutable whereas at competitive prices it may not be the case. In other words, SSNIP test is not always an effective way to identify price abuse. It may not work if the price is already established on a very high level within the non-competitive market. Both SSNIP test and *Cellophane fallacy* concept are of major importance to sport-related matters, since they help to assess properly the relevant market for broadcasting rights for sporting events, to evaluate in this context the legality of market behaviour of the main players and correspondently to fix the relevant responsibility for eventual anticompetitive conduct.

[34] US Supreme Court in United States vs. EI du Pont de Nemours and Co. (351 US 377 (1956))

1.7. European electronic communications and audiovisual policies

The areas of electronic communications and audiovisual services are hardly regulated by positive European competition law. They constitute the centre of gravity for European broadcasting policy in the area of premium sports content. Unlike negative European competition law, these two sectors explicitly and in a more detailed way regulate the area of sports and its broadcasting intermediaries, such as traditional TV (i.e. terrestrial and satellite, digital and analogues, free and pay-TV), TV over Internet, TV over 3G mobile networks and several hypothetical ways of transmission of signals. This is the reason to scrutinize that European regulatory areas in a more detailed way.

1.7.1. Present-day regulatory regime

The evolvement of European regulatory policy in telecommunications started in the mid-Eighties, when Commission published a Green Paper on the development of the common market for telecommunications services and equipment. Originally the regulation of communications infrastructure has been performed by national authorities. The initial idea was to establish a clear guideline upon which the sector would be regulated. The next stage of EC telecommunications policy began in the mid-Nineties with further liberalization of the vast majority of national markets. At that time the homogeneity of the national regulations of telecommunications increased substantially and became generally closer to the common European standards.

By its Resolution 22 of December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures (94/C 379/03), the Council reaffirmed that conditions governing the definition of the future Community policy on telecommunications infrastructures should be the result of a political agreement and welcomed the Commission to provide for a wide consultation of the amendments which should lead to the Community regulatory framework in the telecommunications domain.

As a result of fast technological evolution and a growing juxtaposition in a number of communication areas, a draft of the new telecommunications framework has been launched at the beginning of 2000. Because of rapid convergence among

three, previously almost not interdependent, sectors (i.e. telecommunications, information technology and media), the decision has been made to cover all of them by a single regulatory regime. This new framework included regulation of both telecommunications and broadcasting aspects of communications, which previously have been regulated separately. However, the new regulatory regime of communications does not include both 'content services' providing editorial control and 'information society services', which do not mainly consist in transmission of signals on electronic communications networks. Besides of explicit exclusion of audiovisual services, new electronic communications proposal provided no coverage for regulation of telecommunications equipment.

On 25 July 2003 the new regulatory framework came into force. Initially this new package consisted of five directives: the Directive on a common regulatory framework (2002/21/EC), which lays out the main aims and procedures for an EU regulatory policy in the area of provision of telecommunications services and networks; the Directive on access and interconnection (2002/19/EC), which provides regulation of the access to and interconnection of networks on operators with significant market power; the Directive on the authorisation of Electronic Communications Networks and Services (2002/20/EC) – mechanism for establishing a new system of general authorisation. Under the provisions of this directive national regulatory authorities can no longer issue licenses, but only to establish a general authorization for all telecommunications services; the Directive on universal service and user rights related to electronic communications networks and services (2002/22/EC), which provides a minimum level of affordability the telecommunications services for European consumers, and the Directive on privacy and electronic communications (2002/58/EC), stipulating the rules for protection of personal data and privacy.

A main reason to propose the framework was to harmonise the communications legislation. In addition to this packages the Directive on competition in the markets for electronic communications services (2002/77/EC), the Decision on a regulatory framework for radio spectrum policy (678/2002/EC), the Decision on the minimum set of leased lines with harmonised characteristics and associated standards (2004/641/EC) the Decision establishing the European Regulators Group for Electronic Communications Networks and Services

(2002/627/EC) and the Recommendation on relevant markets (C (2003) 497) have been provided latter on. It is important to note that this paper does not review all provisions of all Regulatory Framework directives; instead, we focus on specific aspects of the directives, related to 'Network Neutrality' debates.

It has been acknowledged, at the current stage of the EC telecommunications development, the general political will to move towards greater application of antitrust *ex post* European principles. This gesture is still far from consensual recognition of the competition law rationale as dominant in the area of telecommunications. On the other hand, it might be interpreted as the manifest of completion of the first proactive regulatory stage in infrastructure liberalisation.

In the course of adoption of new telecommunications framework the Commission publishes annual reports on the Implementation of the Telecommunications Regulatory Package. It presents comprehensive analysis of the implementation procedures, including research of national telecommunications markets, and provides wide empirical data the relevant evaluation.

1.7.2. Compulsory infrastructure access

In accordance with the current European regulatory model, compulsory access to the network infrastructure can be justified as a means to increase competition, but national regulatory authorities have to take into account the necessity of establishing proper balance between the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services.

The Directive on access and interconnection (2002/19/EC) obliges network operators with significant market power to meet reasonable requests for access to and use of networks elements and associated facilities, stipulating that such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity. In cases when access is refused, the aggrieved party may submit the case to the dispute resolutions procedure referred to in Articles 20 and 21 of the Framework Directive (2002/21/EC). However national regulatory authorities are required to find a proper balance between the short-term

interests of new the entrants and their incentives to invest in alternative facilities that will secure more competition in the long-term.

To one of the most important regulatory instruments of compulsory access belongs the price control. In the markets, where the competition is not well-developed incumbent are prohibited from imposing excessive prices and using price squeeze tools for eliminating competition. The Directive on access and interconnection gives to the national regulatory authorities the necessary rights for appropriate price control, such as cost accounting system and undertaking an annual audit to ensure compliance with that procedure.

It is important that compulsory access provisions may be imposed by national regulatory authorities, not exclusively upon a company with market dominance[35]. Such obligations go far beyond the *ex post* competition principles and along with liberalization bring disincentives for incumbents to innovate and expand their networks.

1.7.3. New EU Regulatory framework for electronic communication

In November 2005 the Commission issued a call for input on the forthcoming review of the EU regulatory framework for electronic communications and services including review of the Recommendation on relevant markets. By this set of working documents the Commission invited interested parties to give their views about the application and functioning of the five directives that constitute the current EU framework for electronic communications.

The new phase of telecommunications policy indicated the Commission attempt to reassess existing electronic communications regulatory framework. The main impetus for a reform came from the fast-changing nature of the telecommunications structure, from the deep convergence of various interrelated services (i.e. operation and deployment of the network infrastructure, access services,

[35] E.g. Article 3(2) of the Directive on access and interconnection stipulates as follows: 'Where, as a result of ... market analysis, a national regulatory authority finds that one or more operators do not have significant market power on the relevant market, it may (sic. – O.A) amend or withdraw the conditions with respect to those operators, in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive)...'

entertainment and content provision) and from the multilevel interdependence between them.

During public consultations many incumbent operators and some national authorities considered that the regulatory framework should foster more investment, and called for a major reform. Nevertheless, some have called for either withdrawal of sector-specific regulation or regulatory holidays for major investments that made significant financial injections into structural renovation of their networks.

After broad profession debates emanated from the call for public consultation, in June 2006 the Commission summarised collected propositions into Communication to the Council of Ministers, the European Parliament, the European Economic and Social Committee and the Committee of the Regions in the Proposed Changes of the Regulatory Framework for electronic communications networks and services.

The major areas for proposed changes referred reduction of the procedural burden associated with the reviews of markets susceptible to *ex ante* regulation and consolidation of the internal market. According to this document challenges to the regulatory framework require new EU legislation, which would be expected to come into force around 2009 and bearing in mind rapid growth and modification of industry, to remain in force until around 2015.

The Commission, in its Impact Assessment of the Review of the EU Regulatory Framework for electronic communications networks and services considers several potential options in regards to creation of a proper balance between *ex ante* and *ex post* regulatory measures. Another dimension of this theoretical dilemma is the fine-tuning of harmonic equilibrium between competences of the Community and national regulatory bodies. The regulatory framework strives to establish a sustainable and predictable environment that foster innovation and stimulate investment in telecommunications infrastructure and services by both new entrants and existing operators. The main question is whether the proper balance between flexibility and predictability has been found, and to what extent the existing framework contributes to the fulfilment of these objectives.

1.7.3.1. Common carriage services

The Proposal also covers the area of common carriage services provision. Because of the fact that the fast technological progress significantly changed the conditions under which common carriage service rules operate, and keeping in mind a deep infrastructure deployment and establishment of alternative networks, in the Commission's opinion these services need substantially less regulation from the member states. Conversely, in order to apply common European standards to such services, it is proposed that common carriage services obligations of incumbents must be as much proportionate and transparent as possible. The document proposes to introduce a deadline for reviewing national common carriage rules and give a spur to liberalise the national markets and also introduce competition within newly opened segments of telecommunications market.

Since the central goal of the regulatory framework is to provide development to the information society and deliver substantial consumer benefits, it relies on enhancement of the competition model. As a consequence of the European telecommunications reform many new entrants declare their willingness to operate within the whole European internal market. This would increase competition and bring additional benefits for consumers.

1.7.3.2. Vertical integration

One of the most important and controversial proposals of the Commission is related to universal service provision. The current EC regulations of universal services are based on the 'classic model' under which telecommunications companies may often provide both access to the network and voice communication services. In the Commission's opinion such a vertical integration model, while incumbent provides services of access to network and voice communications, may harm (or, to put it in more appropriate terms, 'not foster') the competition within the internal market. That is why it offers to introduce separate obligations on providers of access infrastructure and on providers of services. One of the main reasons for such legal transformation is that the Commission foresees a rapidly growing interconnection of the different services and consequently the potential harm for the

internal market if competition *for the market* will prevail over competition *in the market.*

According to Article 3 of the Directive on competition in the markets for electronic communications services (2002/77/EC) 'Member States, shall ensure that vertically integrated public undertakings which provide electronic communications networks and which are in a dominant position do not discriminate in favour of their own activities'. Directive on access and interconnection (2002/19/EC) stipulates that the telecommunications companies with significant market power are obliged to operate in accordance with the principle of non-discrimination, ensuring that undertakings with market power do not distort competition, in particular where there are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets.

The attempt of the Commission to regulate the telecommunications industry in such dirigistic way may be justified by a hypothetical reaching of some efficiency gains for the European market. This policy may, however, also lead to a decrement of the general level of legal certainty in the business environment and negatively reflect on the intensions to invest into future development of infrastructure. As of today it is still hard to predict the kinds and methods of regulatory measures, which may be applied in order to impel the incumbents to give up certain part of their business. This is even less likely, if having in mind that the control over network allows them to carry on a wide range of legitimate economic leverages.

The spirit of this proposal is not consistent with the broad economic studies in the area of *ex post* competition law, because the political, industrial and academic discourses in antitrust domain reached almost unanimous consent upon economic efficiency of the vertically integrated business. The possible remedy for vertically integrated companies in the competition law may be applied solely in course of merger approval. Vertically integrated companies may undergo an additional responsibility for abuse of their dominant position, but such a responsibility may not concern compulsory separation of the incumbent, since it is the consequence of *behaviour* but not the mere *status* of the company *per se*.

1.7.3.3. 'Network Neutrality' in the new regulatory framework

Another domain, which is proposed to be covered by the reformed regulatory framework, is 'Network Neutrality' clause. This term has been created in US public debates by proponents of the current model of relations between telecommunications companies and providers of Internet content. The rationale of 'Network Neutrality' is based upon prohibition of 'double charge' for providing the Internet content to the end-users. The idea of launching 'Network Neutrality' movement is based upon the eventual threat for Internet companies aroused from the intentions of Internet providers to establish the prioritised services for users or companies who are willing to pay more for substantial speed increment of data transmission.

The Commission's regulatory proposal maintains quite ambivalent statement in this regard: 'In Europe the regulatory framework allows operators to offer different services to different customer groups, but does not allow those who are in a dominant position to *discriminate* between customers in similar circumstances'. The distinction between the suppositions of such a formula, in all likelihood, might be established exclusively on a case-by-case basis. The Proposal contains an important clause which empowers NRA to establish 'minimum quality levels' for transmission of data via networks, particularly to avoid a situation of 'degradation of the quality of service to unacceptably low level'. The Commission considers that any dispute, raised among parties concerning the different interpretation of 'Network Neutrality' principles, should be resolved in accordance with *good faith* rules, referring to Article 5 (1) of the Access Directive: 'In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements subject to the competition rules of the Treaty'.

Concerning the possibility of application of the provisions of non-discrimination in the context of 'Network Neutrality' will depend on infinitude of eventual interpretations of the Article 10(2) of the Directive on access and interconnection (2002/19/EC): 'Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners'.

The proponents of 'Network Neutrality' interpret these provisions as prohibition to prioritise the transmission of different services and applications, emphasising that in case of vertical integration of the infrastructure and content providers the conditions for premium traffic speed should be automatically (transferred to other content providers. On the other hand, however, the incumbents would reasonably refer to non-discriminatory character of premium speed services, since each company can receive access to such facility under the equivalent conditions. Hence the abovementioned provisions of the Directive on access and interconnection regulate the relationship of network operators and the new entrants, electronic communications companies, who strive to operate within the same infrastructure.

Even taking into account highly growing convergence of technologies and applications, apparently these conditions can not be directly applicable to the relations of network operators with content providers. The evolution of development of the 'Network Neutrality' concept, its ontological essence and legislative regulation, both in the US and EU, will be scrutinized in particular in Section 4 of this paper.

1.7.3.4. Role of competition

Another contestable thesis, declared by the Commission as a main characteristic of the regulatory framework is the algorithm: 'Competition is not an end in itself, but a means to promote innovation, investment and consumer welfare'[36]. The logical elaboration of this rule may lead us to the self-explanatory question: 'what if another, more efficient mean to promote innovation, investment and consumer welfare will be proposed?' and consequently 'what if this new mean is state-planed economy of Chinese or even Soviet type?' We believe this statement of the Commission is inconsistent logical fallacy analogous to the sententia '*Air* is not an end in itself, but a mean to promote circulation of blood, cellular nutrition and general health of every human being'. Competition is not an end in itself indeed, but it is an indispensable part for proper functioning of the market economy, constitutes

[36] Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions in the Proposed Changes of the Regulatory Framework for electronic communications networks and services Impact Assessment from 28 June, 2006, SEC(2006) 817.

its corner-stone. Virtually, there are many alternatives to competition means to promote innovation, investment and consumer welfare (e.g. command-administrative economy), but they are inappropriate for all sorts of market economy and all kinds of liberal society.

1.7.3.5. Regulatory holidays

'Regulatory holidays' is another instrument of proactive regulation. Unlike most administrative interventions built to improve the existing format of competition in the markets, 'regulatory holidays' are not hostile to incumbents. On the contrary, with the view of fostering innovations and investments, this instrument provides more favourable regulatory regime for the companies who already hold dominant position in the market in comparison with their competitors. The aim of these measures is to grant short- and middle-term economic and fiscal guaranties for incumbents not to put them under regulatory pressure in exchange for their investments into deployment of certain strategically important infrastructures and/or conducting the relevant research.

The idea of 'regulatory holidays' for telecommunications incumbents does not have political support of the Commission[37]. Conversely, it considers this instrument as 'Trojan horse' of the European liberalisation policy in the area of electronic communications. Instead of establishing the proper balance between competitors,

[37] The comprehensive economic explanation of such approach is provided in a contribution to the review of the electronic communications regulatory framework 'Preparing the next steps in regulation of electronic communications', Final Report For the European Commission July 2006 Service Contract N° 05/48622 by Hogan & Hartson and Analysys, July 2006: 'Whatever the outcome of the ongoing debate on FTTx, we believe that the idea of a 'regulatory holiday' for FTTx networks deployed by incumbents in the EU would be an untenable regulatory solution. Such discrimination between unregulated and proprietary optical fibre on the one hand, and regulated copper loops on the other, would be arguably incompatible with fundamental principles of the Regulatory Framework (such as non-discrimination and technological neutrality), and would likely lead to a distortion of competition. If so, such discrimination may be incompatible with the EC Treaty Article 3(1)(g) requirement to ensure that competition is not distorted, or provisions on State Aid. Therefore, in our view, the regulatory debate should not be spent on the 'if' of third party access to FTTx but on the 'how' – and here, there is an obvious case for a novel and balanced regulatory approach, rather than a simple replication of conventional access models. As a starting point, and regardless of overarching policy considerations or preferred scenarios in FTTx deployment, we would not recommend any departure from the basic formula 'interconnection fees = costs + reasonable profit margin', which is deeply ingrained in EU competition and electronic communications law As the passive layer is a natural monopoly in most, if not all, cases, its profit margins would naturally tend to be excessive, unless regulated. The ceiling for a reasonable profit margin in this case would need to be set at a level that corresponds to that of a typical utility: high sunk costs, long amortization period allowing the spread of capital expenditure over a longer period, low but less risk-prone profit margins'.

'regulatory holidays' induce the situation of growing disparity, whereas the gap between incumbent and other companies increases drastically. *Secundum* with the system of 'regulatory holidays' the investments of incumbents receive regulatory privileges akin to positive discrimination. Commission is of the view that in network-based economies effective competition does not prevent, but drives investment, therefore any measures, which may slow down establishing the proper model of competition, will not only negatively reflect on the situation in the market but also reduce intentions to invest. The Commission intends to apply this principle not only to existing, but also to emerging markets.

The Commission already launched an infringement procedure under Article 226 of the EC Treaty against new German telecommunications law, asking Germany to remove provisions that could grant Deutsche Telekom a 'regulatory holiday' in spite of its dominant position in the broadband market.

The concept of 'regulatory holidays' gives an incentive to the theoretical discussion. The crucial legal and economic question is as follows: 'is temporal cancellation of obstacle for free market constitutes its liberalization?' There are two possible reasoning paradigms in this context: 1) each constructive measure of elimination of regulation leads to market liberalization; and 2) no discriminatory enactment may liberalize the market, since market integration and predictability constitute indispensable part of its freedom.

It is important to emphasize that from the rationale of regulatory and proactive competition, such measure, if it leads to significant increase of investment and new technological solutions may be effective and bring short- and middle-term benefits for the industry. That is the case, because it fosters innovations and gives for incumbents some amount of legal certainty.

The market of telecommunications technology constitutes one of the most time-sensitive. Even a short regulatory break may result in changing the format of the whole market structure. Therefore, in contrast to the critique of the Commission, our aversion of the 'regulatory holidays' comes not from regulatory, but on the contrary, from the free market premise. We are inclined to consider the 'regulatory holidays' as only one of the eventual proactive regulatory sets, which does not bring more harm for the free market economy than do all other regulatory instruments.

1.7.3.6. Status of national regulatory authorities

European regulatory model of telecommunications, to a certain degree, decreases the competencies of national regulatory authorities, since it provides a great number of unilateral pan-European mechanisms and procedures. This tool helps to avoid the fragmentation of the market and and of 27 parallel existing national regulatory regimes. Commission receives power to insure consistent and most efficient formats of the European competitive environment and internal market in telecommunications.

Thereupon the Commission considers three potential options for achieving these purposes: 1) A single European regulatory body; 2) Maintaining the decentralized model but strengthen the role of the Commission to achieve internal market objectives in selected areas; 3) No change to the regulatory framework.

The first option may provide the most harmonized model of telecommunications in Europe, but because of a particular importance of the industry for member states it is hard to predict the establishment of the central European communications authority. More plausible is the creation of a moderate version of this option, such as a European authority, with the existing NRA being subsumed into a European Regulatory authority, and *de facto* become local divisions of the European regulator; local division can be provided by some limited power for local decision making; a 'European Central Bank' model, whereby the NRA would remain as independent bodies, but would be obliged to act in accordance with the guidelines issued by the European regulator; or a European regulator that acted as an appeals body for decisions taken by national regulators, but without power to instruct an individual NRA in advance of a decision. More integrative format provides the establishing of European Regulatory authority on the principles of the US Federal Communications Commission.

The second option is limited to maintaining the decentralized model but strengthen the Commission's role to achieve an internal market objective in selected areas. This is in conformity with the long-term Community objective of creating a single European information space. The Commission under this option is provided by the competence to block, postpone or amend remedies of national regulatory

bodies but does not stipulate the power of the Commission to regulate an industry in the first instance. The Commission considers this option as the most appropriate and regards it as of paramount importance for telecommunications reform. The final possibility is to provide no changes to the regulatory framework at all. The independent NRA will continue to cooperate with the Commission and among themselves through European Regulators Group, composed of the heads of the national regulatory authorities.

1.7.3.7. Rules for defining the markets

The proper definition of relevant market constitutes the core of both *ex ante* and *ex post* regulatory regimes. A new regulatory framework provides significant revision of this instrument. Under the current system the national regulatory authorities are defining their national telecommunications markets by applying a sophisticated formula, which includes analysis of 18 markets pre-established by the Commission. The essence of this procedure is to examine the markets with a view to significant market power of incumbents. If these markets are found not to be competitive, then they are subject to *ex ante* regulation, in order to stimulate competition.

Although the analysis of the pre-established by the Commission markets provides comprehensive answer of existing situation its critics argue about the efficiency of such time-consuming procedure. They are pointing out the additional difficulties in a proper market definition, which are streaming from a process of digital convergence of technologies and differentiations of communications services. The objective is therefore, in line with simplification and better regulation principles, to reduce the 18 layers of market analysis and consequently notification procedure by at least one third to 12. These are mostly retail markets. There are, however different options for achieving the objective of less burdensome regulation but the final decision must take into account the other objectives of telecommunications regulations reform. One of the alternatives has proposed to remove the existing procedure and re-direct the competences either to national regulatory authorities or European regulatory body (i.e. two ultimate variants).

Another option includes a slight revision of application of existing regulatory rules without changing the legal basis. The main attention would be paid upon several of the most important markets, instead of dissemination between all 18. The Commission considers this option as the most appropriate and effective one.

1.7.3.8. Consumer protection

The issues related to consumer protection in the Internet domain, as well as the rights for users to access and distribute lawful content, to run applications and connect devices of their choice (the European equivalent of the US Federal Communications Commission's 'Network Freedoms' declaration), will be regulated in the relative regulatory framework (i.e. Unfair Commercial Practices Directive (2005/29/EC) and Regulation on consumer protection cooperation (2006/2004/EC)). The principles of 'Network Freedom' are to be regarded as general guidelines and therefore there is no necessity to translate them into legislative format.

1.7.4. Format of regulatory framework

The Commission analyses three potential scenarios for development of the telecommunications regulatory framework: 1) Removal or restriction of sector-specific regulation; 2) Adoption of an 'open access' model for new network structure; and 3) No change to the regulatory framework.

The first, 'free market', model is characterized by eventual advantages for current incumbents and substantial increase of the level of economic predictability and legal certainty. The removal or restricted application of *ex ante* regulation may provide an incentive for long-term investment and make European markets more attractive for trans-national capital. This option envisages application in the telecommunications area *ex post* competition policy rules without considerable sector specific measures.

The biggest disadvantage of this regulatory approach lies in its disintegrational character. The removal of the uniform European regulation would authorize *status quo* in the European telecommunications, which are currently characterized by not

only different levels of technical and structural development, but also by diverse approaches in regard to liberalization, often benefiting from privileged (quasi) national legal status, granted by member states.

In addition, removal of *ex ante* regulation in a market with a dominant position of incumbent operator is likely to slow down the level of effective competition and to cause consumer disadvantages. The rapid growing importance of the communications area in digitally-oriented economy demonstrates that the predictable long-term dominance does not constitute the exclusive condition for extensive investments in the new generation networks.

The second option is diametrically opposite to the removing removal or restriction of sector-specific regulation. Its essence consists in compulsory opening of the access to the incumbent networks to all potential competitors, if they correspond to certain set of established criteria. One of the versions of this option envisages the structural separation, which the Commission foresees as 'could in principle be imposed under competition law instruments' (*sic.*). To the best of our knowledge, until very recently the most radical intervention of a regulatory authority in the commercial practice has been an institute of compulsory licensing of a dominant company under Article 82 EC (i.e. essential facilities doctrine).

There are many advocates and critics of this regulatory measure, both in governmental and industrial circuits. In literature there is virtually consensual agreement upon a fact, that the essential facility doctrine constitutes an utmost borderline of the regulatory interference into a domain of 'societal sanctity' of private property. The most radical version of this institute provides the possibility of compulsory opening access to the piece of private property, which constitutes industrial bottleneck, but only under the principle of limited and shared access. It is almost impossible to imagine how the tools of *ex post* regulation may be used to impel the incumbents to refuse to operate on the market of communications services, leaving them merely the possibility of technical servicing the networks. The only and eventually possible way to implement this idea is via *ex ante* regulatory requirements, consisting in obliging the member states to grant the NRA the competences to provide that network operator guaranteed access to all competitors by dividing their infrastructure services from provision of Internet access. Hence, in all likelihood the Commission considers this approach as solely theoretical, using

such argumentation purely in methodological purposes of comprehension of analysis. For the sake of discussion, however it is possible to simulate the situation, similar to 'famous' rationale of the European courts with regard to parallel trading in intellectual property: 'the possession of property does not necessary correspond to its usage, which might have been restricted'. By analogy, holding of the network does not mean unreserved right to provide electronic communications services. Hence, technically speaking, certain requirements of registration/establishing and accounting separation of incumbents might be launched by the Commission[38].

The Commission is absolutely right saying that the 'open access' model for new infrastructure investment works well in a *tabula rasa* situation, where there is no pre-existing network or Commission initiate proactive initiatives, using structural funds. This situation may be fully justified only under free-will, but on no account under compulsory regulatory initiatives. The offered model has many advantages *per se* but because of impossibility of separation of the present-day infrastructure owners from the communications services (which often constitute the major part of their revenues) this idea remains to be hypothetical.

The third option, considered by the Commission is *no change to the regulatory framework.* The current model is characterised by high degree of predictability and harmonisation, its capability to successfully regulate the European telecommunications area has been proved in practice. For this reason it would be appropriate to concentrate the efforts on adaptation of the regulatory framework to rapid technological changes and direct them on the coverage of new-arising domains, rather than propose radical conceptual changes. The Commission considers that this

[38] The similar position is elaborated in the Paper 'Preparing the next steps in regulation of electronic communications', A contribution to the review of the electronic communications regulatory framework. Final Report for the European Commission July 2006 Service Contract N° 05/48622 by Hogan & Hartson and Analysys, July 2006: The primary role of accounting separation is to ensure that the operator adheres to nondiscrimination, transparency and other obligations. Nevertheless, a case can be made, based on experience, that accounting separation is difficult to implement and gives rise to delays, conflicts and uncertainty. Based on the same argument, if accounting separation is not enough to prevent distortions of competition, structural separation may be the next logical alternative. Structural separation is a drastic regulatory intervention that does not sit comfortably within the Regulatory Framework's provisions and principles. For a start, it is not listed among the available ex ante access remedies. A Member State is, arguably, allowed to propose it under Article 8(3) of the Access Directive in exceptional circumstances, but the Commission would have the power to veto it because it is not on the list. On substance, structural separation brings in the advantage of increased transparency and easier enforcement, but is also a disruptive measure that can reduce the efficiencies of integration. It is not, therefore, a measure that can be easily added to the list of Access remedies.

model is the most appropriate option and consequently has proposed this in the associated Communication.

1.8. European audiovisual policy

Regulation of audiovisual content represents substantial segment of European communications policy. The main legislative document in this area is Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ('Television without Frontiers Directive' or TVWFD (89/552/EEC)), originally from 1989. This document has been substantially updated in 1997. After broad public debates and consultations in 2005 the Commission issued and in 2007 amended its proposal for Audiovisual Media Services Directive (AVMSD is a new title for TVWFD)[39]. According to the Commission's estimations new Directive should enter into force by the end of 2007[40].

The original objective of TVWFD has been the creation of appropriate conditions for free movement of television transmission within the EC. Its primary scope included all forms of public broadcasting, except electronic communications services providing information services on on-demand basis.

1.8.1. Single European TV market

In terms of *liberation-integration-competition* paradigm the main aim of this document has been definitely the second one. Unlike in the US, the broadcasting industry in its European counterparts is characterized by strong public elements. The state inheritance directly or implicitly presented both in all major European broadcasters and the whole consumer media culture in Europe. The genuine liberalisation of broadcasting industry has never been on European agenda. For this reason, apparently, TVWFD does not concentrate its efforts on liberalisation of the

[39] Directive of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

[40] The Commission's Press Release IP/07/706

TV markets, but rather strives to integrate the different national regulatory environments into a single European model.

In order to pursue this important mission, the Commission tries to eliminate any regulatory borders between different member states. Hence, one of the key ideas of the TVWFD has been the prohibition for the member states to conduct any measures, which can restrict reception or retransmission of broadcast signal from other member states, apart from public safety, culture promotion and some similar to that exceptional national needs.

However, there are not enough political, economic and cultural preconditions for establishing a free market model of TV industry in Europe. As it is the case with European regulation of telecommunications infrastructure, the main efforts of the Commission are directed to the regulatory unification within the European internal market. The essence of *harmonization* of TV markets is based upon the subordination of national regulatory regimes to pan-European one. Since the meta-task of European integration is based in elimination of regulatory differences and economic borders between the member states, but by no means in erasing the obstacles for internal free market (i.e. internal market is not free market), the European audiovisual policy develops in conformity with general objectives of the European integration. These regulatory roots of the European model of TV industry play their role in the present-day situation with production and distribution of European TV content. Without unnecessary oversimplifications and fully taking into account all cultural, linguistic, behavioural and aesthetic particularities of Europeans, there are enough evidences for conclusions about direct relation between strong regulatory character of the European TV industry and its poor commercial performance both in the worldwide and domestic markets.

1.8.2. eCommerce Directive

The issues related to the establishment of service providers, electronic contracts and commercial communications are currently regulated by Directive on electronic commerce (2000/31/EC), however in its resolution adopted in 2003 the European Parliament called for inclusion into provision of new TVWFD underlining principles of Electronic Commerce Directive. It provides the legal framework for

services, related to electronic commerce. The areas covered by this act include Internet selling, online advertisement, news services, intermediary transmission and hosting of data, some entertainment and sponsorship services.

The main task of the Directive lies in determining the instruments needed for removing barriers to cross-border Internet-services. According to this document, information society services must be provided with due account of free market principles. Directive also provides a clearance for the services, related to provision of access to the networks and transmission of information from legal liability emerging from the substance of information being transmitted. It establishes also country of origin provision, which substantially expands and harmonises the freedom of providing information services within European internal market. Currently there is a clear distinction between "television broadcasting services" subject to the TVWFD, and "information society services" subject to the Electronic Commerce Directive, new regulatory proposal for TVWFD strives not to create any overlap or confusion in this area. The revised rules would gain character of *lex specialis* towards the Electronic Commerce Directive as *lex generalis*.

1.8.3. Current regulatory framework

TVWFD covers broad range of issues, related to production, transmission and reception of content in the EC. Its adoption has been originally stimulated by fast technological development in TV industry. In combination with firm intentions of establishing single European market these prerequisites became decisive for initiation of this legislative measure. Initially adopted in 1989 it has been amended in 1997 because of further development of audiovisual sector, in particular in the area of satellite TV, marketing-oriented business models, interactive technologies and future deployment of cable infrastructure.

1.8.4. Country of origin principle

The country of origin principle is one of the core regulatory instruments for integration of national broadcasting markets. It provides to TV broadcasters the right to transmit their signal to all EC countries. By this tool the European broadcasters become free from obligations to comply with national regulatory demands of

member states if they satisfied all necessary criteria in their country of origin. Essentially country of origin is defined by the place of central administration of the broadcaster or where its management decisions are taken. Member states must refrain from making any regulatory obstacles for transmission of the signals of broadcasters from another member state. They remain free however to impose more strict rules for their national broadcasters in accordance with principle of reverse discrimination in the situations when no cross-border element is directly involved.

It is important to emphasize that one of the existential principles of the Community is the freedom to provide services. In this context the country of origin principle recapitulates these rights for broadcasters. However free movement of services principle does not grant to broadcasters the freedom *from* regulation, especially if it is Community one, but rather stipulates the obligations of the member states to refrain from the imposition of additional administrative burdens for broadcasters from another member state. Hence the present model is much more the optimisation of European centralized regulatory regime, than complete liberation from regulation. Under such circumstances the necessity to establish single regulatory regime (in order to optimise the gains, integrate the markets and avoid administrative externalities) is much more important than the striving for establishing of free market environment for providing the broadcasting services. Although we should acknowledge that in a short and middle-term perspective the objectives and instruments of these policies coincide.

1.8.5. European production quotas

TVWFD contains a number of regulatory measures with the aim to reserve a certain amount of air time for the content, created in the European Union. The essence of such provisions is twofold: integration and protective. On the one hand they are intended to promote cultural diversity between different member states by impelling consumers to watch more European programs. At the same time this is also an explicit assignment of quota for export of foreign (predominantly American) TV content. However, in accordance with Article 4 of Directive, a major proportion of the transmission time, excluding the time appointed to news, sports events, games and advertising services shall be insured by member states only 'where practicable and by appropriate means'. Furthermore, the obligatory reserved time for European

content is on average 50%, which brings to this measure rather developing, than protectionist connotations.

Achieving a single European TV market envisages establishing the rules for the television advertising. The main objective of these provisions is to provide equal opportunities for European TV broadcasters, but also guarantee a proper protection of the TV viewers regarding misleading, excessive or harmful advertising. TVWFD also provides relevant conditions for periodicity of advertisement spots and prohibits advertisement for tobacco, and medicine that is only available on prescription. The rules for advertisement of alcohol are also substantially restricted. Sponsors shall influence neither the content nor the scheduling of the program. They must be clearly identified and shall not encourage the purchase of a product or service.

1.8.6. Events of major importance for society

One of the most important instruments for integration of national TV markets into one European-wide regime is in establishing the single regulatory model. That is why TVWFD provides for the member states the possibility to range the content, namely in terms of creation of the TV-programs lists (including premium sports events with strong national connotation), which may be declared as being of major importance for society. These programs have to be broadcasted only by companies, who are technically able to cover the biggest part of the population, generally, by public free-to-air broadcasters.

In accordance with Article 3a of TVWFD each member state may take measures to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that member state as being of major importance for society in such a way as to deprive a substantial proportion of the public in that member state of the possibility of following such events via live coverage or deferred coverage on free television. If it the case, the member state concerned shall draw up a list of designated events, which it considers to be of major importance for society. It shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage. This is particularly relevant for broadcasting of premium sports events. The list of such

events may vary widely from country to country. In most cases of the major sports events member states include football (i.e. soccer) matches of national teams, World Cup, European Cup, Olympic Games etc.

The same rationale however is not applied for the right to broadcast the short news reports. The current TVWFD does not guarantee for public broadcaster the possibility to include in its news the highlights of premium sports and other events of major public importance because of possession of the rights to broadcast the whole event by another audiovisual operator. The right to short reporting however is often granted by national regulatory authorities to the operators of linear services.

1.8.7. New EU Regulatory framework for audiovisual media services

In 2007 EU remains on the stage of revision of TVWFD. Under other circumstances and by the new title, the Audiovisual Media Services Directive is called for providing an effective regulatory tool for the area of content production and distribution in the new, digital age.

From the moment of the adoption TVWFD in 1989 and its substantial amendment in 1997 electronic technologies substantially expanded. That is the main reason of initiation by the Commission in 2002 legislative review of TVWFD. It has been officially launched by issuing the proposal for elaboration of a program for the modernization of rules of audiovisual services and a timetable of future actions. The Commission organized extensive public consultation campaign[41]. As a result of this hearing many research and analytical programs and seminars have been organized by the Commission over 2003-2007 period of time. Finally in 2005 the Commission officially adopted legislative proposal for the revision of TVWFD (with the relevant amendments in 2007).

This document stresses the importance of European audiovisual environment, based on principles of pluralism, cultural diversity and consumer protection. The Commission offers in this proposal to provide the independence of national regulators in the media sector. It essentially means the striving to guarantee the tools for stronger regulatory power.

[41] The written submissions from the main European and worldwide TV companies will be analysed supra

1.8.8. Linear and non-linear services

The proposal also ranges the audiovisual services under the *intentional* criterion, meaning to whom the original offer to interact belongs. The traditional *one-to-many* broadcasting model constitutes a linear service, whereas the new *point-to-point* business solutions for content delivery are called non-linear models. The linear services are scheduled by broadcasters in advance and *de facto* 'push' content to the end-users. According to the alternative model an incentive to consume is primarily 'pulled' by the viewers themselves. The examples of the former are the broadcasting via TV, Internet, pay-per-view and also live stream of sports events via Internet directly from the initial owners rights (e.g. Champions League from the website of UEFA), whereas the movies-on-demand, music clips, reality shows, etc. are forms of the latter. The intermediary for the linear services is a time schedule, but for non-linear is rather a catalogue.

According to the proposal, linear services will be regulated in a stronger regulatory manner as compared to non-linear. This difference is resulting from the level of end-users choice and its protection in the case of linear services. Whereas consumers of the non-linear services conclude *de facto* equal in rights agreement with content providers, their transactions are rather classical 'buyer-seller' than 'broadcaster-viewer' relations and do not need an additional regulatory protection.

With regard to non-linear audiovisual services new regulatory regime constitutes a real liberalization, since by bringing the regulation on the Community level it eliminates the demand to comply with differing national procedures and consequently substantially reduces barriers to entry. It provides however for non-linear services certain minimum sets of rules, including the country of origin principle with regard to such public domains as regulation of hate speech, protection of minors. Technically the non-linear services may remain under regulation of Electronic Commerce Directive, but in many areas this directive substantially deviates from the country of origin principle, which poses eventual obstacle for future European harmonisation of these markets.

New regulatory framework naturally does not provide any European quotas for non-linear service. Taking into account the potential openness of worldwide Internet

market for non-linear content these restrictions would only increase market entry thresholds for European content providers.

1.8.9. Product placement

The Commission proposes also legalization of product placement advertising technique, which is a commercial of the real product implemented into the main content. Although this institute is not explicitly in the proposal, there is consensual agreement among European regulators about the necessity of future authorization of the product replacement practice. The product placement does not provide visual separation between the TV program and advertisement.

In many national European jurisdictions this instrument was previously considered to be a misleading advertisement and unfair practice. However the fast development of technologies, which provide for consumers the ability to skip the advertisements by separating it from the main content, lead to substantial decrease of revenues of content producers, distributors and broadcasters.

Product replacement may provide some reimbursement for such commercial losses. In addition, the current model does not prevent European consumers from the product replacement in the content, exported from other jurisdictions, but only prohibits such a practice for domestic producers. Therefore it is inefficient regulatory burden for the European audiovisual industry. New proposal stipulates the application of product placement in the movies and shows but keep it prohibited for the child programs and news. In its 2006 Report on the Commission Proposal the Committee on Culture and Education of the European Parliament stipulates that no program should 'contain product placement for tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products; or specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls'[42].

[42] Amendment 132 of the 2006 Report of Committee on Culture and Education, European Parliament (COM(2005)0646 – C6-0443/2005 – 2005/0260(COD))

1.8.10. Format of regulatory framework

In its Impact Assessment of the AVMSD from 2005 the Commission envisages five possible regulatory scenarios. 1) Repealing the Directive (i.e. only national rules would be applicable and country of origin principle would be eliminated); 2) Preserving *status quo*; 3) Focused amendments and document clarifications; 4) Broad reform of the definition of status for linear and non-linear broadcasters, but providing for non-linear services only a basic rules (such as minority rights); 5) Comprehensive harmonization with equal treatment of linear and non-linear broadcasters (including imposition upon non-linear operators with the same scope of requirements relative to advertisement, European content quotas and product replacement).

The first and the last options are considered to be purely hypothetical. It is the case since neither complete elimination of pan-European rules in the audiovisual industry nor their expansion to all the spectrum of relations, including strict rules for governing non-linear operators, are not only implausible, but also technically and politically impossible.

The document comprehensively analyses the impact, which would have the adoption of second, third and fourth options for nine major audiovisual actors and public areas (i.e. public service broadcasters, free-to-air commercial, pay-TV, written press, internet service providers (both telcos and cable operators), IPTV linear providers, video-on-demand non-linear services, independent producers, consumers, regulators and Commission). Each of these stakeholders would have various ranges of priorities and reservations (and different kinds of their combinations) with regard to each particular area of audiovisual policy.

1.8.11. *Status quo* option

Current option stipulates application of the present-day European rules only for broadcasting (i.e. TVWFD regime). Non-linear services remain to be regulated separately by the member states (where applicable). This essentially means that each company, who intends to launch non-linear services in the EU, has to comply with 27 national regulatory requirements. These problems would face as well public and pay-TV linear broadcasters, since during most of them increasingly offer some of

their content on non-linear basis. In the middle- and long term perspective public broadcasters are likely to suffer from the current model, since non-linear and new (unregulated at the EU level) linear companies are not submitted to European content quotas obligations and therefore have competitive advantages over their linear vis-à-vis.

The linear services remain to be attractive for advertisers so far as they save on regulatory expenses, benefiting from country of origin principle, but since many advertising strategies become more and more concentrated on non-linear and new linear services, they will not be obliged to meet European quotas.

One of the most concerned actors of this clause are Internet service providers, since most of them are currently launching non-linear on-demand services and have to adopt them to the national rules of each member state. Non-linear service providers would develop rapidly in a low regulated environment choosing content on purely commercial considerations and benefiting from competitive advantage vis-à-vis linear services. However, in a fragmented EU market non-linear services would remain a domestic activity[43].

Because of fast electronic communications development some provisions of TVWFD become obsolete. That is the case in the area of defining the linear operators. Under the current framework companies, which broadcast over Internet under schedule-based model, are not included yet into linear service operators. Taking into account the European policy of technological neutrality, these provisions have to be changed. Otherwise IPTV companies would not benefit from country of origin principle. The increasing quantity of operators, who may be regulated under country of origin principle, would lead by chain-reaction to the development of independent content producers, since the latter will benefit from new exploitation of the business options. The growing numbers of non-linear and new linear services increase also the costs of their effective monitoring for the national regulators.

1.8.12. Focused amendments and clarifications of text option

Under this option TVWFD will be revised to make the advertising rules more flexible and to update the definitions in order to clarify that all linear services similar

[43] Ibid

to television are covered. The Directive however would not encompass non-linear services. This option is particularly important for the companies, which develop new linear services, including traditional public broadcasters, Internet service providers, pay-TV channels and IPTV operators. This variant of Directive will encompass all these services into country of origin principle. The regulatory burdens of compliance with 27 national rules will however remain for non-linear services.

In the context of European quotas provisions this new model will increase the significance of the Community cultural policy, by covering new linear services, which are currently gain competitive advantages over traditional broadcasters by benefiting from free market principles, but at the same time are in danger to suffer from the strong requirements of national regulatory authorities.

This format of new Directive will allow substantial reduction of administrative costs for national regulatory authorities, since they will no longer be obliged to register and monitor new linear services, which will benefit from the country of origin principle. Does the reduction of regulatory expenses means the reduction of regulatory powers? This rhetoric question remains to be answered by the future development of interactions between national and supra-national (European) regulatory bodies.

1.8.13. Comprehensive framework with graduated treatment of linear and non-linear services option

According to this option TVWFD would create a comprehensive framework for any form of electronic delivery of audiovisual content, but would treat different types of service (specifically linear and non-linear) differently. Non-linear services will be subject only to a basic tier of rules rather than to the entire body of Directive provisions[44]. The Commission relies in particular on this scenario.

This format envisages the expansion of the country of origin principle to all non-linear providers. Under this model traditional public broadcasters will face growing competition from non-linear services, but this comparative disadvantage will be neutralized by fostering public broadcasters to new business activities. On the other hand they can also benefit from the launching of non-linear programs

[44] Ibid.

themselves. Increasing business opportunities for European-wide non-linear services could improve advertising investments by written press providers. That is also the case for Internet service providers.

The most benefits from the present model will get providers of video-on-demand services, which will reduce the costs of compliance with different regulatory models, since non-linear services will be covered by country of origin principle. It must be recognized however that spreading the pan-European model to all kinds of audiovisual services might in the short term perspective degrade the activities of the non-linear companies, who currently perform their services exclusively in the domestic market under more liberal (in comparison with Community) regulatory regime. On the other side, they will receive the possibility to operate in the pan-European markets, since the fragmentation of EU market will be also reduced.

Summary

This part of the thesis provides an overview of EC competition law structure. For methodological reasons we included here also European regulatory instruments within the areas of electronic communications and audiovisual policy. These administrative tools, as well as some other European regulatory policies are relevant to research of intersections between sport and competition law. From our perspectives regulatory policies also constitute a part of competition law. Although they do ontologically differ from the traditional antitrust, one of their main object is to establish and develop the proper regulatory constellation for competition. Unlike traditional antitrust, positive competition policy does not limit itself only to preventive steps of protection of competition. It goes much far, not only protecting, but also fostering, developing and establishing competition within some sensitive areas of European economy.

From the legal mindset these two institutes are different indeed. While traditional antitrust is ruled by the legal principles, whereas the main actor is market itself, interventionist competition policy, on the contrary is striving to establish competition, even if purely market-oriented mechanisms do not produce a competition between the subjects. This is an important theoretical distinction and probably the main reason why these two institutes are never explored in

interconnection. However the purpose of our research force us to the multidimensional analysis of sport and competition law. Being fully aware about the ontological differences between antitrust and regulatory policies, we are not focussing on the nature of these two institutes, but rather on their effects in sport-related areas. That is main methodological reason to joint two fundamentally different institutes together in order to provide a picture of correlation between sport and competition law (irrelatively of the principle of the creation and functioning of the latter one).

Part II

European Competition Law and Sport

2.1. European Union and Sport

Sport-related areas of European entertainment and media industries are strongly regulated by the European competition authorities. Bearing in mind their fast-growing innovative nature sometimes it becomes hardly possible to regulate them efficiently. As *Robertson* indicates, 'It is difficult to escape the conclusion that the world of sport broadcasting moves rather more quickly than the competition authorities' responses to undoubtedly significant competition issues which have been raised... It remains to be seen how much impact the Commission's policy in this area will actually have in practice, given the financial problems encountered by potential new entrants to pay TV broadcasting. It may be that the Commission's proposed solutions come too late to remedy the problems it seeks to tackle and that commercial developments will render the Commission's action otiose'.[45] That is, however, rather theoretical speculation, since the very nature of regulatory body precludes it from being absolutely efficient and flexible. Although the Commission not always reacts promptly to the new regulatory challenges from the digitally-oriented economic environment, it still is able to provide legal and administrative responses within the sector.

Sport within European context is an ambivalent phenomenon. None of the Founding European Treaties[46] has been designed to explicitly regulate sport-related issues. Many of the European rules and policies, however, have direct impact on the sports relations or are of interest to it. Although EC Treaty does not cite sport explicitly as a competence of the EC, European activities covered by Article 3 indirectly affect sport. The main areas of intersection between sport and European policy are matters of prohibition of discrimination on grounds of nationality; specific fields of employment;[47] establishment rights;[48] service provision;[49] competition law and state aid;[50] social standards, social dialog and collective bargaining agreements.[51]

[45] Aidan Robertson, 'The Application of European Competition Law to Sports Broadcasting', World Competition 25 (4); 423–433, 2002

[46] Treaty establishing the European Community (consolidated text) – Official Journal C 325 of 24 December 2002. Treaty on European Union (consolidated text) – Official Journal C 325 of 24 December 2002

[47] EC Treaty Article 39 Supra

[48] EC Treaty Article 43 Supra

[49] EC Treaty Article 49 Supra

[50] EC Treaty Articles 81 – 87 Supra

In accordance with Article 5 of the EC Treaty 'Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'[52]. The European Community 'shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein'[53]. In domains which do not fall within the exclusive competence of the EC, the Community shall take action, in accordance with the principle of subsidiarity. This principle stipulates the action of the EC only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, be better achieved by the Community.

There is essential interdependence between the economic and socio-cultural angle of sports nature. As a social factor, sport plays an important role in the establishing and protection of healthcare system and proper physical education. This side of a sport constitutes an indispensable part of the EU Member States' domestic socio-cultural policy and does not fall under the jurisdiction of the European Union. There is, however, another side of sport, which represents predominantly its professional dimension. Sport as a professional activity becomes increasingly involved in the entertainment industry, which represents an important part of the economic relations. In its second meaning sport falls within the framework of the EC policy, and is regulated by the wide range of the European legal and political instruments. However, even in a purely commercial sport interaction, its first, socio-cultural, dimension remains to be inseparably presented. This ambivalence of sport leads to the substantial regulatory complications, because it does not allow the application in all their purity the existed legal formulas, legislative models and judicial constructions to sport related issues[54].

The European sports policy reflects the multifunctional nature of the European Union as such. There are several thematic points of regulatory intersection between sport and EU policy. Some of them are governed by similar legislative tools, others are ontologically different. For the time being there is no general concept of the regulatory treatment of sport by the EU authorities. The complex European sport nature with its multi-faceted characteristics intersect with a substantial quantities of

[51] EC Treaty Articles 136-139 Supra
[52] EC Treaty Article 5 Supra
[53] EC Treaty Article 5 Supra
[54] It remains to be seen if there are some, if any, areas of social life, where one could not advocate its special regulatory status, referring to 'sector peculiarity'.

other EU policies and is facing new societal challenges, a fact which has so far not been addressed in a diligent way via an EU-level initiatives. Furthermore, there is range of disparities and different understanding of sport even within the limits of one European competition policy. This is the case, not least because the antitrust is designed to regulate many relatively dissimilar commercial relations and practices, but also because of many potential intersections between sport and competition policy. Sport as an industry may become of interest to antitrust regulators not only in the area of selling of broadcasting rights, but also within the issues related to definition of legal nature of sports leagues and/or federations and sporting event organizers (related to concept of an 'undertaking'); regulation of the sports players' transfer rules; contract termination; home-grown players rule; players agents' status (and activities); salary caps; state aid for modernization of the stadium facilities, tax vacations and indirect subsidy for clubs' infrastructure[55]; state involvement in the process of tendering for major international sporting events; advertisement rules; marketing commercial rights, regulation of manufacture sports equipments; the agreements governing ticket sales and some other issues mostly related to public domain. However, management of broadcasting rights for sporting events remains to be of central importance both in the research agenda and regulatory environment.

In addition to antitrust, sport is regulated by some other European regulatory instruments, most important of which is provided by Article 39 EC, which secures free movement of workers and abolishes discrimination based on nationality. Direct applicability of these conditions and their relation to non-state entities (such as sport federations) has been confirmed by ECJ in its milestone *Bosman* decision[56]. The regulatory 'predecessors' of this ruling were decisions of ECJ in the cases *Dona*[57]

[55] There are various forms of state aid in the sport-related industries. The Commission Staff Working Document 'The EU and Sport: Background and Context' mentions as the most widespread among such practices the following: direct subsidies from public budgets; subsidies from fully or partly State-owned gambling operators, or direct revenues resulting from a licence to provide gambling services; special tax rates; loans with lower interest rates; guarantees with lower commissions; public financing of sport facilities; acquisition of a public municipal facilities by a private club or institution at a low price; renting of sports facilities by public entities at a low price; payment for the construction or renovation of sport facilities by the local council; public works in private sport facilities; public acquisition of advertising spaces in sport facilities and land sales or donations or an exchange of land for sport facilities.

[56] Case C-415/93 Union Royal Belge de Sociétés des Football Association ASBL v. Jean-Marc Bosman, [1995] ECR I-4921

[57] Case C-13/76 Donà v Mantero (1976) ECR 1333

and *Walrave and Koch*[58]. These cases laid the judiciary foundations for regulation of sport-related issues by the European law.

There were many attempts to limit the jurisdiction of the EC in the area of sports. In particular, delegations of some Member States insisted on social and cultural dimension of sport and offered to exclude the competence of the Community legislation to regulate this area. However, the formula '*the practice of sport is subject to community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*'[59], elaborated by ECJ in 1974 remains to be the main benchmark for regulation of sport-related issues. From the Amsterdam Treaty onwards there is opposite tendency as well. Its essence is not in exclusion of the economic-related sport activities from the regulatory regime of the EC, but just the contrary, in inclusion of the socio-cultural elements of sport into European regulatory environment.

This policy begun in 1985 at the Milan EU Summit, the Adonino Report[60] has been accepted, which explicitly declared sport as an instrument of European consolidation. Afterwards in its Amsterdam Declaration on Sport[61] the EC called on greater co-operation between Community institutions and the sporting federations. In the conclusions of Vienna European Council[62] in 1998 is mentioned the need to safeguard current sports models and increase the social role of sport in the EU. In 1999, the Commission issued a Report to the Helsinki European Council[63], in which it presented the case for establishing the European model of sport in its both commercial and non-commercial aspects. In December 2000 the 'Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account should be taken in Implementing Common Policies'[64] has been adopted and

[58] Case C-36/74 Walrave and Koch v union Cycliste Internationale (1974) ECR 1405

[59] Walrave Supra

[60] A People's Europe Notes from the Commission, European Council, 26-27 June 1986. COM (86) 371 final, 28 June 1986

[61] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts OJ C 340, 10 November 1997 Declaration on Sport http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html

[62] Vienna European Council – 11 and 12 December 1998 Presidency Conclusions http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00300-R1.EN8.htm

[63] The European Model of Sport, Commission's Report to the Helsinki European Council, 1999 http://ec.europa.eu/sport/action_sports/historique/docs/doc_consult_en.pdf

[64] European Council Nice 7-10 December Conclusion of the Presidency Annexes Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account should be taken in Implementing Common Policies (Annex IV) http://www.europarl.europa.eu/summits/nice2_en.htm

included in the Annex of the Council Conclusions. This document stipulated even more proactive role of the Communities in the sport-related sectors, including those of socio-cultural dimension: '...the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured'[65]. In the last version of the Treaty establishing a Constitution for Europe[66] from 2004 sport has been also mentioned explicitly. In particular Article III-282, subparagraph (g) envisages that 'European Union action shall be aimed at: 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen'[67]. Following the negative results of the constitutional referendums in France and the Netherlands in 2005 the UK Presidency of the European Union initiated Independent European Sport Review-2006[68] with a particular focus on European football to recommend the measures to be taken to provide a proper status for sport within European context. This paper in general terms allocates the main problems in the existing multilevel system of relation between the EU and sport. However, its very descriptive nature and striving to include into consideration the whole range of the current and potential intersections between sport and European policies in a combination with quite a moderate scope of research do not allow a thorough insight into the challenges facing sport at the EU-level[69].

[65] European Council Nice 7-10 December Conclusion Supra

[66] Treaty establishing a Constitution for Europe OJ C 310, V 47, 16 December 2004 http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML

[67] Treaty establishing a Constitution for Europe Supra

[68] Independent European Sport Review, Independent Football Review, Jose Luis Arnaut, 2006 - http://www.independentfootballreview.com/

[69] Independent European Sport Review Supra e.g. it is concluded with a quite large corollary: 'The findings of this Review demonstrate that there is a crucial need to have a formal structure for the relationship between the EU institutions and the European governing body for football ... Against this background, a comprehensive and proactive approach is needed by both the EU institutions and the football authorities in order to deliver greater legal certainty in football - and protect the European Sports Model... It's time to act.'

2.2. Sport as an economic activity

The concept of sport as an economic activity has been developed by the ECJ in its *Walrave* decision from 1974: 'the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty'.[70] In 1976 in its *Dona* case ECJ elaborated these conditions: 'This applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service'[71]. Having said that, ECJ stipulated conditions which are not covered by this definition: 'however, those provisions do not prevent the adoption of rules or of practice excluding foreign players[72] from participation in certain matches for reasons which are not of an economic nature[73], which relate to the particular nature and context of such matches and are thus of sporting interests only, such as, for example, matches between national teams from different countries... It is for the national court to determine the nature of activity submitted to its judgment'[74]. In its *Bosman* decision ECJ rejected the argument of the governments of some Member States[75] that sport as an indispensable part of culture is supposed to be excluded from the jurisdiction of Community law. In particular, ECJ pointed out that '[T]he argument based on points of alleged similarity between sport and culture cannot be accepted, since the question submitted by the national court does not relate to the conditions under which Community powers of limited extent, such as those based on Article 128(1), may be exercised but on the scope of the freedom of movement of workers guaranteed by Article 48, which is a fundamental freedom in the Community system'.[76] It is also important to note that according to settled European case-law the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity.[77]

[70] Walrave, paragraph 2 Supra

[71] Dona, paragraph 14 Supra

[72] In the light of very popular practice, known as 'naturalization', whereas foreign players receive new citizenship in order to play for national team of another country, this rule has to be rethought.

[73] From the perspectives of 2007 this notion appears to be quite contestable, since commercial part of national teams' competitions is increasing significantly.

[74] Dona, paragraph 14 Supra

[75] In particular, France and Italy

[76] Bosman, paragraph 78 Supra

[77] Joint cases Deliège C-51/96 and C-191/97 - paragraph 53

2.3. White Paper on Sport 2007

In 2005 European Commission has launched its first public debates on the project of a new consolidated document under the title 'White Paper on the Role of Sport in Europe'[78] which is supposed to define the policy of EU in the sport-related areas. After a lengthy consultation process with the main sports actors in Europe White Paper on Sport [79] has been conclusively adopted in July 2007[80]. The goal of this document is to provide a strategic orientation on the role of sport in the EU. In this paper the Commission recognized that the current legislative framework does not provide the EU with a specific legal power for sport but emphasised that sport, however, is '...an area to which many EC Treaty provisions apply and which has therefore also been subject to judgements by the European Courts and decisions by the Commission'[81].

Structurally the White Paper on Sport is divided into three main areas: (i) societal mission of sport (promotion of health, education and social responsibility; recreation and cultural development, social inclusion and equal opportunity, environment)[82]; (ii) sport and economic context and (iii) organisational constellation of European sports bodies. The borderline between the first and the both following areas of sports regulation has been implicitly mapped under the criterion *amateur sport vs. professional sport*[83]. This is the case, because the vast majority of sporting activities take place in amateur areas. However, the Commission recognises as well that 'professional sport is of growing importance and contributes equally to the societal role of sport'[84] and includes into the first category some domains which are closely related to professional sports activities (such as fight against doping, racism, xenophobia, extremism and violence).

[78] Commission of the European Communities, IP/05/1709 Brussels, 23 December 2005 'The EU action in the field of Education through Sport: building on EYES 2004 achievements'

[79] Commission of the European Communities, Brussels, 11.7.2007 COM(2007) 391 final, White Paper on Sport http://ec.europa.eu/sport/index_en.html

[80] In this section we do not provide analysis of that part of White Paper on Sport, which is, related to competition law and internal market, since they will be examined in the relevant part of the research project.

[81] White Paper on Sport Supra

[82] I.e. 'sport and everything'

[83] The Commission understands an amateur sport in its close interconnection with public health policy White Paper on Sport Supra: 'Lack of physical activity reinforces the occurrence of overweight, obesity and a number of chronic conditions such as cardio-vascular diseases and diabetes, which reduces the quality of life, put individuals' lives at risk and is a burden on health budgets and the economy'.

[84] White Paper on Sport Supra

The Commission analyses the economic dimension of sport by separating it into three groups: (i) sport as a public utility (it includes the whole range of Lisbon objectives, local and regional development, tourism, enhancement of the upgrading of infrastructure and leisure facilities); (ii) sport and intellectual property rights (this area is of particular interest of the present research project, since it embraces copyright, commercial communications, trademarks, and image and broadcasting rights) and (iii) public utility domain (such as developing of European statistic methods for measuring the economic impact of sport, in particular in terms of GDP, growth and employment, more security for sport-related economic activities and taxation).

The last important area of the White Paper is devoted to sport governance and the interaction between sport federations and public authorities on both domestic and European levels. It is exactly this part which engaged vast arguments within professional sport environment. Most sports federations were interested in assigning of universal clear-cut governing principles of relations between sport bodies and pubic authorities. In their opinion this would lead to legal certainty, in particular in such areas as transfer system and national players' clauses. However, in view of heterogeneity and complexity of these rules the Commission decided that 'it is unrealistic to try to define a unified model of organisation of sport in Europe'[85] The Commission fully recognised the specificity of sport, but it limited this notion only to the specificity of sporting activities and of sporting rules[86] and the specificity of the sport structure[87] but it refused to establish explicit conditions under which sport federations would be exempted from the Communities jurisdiction,[88] underlining that in respect of the administrative sides of sport, the calculation whether a some

[85] White Paper on Sport Supra

[86] White Paper on Sport Supra: 'such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions' but also rules of the game (e.g., the rules fixing the length of matches or the number of players on the field); rules concerning selection criteria for sport competitions; 'at home and away from home' rules; rules preventing multiple ownership in club competitions; rules concerning the composition of national teams; anti-doping rules; rules concerning transfer periods ('transfer windows').

[87] White Paper on Sport Supra: 'including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport'

[88] E.g. Under blocks exemption principle of Art. 81 (1) and Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25

sporting regulation is reconcilable with EU law can only be done on a case-by-case basis. The Commission illustrated its approach by recent *Meca-Medina*[89] judgements of the CFI and (later on) ECJ, which essentially confirmed the legitimacy of the previous Commission's practice to distinct between 'specificity of sport' and 'inapplicability of EC law to the sport sector'[90].

2.3.1. Criticism

Against this background one can better understand all the controversy in a constellation of the European sport policy, as well as its multi-faceted nature. It is no wonder that under such circumstances many European sport bodies are expressing their moderately prudent approach to this document. In particular, Union of European Football Associations (UEFA) explicitly qualifies White Paper as a 'disappointing document'.[91] In this opinion UEFA obtained support from other team sports federations[92]. They appear to associate themselves with this position, because all federations indeed are seeking to find more autonomy from the strict Community rules. It is the case, since after landmark ECJ decision in *Bosman*-case the legal status of the internal sport regulations are no longer considered as independent stand-alone regulatory system, but within the context and under the legal supervision of the Communities rules and principles[93]. Shortly after the decision in *Bosman* case has been promulgated, the Commission announced about the informal agreement between UEFA and FIFA with the DG COMP concerning the revised football rules relating to the international transfers system. Football associations have never been satisfy with achieved compromise, arguing that transfer rules regard to specific side

[89] Case T-313/02 Meca-Medina v. Commission, ECR 2004, II-03291 and Case C-519/04 P, Meca-Medina v. Commission, ECR 2006, I-6991

[90] These two notions have to be reconciled by proportionality test. Supra

[91] Union Européenne de Football Association (UEFA) Media Release 13/6/2007 # 082 – 'Draft EU White Paper on Sport: a disappointing document UEFA together with other team sports ask for clear political guidance in favor of European sport' www.uefa.com/newsfiles/550697.pdf

[92] Fédération Internationale de Basketball (FIBA) Press Release 'Initial Reaction of European Team Sports to the Draft EU White Paper on Sport': 'What European sport urgently needs is a clear political orientation that will lead to a well-defined legal and policy framework for all sport activities throughout our continent. As a basis for this approach, the Commission should follow the appropriate EU texts…'

[93] President of the UEFA Michel Platini in his interview to The Financial Times, 20/4/2007: 'The commissioners] need to listen to what are the governing bodies of sport. If it is a totally different result, we will fight. They lost the constitution vote in France because there is no social issue in the constitution. Sport is social'
http://search.ft.com/ftArticle?queryText=Platini&aje=true&id=070520004464

of sport and provide coherence and stability to relation between football clubs. They expected that their position would be reflected to some degree in the White Paper on Sport.

As we see, the main concern and criticism of White Paper encompasses a whole range of issues. But generally they centre on the need for a partnership between sport's governing bodies and public institutions for the good governance of the domain, which fully respects the self-regulatory features of professional sport, whereas regulatory autonomy of sports federation remains to be preserved. On the eave of the appearance of White Paper on Sport European Parliament adopted Resolution on the future of professional football in Europe.[94] This document met expectations of sports federations in terms of the presentation of their priority status. It underlines the Commission's commitment to consider European sport as 'an inalienable part of European identity, European culture and citizenship' [95] and emphasizes the important societal role of sport within the European Communities. It expresses the necessity to avoid the future of professional sport in Europe being solely determined on a case-by-case basis which would lead to substantial decrease of legal certainty. This Resolution approached the general goal of sport federations, which consists in granting to them higher autonomy, de facto immunizing them from the jurisdiction of European law[96].

However it appears to be tenable that the application of *negative* European competition law renders enough theoretical space for proper consideration of the 'specificity of sport'. It does not block the nature of sporting business and fully recognises sporting rules that purport to evolve inherent goals in the area of the management and effective control of organisational aspects of sport are legitimate instruments for reach comparative autonomy of this industry. Having mentioned that, it is also important to be aware of the impossibility to establish a complete and

[94] European Parliament resolution of 29 March 2007 on the future of professional football in Europe, INI/2006/2130
http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=INI/2006/2130

[95] European Parliament resolution of 29 March 2007 on the future of professional football in Europe Supra

[96] European Parliament resolution of 29 March 2007 on the future of professional football in Europe Supra: '[European Parliament] agrees with the basic principle that the economic aspects of professional sport do fall within the scope of the EC Treaty, taking into account the specificity of sport as set out in the Nice Declaration; and considers that in this respect the consequential restrictive effects of a sporting rule are compatible with EU law, provided that the rule pursues a legitimate objective related to the nature and purpose of sport and that its restrictive effects are inherent in the pursuit of that objective and proportionate to it ' (emphasizes added).

unequivocal catalogue of sporting rules which *ex ante* are likely to breach European competition order. These intentions of some leading European sporting associations do not appear to be perfectly measured in legal and doctrinal senses.

2.4. Sport and European competition policy

There are numerous direct and hypothetical points of intersection between sport and EC economic law[97]. It is important to stress that the specificity of sport in no way provides immunization from the application of EC law to sport-related issues. It may, however, under sufficient circumstances constitute merely an objective justification for otherwise illegal/anticompetitive conduct: 'Where a sporting activity takes the form of paid employment or a provision of remunerated service, it falls within the scope of Article 39 EC et seq. or of Article 49 EC et seq. Therefore, the prohibitions laid down by those provisions of the Treaty apply to the rules adopted in the field of sport which concern the economic aspect which sporting activity can present. On the other hand, those prohibitions do not affect purely sporting rules, that is to say rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity. That restriction on the scope of the above provisions of the Treaty must however remain limited to its proper objective'[98]. This position has long been established by the EC case-law in many related areas and explicitly confirmed by the CFI in the several judgements. In evaluating the conformity with this precondition it is necessary to assess the entire spectrum of factors in which this norm was adopted and in particular to take into consideration its goals as well as whether the restrictive consequences are unavoidable in the pursuit of these goals and are proportionate to them.

When sporting rules are not related to an economic activity, they do not fall neither under the scope of 'four freedoms', nor *negative* competition within the internal market. However, rules which are adopted in the field of sport, but are not of purely sporting nature fall within the scope of the provisions both of 'four freedoms' and EC competition law. They may constitute an infringement of the EC law and have to be subject of the legal scrutiny without any doctrinal exceptions.

[97] I.e. 'four economic freedoms' and competition law (or in terms of this paper positive and negative competition law)
[98] Meca-Medina Supra

This rational has been confirmed by CFI in its *Laurent Piau*[99] judgment from 2005: 'FIFA is an association of undertakings and the amended regulations constitute a decision by an association of undertakings. Representing the interests of all buyers, FIFA is acting as a monopsony, a single buyer imposing its conditions on sellers'.[100]

EC competition law often applies to organizational sporting rules. It has been repeatedly approved by the ECJ that so called 'specificity of sport' does not automatically immunize sport federations from application of EC competition law. In other words, the acknowledgement of the specificity of sporting rules cannot involve the unequivocal inapplicability of the EC competition law to managerial sporting provisions but it has to be considered as an important legal factor during the course of scrutinizing the accordance of such rules with EC competition standards. In its Staff Working Document[101] the Commission indicates approximate catalogue of sport associations' behaviour with a higher likelihood of contradiction to competition rules of the Communities[102]. This index includes, in particular, norms protecting sports governing bodies from competition; rules excluding legal challenges of decisions by sports associations before national courts if the denial of access to ordinary courts facilitates anti-competitive agreements or conduct; rules concerning nationality clauses for sport clubs/teams; rules regulating the transfer of athletes between clubs (except transfer windows) and rules regulating professions ancillary to sport (such as football players' agents). Some organizational regulations of sports associations concerning the participation of athletes in sporting competitions are also likely to infringe European competition order.

2.4.1. Prioritisation of the European public law provisions over sports rules

European case law has the wide range of judicial and administrative examples when sport collective governing authorities receive certain immunity over application of the European competition provisions. However there are also many cases in which the prevalence of provisions of EC competition law over is remained to be incontestable and the internal regulation of sport industries need to undergo

[99] Case T-193/02 Piau v Commission [2005] ECR II-209
[100] Piau Supra paragraph 57
[101] The Commission Staff Working Document 'The EU and Sport: Background and Context' Supra
[102] Some of them could be justified under certain conditions under Article 81(3) or Article 82 EC

significant changes in order to reaffirm its compliance with public European law. Generally these sports rules are held not to be indispensable or inherent for the organisation or proper conduct of sporting events. Therefore such rules usually are likely to constitute a breach of the EC competition law provisions.

2.4.1.1. Bosman case

This is the case for example in the issues related to nationality of sports players and transfer systems of leagues. After decision on *Bosman* case, the 'fundamental' rule of the domestic football clubs competitions, permitted participation in the tournaments only limited number of foreign players (so called '3+2 rule') has been cancelled as inappropriate and disproportional to 'specificity of sport'. Under the new system any European club is allowed to impose restrictions related to nationality of the athletes, who are the citizens of the European Union. Furthermore even sports players from some non-EU countries can apply this rule in their cases, since provision restricting the employment of foreign athletes can also violate Article 81(1) EC inasmuch as they limit the opportunity for the sport clubs to participate in competition with each other by engaging new players.

The ECJ also adjudicated in the *Bosman* case that world football players' transfer system is in violation of the freedom of movement and rules requiring payment of international end-of-contract transfer fees in respect of players who are nationals of an EU Member State go beyond the limits of Article 39 EC. This approach of the ECJ shows that although specificity of sport has to be tolerated by European public authorities, this specificity has to be in conformity with imperative European legal requirements. That transfer system did not constitute 'purely sporting' rules but rather concerned economic activity that is why it has been successfully challenged by Bosman and latter on by the Commission.

In the Opinion on *Bosman* case Advocate General Lenz concluded that FIFA transfer system breach not only European free movement postulates but also EC competition law because the transfer rules replaced the usual format of competition. He pointed out in particular that the most explicit violation of European law consist in authorisation by FIFA the model where even after the contract has expired the

player remains assigned to his former club. The transfer provisions limit the opportunities of the teams to compete with each other by engaging players.

This position, however, is quite contestable, since player's assignment to his former club after expiration of the contract is valid for *every* clubs and *every* league in the world. That is why there are no explicit competitive disadvantages for some teams as compared to any another team. Furthermore, these provisions had been usually used by relatively smaller clubs in order to prevent overbidding by their strong vis-à-vis. Transfer rules had been always considered as stable and predictable. That is why the only relevant (and explicit indeed) remedies of transfer system should be based on human rights justification. If European law provides that transfers of players constitute 'trade between member states' (at least it appears to be the case from the perspectives of the position of Advocate General in *Bosman* 'When UEFA submits that transfers of players do not affect `trade', it overlooks that that expression in Articles 81 and 82 is not restricted to trade in goods but covers all economic relations between the Member States...for trade between Member States to be affected, even a potentially appreciable effect suffices'[103] and 'the effect of the rules at issue in this case is a restriction of competition within the meaning of Article 81(1). The rules on foreign players restrict the possibilities for the individual clubs to compete with each other by engaging players. That is a restriction of competition between those clubs. The Commission has rightly observed that those rules `share ... sources of supply' within the meaning of Article 85(1) (c). Analogous considerations apply to the rules on transfers'[104]) why any labour contract (and its consequential transfer to another club) should not be considered as inconsistent with EC competition law provisions? We are of opinion that offered by Mr. Advocate General rational is consistent with *positive* European competition law (i.e. the law which strive to 'promote' and 'develop' the competition within internal market) but are quite contestable from the perspectives of *negative* European competition law, which is regulated by Article 81 and 82 (EC) and the philosophical objective of which is to 'protect' rather than to 'improve' the European competitive environment.

[103] Case C-415/93 Opinion of Mr. Advocate General Lenz delivered on 20 September 1995. - Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman ECR 1995 Page I-04921

[104] Case C-415/93 Opinion of Mr. Advocate General Lenz Supra

It is difficult to agree with the following argumentation of Mr. Advocate General in the present case. Thus arguing in favour of prohibition of transfer system basing on its inconsistency with EC competition law he concluded that 'If the obligation to pay transfer fees did not exist, a player could transfer freely after the expiry of his contract and choose the club which offered him the best terms. Under those circumstances a transfer fee could be demanded only if the player and his club had contractually agreed that in advance. The current transfer system, on the other hand, means that even after the contract expiration the player remains assigned to his former club for the time being. Since a transfer takes place only if transfer compensation is paid, the tendency to maintain the existing competition situation is inherent in the system. The obligation to pay transfer fees therefore by no means plays that `rôle neutre' with respect to competition which UEFA ascribes to it. The rules on transfers thus also restrict competition'.[105] However it is quite obvious that before signing a contract each player is well aware of the specificity of existing transfer rules and hence 'the player and his club had contractually agreed that in advance'. Having said this, we are fully recognising, however, inappropriateness of the transfer rules from the point of view of fundamental freedom. The practice of the 'possession of rights on players' has to be considered as an atavism at a minimum.

For the sake of consistency it is important to analysis why the deeper and more unpredictable issue of the alleged illegality of the payment of transfer fees for athletes who are still under their contract. The demanding of such compensation by the selling club may significantly infringe freedom of movement for sports players. Indeed the common transfer rules can affect competition which is defined in its broad, *Schumpeterian,* sense. This affection however has not much to do with antitrust provisions of Articles 81 and 82 EC, since these antitrust instruments are established for 'protection' but not for 'improvement' of competition. That is why these issues have to be settled rather on the political level without involving legal mechanisms, which might appear to be under certain circumstances sort of 'Pandora box' with unpredictable consequences for the European antitrust philosophy.

That is why the Commission decided to resolve these inconsistencies with FIFA via the diplomatic channels by means of negotiations and mutual compromises. Consequently FIFA agreed to significantly modify the existing system of transfers on

[105] Case C-415/93 Opinion of Mr. Advocate General Lenz Supra

the basis of abovementioned principles. In accordance with new transfer rules '[p]layers may only be registered to play with a national association during one of two registration periods per year, as laid down by the national association for this purpose, with a limit of one transfer of registration per player in the same sports season in a period of 12 months. One of these periods ('registration periods') is fixed for the end of the season and another period for the middle of the season. National associations can only register players coming from another association subsequent to the receipt of (i) a certificate of transfer of registration from that other association (hereunder referred to as the 'international registration transfer certificate') and (ii), in the case of a non-amateur, a copy of the player's contract with his new club'.[106] These rules also provide a 'solidarity clause' with a view to redistribute proportionately a substantial part of revenue to professional and amateur clubs involved in the training of a sport player.

2.4.1.2. Formula One case

One of the clearest and most unequivocal examples of the prioritisation of the European competition over the specificity of sport provisions is the Commission's decision on *Formula One*[107] motor racing. In this case the Commission has accused the sport association in charge of international motor racing, *International Automobile Federation* (FIA) and *Formula One Administration* (FOA), in abusing their dominant position on the market of selling of broadcasting rights for motor racing and obliged them to renegotiate selling contracts in conformity with EC competition law. The essence of violation is based in the very status of FIA and FOA, which allowed them to authorize every motor racing events and prevent their participants (i.e. track owners, vehicle manufacturers, organisers of motor sport events) from participating in other motor racing events. Any license holder found to ignore this prohibition can be stripped of his license. The Commission has found clear empirical evidence which demonstrates that the FIA is directly abused this power to force a competing motor racing association out of the market.

[106] FIFA Regulations for the Status and Transfer of Players, 2003 http://www.fifa.com/aboutfifa/federation/administration/playersagents/regulationstatustransfertsplayers.html

[107] IP/99/434 Brussels, 30 June 1999 Commission opens formal proceedings into Formula One and other international motor racing series

The Commission explained the reasons for its imperative intervention by following: 'In 1995 the FIA introduced new rules under which it claimed the television rights to all the motor sport events it authorised. It then transferred these rights to International Sportsworld Communicators Ltd (ISC), a company controlled by one of FIA's vice-presidents, Mr Ecclestone. The introduction of these rules also meant that a promoter wishing to establish an international series was forced to assign the television rights for that series, whether it wished to or not, to a competing promoter, namely the FIA. Although the FIA changed these rules at the end of 1998 to limit their scope of application, the Commission considers that it has continued to abuse its power by acquiring the television rights, in this way, to championships incorporating the FIA name in their title'[108]. In addition it has been found that the terms of the broadcasting agreements between FOA and its commercial partners increase the difficulties for those who wish to organize an alternative to Formula One Championship tournament. In particular, these contracts prevent trails used for Formula One competition from being used for races which could potentially compete with Formula One as well as Formula One teams from participating in any other competitions comparable to Formula One. FOA also put restrictive provisions in the agreements with its broadcasters penalizing them for televising anything deemed to be a competitive product to Formula One. This violation in terms of European competition law constitutes an explicit and disproportionate exclusionary abuse and is prohibit by Article 82 EC. In accordance with compliance procedure following long discussions the FIA agreed to change its rules to bring them in line with EC competition provisions and to prevent eventual conflicts of interest. The substantial modifications limited the status of FIA to that of a sports association, without commercial involvement into the business. In addition in has been explicitly declared about unacceptability of the unjustifiable prevention and impediment of new motor races (with the exceptions related to public safety and fair play rules). It also agreed not to create artificial obstacles for potential competition between the participants of Formula One and tournaments alike. That is why it has been decided to reduce (or in certain cases to eliminate) obstacles to entry for new motor sports operators to this very lucrative market, in particular, by cancelling existing prohibitions in circuit contracts about the organization of other motor sports competitions. Thus FIA

[108] Fédération Internationale de l'Automobile — FIA (Case COMP/35.613) and FIA Formula One World Championship (Case COMP/36.638)

essentially agreed to withdraw its power over the commercial exploitation of the Formula One World Championship.

2.4.1.3. Ticketing policy

There are some competition concerns with regard to ticketing policy by clubs, associations and leagues. The legal status of the tickets to sporting events is ambiguous. On the one hand, ticketing arrangements fall within the scope of free movement of goods and services; they may be freely sold and purchased without any limitation from the initial owner. The right to establish the price of the ticket as well as the factual way of its distribution belongs to the commercial entity, which hosts the event concerned. However, after the first selling those rights are exhausting and everyone is free to resale the tickets establishing their own price. On the other hand, however, there are at least three arguments against this 'libertarian' approach to the definition of legal status of the tickets. First of all, from the classic civil law perspective, ticket is neither good nor service, but rather certificate of the rights to use some services. It means that each commercial entity, during establishing its price policy take into account many commercial reasons.

The mere ability of resale undertaking to acquire all tickets for airline, opera or football match does not necessary correspond to its legal competence to do it. By distributing the tickets, the company may pursue different goals, one of which is sustainable development of customers' loyalty. Charging a moderate price, they may expect to attract some particular social groups of people. Whatever the reason might be, it seems sensible that the main organizer of the event is fully entitled to establish the price, which appears to be the most appropriate to it, without any sequential explanation of these commercial steps. In this sense ticket reflect the final decision between seller and buyer and each following re-assignation has to be done with an explicit consent of the seller. Each unauthorized ticketing transfer may be reasonable from the practical point of view, but should be considered as legally null and void.

This approach seems to be even more appropriate if the ticket has its nominal features. It becomes untransferable *ipso facto*. In addition to the commercial limitation, arising from the ontological rights of owner to establish the selling strategy of its facility, there are also several public components in favour of tickets

resale restrictions. It is often the case during the organisation of the big sports events, such as Olympic Games or FIFA World Cup. It is usually the case, that each national federation is entitled to acquire some amount of tickets for the sports supporters from their country. The mere fact that free market offers much more attractive price does not automatically means that viewers from the less developed countries should be precluded from the attendance of this sports events. The scale of reasons of this policy may vary from the pure philanthropic cultural intention to participate in the educational development of that nation to cynical expectations to develop the customers' loyalty for that potentially attractive in the future market. That may be a reason of allocation to national sports federations whose teams were participating in a given match of tickets. In evaluating ticketing policy, the Commission has taken a view that the tickets sale should be performed in a manner which ensure that all consumers may have reasonable conditions to access to entry tickets. Particular regulatory attention in this respect is paid to clauses related to territorial restrictions on tickets sales, limitation in payment methods to some favourable credit cards services and exclusive distribution agreements.

There are also concerns of public safety which might influence the decision of the organizers to sell the tickets in a certain way. In particular it concerns prevention of security violation. Thus in its Decision concerning discriminatory ticketing practices [109] the Commission admitted that 'in order to determine whether and, if so, to what extent, security considerations may justly ticketing arrangements which would otherwise be deemed to infringe Community law, each set of arrangements must be considered on their individual merits in the light of an objective assessment of what is necessary to achieve reasonable security objectives'.[110] Another argument of the differential ticketing policy would be efficient separation of rival groups of supporters, as well as fight against counterfeiting of tickets. Each reference to the free movement values would be considered within this context as not fully appropriate. However, due to the fact that each major sports event may be considered as a separate market and its organizer would be seen as an undertaking in a dominant

[109] Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 - 1998 Football World Cup) (notified under document number C(1999) 2295) Official Journal L 005 , 08/01/2000 P. 0055 - 0074

[110] Commission decision concerning discriminatory ticketing practices Supra

position, there are eventual possibility that some limitation of freedom to sell or re-sell tickets might be interpreted as an abuse of a dominant position.

One of the most disputable matters in relation to regulation of tickets policy by EC competition law is a proper market definition. Since tickets for most sport events are usually sold by a single commercial entity it is very likely that these relations would be regulated by Article 82 EC. For the proper market definition in these cases it is important to evaluate the nature of the sporting event as well as its eventual substitutability by another sports competition. The Commission is of opinion that most sporting events are generally substitutable and therefore constitute one relevant market. However, there is a range of the premium tournaments, which due to their branding nature and big loyalty of their audience may be seen as the separate relevant market themselves. For example, in its Football World Cup decision[111] the Commission address this problem, by applying traditional SSNIP approach: 'The relevant product market can be determined by considering the extent to which an undertaking's competitors, if they exist, are capable of constraining its behavior and preventing it from acting independently of competitive pressures. In determining the scope of the relevant product market and the extent to which undertakings are able to act independently on such a market it is necessary to consider, inter alia, the manner in which consumers are likely to react to changes in the price of the product or service in question. In this context, a relevant product market will usually be limited to a single product or service if a small but significant increase in the price of that product or service (for example, 10 %) does not lead to any measurable change in consumer demand in favour of substitutable products or services... The nature of the World Cup finals competition is such that an increase of at least 10 % in the price of match tickets would not have resulted in a significant switch in demand by the general public to otherwise competing products.'[112]. It substantiates this view by the range of arguments. In particular, by the huge popularity of football throughout Europe over all other sports, since it is the only genuinely worldwide sport event, with particularly strong support all around the world. In the context of big worldwide popularity of football as a whole, World Cup is characterized as premium football tournament, played only once in four year and gaining the biggest loyal audience. Even if the demand for match tickets is significantly exceed the reasonable amount

[111] Case IV/36.888 - 1998 Football World Cup Supra
[112] Case IV/36.888 - 1998 Football World Cup Supra

of available tickets, most of the viewers are not willing to switch to another entertaining event even after significant increase of selling price. There are also many concerns about the geographic dimension of the relevant market for sports tickets. Due to the big demand for tickets to premium sports events from the consumers of all of European countries, the Commission tends to qualify the relevant geographic market at least to all countries within the EEA. This is necessary, because usually in the ticketing policy, unlike in the framework of media rights distribution, there are strong centralized measures of the organizers of the events. Their marketing policy is not influenced by substantial national or cultural specificity of each country. Selling of the tickets is performed in a universalised and centralized manner. The event of less international importance the relevant geographic market may be defined more narrowly, for example within the national or even regional borders.

The Commission expresses constant concerns about the restriction of payment methods for tickets, which has its roots in the sponsorship agreement with some financial operators, which put into it the clauses of card exclusivity. However it accepts that there should be some technical limitation for establishing the proper condition of selling the tickets. Such a moderate approach is not shared by all academic community.[113] Given that major sports events concern also prominent scholars, one of them skilfully addressed the issue in his public discussion with the Commission: 'It seems clear that the organizing authorities are in breach of their commitments to you. (Of course, it is not adequate for the authorities to claim that in practice they will sell to buyers even outside France despite the information on the Web site. An administrative practice cannot be considered to save a breach of EC law, because otherwise legal certainty would be damaged)'[114]. Professor Weatherill elaborates his reasoning by stating that security aspects of restrictions of tickets sale are disproportional, since they are not limited to matches of the national teams concerned, but are expanded to all matches. We have to admit that this issue as well as such marketing practices as restriction on selling of some beverages within a certain territory during the major sporting events and drastic measures to prevent ambush marketing, although go in conformity with commercial rationale to protect significant investments raise many concerns with regards to the compatibility of such

[113] E.g. Stephen Weatherill, Fining the Organizers of the 1998 Football World Cup E.C.L.R. 2000, 21(6), 275-282

[114] Weatherill Supra

practices with EC competition law and other Community policies. Each future major sports event will provoke new discussion in this respect. It remains to be seen what administrative response will made the Commission, but also competitors themselves, which can plead applying private enforcement instruments available within EC competition law.

2.4.1.4. Rules governing the licensing system of football agents

Another important domain where specificity of sport did not obtained unequivocal support from the European public law is FIFA regulation of licensing system of football agents. The profession of sport player's agent is characterized by substantial specificity and could not be considered as mere 'representation'. At the present days, when European football becomes indispensable part of entertainment business the role of football agent is increasing significantly. They play important role in the industry's success and its commercial development. Remaining usually invisible for supporters they constitute essential driving force for the arrangement of all commercial deals in the football business. That is why FIFA rules governing the licensing system of football agents may became object of such close attention of public authorities.

According to these rules a contract is valid only if the deal has been made via the agent licensed by national football federation. The procedure of licensing stipulates some formalities, such as possession of a spotless reputation passing an interview, and deposition of a bank guarantee. If disproportional the rules constituted a substantial restriction on competition in terms of Articles 81 and 82 EC. As a consequence of the Commission's intervention, FIFA changed the most controversial obligations. Thus the interview procedure has been replaced with a multiple-choice test and the deposit has been substituted by liability insurance. Since this profession constitutes rather typical commercial activity and the purpose of a sport agent is to provide an effective employment relationship between player and club the Court adjudicated that this activity clearly is not fully covered by the 'specificity of sport' clauses and cannot benefit from the exclusion from application of Articles 81 and 82 EC only because it has 'some relation' to sport as such. The critics of the present rules are arguing that behind the surface objective of defending players, protecting specificity of sport activity and developing ethical standards in the profession of

players' agent, the real goal of FIFA is to obtain uncontrolled power of the occupation of players' agent. These intentions are claimed to be in breach of the principle of non-discrimination and the freedom to carry on a business. 'Specific nature of sport', which makes it possible to deviate from EC competition standards are often extrapolated to cases which are not linked directly to sport. Furthermore if these rules are established by an undertaking which is in a dominant position on the market (this is the case for FIFA) that might be seen as an abuse of dominance. This last argument appears to be quite doubtful, since provisions of Article 82 EC are only applicable to economic activities and do not relate to regulatory jurisdictions of FIFA as football governing body and the procedure of licensing of players' agents has no direct or explicit correlation with economic activities.

The competence of FIFA to regulate football agent activities has been challenged as inappropriate on the ground that it is exclusive public competence. The similar approach has been adopted by CFI in its *Piau*[115] decision. According to adjudication of the CFI, 'The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organization of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties... Such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities. Nevertheless, in the present dispute, the rule-making power exercised by FIFA, in the almost complete absence of national rules, can be examined only in so far as it affects the rules on competition, in the light of which the lawfulness of the contested decision must be assessed'.[116] It consequently follows from the decision that the duty imposed on players' agents to carry on the FIFA rules governing the licensing system of football agents does not appear to be *ipso facto* contrary to the EC competition provisions, but can violate European competition law if are disproportionate and unreasonably restrictive.

[115] Case T-193/02 Laurent Piau v Commission of the European Communities ECR 2005 Page II-00209

[116] Piau case paragraphs 77, 78 Supra

2.4.1.5. State aid

Over the last few years, the Commission and national competition authorities have become significantly more active in its enforcement of EC state aid rules to the sport-related areas. It is particularly the case for state subsidisation of public broadcasters, public support of digital switchover and state (or municipal) aid for construction of new sports facilities.

Public financing of national TV and radio-operators has its long regulatory history in Europe. The mere fact that most of European broadcasting corporation have been established by state shows the fundamental difference with their US vis-à-vis. However, new European regulatory approach continues tolerate public financing with substantial limitations. The Commission believes that application of Article 86 (2) EC is possible only within limited number of cases. In order to receive state subsidies the broadcaster has to perform the service of general economic interests. In addition to that the amount of state aid has to be strictly limited to the real needs of the present broadcaster to perform its public duty (i.e. proportionality and transparency clause). This is particularly important for the tenders to broadcast premium sports events.

Thus in its decision on Dutch public broadcaster[117] the Commission stated that 'broadcasting of sports programmes by public broadcasters is not considered a manifest error within a limit of "approximately 10%", implying that broadcasting of more than approximately 10 per cent for sports programmes by public broadcasters would be considered as such an error'.[118]

There are also many cases when public aid to sport facilities has been considered as anticompetitive by national competition authorities. Thus e.g. in 2006 Czech Office for the Protection of Competition imposed a fine of 500 000 Kc on Prostejov city for the lack of compliance with the Law on public orders regulation during the construction of the local recreational and sport centre.

[117] Commission Decision C (2006) 2084 final, of June 22, 2006 on the ad hoc financing of Dutch public service broadcasters C 2/2004/ (ex NN 170/2003). Available at http://ec.europa.eu/comm/competition/state aid/decisions/c2 2004/en.pdf

[118] Commission Decision on Dutch public service broadcasters Supra

2.4.2. Recognition by EC competition law the 'specificity of sport' clauses

European case law provides also several examples of a more benevolent approach of the Commission to the specificity of sport. These exceptions concern predominantly pure sporting rules, such as establishing the size of the field, quantity of players, weight of the ball etc., but also are likely to embody neighbouring provisions related to the essence of the sports contests: rules prohibiting possession of financial interests in two or more clubs in the same competition, requirement to play only for one national team, some minor elements of the transfer system, demand to encourage participation in the clubs locally-trained players etc..

2.4.2.1. UEFA Integrity Rules

Thus, in accordance with the *UEFA Integrity Rules*[119] communication of Commission, the management of sporting contests on a national territorial basis infringes European competition law only hypothetically, since the very nature of sports business requires the existence of this format of sporting events. The rule has been alleged by the Commission as inherent for the organisation of sports contests on the national and international levels, because it secure the spirit of sport competition between clubs. It has been decided that the rule did not go beyond what was necessary from the perspectives of principles of sporting unpredictability, equality and contestability. In this communication it has been pointed out that 'It is of fundamental importance that the sporting integrity of UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition'[120].

[119] Communication made pursuant to Article 19(3) of Council Regulation No 17 concerning request for negative clearance or for exemption pursuant to Article 81(3) of the EC Treaty (Case No 37.632 - UEFA rule on 'integrity of the UEFA club competitions: independence of clubs'(Text with EEA relevance), Official Journal C 363 , 17/12/1999 P. 0002 – 0004

[120] UEFA Integrity Rules Supra

2.4.2.2. UEFA requirements on home-grown players

After drastic changes emanated from the ECJ decision in *Bosman* UEFA is trying permanently to establish some other rules, which would secure stability and sustainability in European football. Although from the point of view of consumers these changes were predominantly useful, in the long-term perspective this liberalisation can bring some negative cultural consequences for the game. That is why UEFA strives to substitute 'nationality clauses' by another significantly less controversial requirement known as 'home-grown players' quota'. By implementing this rule UEFA seeks to re-establish the national, regional and local identity of European football clubs and their supporters – the issue which plays crucial role from the commercial and cultural and perspectives. Consequently UEFA together with national associations decided to launch the compulsory quota for players trained by club's academy. UEFA defines a local-trained player as one who has been registered for a minimum of three seasons with the club between the age of 15 and 21.

However these new provisions are not in complete consistency with European freedom of movement requirements as well as antitrust law and policy. That is why the football governing bodies are trying to 'test' the different modifications of these provisions in the separate countries outside European Union. These provisions have been already launched e.g. in Ukraine, Russia, Norway and some other countries. Apparently requirements of local-trained players also can be in compliance with public European requirements, because there are no explicit mentions of nationality of such players. It is perfectly possible that local academy will raise foreign players, which will meet the conditions of home-grown players to the same extent as other players who are citizens of this state. It is difficult to predict the reaction of the Commission to such a 'tricky' invention: on the one hand this rule does not differentiate between players on the ground of nationality; on the other hand, however, there is no much doubt that *de facto* these restrictions would concern predominantly foreign players. Another sophisticated argument of UEFA is that this regulation does not seek to 'restrict', but to 'encourage'. It is philosophical question indeed to what these provisions are not discriminative. However, as long as any powerful part is directly concerned by this rule it is not very likely to expect legal challenges of 'local-trained rule' by anybody else than Commission. For the time

being it looks satisfied with this initiative and does not send any 'codified messages' warning UEFA about its future legal remedies.

2.4.2.3. Regulations for participation in the matches of national team

Rules related to compulsory release by football clubs' players for matches of their national teams have always constitute an essence of world football. While playing for club usually is not directly associated with societal context, participation in the national teams always brings some cultural connotations. For a long time the rules governed issues related to participation in the matches of national teams were incontestable. However, with adoption by FIFA new Regulations for the Status and Transfer of Players, some provisions of this document can be assessed as inconsistent with European competition provisions. In accordance with this rules release of players for national association representative matches was done on the unilaterally compulsory for clubs basis: 'any club which has concluded a contract with a player who is ineligible to play for the national association of which the club is a member is obliged to release him to the national association of which he is a national, if he is selected for one of its representative teams, irrespective of his age... If a club refuses to release a player or neglects to do so despite the provisions of Article 36 to Article 40 above, the FIFA Players' Status Committee shall apply the following sanctions: (a) a fine (b) a caution, censure or suspension of the club involved'.[121] In addition to that the national federation to which the club belongs was obliged to declare the matches in which the player participated as lost by the club concerned with subsequent forfeit of any points thus won by the relevant team. This provision was obligatory for the explicitly defined category (and amount) of international matches and included in particular FIFA World Cup preliminary and final competition Olympic Football Tournaments and several other high rank contests. It has been allowed for clubs to prohibit players' participation in friendly matches scheduled on dates outside the coordinated international match calendar. Pursuant to these rules any club which releases a player for national association representative matches is not entitled to any financial compensation except some

[121] FIFA Regulations for the Status and Transfer of Players Supra Articles 36, 41

case of minor relevance (e.g. compensation agreed upon in the case of an extended period of release).

At the moment these provisions constitute a big threat for integrity of world football. It is the case because of potential financial burden which is imposed for clubs in these circumstances. They are reluctant to release their best players for participation in the competitions which have no relevance neither for status nor commercial success of the clubs concerned. Furthermore, the club with which the summoned player is registered shall bear all expenses related to his insurance cover against illness and accident during the whole time of his release including insurance for injury sustained in the international matches for which he has been released. From the commercial perspective it essentially means that national federations are unjustifiably profiting from the players registered with clubs, not willing however to cover such basic commitments as it is players' health insurance and not having any financial responsibility for players' injury and other related problems, which may negatively reflect upon players' future performance. This situation already provoked vast discussion in the football industry. Both relevant parties (i.e. national associations, supported by FIFA and UEFA on the one side and professional clubs and their associations on the other) were able to provide a wide range of *prima facie* reasonable arguments in their own favour. Some legal answers to these questions will be undoubtedly provided by the European judicial authorities since ECJ currently is pending the *Charleroi*[122] case, which is directly related to the presented problem. The question referred to the ECJ by *Tribunal de commerce de Charleroi* within the framework of the preliminary ruling procedure concerns the legitimacy of the imposition of obligations to cover insurance costs for players summoned to participate in national team: 'the obligations on clubs and football players having employment contracts with those clubs by the provisions of FIFA's statutes and regulations providing for the obligatory release of players to national federations without compensation and the unilateral and binding determination of the coordinated international match calendar constitute unlawful restrictions of competition or abuses of a dominant position or obstacles to the exercise of the fundamental freedoms conferred by the EC Treaty and are they therefore contrary to Articles 81 and 82 of the Treaty or to any other provision of Community law,

[122] Case C-243/06 SA Sporting du Pays de Charleroi and G-14 Groupement des clubs de football européens/FIFA, OJ C 212

particularly Articles 39 and 49 of the Treaty?'[123] As it follows from the request the plaintiffs decided to apply traditional in these cases reference to two European legal institutes (i.e. free movement of workers and antitrust law).

In its *Vision Europe Strategy*[124], approved at XXIX Ordinary Congress in Tallinn, Estonia, UEFA expressed its view on the direction and future development of European football. It has been pointed out in particular that in 'an ideal world there would be ... a future legal environment and sports-law jurisprudence shaped by UEFA and the values of European football, leading to legal certainty and full judicial recognition of the autonomy of sports structures and the specificity of sport; Full understanding by all key stakeholders about why the European football structures are the way they are. Empowered national football associations in control of football in their country – promoting, regulating, managing, organising and developing football at all levels – and retaining control over key sporting areas such as refereeing and match schedules.'.[125] It becomes obvious that the nature of national federations is changing. They are no longer merely regulatory bodies, responsible for governing football as a sport. Nowadays they do operate with significant costs, received from advertisement, sponsorship agreements and broadcasting rights to matches of their national teams (in particular of those being played on the final stages of European and World Cups). They can afford to bear the expenses, directly related to their commercial activities, so they can cover costs of players' insurance. On the other hand competitions between national teams have their long cultural and historical background. Often they are directly associated with traditional *modus vivendi* of some nations. That is why it still may sounds reasonable to consider participation in the competition between football national teams as cultural activity in terms of public order.

We do not however support another widespread argument for exclusion of rules related to participation of players in the matches of national team from the application of European competition law. This additional plea essentially proposes to consider the participation in national teams' competition as a supplementary (and condensed) opportunity for individual clubs to conduct effective selection of their

[123] Charleroi Case Supra
[124] Vision Europe Strategy approved at XXIX Ordinary UEFA Congress in Tallinn, Estonia, 2005 www.uefa.com/newsfiles/374875.pdf
[125] Vision Europe Strategy Supra

future players. We reject this *prima facie* reasonable argument on a methodological basis, since it is not the task of competition law to look into such unpredictable and *ipso facto* controversial categories as *lucrum cessans* and neighbouring legal and economic institutes. Allowing players to participate in the competition between national teams, individual clubs are facing a threat not only of the decrease the health and physical conditions of the player but also of the possibility to lose its leading athletes, if they are invited by financially stronger clubs. Should ECJ decide that obligations imposed upon clubs by FIFA are disproportional and unjustifiable (hence, go beyond the scope of the 'specificity of sport' principle), European football may address new substantial changes, comparable to that of post-*Bosman* reforms.

2.4.2.4. Multi-ownership

The Commission also acknowledged that no sport club participating in European club tournament may, either directly or implicitly hold or deal in the securities or shares of any other club, or be a member of any other club, or be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or have any power whatsoever in the management, administration and/or sporting performance of any other club participating in the same UEFA club competition. No person may at the same time, either directly or indirectly, be involved in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in the same UEFA club competition. 3. In the case of two or more clubs which are under common control, only one may participate in the same competition[126]. The Commission demonstrated the similar approach in its *Lille v UEFA*[127] decision. In this case Commission decided that the sporting rule to the effect that each team is obliged to play its home game at its own stadium is a purely sports rule that does not fall within the scope of the EC competition provisions, since there is no European interest that would legitimize looking more closely into whether UEFA has abused any dominant position it might have by applying exceptions to that rule without taking account of the integration that exists between certain frontier

[126] UEFA Integrity Rules Supra

[127] Commission decision of 9 December 1999, Case 36851, C.U. de Lille v UEFA (not published in OJ)

regions. In addition this rule is needed to secure equality between clubs. By adopting this provision and the exceptions to it, UEFA has executed its legitimate competence of self-regulation as a sports governing body in a manner which cannot be challenged by the European competition rules.[128] That is the reason why even though some sporting rules might eventually restrict competition within the internal market, if they pursue a legitimate objective this possible harm for competition in indispensable and unavoidable, proportionate and appropriate and is therefore tolerable by the EC competition law.

The Commission sided with sports associations on the issues related to specificity of sport in some other cases. Thus in *ENIC v UEFA*[129] case the Commission refused as inappropriate complaint of the company that holds shares in several top European football clubs about the UEFA rule, which prohibits direct or indirect control by one commercial entity of clubs that participate in the same football tournament. It concluded that these provisions are stipulated by the sporting nature of the relationships, are proportionate and reasonable, guarantee the integrity of contests organized by UEFA and contains no restrictions of European competition legal order.

That attitude has been adopted also by the European Court as to sporting rules related to transfer periods. Thus in its *Lehtonen*[130] decision ECJ concluded that although the conditions of player transfers (even adopted in a considerably 'softer' form as compared to 'pre-Bosman' era of professional sport) *ipso facto* contradict to the EC Treaty's provisions on free movement of workers, they might be tolerated by the European law by virtue of performance by them important sports function. It recognized first of all the applicability of the provisions of Article 39 EC to sport associations, confirmed that 'the Treaty provisions concerning freedom of movement for persons do not preclude rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, as in the case of matches between national teams from different countries'[131]. The ECJ also *inter alia* said that 'it must be acknowledged that the setting of deadlines

[128] C.U. de Lille v UEFA Supra

[129] Case 37806, 25 June 2002, ENIC/UEFA (not published in OJ)

[130] Case C-176/96 Jyri Lehtonen and Castors Canada Dry Namur-Braine v. Fédération. Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga [2000] ECR I-2681

[131] Lehtonen, paragraph 34 Supra

for transfers of players may meet the objective of ensuring the regularity of sporting competitions...However, measures taken by sports federations with a view to ensuring the proper functioning of competitions may not go beyond what is necessary for achieving the aim pursued'[132]

Hence it can be concluded that there are domains which are not likely to infringe EC competition law requirements. It touches on, first of all, 'rules of the game' (i.e. sporting rules *stricto sensu*); rules concerning selection criteria for sport competitions (such as transfer regulation, 'at home and away from home rules', anti-doping provisions, prohibition of multiple ownership in club competition, rules concerning selection and performance of national teams etc). Having mentioned that, it is important to stress that any of abovementioned provisions has *per se* immunity from the intervention of European public order. Most cases in sport-related areas are balancing on the borderline between legality and violation of EC antitrust law and free movement provisions. Therefore it would be exaggeration to predict that future relationship between Commission and sport associations are supposed to be more stable and coherent. That reflects the very specificity of the sport area, which is saturated by the diverse interests of different political and commercial actors.

2.5. Sports rights as matters of public importance

European law provides the possibility for Member States to define among sports event those of major public importance. These rules stipulate the necessity to broadcast those media rights solely via publicly accessible channels with maximum viewers' coverage. These measures have been adopted in response to absolute commercialisation of broadcasting rights for sports events. There is an excellent recent example, which illustrates the public nature of some sports events. German public broadcasters ZDF and ADR suspended their live coverage of prestigious and very popular bicycle race Tour de France 2007 after the preliminary announcement of the positive results of doping test by German T-Mobile rider Patrik Sinkiewitz, stating that it is not in the German public interests to popularise the sports with frequent doping scandals.

[132] Lehtonen, paragraphs 53 to 56 Supra

The initial legislative mechanism for protection the public access to sports content has been installed by Television without Frontiers Directive[133], which nowadays has been substituted by Audiovisual Media Service Directive[134]. In particular, it stipulates that '[e]ach 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'.[135] In this case the Member State concerned shall schedule a register of events, national or international, which it considers to be of major importance for society and define whether the broadcasting of these events should be available via whole or partial live or deferred coverage. These lists are published in Official Journal and considered of being mutually recognized by all other Member States. In its revised version Directive provides that broadcasters exercising exclusive rights for such events are obliged to grant other broadcasters the access to their content and right to use extracts for the purpose of short news reports. This provision is supposed to help to foster the right to information of European citizens and to contribute to the trans-border circulation of sport-oriented content within the Member States.[136] The right to be freely informed should be limited solely to showing short highlights of the match, but this by no means can substitute live streaming of the sports events as well as broadcasting of systematic highlights from all the matches. The provisions of this Directive essentially serve as a means to secure the constitutional rights to be informed. However, the constitutional nature of rights to information does not imply that this notion can be abused in order to free ride on competitor's facility. A proper balance between the interests of sports organizations and the free flow of information remains to be discovered.

[133] Council Directive n°89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (Television without Frontiers Directive).

[134] Directive of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive). Directive should enter into force by the end of 2007

[135] Television without Frontiers Directive Supra Article 3

[136] Audiovisual Media Services Directive Supra

In the industry of Olympic sports the media access for non-rights holders to the sporting events is guaranteed by slightly modified formula.[137] No non-rights holding broadcaster is allowed to record images or sound in the sport facilities unless access to them is permitted in accordance with the agreement. No such content could be transmitted or communicated by the internet or any other new electronic media, except that international non-rights holders could make such material available with the previous consent of the initial rights holders (i.e. International Olympic Committee). Non-rights holding broadcasters are physically precluded from the vehicle access to the stadiums. They cannot install at any time any free standing facilities within the limited area. In addition to that all non-rights holdings broadcasters are obliged to sign the declaration contained within the application form indicating that their organisation and crew representatives would comply with the provisions described above. It is important to indicate that these principles play an important role during the selection procedures for every following Olympic Games.

The country selected by IOC to be organizer of this sports event is obliged to comply with these rules on the legislative level. Thus, especially for Summer Olympic Games in Sydney the Olympic Arrangement Bill[138] has been adopted. It provides that all non-rights holdings broadcasters are precluded from the broadcasting, telecasting, or transmission by any means whatever 'any sound or image of an Olympic Games event or activity, or any part of an Olympic Games event or activity, or make any sound recording, or any film, television, video or digital recording of moving images, of an Olympic Games event or activity, or any part of an Olympic Games event or activity, for profit or gain or for a purpose that includes profit or gain, at or from a place within or outside an Olympic venue or facility, or an Olympic Live Site'[139].

[137] Official Report of the XXVIII Olympiad www.olympic-museum.de/o-reports/report2004.htm
[138] Olympic Arrangement Bill, 2000 (NSW), Australia
[139] Olympic Arrangement Bill Supra

2.6. Comparative overview of the European and North-American models of sport

In comparison with American model of sports industry the relations of European sports leagues with individual clubs are not so closed and predetermined. This gives some economic ground for the point of view of the Commission. Because commercialisation of sport occurred in the US much earlier than in Europe, American regulatory policy of sports is in a much more developed situation.

The professional sport in North America is founded under the principles of close economic interdependence between individual clubs and league. There is sufficient ground for considering their relations within the terms of franchising. Unlike North-American professional leagues, European sport is built upon the principle of pyramid league structure, which allows the system of 'promotion – relegation'. There are no closed professional leagues in Europe. Potentially every European team can play in every competition. The corporate structure of professional leagues in the US is recognized by the US legislator and safeguarded by several important exemptions from the application to them the US antitrust law.

For example one of the most profitable US professional leagues MLB (Major League Baseball) has been exempted from the application of US antitrust laws, when in 1922 the US Supreme Court adjudicated in *Federal Baseball Club of Baltimore, Inc. v. National Baseball Clubs*[140] that even though there was planning of matches across state borders, those matches were internal state events inasmuch as the travel from one state to another was not the decisive factor. The US legislator also tolerates to a certain extent the reserve clauses (the system under which the sports players could rarely leave their original teams by their own choice without appropriate financial compensation, while within European context the similar clause caused '*Bosman* transfer revolution'[141]). However, this domain also is quite ambiguous and there were already cases, when the US courts decided in favour of application the antitrust rules to issues related to professional sport.

In 1961 the Sports Broadcasting Act was adopted in the US. The Act explicitly legalised certain joint broadcasting agreements among the major professional sports

[140] Federal Base Ball Club of Baltimore, Inc. v.... Federal Baseball Club v. National League, 259 U.S. 200 (1922)

[141] Case C-415/93 Union Royal Belge de Sociétés des Football Association ASBL v. Jean-Marc Bosman Supra

teams. It allowed the management of television rights to the network The law is currently interpreted to include the 'blackout rule' which protects a home club from unauthorized competing games broadcast into its home territory on a time when it is playing its match at home. This privilege concerns only US professional sports leagues and does not permit joint selling of broadcasting rights for sporting events to amateur and college leagues.

The very nature of the professional sports in the US is oriented on commercial and entertainment aspects of the business and gaining revenue. Each American league is a commercial entity with joint commercial interests, revenue and expenses. That explains why American clubs are not pretending to have a considerable amount of power within the framework of the league. Each league is entitled to limit clubs from moving to other cities and has the legitimacy to order them to continue to play in the city, even if another market is a available one. This is the case since the interests of a competition are prevailing over the interests of a single club. It is hardly imaginable within American context how the strongest clubs of the league would commercially separate themselves from the remaining teams in order to gain e.g. more attractive TV broadcasting agreements.

Summary

This part of our research is devoted to analysis of the main fields of intersection between sports and European competition law. We did not take into considerations some matters of European sport policy, which have only marginal, irrelevant or hypothetical correlation with competition law (such as sports and human rights, sports and free movement of persons, sport and freedom of establishment etc.). We leaved aside also the fields of European competition law, which might be seen within the interconnection with sport, but for the time being there were no cases with relation to sport.

The particular attention has been devoted to White Paper on Sport, which is a new and quite comprehensive European programming document on future Communities sport policy. We support as a whole the idea of the Commission to make a clear distinction between sport as recreation and sport as economic activity. It becomes more easy to draw a borderline between these activities, since professional

sport nowadays goes in close intersection with commercial activities, while amateur sport remains to be purely recreation. European competition law, as well as regulatory policy are interested only in sport as an economic activity. There are number of fields of intersection between sport and competition law. Some of them have already well established case-law with substantial amount of consistency. However the very natures of sport, as well as the complexity of European competition law almost indispensably lead to the lack of theoretical uniformity. Furthermore, most of the cases in sport-related areas are decided inductively, referring first and foremost to the necessity of each particular case, rather than doctrine as such. Most of the cases have been decided on the pre-judicial stage by reaching by the parties involved some sort of mutually satisfactory agreements.

There is a big influence of politicians on the decisions adopted within the area. It is the case since sport has always been one of the matters of public importance. It served as a symbol of power and force of the nation. The competition on the pitch often has its political and/or economic connotation. That is why sport cannot be regulated on the European level without taking into considerations those quite controversial and ambivalent elements. Another important external factor is an innovative essence of sport. The rapidly growing and highly transforming nature of technology reflects on the regulatory aspect of the problem. However, it is necessary to point out that despite of the whole range of specificities of sport, European Union already has relatively well developed regulatory policy within this area and its current steps, in particular its adoption of White Paper on Sport show the perspectives for future evolution and consistency of the European sports law.

Part III

Sports Broadcasting Rights and EC Competition Law

3.1. The nature of broadcasting rights for sporting events

Broadcasting rights for sporting events constitute quintessence of European regulatory policy in the area of sport. This is the case both from the legal and industrial points of view. The application of EC competition law has an immense influence on commercial relationship between television companies and sporting organisations.[142] The regulatory history of European sport gives many examples of how the proper model of sports rights distribution has been successfully achieved by means of competition law. Legal transactions of broadcasting rights for sporting events are clear-cut illustration of sport as an economic activity in terms of Article 2 EC and abovementioned decisions of the and ECJ.[143] Under some circumstances broadcasting rights for sporting events represent indispensable 'must have' content. This is the case especially among commercial broadcasters, operating on pay-TV market. In this connection the commercial nature of the transactions related to selling/buying of sports rights becomes almost incontestable by all main actors of the industry. This does not mean, however, that the argument of 'specificity of sport' is not applied sports associations and TV broadcasters.

Among other things sport and in particular football is characterized by its regularity. That is very important for TV operators feature, in particular as regards the ability of TV operators to develop successful branding and marketing policy basing the future popularity of the entirely channel on the highly attractive exclusive sports media rights. The UEFA Champions League, for example, is one of the most commercially attractive TV content with a strongly developed own brand, which allows TV operators to reach broad audience on a permanent, stable and developing principle. Even if there are many other TV programs which may achieve even a higher audience figure that is the case only for sporadic broadcasting, which cannot establish long-term viewers' loyalty. That is the main explanation of tremendous increase of commercial value of premium sports events, which occur regularly. This value also increases proportionally to terms of exclusivity and duration of the contract. The fact that football matches are broadcasted on a regular basis as well as

[142] Sporting organizations can be seen in both their eventual forms: single club as an individual undertaking or league/federation as an association of undertakings.
[143] Walrave, Dona, Bosman Supra

their mass attraction with high viewing figures also increases their commercial attraction among advertisers, since it facilitates the advertiser the establishing more close and predictable connection with a potential consumer with a distinct characteristic. All that makes the top football matches one of the most effective tool to address the particular consumer group.

European case law provides sufficient legal basis for considering sports leagues as well as commercial (and even public) broadcasters into category 'undertaking' in terms of antitrust law. Apart from broadcasting of events of major pubic importance, all other content is considered to be commercial and the relevant activities of acquisition, licensing and sublicensing of broadcasting rights for sports events as well as the sale of advertising slots in-between of the televising of this content. The situation in the commercial television market shows that major sports events are generally considered as a important element for the main TV operators. In the free-to-air environment, sport is a key instrument of differentiation between channels given its unique branding abilities and its appeal to advertisers. This is particularly the case for pay-TV market on which sport content constitutes one of the several (along with some interactive entertainment services and the first screening of major, often Hollywood, movies) main subscription 'killer applications'.

There are certain features that distinguish the broadcasting rights for sporting events from many other prima facie related media products. These characteristics of sports right have to be understood with all due diligence, since they constitute the essence of specificity of European regulatory intervention into the media marketplace.

3.1.1. Ontological aspect

The first distinctive feature of sports products is in their 'fugacity'. The consumption circle of sports events in very short and in most cases it is limited to real-time mode. This is obvious feature, since there is no viewers' interest in watching the sports event if its result has been already known. That is why sport matches are mainly of interest if broadcast live. One can hardly imagine the release of sports matches on DVD or even their repeated broadcasting (although this practice is known, the viewers' audience of repeated broadcast hardly reaches 1% of the same

event being broadcasted live), even though the streaming of matches' highlights represents very attractive market. Hence, in relative terms the expenses of producing sports media product are substantially lower than it is at other related entertainment content. The gender, cultural background and age of sports viewers are easily identifiable. That allows increasing the revenues from advertisements, since commercial spots can be more task-oriented in their focusing on particular consumer groups. In addition each sports event is characterised by its unique nature. There is essentially no substitutability between prima facie identical products[144] since the percentage of demand-intersection between viewers of different games is fairly marginal. Furthermore, both the initial sports rights holders and broadcasters are mutually interested in preserving (though artificially) the scarcity of product on the supply side. That is why the access to sports media rights is so restricted and its availability is so limited.

Sports rights are usually concentrated in the hands of a one sports association and TV contracts are concluded on an exclusive basis, often for long periods or for a large number of events. The last peculiarity of broadcasting rights for sports event resides in their premium composition. Unlike movies and other entertainment TV products, where there is big scale of differentiation as to aesthetic (categories 'A', 'B', 'C', 'D'), genre (historic, thrillers, detectives etc.) and production quality (low-budget, blockbusters, experimental etc.) features, in the sports industry only premium events may attract attention of broadcasting companies and respectively be televised. It means that although in purely sports terms the quality distinction between matches of e.g. English Premiership and Championship is 'y' in terms of commercial attractiveness and eventual broadcasting rating this discrepancy will constitute 'y^{∞}'.

3.1.2. Commercial aspect

Broadcasting rights to premium sport events constitute a driving force for the development of new media products. They are particularly attractive for pay-TV channels and new media (IPTV and 3GTV). In the commercial agendas of biggest broadcasting channels the premium sports rights belong to 'must have' category and these companies are ready to pay progressively for acquisition of the media rights to

[144] E.g. different football matches of the same league are highly unique.

these events. The main reason of such media policy is explained by assignment to sport-related products a leading role in the overall promotion of pay TV markets. They constitute a 'killer application' for attraction new viewers to these broadcasting platforms. That is a reason why most broadcasters are seeking to purchase these rights on an exclusive basis. By doing so, they not only achieve the purpose of enlarging their own audience but also protect themselves from the alternative TV channels, eliminating essentially them from the competition on this market. That is why the domain of sport broadcasting rights is specifically susceptible to antitrust infringement and has to be properly regulated by the relevant competition authorities.

Average viewer behaviour show that for some sporting events such as Olympic games, certain tennis competitions and in particular premium football matches viewing preferences does not effected substantially by the coincidence of other big sports events being broadcast simultaneously. It means that the offer of such sports performance could influence the behaviour of subscribers or advertisers to such a level that the TV operator would be ready to impose essentially higher subscription fees. Usually owner of sports rights sell all of them for a long-term period of time under the principle of exclusivity to one single entity in a certain geographical and product market. Other companies in that area are virtually excluded from commercial exploitation of these rights. This usually leads to considerable competitive damages. Furthermore, practice of exclusivity often expanded to neighbouring markets, which are particularly sensitive to sports rights and consider them as indispensable strategy for their commercial development and new markets penetration. This practice may bring substantial damages for these companies and negatively effect consumers as well as competitive process as a whole.

The specificity of the area is conditioned by the fast development of the media industry including new technological solutions necessitates that definitions of the market are kept under permanent modification. Convergence of previously separated media platforms does not allow making a definitive conclusion about the appropriate scope of the broadcasting rights. It is often impossible to draw a clear borderline between neighbouring, but yet different media products. The situation become even more blurred taking into account the fact that most of the contracts regarding sale and acquisition of media rights for sporting events are concluded for relatively long period of time. The consequences of the excessive length of the contracts are

predominantly negative. Since technological development in the TV industry substantially outscores the period of the contracts, often new platforms remain to be undefined at all. This was the case, for example, for such new intermediaries as Internet and 3G broadcasting of sports events, which had not been previously detached into the separate package from the 'main' traditional TV broadcasting rights. As a consequence of this, the broadcasting of sporting events over new media platform had been essentially blocked, since the companies which launched these services did not have an access to exclusive broadcasting rights, whereas the owners of these rights did not intend their commercial exploitation (preventing at the same time launching the broadcasting via Internet and 3G mobile networks by their indirect competitors).[145]

3.1.3. Legal aspect

There are different ways to approach the issue of legal nature of broadcasting rights for sporting performance. The sports events do not explicitly envisaged by the patent or copyright law and do not fall within the scope of these institutes. In terms of intellectual property law broadcasting rights for sporting performance rather constitute neighbouring rights or home rights to access. There are already several cases in which different European courts refuse to consider sports matches as copyrightable substances. In particular, in the German domestic case Radio Hamburg v. Deutsche Fußball Liga GmbH, Hamburger SV[146] the District Court of Hamburg although accepted the rights for compensation for organizers of football competitions, dismissed the applicability to these relations the German Copyright Act (*Urheberrechtsgesetz*). It means that the only available protection is that raised from the physical holding of the venue where the match is played and particularly the possibility to exclude or limit the media from accessing the stadium. This approach does not provide a solution for re-broadcasting of transmission video and audio signals from the authorised operator. Furthermore, the limitation of physical access to venue does not appear to be an absolute protective measure at the age when professional video equipment can offer high-grade broadcasting even when the

[145] This issue will be analysed in the following part of the paper
[146] Az. 308 O 415/01 Radio Hamburg v. Deutsche Fußball Liga GmbH, Hamburger SV

facility is of a limited access[147]. Broadcasting rights for sports events can also be protected under the constitutional rights of undertakings to secure their economic activities and business investments. This essentially precludes third parties from unauthorized commercial exploitation of sports rights.

Rapid development of new media indispensably leads to more complicated and sophisticated ways to provide live access to sports events. Furthermore, the clear-cut borderlines between different platforms will be gradually eliminated. With the arrival of the new communication technologies the possibilities to exploit sports rights have become substantially wider. In today's media sphere it is easily possible to be informed of the course of a match by blogs, blackberries, internet sites, iPhone and other mobile communications devices. There are already several cases in Europe and the United States, related to defining the scope of sports rights usage. In particular, British Premier League is currently contesting the legality of live commentaries of its football matches, provided by the journalists of the Guardians in their blogs. The similar case has been held in the USA[148].

American court does not endued sports rights with the explicit copyrights protection since sports games do not 'fall within the subject matter of federal copyright protection because they do not constitute "original works of authorship''.[149] The main reason for this qualification was the absence of 'sports games' as copyrightable event in the current US legislation, which lists only such categories of 'works of authorship' as 'literary works', 'musical works', and 'dramatic works'. Although the list is concededly non-exclusive, 'such events are neither similar nor analogous to any of the listed categories'.[150] The court, quite surprisingly, continued with the very contestable notion that '[s]ports events are not "authored" in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. It is the stream, not the underlying match that is the subject of copyright protection. Unlike movies, plays, television programs, or operas, athletic events are

[147] E.g. by buying the tickets for the match on different stands of the stadium

[148] The National Basketball Association and NBA Properties, Inc. (collectively the "NBA" Nos. 822, 824 August Term, 1996 United States Court of Appeals for the Second Circuit v Motorola INC doing business as Sports Trax

[149] NBA v Motorola Supra

[150] NBA v Motorola Supra

competitive and have no underlying script'[151]. The Court of Appeals found the basis for this decision n the fact that sports events are not authored. But this notion appears to be arguable, since the broader definition of creativity accepts collective authorship. In addition, the Court recognized himself that recorded broadcasts of sports games – as opposed to the games as such – are entitled to copyright protection. The US Copyright Act[152] has been amended in 1976 precisely to secure the conformity of simultaneously-recorded transmissions of live performances and sporting events to the Act's imperative that the original work of authorship is fixed in any tangible medium of expression[153]. It means that the protection by copyright law of broadcast does not protect the game as such and any reproduction of the facts (including live report about facts and analysis of events in the blogs) does not infringe copyright, unless it constitutes expression, description or commentaries of the game as such (it is the derivative definition from the formula 'no author may copyright facts or ideas. The copyright is limited to those aspects of the work – termed 'expression' – that display the stamp of the author's originality'[154]). The one plausible explanation of such approach is that the concept of 'public event' does not belong to the best developed areas in the United Stated and limitation the sports rights in their copyrightability is maybe one of the ways to allow more public access to these events.

Unsurprisingly, sport associations as well as other sports rights holders insist upon granting to broadcasting rights for sports events absolute rights of intellectual property together with relevant protection. They substantiate this claim with plenty of empirical and theoretical evidence. The main stress has been placed on analysis of discrepancies between sports events and other public performance. The relations between manager and players can by no means be compared with those between author of song and its performer. The quintessence of any musical creation is in the transcendental interaction among composer and his/her inspiration. Although the performance of the piece plays an important role, the predictability of execution, its predetermined 'programming', does not leave essential space for creativity of the

[151] NBA v Motorola Supra
[152] United States Copyright Act of 1906
[153] Amendment of the United States Copyright Act of 1976 44 U.S.C. §§ 505 & 2113; 18 U.S.C. § 2318
[154] Harper & Row, Inc. v. Nation Enter., 471 U.S. 539, 547-48 (1985))

performer. In the sports entertainment industry[155] the situation is quite opposite. Each match is characterized by its uniqueness. There are no other ways to understand the essence of any particular match than to watch it. The games between the same teams composed of the same players are always substantially different, whereas the performance of the same creation by the same orchestra (at least in terms of consumer's expectations and predictions) is always the same.

However, pursuant to Community case-law sports rights holders are granted with home rights as a result of the right of ownership or exploitation of the stadium. In particular, in its *Eurovision II*[156] judgment CFI decided that 'Television rights are normally held by the organizer of a sporting event, who controls access to the premises where the event is staged. In order to control the televising of the event and to guarantee exclusivity, the organizer admits only one broadcaster or a limited number of broadcasters to produce the television signal. Under their contract with the organizer, they are not allowed to make their signal available to any third party who has not acquired the relevant television rights'.[157] However, if the tournament is organized under the auspice of league[158] and represents as such sufficient amount of reconcilability[159] and structural homogeneity[160], the relations between clubs and league appear to obtain franchising dimension. It means that league become an indispensable actor of the relations of management the broadcasting rights for such sports events. Under these circumstances the home rights of individual teams would be proportionately decrease. The Commission however has certain disagreement with regard to this approach to the legal definition of sports rights. It insists upon conferring to leagues and other collective sports entities the legal status of co-owners of broadcasting rights[161] rather than their main holders. This status is substantially differs from the typical joint selling agreement, in which the group of individual undertakings create a conglomerate of owners, which then market them on their behalf. Sport league, on the contrary, are also considered as owners of at least of a part of media rights, therefore they do essentially market their own property.

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[155] In particular speaking of collective (as opposed to individual) sporting events

[156] Case T-185/00 etc Eurovision II ECR (2002) II-3805

[157] Eurovision II, paragraph 61 Supra

[158] I.e. the set of games with common denominator

[159] I.e. if the interest to match between two teams is substantially higher if played under the auspice of this tournament rather than another one

[160] I.e. they take part in long-term yearly competition

[161] Co-ownership does not concern horizontally all the rights arising from a tournament

The issue of ownership of media rights has been fiercely discussed on the domestic level of some member states[162]. There is no unanimous doctrinal approach on the proper legal status of the media rights for sporting event. In some countries national federations dominate in the debates and have more property rights than individual clubs, in other jurisdictions the situation is completely opposite. Thus, in France the main media rights belong to individual clubs. The similar situation is in Austria. In Belgium there are no legal obligations of joint selling of media rights, whereas Italian legislator explicitly requires the protection of individual ownership of broadcasting rights by the clubs. In Finland clubs hold the media rights only to the matches of the Finnish club competitions. In the Netherlands the main proportion of the broadcasting rights belongs to home club. Danish competition authorities consider that the media rights of a match played in the Danish National Championship belong to the Danish Football Association, as the owner of the tournament, and the home club of the specific match, although Danish legislation does not requires that. The seminal is the situation in Germany. However, in all national case there is at least some form of joint management of sports rights.

3.1.4. Database rights

The theoretical problem, similar to 'fundamental rights to be informed' has been raised within the European context in the area of regulation of database rights. Sports rights are also the subject of database protection in accordance with European Database Directive.[163] The Directive provides that methodical and systematic extraction or re-use of insubstantial parts of a database's contents can, cumulatively, amount to breach of the *sui generis* right where these conflicts with the owner's legitimate rights. In accordance to this act, the database constitutes 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'.[164] The collected data are considered to be a database if the data collected constitute a substantial new

[162] For more details see e.g. Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League footnote 60 Infra

[163] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases 1996 O.J. (L 77) 20

[164] European Database Directive Supra

investment. This Directive established a 'two tier' level of protection for databases, which includes copyright and the database right *sui generis*. In its judgments delivered in November 2004 ECJ narrowed the scope of the *sui generis* database rights for companies who generate downstream licensing income from data which represent the product of their upstream activities. The ECJ adjudicated on four cases whereas three of which involved company which, on behalf of the Football Premier League, provides the licensing of the fixture lists outside the UK. These three cases dealt with the use of sport fixtures' data for pools betting in other European countries[165]. The fourth was the preliminary request of the British court concerning the BHB v. William Hill case[166]. This last involved the usage of data from the British Horseracing Board database on the website of William Hill for online betting. In this cases, the database owners alleged infringement of their *sui generis* rights in the databases by the unauthorised usage of their data. The ECJ concluded that 'the fact that the contents of a database were made accessible to the public by its maker or with his consent does not affect the right of the maker to prevent acts of extraction and/or re-utilisation of the whole or a substantial part of the contents of a database'[167], but '[t]he fact that the data extracted and re-utilized by William Hill are vital to the organization of the horse races which BHB and Others are responsible for organizing is ... irrelevant to the assessment whether the acts of William Hill concern a substantial part of the contents of the BHB database'.[168] This essentially means that the costs involved for the collection as such of the content included in a database cannot be taken into account in evaluating whether the investments in the creation of that database were substantial.

3.2. Sports rights market structure

Competition relating to the commercial transaction of broadcasting rights for sporting events is characterized by some specific features. First of all it is time limitation and high value of live broadcasting, but also the very composition of the

[165] Case 338/02, Fixtures Marketing Ltd v Svenska Spel AB [2004] ECR I-10497; Case 444/02, Fixtures Marketing Ltd v OPAP [2004] ECR I-10549; Case 46/02 (Fixtures Marketing Ltd v Oy Veikkaus Ab

[166] Case-C 203/02 British Horseracing Board v William Hill Organization Ltd [2004] E.C.R. I-10415 [2005] 1 C.M.L.R. 15 [2005] (from the Court of Appeal, England and Wales)

[167] British Horseracing Board v William Hill Organization, paragraph 67 Supra

[168] British Horseracing Board v William Hill Organization, paragraph 78 Supra

market. Commercial transactions in the domain of sports events are structured in a way which allows existence of few strong actors at each level of the supply chain, which are competing for highly valuable and relatively scarce premium sport rights.

3.2.1. Initial rights holders

Initial sports rights holder is commercial entity/entities which produce sports event as such. Depending on each relevant market, they are composed of individual clubs and/or sports associations. Under the model where initial sports rights belong to clubs, usually their biggest part holds home club, which organizes the event. However even in the systems with individual ownership of initial rights, some part of gained revenue is distributed between all clubs of the league. Such financial 'solidarity mechanism' (see Table 1) helps to increase sustainability and inherence of the whole league but also allows to keep proportionate balance between the strongest and the weakest teams in the tournaments. However, the most usual and probably the most appropriate format of sports media rights ownership envisages the disposal of main shares by centralized league. This format provides for each particular competition its own integrity and homogeneity, what is not always the case when the media rights are distributed by individual clubs independently. The collective selling is also more attractive from the purely commercial standpoint, since single branding of the product increases in the long-term perspective the economic value of this product. It is the case, because only joint marketing of media rights together with centralized advertisement and long-term planning may secure commercial success of the competition as a whole.

There are however quite significant opposition to this comprehension of sports leagues as a single economic entities. The dominant rationale for such opposition lies in the fact that sports clubs perform their own commercial rights independently and their interconnection and interdependence are featured, indispensable in every industry. The very notion of competition is based upon subordination of an undertaking by the competitors and market as such. As *Quinn* underlines, 'The notion that ... somehow we should treat these separate entities, separately owned teams, as a single entity for all economic purposes, has been rejected by at least eight courts and by four different circuit courts (i.e., obviously within the US context – O.A.) There simply is no growing body of law out there that is about to embrace the

so-called 'single entity theory'. The single entity theory is simply a plaintive cry by billionaires for immunity from the antitrust laws'.[169]

The creation of a brand loyalty to a channel is one of the main marketing tasks for TV operators. This policy 'pushes' consumers to use selected channel as a 'first choice option' for their entertainment, and consequently makes substantial influence on other content broadcast by that channel. The development of a single branding strategy is very important in a media industry. It is the case because the big number of TV operators makes the industry highly competitive in marketing sense. The consumers have to select between many TV companies, whereas content transmitted by them are generally homogenised. It becomes increasingly difficult for TV operators to maintain audience sympathy. That is why successful branding policy helps to attract audiences to schedule their viewing priorities to make appointments to view a particular TV channel. In this sense premium content plays a pivotal role, because it is the one commercial tool using which TV operators can differentiate product and, as a consequence, firmly associate their TV channels with the premium entertainment. Football media programs such as the UEFA Champions League and national football competitions of top European championships are strongly branded TV products. That is the reason why football supporters may develop an ability of screening that channel as their first port of call in determining their consuming preferences.

The joint selling media rights usually include all formats of broadcasting rights, such as pay TV and pay per view TV, free TV; cable broadcasting, satellite broadcasting, terrestrial broadcasting; live or deferred broadcasting; showing of the entire event, of extracts or of compiled highlights; and radio transmission. It also covers rights for all sorts of existing and predictable technical platforms such as 3G mobile technologies, the Internet Protocol TV and business TV.

The opposite strategy by which each club operate its own media rights individually may appear to be more prosperous, but it is also characterized by its shortfall nature. It is particularly important for sports domain where the existence of a strong competitor is decisive for each part. Neither commercial nor sporting

[169] Quinn, James W. Contribution in 'Sports Under EC Competition Law and U.S. Antitrust Law', Annual Proceedings of the Fordham Corporate Law Institute, 1999.International Antitrust Law & Policy, New York, 2000

elimination of competition would make advancement for strong part. Unlike in many other areas of economy, the existence of powerful vis-à-vis is indispensable in sport competitions.

That is the reason why collective distribution of broadcasting rights for sporting events appears to be more forward-looking policy, even though if in the short-term perspective the strongest clubs would gain relatively less revenue from the rights selling. Furthermore, even the evidences, that total sum of revenues received by clubs which marketed their media rights individually surpasses the total sum of media rights distributed collectively by the league, do not change the formula of success, since most part of the incomes will generate only few top clubs. This would lead to increasing of financial and sporting discrepancy between the 'tops' the 'rests' and the 'outsiders', which in its turn would negatively reflects on the welfare of the 'tops' in the future. It is important, however, to point out, that we by no means advocate the 'socialistic' model of revenue's distribution, which consists in parceling of all the profits, generated from the joint selling of broadcasting rights, into equal shares. On the contrary, the distribution of revenues has to be performed under the formula, which takes into account main commercial contribution of each club into rights' added value. In addition to that, league as a commercial entity should also receive some part of the profits. These costs may be invested into long-term developmental projects, which usually have not been considered as indispensable by each club separately. English FA Premier League in all likelihood constitutes good example (see Table 2) of sustainable development with coherent coexistence of strong association and powerful clubs.

3.2.1. Sports rights intermediaries

At the commercial chain of sports rights distributors there three main levels: initial rights holders, intermediaries and broadcasters. Usually intermediaries represent companies, which neither produce content themselves nor provide downstream access to sport rights for end users. However, sometimes leagues and broadcasting operators also provide intermediary services. In particular it is the case in sublicensing relationship. These economic entities are of paramount importance for the industry, since they are striving to increase commercial attraction of the sports media rights as well as to generate added value for the product.

In addition to their commercial characteristics, they also have substantial political influence and usually represent industry at the unofficial level. Thus European Broadcasting Union, an association of European public service TV operators,[170] is one of the most influential organizations in this domain. It advocates the interests of EBU members in such controversial matters as distribution of broadcasting rights to UEFA Champions League, FIFA World Cup, EUFA European Cup, Olympic Games and many other premium sporting events.

3.2.2. Broadcasting companies

Broadcasting companies are the last element in the structure of sports rights market. We include under the term 'broadcasting' the whole variety of public service and commercial broadcasting companies irrespectively of the platforms, via which they transmit their signals (both analogous and digital). They can reach their customers by free-to-air TV, free cable TV and free satellite channels, as well as pay terrestrial, cable or satellite TV. For the purpose of this paper the term 'broadcasting' also includes Internet Protocol TV and TV over 3G mobile phone networks.

The development of digital technologies substantially decreased the expenses, necessary for launching transmission of broadcasting services. That is why many European football clubs are opening their own TV channels or offering broadcasting products via their Internet web-pages. This market is enjoying fast growth owing to the launching of digital technology which, thanks to compression, makes possible a much higher quantity of TV channels and neighbouring services to be marketed than analogue technology. Some broadcasting rights for sporting events are also reserved for the leagues (as it is the case with pay-per-view transmission over Internet of the UEFA Champions League matches).

[170] For the time being it is comprised of 75 public broadcasters

3.3. Market definition for the acquisition of broadcasting rights for sporting events

Within the context of broadcasting rights for sporting events market definition is a particularly controversial area. It is so because in the fast transforming environment of media industry sports products and broadcasting services are no longer clearly identifiable. In order to qualify a relevant market in the area of sports media rights it is important to take into account the specificity of sport as commercial product, in particular during the assessment of upstream and downstream market for broadcasting rights.

3.3.1. Upstream market for media rights

Alongside with rapid convergence of the media-platforms it is not always possible to establish the features which will be sufficient to assess if the product concerned constitutes a relevant market. Moreover the sport product is very specific domain and it is hypothetically possible to consider each (or some) matches as a separate market. Such a narrowing of the scope of market definition may reflect negatively on the industry since it will decrease predictability of the market behaviour and legal certainty of the main actors. Although the current European legislation and case law do not give any substantial reason for considering of such a radical approach to defining the relevant market, there are, however a long-term tendency for narrowing down premium sports content. In its *TPS*[171] decision the Commission concluded that 'films and sporting events are the two most popular pay-TV products. It is necessary to have the corresponding rights in order to put together programs that are sufficiently attractive to persuade potential subscribers to pay for receiving television services. Films and sport are therefore pay-TV's loss leaders'.[172] Sports media rights which are indispensable components for setting up special-interest channels are indeed essential for putting together all pay-TV services by pay TV operators.

The Commission decided that sports content has particular features for attraction of new viewers; it is capable to reach high viewing figures and in particular

[171] Commission Decision 1999/242/EC —TPS (OJ L 90, 2.4.1999, p. 6)
[172] TPS Supra

among the identifiable audience, which is especially targeted by TV advertisers. Latter on the Commission found in *Canal+/RTL/GJCD/JV*[173] that the mere fact that sports media rights may be considered as a distinct field from other TV content, sports rights market may be easily subdivided into other relevant product markets. Following this logic, football media rights may not be considered as substitutable to other sports events, since both sorts of content has its own loyal category of viewers. That is why there is a relevant market for the buying and sublicensing of football media rights to matches that are conducted regularly throughout every year (i.e. matches in the domestic leagues and cups, the UEFA Champions League and the UEFA Cup). On the contrary, the matches that happen less regularly are not part of that relevant market. A similar approach had been taken by the Commission in the *Newscorp/Telepiù,*[174] where the existence of a relevant market for the buying of exclusive media rights for football matches played every year where national teams participate (the domestic league, primarily first division and cups, the UEFA Champions League and the UEFA Cup).

Thus initially the relevant market for media rights for sporting events was 'the broadcasting rights for certain major sport events', which has been subsequently narrowed down to 'broadcasting rights for football events played regularly throughout every year where national teams participate'[175] and recently this definition become even more narrow: 'the broadcasting rights for football events that do not take place regularly where national teams participate'. With this in view the Commission has established a set of different indicators, such as the ability of clubs/leagues to attract and modify viewers' loyalty, single branding of a tournament, and homogeneity of consumers from the point of view of advertisement.

[173] Commission Decision COMP/M.2483 — Canal+/RTL/GJCD/JV

[174] Commission Decision COMP/M.2876 — Newscorp/Telepiù, (IP/03/478)

[175] E.g. Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League, paragraph 78 Infra 'some have suggested that narrower market definitions may exist, such as for matches involving only national clubs. Assuming that such market definitions were correct, they would nevertheless not substantially alter the market share of UEFA. As such it is not necessary to consider such alternative market definitions for the purposes of this case'

3.3.1.1. Eurovision Cases

The decisions of the Commission in *Eurovision* cases as well as the following adjudication of the European courts, represent the first important case law within the area of EC regulation of the broadcasting rights to premium sports events via European competition law. This 'saga' has been started at the beginning of nineties by the Commission decision on *Screensport/EBU*[176]. The case concerned the complaint of Screensport about the refusal of the European Broadcasting Union to sublicense Screensport on media rights for some major sports events to which the EBU has obtained exclusive rights. The result of this policy of the EBU was the prevention of Screensport from the ability to compete on this market. The investigation of the Commission discovered that 'While acquiring the rights for such sports events, however, most EBU members in fact transmit only a small proportion of the events in question. Indeed, on average, members transmit only about 15 % of all sports events that are potentially available through the Eurovision system. EBU members attribute this to their 'public mission' obligations, which prevent them from concentrating unduly on only one type of program'.[177] However the Commission decided to select the issue in the separate investigation procedure, which latter on authorized an exemption the media rights distribution of EBU under Article 81(3) EC. Its results did satisfy neither complainant nor other interested parties and the case ended up in the CFI.[178] The decision of CFI found that joint selling system is very likely to restrict if not eliminate the competition between media operators contrary to Article 81(1) EC.

Furthermore, according to the Decision of CFI, joint management practices of the members of EBU enable them to strengthen their position on the market at costs and interests of other independent competitors. The rules governing participation of the EBU allegedly restrict competition with TV operators who are not active members of the EBU. Nevertheless the CFI believes that such practice of joint buying and sublicensing of media rights provides a substantial amount of benefits within the meaning of Article 81(3) EC. Therefore CFI partly confirmed the legality

[176] 91/130/EEC: Commission Decision of 19 February 1991 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.524 - Screensport/EBU members) Official Journal L 063 , 09/03/1991 P. 0032 – 0044

[177] Screensport/EBU Case Supra

[178] Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities. Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 ECR 1996

of the granted exemption, stipulating it by the following conditions: 'there is the obligation for the EBU and its members collectively to acquire television rights for sports events only under agreements which themselves embody one of the following two possibilities: either they allow the EBU and its members to grant access to television rights to third parties or they allow the rights' owners to grant access to third parties in conformity with the access scheme or, subject to the approval of the EBU, on conditions more favorable to the non-member... Secondly, the Decision lays down an obligation for the EBU to inform the Commission of any amendments and additions to the rules notified, of all arbitration procedures concerning disputes under the access scheme and of all decisions regarding applications for membership by third parties'[179] The Commission alongside with major EBU member insisted that such granting of such exemption has been performed in conformity with Article 81(3) EC and CFI has to reject the complaint as inadmissible. However the CFI adjudicated to annul Commission decision by which the media rights acquisition and sublicensing practices of the EBU have been granted an exemption from the Article 81(1) EC.

In 2000 according to the decision of CFI, the Commission adopted its new Decision relating to a proceeding pursuant to Article 81 of the EC Treaty[180] by which a new exemption has been granted to Eurovision broadcasting alliance EBU pursuant to Article 81(3) EC. The main provisions of this decision reflected the ideas that such commercial practices of the EBU members as the joint acquisition of sport television rights (if EBU member from two or more different countries express their interest in a certain sporting event they should to request coordination from the EBU); the sharing of the jointly acquired sport television rights (the media rights are acquired on behalf of the members who participate in the contract for their countries, after that, however all members of the EBU participating in the agreement obtain the rights to the full operations with the signal, regardless of the territorial scope of their activity and regardless of the technical means of transmission); the exchange of the signal for sporting events (if one of the EBU's members decide to cover a sporting event, which takes place in its own country and is of potential attraction to other EBU members, it should offers its signal usually free of charge to all the other

[179] Eurovision I Supra

[180] Decision relating to a proceeding pursuant to Article 81 of the EC Treaty (2000/400/EC Case IV/32.150 - Eurovision) (OJ 2000 L 151)

members of the EBU under condition that in return it will get relevant offers from all the other operators if the would take place in their relevant national territories); the sub-licensing scheme (Usually the rights for live broadcasting are granted by the incumbents to the non-members if the event is not transmitted live by Eurovision member in the relevant countries, except for those parts of events which the member(s) decided to reserve for their own live broadcasting); and the sub-licensing rules have to be authorized by the Commission in accordance with Article 81(3) EC.

The declaration of exemption, however, was announced in conjunction with some reservations. In particular, it obliged the EBU members to perform the practice of joint buying of the media rights to major sports events only under agreements which give them possibility to provide access to third parties in conformity with the special access scheme. In addition the EBU has been required to provide information to the Commission concerning any changes to the access scheme. This decision has been challenged in the CFI as well.

By its adjudication from October 2002[181] CFI decided to annul the Commission decision again. The applicants successfully built their strategy of argumentation in particularly on the facts that the EBU joint selling system does not go in conformity with any of the criteria for exemption stipulated in Article 81(3) EC. They underscored the lack of the possibility of restricting competition in respect of a substantial part of the products in question and the fact that the Commission in essentially misapplied Article 81(3) (b) EC, because it failed to provide exact definition of the product and geographic market, but concluded that 'agreements notified do not afford the undertakings benefiting from the exemption the possibility of eliminating competition in respect of a substantial part of the products in question can have no basis of reference',[182] which is impossible *ipso facto*, inasmuch as having no clear definition of the relevant market it is impossible to qualify whether the guarantees offered to the EBU correspond to the provisions of Article 81(3)(b) EC. This is particularly the case with regards to the premium sports events which are considered to be of major public importance, which are essentially excluded by the EBU from the competition in accordance with the modifications accepted by the

[181] Métropole Télévision SA (M6) (T-185/00), Antena 3 de Televisión, SA (T-216/00), Gestevisión Telecinco, SA (T-299/00) and SIC - Sociedade Independente de Comunicação, SA (T-300/00) v Commission of the European Communities Joined cases T-185/00, T-216/00, T-299/00 and T-300/00 ECR 2002

[182] Eurovision II, paragraph 44 Supra

Commission. The application of Article 81(3) (b) EC within the present context was not sufficiently justifiable.

The Commission accepted that the relevant product and geographic markets have not been defined; however it also reasonably admitted that even 'on the narrowest definition of the product market, such as the market for the acquisition of transmission rights for specific sporting events like the summer Olympics, and taking account of the structure of the market and all the rules governing sub-licensing for access to Eurovision sports programs by broadcasting organizations which are not EBU members, the notified agreements do not give rise to any restriction on competition'.[183] It also pointed out that the issue of the narrowest possible definition of the product market has been clarified by the Commission in its conditions, imposed on the agreement concerned.

The CFI, contrary to the position of the EBU, did not accept that the relevant geographic market in pan-European by its nature, as well as it did not confirm the references of the defendants to the necessity to define the relevant productive market as 'the acquisition of the television rights to important sporting events in all disciplines of sport, irrespective of the national or international character of the event'. Such a broad definition of the relevant market would effectively eliminate any anticompetitive concerns and would tolerate the future existence of the Eurovision system of media rights acquisition, distribution and sublicensing. The Commission confirmed the findings in the European case law saying that 'data on viewer behavior, among major sporting events, show that for at least some sporting events which have been analyzed, such as the summer Olympics, the winter Olympics, the Wimbledon Finals and the Football World Cup, viewing behavior does not appear to be influenced by the coincidence of other major sporting events being broadcast simultaneously, or nearly simultaneously. That is, viewing figures for the major sporting events appear to be largely independent of whatever other major sports are broadcast at a similar time. Therefore, the offer of such sporting events could influence the subscribers or advertisers to such an extent that the broadcaster would be inclined to pay much higher prices'[184] (for the detailed costs of the European rights to Olympics for the EBU see Table 5 *infra*). That is why the

[183] Eurovision II, paragraph 48 Supra
[184] Eurovision II, paragraph 51 Supra

Commission's concluded that the scope of the relevant market, as it offered by the EBU is unjustifiably broad, stipulating, however that for the case concerned the precise definition of the relevant product market does not constitute the decisive factor. As regards to upstream geographic market the Commission confirmed that there is technical possibility to define pan-European market, however recognized that it would be see rather as exception from the general rules which supposed to define the relevant market more narrowly and to limit it rather to the national or regional level, since the big cultural, linguistic and regulatory differences of the EU Member States do not allow (yet) to consider broadcasting rights to the major sports event as homogeneous pan-European product.

The CFI recognized the legitimacy of the arguments of one the complainants that 'the effects which restrict competition for third parties as a result of the Eurovision system are accentuated, first, by the level of vertical integration of the EBU and its members, which are not merely purchasers of rights but also television operators which broadcast the rights purchased, and second, by the geographic extent of the EBU, whose members broadcast in all the countries of the European Union. As a result, when the EBU acquires transmission rights for an international sporting event, the access to that event is in principle automatically precluded for all non-member operators'.[185] If, however the broadcasting of sports media rights is managed by the intermediary operator with the purpose to resell it in the future, the other operators would not be precluded from the possibility to acquire the media rights within the respective relevant market. These provisions are stipulated by the following sublicensing system, which have to facilitate the possibility of the commercial broadcaster to get the access to the media rights, which are marketed predominantly by the EBU members. Following the multilevel analysis of the presented arguments, the CFI concluded that in the course of the assessment of the evidences and the markets the Commission made 'a manifest error'. The fact that the product market is limited to certain premium international sports events (hence, represents pan-European relevant market) can not be reasonably improved by the following sublicensing opportunities for third parties who compete on the same market with the members of the EBU and the EBU itself.

[185] Eurovision II, Supra

It has been concluded by the CFI, that neither EBU nor the Commission provide sufficient evidences that all four conditions of the Article 81(3) EC satisfied. That is why there is no justifiable ground for granting the EBU media rights management system of sporting events the exception under the Article 81(3) EC. For this reason the contested decision of the Commission granted exemption to the EBU must be annulled.

3.3.1.2. UEFA Champions League Cases

The Commission decision on *UEFA Champions League* was one of the first essential regulatory interventions of EC competition policy enforcer into the domain of broadcasting rights for sporting events. Similar to *Bundesliga* case[186], it has been initiated by the UEFA itself within the framework of 'old' notification system of EC competition law[187]. Pursuant to Articles 2 and 4 of Council Regulation No 17 (1) UEFA asks for a negative clearance or an exemption of the joint selling of the media rights to the UEFA Champions League, which is leading European individual clubs football competition with the participation of the domestic league champions of each of the UEFA member federation plus the top clubs of the domestic league championship from the member associations with the best coefficient (which is calculated on the basis of the results achieved by clubs from all the member federations in the UEFA club tournaments over the last five seasons).

The competition leading to the Champions League consists of three qualifying phases prior to the group stage of Champions League. This tournament is regarded as the most prestigious pan-European club football competition, involving the best European squads. The deal establishing the joint management arrangement between the European football clubs participating in the UEFA Champions League has an appreciable effect on trade between Member States. The Champions League itself consists of matches by eight groups with four teams each, the quarter-final games, the semi-final games and the final game. UEFA is eligible to sell the broadcasting rights only to the group stages and final phase of the Champions League. The national federations and/or clubs sell the broadcasting rights to the previous phases

[186] Bundesliga Case Infra

[187] Case No IV/37.398 UEFA Central marketing of the commercial rights to the UEFA Champions League (1999/C 99/09), Official Journal of the European Communities C 99/23

of the tournament. Joint selling of broadcasting rights on UEFA Champions League is compulsory for all national federations and individual clubs. This is inevitable condition for participation in this competition. It must be, however, for the sake of argument, added that individual clubs are allowed to conduct friendly matches and to market their media rights individually, but the commercial value of that TV product is incomparable lower than that of UEFA Champions League. Essentially it was UEFA which invented this clubs competition and substantially increased its popularity and commercial attractiveness over the last decade or so.

The status of the tournament defines the interest to the match even more than its composition itself. It would be much higher attention to matches of mediocre clubs conducted within the framework of Champions League than to matches of top clubs played in some commercial competition or even in domestic league. That is the main commercial reason why UEFA claims its initial competence to centrally market the media rights to Champions League. The revenues gained from the joint selling of these rights are proportionally distributed by UEFA between individual clubs, which participated in that competition as well as national federations. Some small fraction is also directed to other national clubs in the framework of solidarity fund. UEFA developed sophisticated (but also predictable and reasonable) system of calculation of matches of which clubs attract the biggest attention from the TV operators, sponsors and advertisers. Clubs who took part in the most lucrative and commercially successful matches are receiving higher share of revenue than that of relatively less viewers' interest (see Table 3).

That is why UEFA is of opinion that it is the co-owner of the broadcasting rights for Champions League together with individual clubs, since the format as well as branding policy of the competition has been created by UEFA. Furthermore, it is in charge of all administrative activities, associated with this tournament, it bears financial risks and offer to clubs certain amount of bonus sum irrespective of success of the competition. For these reasons UEFA does not consider joint selling of broadcasting rights for Champions League as important and well-grounded consequence of its investments and considers that even if this practice fall within the scope of Article 81 EC, it has to be excluded from the remedies under Article 81(3) EC. It has to be the case, since joint selling of media rights in this context is rather indispensable rationalization of a commercial activity; this model contributes to

sustainable development of all European football (including, youth and amateur football), provides a variety of direct and long-term benefits for viewers, participates in the technical and innovative development of TV industry and new media, and finally increase the popularity of the European sports altogether. But UEFA accepted to offer 'competition specific' or 'UEFA branded' products of new media rights whereas the football clubs shall offer only 'club specific' products, which would show Champions League matches from the perspective of club branding.

UEFA, however, refused to recognize any kind of uniqueness of the media rights for Champions League, in comparison with other football events or sports rights as a whole. UEFA said that 'although the UEFA Champions League is a very important sport event, it does not constitute a separate relevant product market. UEFA argues that it is part of a much wider market with a large number of sports events in addition to the UEFA Champions League, which allow broadcasters, sponsors and suppliers to achieve the same commercial objective, such as the national club football leagues. In addition, there are other prestigious and quality sports events on the market. Furthermore, non-sport content, in particular, popular films, soap operas and comedy shows can also attract very sizeable audiences. UEFA moreover argues that the Commission should differentiate between UEFA Champions League matches involving domestic clubs and UEFA Champions League matches not involving domestic clubs. UEFA also submits that the free-TV market and the pay-TV market constitute distinct relevant product markets'[188]. This approach allows to define a very wide relevant market on which UEFA in not likely to have neither dominance, nor even substantial part. This opinion is hardly acceptable, bearing in mind, in particular the understanding of the place of Champions League in commercial terms by UEFA itself.

The Commission, however, did not entirely share the opinion of UEFA. It expressed its concerned that such commercial policy of management all media rights on a basis of exclusivity and to a single operator per territory for a period lasting several years may be considered as incompatible with EC competition rules. Several administrative steps had to be made in order to ensure that consumers can indeed gain substantial benefit from such commercial practice, since centralized marketing on an exclusive basis may cause a number of consequences that complicate access to

[188] Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League Infra

Champions League by the viewers, unless some preventive regulatory arrangements are made. It had to be assessed, in particular, if the practice of 'single buyer per single territory' may be acceptable, since it presupposed that only big media companies would be able to acquire the broadcasting rights (hence, medium and small competitors would be essentially eliminated from the competition). Until that time the media rights were sold by UEFA as a bundle on a principle of exclusivity for up to four years to a one broadcaster per each country. Usually those rights were sold to a free-to-air television operator which would sublicense some of them to a pay-TV company. As a consequence of that policy substantial fraction of media rights have been unexploited, because some of them are mutually exclusive, although there is potential demand for those unexploited rights from other TV companies. The main areas of alleged restriction of EC competition law have been defined by the Commission in its final decision on the case in a following form: '[t]he notified joint selling arrangement grants UEFA the exclusive right to sell jointly certain commercial rights on behalf of the football clubs participating in the UEFA Champions League. This includes media rights that relate to the UEFA Champions League as a whole and involving action from all matches of the UEFA Champions League. Those media rights ... relate to all types of media rights and are not restricted to the rights for specific markets. As such, the restrictive effects of UEFA's joint selling arrangement are capable of manifesting themselves on any of the markets where the rights could be used'.[189] That essentially mean, that the Commission was of the opinion the UEFA practice of joint selling of media rights infringes competition between media operators, stimulates concentration of TV companies and restricts the development of new media platforms, which provide sports content, such as IPTV and 3G mobile phones, since major companies try to acquire all sorts of media rights in order to prevent inter-platform competition with new media. In addition to that the Commission presumed that UEFA's joint selling practices substantially infringe the capacity of individual football clubs to license those commercial rights that remained to be possessed by clubs individually. Therefore UEFA's joint selling system violate competition in the upstream markets between individual football clubs as well as between UEFA and the football clubs in providing media rights to TV operators and other media companies.

[189] Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League, paragraph 113 Infra

After several modifications the commitments of UEFA has been accepted by the Commission. By its Decision of July 2003[190] the new joint selling rules of UEFA for the broadcasting rights to the Champions League has been exempted from the application of Article 81(1) EC. UEFA committed to announce criteria on the standards which media operators have to correspond for acquiring the rights to the UEFA Champions League. Such TV operator has to possess relevant licence and appropriate infrastructure to cover all or substantial part of the country. All qualified TV operators must be provided with a reasonable time limit in which to apply for the bids. All submissions have to be assessed by UEFA pursuant to objective criteria of impartiality. In accordance with approved rules, the decision of UEFA must be conditioned in particular by '(a) price offered for the rights package or packages; (b) acceptance by the bidder of all relevant broadcast obligations; (c) level of audience penetration of the bidder in the contract territory; (d) proposed method of delivery or transmission; (e) proposed promotional support offered for the UEFA Champions League; (f) production capability and host broadcast expertise; (g) combination of rights packages offered in the contract territory; (h) balance between free and pay television'. UEFA has been obliged also to offer its media rights for Champions League in more limited packages on a market-by-market principle. All broadcasting rights are divided into fourteen portions, new media rights being also separated from the 'main' packages[191]. The format of offers may vary depending on the structure of the broadcasting market in the country in which that media rights are being sold.

As to definition of relevant market, the Commission decided[192] to narrow down the approach of UEFA in this regard and to define the relevant markets for joint selling agreements as following: (a) the upstream markets for the sale and acquisition of free-TV, pay-TV and pay-per-view rights; (b) the downstream markets on which TV broadcasters compete for advertising revenue depending on audience rates, and for pay-TV/pay-per-view subscribers; (c) the upstream markets for wireless/3G/UMTS rights, Internet rights and video-on-demand rights, which are emerging new media markets at both the upstream and downstream levels that

[190] Commission Decision of 23 July 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/C.2-37.398 —Joint selling of the commercial rights of the UEFA Champions League) (notified under document number C(2003) 2627)

[191] For detailed format of the packages see Table 4

[192] Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League Supra

parallel the development of the markets in the pay-TV sector; (d) the markets for the other commercial rights namely sponsorship, supply and licensing.

As to upstream markets, the Commission defined it as 'the upstream market for the acquisition of TV broadcasting rights of football events played regularly throughout every year'. A distinction could be made between football events that do not take place on a regular basis throughout the year. The reason is that the latter do not constitute an equally regular source of programming for broadcasters.[193] That was quite narrow definition which by no means placed UEFA in a position of an undertaking with significant market power. Commission recognized that in a philosophical sense viewer preferences are indeed crucial factor for all types of TV operators in their content selection policy as they stipulate the very value of content to TV operators. In this context all TV operators may be considered as potential competitors, irrespectively of which content they transmit. This approach, however, may lead to inclusion into such broad relevant market all other entertainment industries, which in a certain sense also compete with each other for the consumers. That would diminish the very essence of market definition technique and will not allow providing a workable benchmark for a proper market evaluation. That is why Commission limited the definition of upstream market only to the acquisition of TV broadcasting rights of football events played regularly throughout every year, which is also not the narrowest possible approach.

The Commission's analysis of this case demonstrated that 'there are no programmes which place a competitive restraint on the ability of the holder of the TV rights to football events being played regularly throughout every year to determine the price of these TV rights. TV rights to other sports events or other types of programmes such as feature films do not put a competitive restraint on the holder of the TV rights for such football events. Including such rights in the market definition would make the definition too wide. In other words, there is no substitutability between the TV rights to football and the TV rights to other types of programmes'.

In relation to new media platforms, the Commission concluded that broadcasting rights for Champions League is an important developmental element of this industry, because new media services may represent driving force to entice

[193] Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League Supra

viewers to take up new media platforms subscriptions as well as to attract advertising companies to their services. These new services are usually organized on a 'pull' or 'on demand' basis, whereas the traditional broadcasting companies operate with 'push' format. This new approach to content consumption allows narrow down targeted customer demands than is the case with traditional broadcast system. It makes the Commission confident that football media rights have to be considered also as a separate relevant product market in relation to new media operators.

The Commission also refused the initial proposal of UEFA to consider relevant geographic market within the scope of EEA, since most broadcasting rights for UEFA Champions League are usually sold on a national basis. It means that geographical scope of the upstream markets tends to be national not only for national events, such as domestic football clubs competitions, but also for European-wide sporting events. This is the case, because the distributions of such rights, as well as public regulatory regimes, usually have national character. There are many factors which justify this practice. In particular, it is due to the nature of joint selling procedure, which in its essence is performed on a domestic exclusivity principle 'one nation – one station', but also because of different national regulatory policies, cultural and linguistic differentiation, different tax and advertisement systems and the existence of strong consumer preferences in watching predominantly the matches of the clubs of their country. However, in most of the disputable issues the Commission and UEFA managed to reach compromise, to a large extent due to intensive cooperation of two bodies during the investigation.

Speaking of the exemption of joint selling of media rights in UEFA case, it is important to evaluate the eventual benefits for consumers and economy as a whole. If the benefits are likely to outweigh the restrictive effects, then an exemption under Article 81(3) EC agreement is possible. It is particularly relevant for organizing of an international football competition, which is composed of many international football clubs from many national jurisdictions. Unless jointly organized maid rights management may encounter many administrative and regulatory complications, since each state has its own system of broadcasting and ownership regulation, which would have substantial negative effect on a tournament. In addition to that one has to take into account also, that national only few top clubs are able successfully market their broadcasting rights outside of the national (and even regional) borders. In order

to preserve the Champions League as homogeneous competition, there must be one commercial supervisor, which can eliminate many negative effects of branding inconsistency.

Another reasonable argument in favour of joint selling of broadcasting rights is based on the principles of fair trade. If sold individually, the rights, which belong to less commercially successful clubs would be abused by them. Many weaker clubs would not allow broadcasting of their home matches with some famous squads unless being unjustifiably high financially compensated. This would essentially distort the system of the tournament and would lead to modification of the competition from the homogeneous sports product to a series of matches between two clubs, whereas the weaker commercially free-ride at the cost of the stronger and more popular team.

The system of joint selling allows also the establishing of the model of packages of UEFA Champions League media rights. This expands the abilities of TV operators to broadcast the league as a whole and over the course of the season as a whole and not being conditioned in their media rights policy from the sporting performance of the individual clubs of their own country. In addition the very nature of Champions League does not provide guarantee to any individual clubs of how many matches it will play in a season. This situation is dangerous from the point of view of professional TV programming, and therefore is not accepted by media operators, which prefer to cooperate on these issues with UEFA rather than individual clubs. In addition single branding increases the interest to Champions League from the viewers, which do not give their support for any particular team in the tournament. It allows observing the competition impartially, enjoying the games as things-in-themselves. There are also such less important visual consolidate factor as single design of stadium, music, opening ceremony, flash-interview, single time schedule and even emblem of a ball and jumpsuits of players, which distinguish this tournament from other football competition and constitutes added value, brought to it by UEFA. All of that makes the Champions League visually recognizable for consumers, irrespectively on a channel, which broadcast any particular match.

In its conclusion regarding improvement in production or distribution and/or promoting technical or economic progress the Commission accepted that the 'decision of the football clubs and UEFA regarding the joint selling arrangement

improves production and distribution of the UEFA Champions League within the meaning of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement by enabling the creation of a quality branded content product and by providing an advantage for media operators, football clubs and viewers, since it leads to the creation of a single point of sale for the acquisition of a packaged league product. However, since no such benefits arise from the restriction of football clubs' freedom to sell live TV rights under package 5 to other broadcasters than pay-TV/pay-per-view broadcasters, this decision should be subject to a condition, which will enable football clubs to sell their live TV rights to free-TV broadcasters, where there is no reasonable offer from any pay-TV broadcaster'.[194]

The decisive element of this decision was the evaluation by the Commission the benefits for consumers from the joint selling of Champions League media rights. This area has been always characterised by many doctrinal ambiguities and sometimes *prima facie* similar cases got fundamentally different assessments, depending on the theoretical and empirical background of the judge or competition enforcer. The Commission is of the opinion that UEFA's joint selling of media rights offers to consumers a substantial amount of the benefits, which are in particular emanated from the single point of sale concept. This commercial practice brings efficiencies, which make possible for TV operators to invest more costs in the technical side of the competition, and concentrate their efforts on technologies of transmission, but also television signal as well as issues related to production and distribution rather than to making arrangement with may European clubs on individual selling of their media rights to Champions League. After proposed commitments the UEFA Champions League joint marketing arrangement also provides the mechanisms to offer fair deals to new media operators, which is very important factor from the perspective of European innovative policy and European-wide goal to create within the framework of the EU a most technologically developed area.

Taking into account all abovementioned factors, the Commission decided to tolerate the restriction for competition, which is raised from the central marketing of the media rights to UEFA Champions League, in particular, that its part which is indispensable to achieve the very purpose of the tournament. Consequently it

[194] [194] Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League Supra

stipulates its exemption by condition that individual clubs would not be prevented from the management of some media rights, which have ancillary character, comparing to the main set of sports rights, which will continue be managed jointly by UEFA. The Commission granted an exemption (under the previous notification system) from application of Article 81(1) EC to these relations to July 2009.

3.3.1.3. FA Premier League Case

The competition concerns in the area of sports media rights predominantly relate to joint acquisition and joint selling of broadcasting rights by sports governing bodies or professional leagues. Within European context there are number of cases, in which theses issues have been scrutinized by the Commission from the perspectives of EC competition law. Thus in its recent *Premier League*[195] decision the Commission expressed concerns about the format of horizontal joint selling of broadcasting rights to the Premier League English football club yearly competition by FA Premier League. After five years of formal investigation the Commission accepted commitments from the FA Premier League and rendered it legally binding. The aim of these commitments (which will remain valid until 2013) is to facilitate the access to broadcasting rights to English premium football matches, as well as develop the competitive process within industry for the future benefits for viewers.

According to long-term practice of management of media rights to English premium football FA Premier League has been granted by individual clubs the exclusive rights to bargain broadcasting rights deals on behalf and in the interest of the clubs. In accordance with the internal rules of FA Premier League, 'the Board shall not in relation to any dealings relating to television, broadcasting, sponsorship or like transactions or other matters materially affecting the commercial interests of the Members enter into any contract or agreement or conduct themselves in any way as would bind the Association to any contract or agreement without the prior authority or approval by Resolution of the Members'.[196] These provisions essentially confine the competence of individual clubs to sell their broadcasting rights to football events directly to TV operators.

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[195] Commission Decision of 22/III/2006 relating to a proceeding pursuant to Article 81 pf the EC Treaty (Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League)
[196] Articles of Association of the Football Association Limited, 77797

The FA Premier League administrates its broadcasting rights to football matches on behalf of the individual clubs to TV operators on an exclusive basis. This practice prevents clubs from individual selling of their rights. Collective selling of media rights is performed by tenders. Until recently all matches have been acquired by single buyer, who (for the marketing reasons) did not exploit all of them in full measures. In practice, this means that only 25% of the FA Premier League matches have been shown live.

This commercial strategy of FA Premier League, although justifiable from the economic perspective, did negatively influence the competitive environment within the industry, since 'winner gets all' formula is acceptable only for strongest player of the TV market, which will try to undertake all administratively and commercially justifiable steps in order to receive the deal. This *de facto* dominant company usually is even more prepared to take effective measure in order to prevent its competitors from acquiring even a part of these broadcasting rights (and, essentially, to eliminate completely competition within the market of sports broadcasting). The situation when only big TV operators can afford the buying and management of the sports rights leads to establishing of higher prices and prevent sustainable development within the market of its main competitors. Football supporters are also damaged as well since they can usually watch only a fraction of all games, even if they are subscribed to all TV packages.

The Commission consistently expresses its concerns about this commercial practice of FA Premier League. It insists on unacceptability of the 'single buyer' practice. In 2001 it issued its first formal statement of objections on this matter in accordance with the Regulation 1/2003, which stipulates that 'Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission'.[197] It is important to emphasize that the commitments authorized by the Commission by no means bind national

[197] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 9, Supra

competition and regulatory authorities as well as national judicial bodies. This approval also does not concern the issues related to contracts concluded as a consequence of the tender process. Thus if the acquisition of broadcasting rights will contradict the principles of EC competition law, the Commission will be empowered to intervene and conduct respective investigations again.

In its document the Commission confirmed that the practice of joint selling although formally may contradict to Article 81 EC as it is an equivalent of the price fixing, is tolerated by the competition enforcers, since this practice provides substantial advantages for the sports business, broadcasting industry, solidarity among individual clubs and supporters preferences. In legal terms it may fall under the scope of Article 81 (3) EC, if it could bring sufficient efficiency gains for the industry and consumers. It is important however that to get the immunity under Article 81 (3) EC the agreement has to be in conformity of all four efficiency conditions, which in this case cannot be easily identified, especially speaking of third and fourth conditions (i.e. inevitability of the restrictions of competition in order to reach the benefits for consumers and an absence of involvement a substantial part of the market concerned), thus alleged benefits for the consumers are not likely to overweight the adverse effects caused by these restrictions of competition.

At the same time the concerns have been raised as to joint buying strategy. It has been pointed out that FA Premier League as well as individual clubs possesses sufficient competence to prevent this practice or at least to make it less harmful for the competition. The main damages concerned not only other TV operators but also football supported who have been deprived them of choice, reduced the innovative incentives and led to higher prices for the premium rights. The elimination of competition will indispensably lead to prevention of the development of new innovative technologies for live broadcasting of football matches via mobile devices, since the media rights for sporting events constitute one of the driving forces of their evolution.

In this case the Commission established the relevant product market as 'acquisition of media rights of premium football matches'[198]. It explained this definition by the fact that premium football denotes the top tier of football games

[198] Commission Decision of 22/III/2006 relating to a proceeding pursuant to Article 81 pf the EC Treaty (Case COMP/C-2/38.173 – Joint selling of the media rights to the FA Premier League) Supra

(that is matches involving clubs that play in the Premier League tournament). These matches may also be played by these clubs in other competitions. It distinguished between media rights to football matches acquired for broadcasting via different platforms. It pointed out the deep interconnection between the upstream and the downstream product market, since the limitation of these rights in the upstream level would almost inevitably reflects on the downstream market, furthermore often competition in the upstream markets are used by more strong party as a leverage to eliminate competition within the downstream market. The leverage is considered to be a very important problem irrespectively the fact that *prima facie* there is no direct competition between the operators which are acting on different downstream markets (e.g. free-to-air TV operators usually compete for advertising – hence try to increase the quantity of viewers, whereas pay-TV broadcasters are predominantly interested in the subscription since the advertisement is only ancillary source of their revenues). In this sense all TV operators are actual or potential purchasers of media rights of football events. Football matches are equally important to all TV operators whichever the market they operate in. TV operators purchase sports content for the purpose to attract broader audiences whether they are financially dependant fully or partially from advertising fees or not. Pay-TV companies acquire sports content to attract consumers to subscribe to their media services.

As to definition of geographical upstream market, Commission considers it predominantly on the basis of national level, however in its FA Premier League decision, bearing in mind the specific circumstances of the case, in particular, linguistic homogeneity, it considered as possible to expand it to other countries or regions.

The Commission statement of objections has been immediately accepted by the FA Premier League. It promised to cancel the practice of joint buying of its media rights by changing the provisions of invitation to tender so that no single TV operator would be allowed to acquire all of the media rights to live matches in one package from 2007 onwards. In addition the viewers will be able to watch all matches of the Premier League live or with short delay. Any of potential buyers should be excluded from the participation in tender and its provisions will be designed in a way which will allow offering fair share of the media rights to at least two independent TV operators. The commitments specify the terms of the 'no single buyer rule' and the

process of the auction process. FA Premier League was obliged to establish more balanced as regards to viewers' preferences packages of media rights as well as enable the possibility of separate buying of the new media sports rights. The conditions for tenders would be transparent and non-discriminatory. The commitments also increased the limit for individual clubs to operate with media rights that are not sold by FA Premier League or exploited by the purchaser, delayed media rights, subject to embargo of e certain period of time after the game has taken place and regional radio broadcasting rights. The media rights for UK and Ireland would be sold in separate packages and duration of these commercial deals would not exceed three year, which still is quite a long period of time, taking into account the rapidly changed nature of broadcasting technology and consumers' preferences.

For the moment FA Premier League has already sold its broadcasting rights to football matches for 2007/8 – 2009/10 seasons under the new rules announced by its commitments statement. The media rights to live coverage of football matches have been divided into six packages. Their commercial attractiveness is still non-proportional; however the previously presented discrepancy between 'platinum', 'gold' and 'silver' packages is already not so drastic and much more moderated. This is also the case since the very nature of the Premiership becomes to be more unpredictable and much more teams become more attractive for viewers.

The commitments substantially improved the accessibility of the premium media rights, thus beginning from the season 2007/2008 all 380 matches will be broadcast live by two channels *BSkyB* and *Setanta*. Since these TV operators are direct competitors within the British pay TV market they are offering live broadcast of acquired premium content alternatively in full coverage. This means that consumer in order to be able to watch all Premier League matches has to subscribe on the TV services of both channels, which will increase his/her expenses. This situation already caused vast critique of the Commission's incentive to break existed monopoly on this content of *BSkyB*.

Some consumer protection organizations express their disappointment of the Commission's attempts to split up previously bundled media rights into several packages. They point out that such a reorganisation of the sports media rights bid system will indispensably lead to increase the value of the product, which at the end of the day will reflect on the consumers' bills. The limitation of the principle of

exclusivity through the splitting up into more portions alongside with cancellation of embargoes will decrease the commercial value of the product. The very nature of premium football content is based on the principle of exclusivity (phenomenon of 'forbidden / unattainable fruit'), that is why it only has value when it is held in by one media operator per relevant market. The media rights' segmentation may decrease the attractiveness of the sports content since it could lead to short-term growth of the quantity of football transmissions at cost of long-term reduction of its quality.

Such a discontent is the typical reaction of consumer oriented groups, which attempt to demonstrate the discrepancies of the previous and current costs by comparing the end price of the products 'before' and 'after'. Although it is difficult to argue that the cumulative price for subscription for two channels exceeds the previous price, it does not mean that consumers will not benefit from it in the future, since the very essence of a fight against the abuse of a dominant position stipulates long-term, *prima facie* invisible benefits for consumers and industry and does not contradict to short-term losses, which is always the case, because the monopolist is better prepared to offer lower price *ipso facto*.

In this context it is also important to look at the price which has been paid *BSkyB* and *Setanta* for the FA Premier League media rights. They paid totally £ 1.708 million (or £1,314 million and £392 million respectively), which for Europe is the biggest price paid ever for national sports competition. This agreement represents on average £28 million to each Premier League club yearly. These figures are barely comparable with the first media rights agreement between BSkyB and FA Premier League, which was worth £191 million over five seasons. In addition to that the BBC has acquired the rights to broadcast highlights for three seasons on its well known Match of the Day show for £171.6 million, which constitutes a 63% increase on the £105 million it paid for the previous three year period, BSkyB together with British Telecom have agreed to jointly pay another £84.3 million for media rights to broadcast 242 matches in full on television and/or over the Internet protocol TV for a period of 49 hours after 10 pm on matchday. Since FA Premier League is very popular TV product not only in the UK, but also oversee, it managed successfully to sell its media rights to foreign TV companies for another £ 625 million. The total revenue of the FA Premier League from the joint selling of broadcasting rights to

English club football is £ 2.7 billion. This amount represents on average £45 million to each Premier League club yearly. Such high popularity of English Premier League perfectly explains why TV operators are striving to apply 'winner gets all' strategy fighting with competitors for these media rights often ignoring the provisions of domestic and European competition law.

3.3.1.4. German Bundesliga Case

The Commission decision on German Bundesliga[199] is one of the recent cases decided by the Commission in the area of broadcasting rights to football matches. German Bundesliga as an association of top German clubs has been accused in alleged violation of EC competition law by practicing of centralized marketing of broadcasting rights to football matches. Similarly to *Premier League* and *UEFA Champions League* cases, Bundesliga decided to adapt its commercial practices to the EC competition standards and committed to change its system of joint selling of broadcasting rights to football matches. This case has been applied in 1998 by German Football Federation to the Commission for negative clearance or individual exemption under Article 81(3) EC. In 2003, pursuant to Article 19(3) of Council Regulation No 17, in a notice in the Official Journal of the EU the Commission informed about its generally favourable view of an amended system of joint selling of football rights.

According to this document, 'in the selling agreements, the League Association determines the price and the nature and scope of exploitation. Through the agreement on central selling and the subsequent joint selling, the clubs are prevented from dealing independently with television and radio operators and/or sport rights agencies. Competition in the sale of rights is excluded. The clubs are prevented in particular from taking independent commercial decisions about the price or structuring the nature and scope of the rights sale differently from the joint selling system'.[200] It has been also detected that joint selling of media rights has a negative effect on the downstream market. For this reason German Football League accepted the necessity of its commitments to improve the current media management system.

[199] Case COMP/C.2/37.214. Joint selling of the media rights to the German Bundesliga). (notified under document number C(2005) Official Journal L 134 , 27/05/2005

[200] Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/C.2/37.214 Joint selling of the media rights to the German Bundesliga (2004/C 229/04)

The main goal of the Commission intervention was to perform a moderate modification of the central marketing of Bundesliga media rights. Within the German context it has been seen as appropriate to preserve some elements of joint selling of broadcasting rights, since it substantially facilitate the procedure of rights managements and increases its value. At the same time, however, clubs would receive some freedom to negotiate more effective and lucrative agreements with TV companies and new media operators on the individual basis. These deals would be enabled in particular to residual rights, which have not been effectively exploited by Bundesliga as a collective administrator. As a main consequence of negotiations between the Commission and German Football League, it has been decided to expand an offer of Bundesliga football matches via new broadcasting platforms, such as Internet and 3G mobile phones. Individual clubs will also be receive the possibility to sell their home matches themselves directly after the end of the game in addition to the content offered by German Football League. The Commission did not intend however to cancel the single marketing in principle. There are substantial commercial advantages of a joint selling of media rights by Bundesliga. It is in particular, a very attractive instrument in the context of heterogeneity of the individual interests of the clubs, some of which may contradict to commercial strategy of Bundesliga. The establishing of a system of joint selling of media rights is of particular interest for national-wide premium tournaments, since they tournament involves a number of best national clubs.

The Commission announced the scope of the commitments as well as their main content in its Memorandum Details of broadcasting rights commitments made by the German Football League.[201] It underscores that procedure of joint selling of media rights has to be conducted on non-discriminatory basis for a reasonably short period of time, which does not have to exceed three years. It has been arranged that live broadcasts of the Bundesliga and the Bundesliga II should be offered by the GFL in nine different packages, whereas main two have to be accessible to both for free TV operators and for pay TV companies. A third package includes the rights to broadcast deferred highlights on free TV, plus to live broadcasts of at least two Bundesliga games. A fourth package consists of live games of the Bundesliga II and the rights to deferred highlights on free TV. A fifth covers rights for second or third

[201] Details of broadcasting rights commitments made by the German Football League, MEMO/05/06, 19/01/2005

showings of the games in full or in highlights form. Package 6 contains the right to broadcast Bundesliga and Bundesliga II matches live and/or near-live on the Internet. From 1 July 2006, the package contains the right to broadcast the matches live and near-live. The League Association will, on every day on which games are held, offer a total of at least 90 minutes live coverage of the matches on the Internet, e.g. in the form of a conference channel. Coverage per game will not be less than five minutes and will contain all important match events, e.g. goals and penalty kicks. A seventh package comprises deferred highlights coverage on the Internet. Package 8 contains the right to broadcast Bundesliga and/or Bundesliga II matches live and/or near-live and/or after the event on mobile phones. Package 9 confers the right to the deferred broadcast of excerpts from Bundesliga and/or 2. Bundesliga matches on mobile phones. Every club can sell its home games to a free-TV broadcaster 24 hours after the match for one-off free-TV broadcasting of up to the full match within the EEA[202]. Such a comprehensive differentiation of broadcasting rights to top German football opens up this highly attractive and lucrative market for many TV operators, as well as to new media companies. This is particularly important, since in the time of rapid innovations there are many technical ways to upgrade that initial, elementary stage of the telecast from the stadium. TV operators are free to improve this product, complement it with commentaries of professional athletes or experts, to meliorate the picture so as the final TV products of two operators would differ substantially, although their ground would compose one and the same football match. The increase of importance of creativity has to be seen also in a context of highly popular 'peer-to-peer' technologies, which allow users from European countries to watch (illegally (?)) the matches of European national championships broadcasted by many Asian TV operators, since from the technical perspective it is hardly possible to prevent such violation of territorial restriction. Thus the main emphasis has to be put on the add value of the final product, such as professional commentaries, attractive management of the highlights in the course of live transmission of the match, as well as on a proper advertisement of the TV channels.

The Commission policy in the *Bundesliga* case – as well as in two other major football-related cases – is essentially stipulated by the proactive goals, which are mainly characterized by such requirements to alleged violators of EC competition

[202] Commitments made by the German Football League, Supra

law as a moderate amount of media rights' packages, their meaningful nature and elimination of conditional biding system. In particular, the establishing of several independently valid and mutually balanced live packages was demanded. This approach allows *creating* competition within internal market, since it enables the appearance of at least two powerful operators, which are ready to bid for live media rights. In order to attract relatively weaker media companies the Commission often requires the existence of differentiated packages (prevention of 'winner gets all' situation). Often the big size of the packages also means the big price. This eliminates from the competition most of the TV companies, which would consider becoming potential buyers if the packages would be more differentiated and obligation flexible.

New format of the distribution of broadcasting rights to European football will stipulate their division into the packages under the principle of platform differentiation. It is still complex, controversial and vague question if new media rights should be considered as a separate market, but for the sake of the development of such new media platforms (i.e. broadcasting via Internet and 3G mobile phones) the Commission insisted on their segregation into the special package. All media operators, which intend to bid on those packages, would be obliged to exploit them in the full scope. It will be not acceptable anymore the preventive (restrictive?) policy of the main broadcasters, which in order to eliminate eventual competition with new media prefer rather to buy all media rights to football events, with no sequential intention of their following commercial exploitation. Due to the strong asymmetric value of rights for different distribution platforms, the buyers of the mainstream rights may easily prevent acquisition of remaining rights by their competitors, irrespectively the fact that these competitors may be often composed of the telecommunication giants, which are potentially capable to overbid the offer of TV companies, but consider such 'race' inappropriate and harmful for the competition.

Henceforth it will be also explicitly forbidden to offer conditional bidding. Generally only stand-alone unconditional bids for each individual package will be tolerated in the future. The media rights would be marketed only to the highest standalone bidder. The purpose of such unconditional selling is to limit the ability of the strong purchaser to select the most attractive package by proposing additional

payments for the possibility to acquire all valuable media rights. This harmful behaviour is in particular dangerous for the operators of the sports rights for new media. With a view to prevent eventual limitations of the output, the Commission insisted on abandoning the practice of reserving of unused media rights. If some of them are not sold by leagues they should fell back to the clubs, which will have the ability to market them using their own commercial strategy.

3.3.1.5. CVC/SLEC case

In this case[203] the Commission has been asked to approve proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the investment funds CVC Capital Partners Group Sarl (CVC, Luxembourg) acquire within the meaning of Article 3(1)(b) of Council Regulation (EC) No 139/2004 sole control of the whole of the undertaking Speed Investments Limited (.Speed., Jersey) by means of purchase of shares. Through its control of Speed, CVC will gain control over SLEC Holdings Limited (SLEC), which is the holding company of the Formula One group of companies[204]. One of the main questions which Commission explored was the issue of the definition of a relevant market for media rights to major regular free-to-air sports events in Italy and Spain.

The Commission did not provide definitive answer as to whether separate upstream market for premium motor sport events (such as Formula One and/or Moto Grand Prix) exists or whether into definition of the relevant market should be included all regular major sport events. Commission reaffirmed its previous opinion that '[m]ajor sports events are generally recognised as a vital input for the main TV broadcasters. In the free-to-air environment, sports are a key instrument of differentiation between channels given its unique branding abilities and its appeal to advertisers. For pay TV, top sports is one of two main subscription drivers, along with the first screening of major, often American, movies... however in any case, the analysis of the competitive situation does not depend on either definition, since under either market delineation competition concerns would be likely to occur',[205] Thus,

[203] Case, M.4066, CVC/SLEC Notification On, 31 Jan 2006
[204] Case, M.4066, CVC/SLEC Supra
[205] Case, M.4066, CVC/SLEC Supra

with regard to concrete market definition the Commission did not decide which of two existing approaches (i.e. relevant market defined as 'media rights to major motor events' or relevant market defined as 'media rights to major sports events except premium football') would be the most appropriate definition within the context of Italian and Spain TV industries.

In its previous cases, the Commission has distinguished upstream market for the buying of media rights for free-to-air television from pay-TV media rights. This difference has been also applicable in the *CVC/SLEC* case, since the commercial strategy of Moto GP and Formula One is elaborated within their broad presence on free-to-air television. This is the case, because of the fact that significant portion of their revenues these companies receive from advertisement and sponsorship contracts with corporations which are directly interested in their public presence on free-to-air TV. That is why their presence on free-to-air channels is considered as essential and irreplaceable.

The importance of free-to-air TV share to Moto GP and Formula One has been confirmed by those companies in the course investigation as well as by the empirical evidences of the case as such. The media rights to major motor events are substantially differed from those sports rights, which have to be acquired 'only' one time per two or four years. Such major sports events as Olympic Games, football's World Cup and European Championship, although attract massive commercial and consumer attention during their performance, may constitute distinct relevant market, since they are manageable only for very short period of time, whereas Formula One and Moto GP are organized around 20 times per year and could be neither competitive nor comparable with the sports events organized one time per four years. This rationale may be also applicable with regard to regular throughout the year football competitions, given that for the most part of the viewers the European football clubs competitions are by no means replaceable by the premium motor events. This conclusion is supported by the figures from the market investigation, which demonstrate that TV companies have to pay huge costs in order to gain premium football events. In such countries as Italy and Spain football clubs competition is inevitable part of market strategy for all TV operators. That is why the Commission concluded that 'due to branding, popularity, and price characteristics, football is not in the same market as other major events with regard to Italy and

Spain. In any case, and also on the basis of different scheduling constraints... football will not be considered by a TV broadcaster as a viable alternative to Moto GP or Formula One'.[206] In all likelihood this is also the case for many/all other European countries as well as the EC as a whole.

Having said that the Commission also recognized that both Formula One and Moto GP are by no means should not bee considered as major sport events, since their telecasting manages to collect substantial audience. It is also the case, because the amount of the broadcasting fees charged for the motor sport media rights in Italy and Spain prove the essential difference between Moto GP and Formula One on the one hand and the all other motor sport media rights on the other hand. However, within the context of Italy and Spain these rights have to be seen as the same market as other major regular free-to-air sport events. Inasmuch as they belong to the same relevant market they have to be considered as substitutable media products and the media rights to these events have to be seen as substitutable as well.

On the other side, the Commission did not exclude the future possibility to define the relevant markets for media rights to major motor sports events in Spain and Italy. It said that 'other sport events currently do not remotely achieve the same levels of viewer attention in Italy and Spain. This is due in part to the fact that for most other sports, there are a limited number of events which are of high interest, and those do not span the whole year, thus not delivering overall high audience and advertiser attention throughout the year. In Spain, in 2005, there is no other sport in the top 50 TV ratings, and all other sports (e.g. basketball, tennis, cycling and volleyball) make up only 7 out of the top 100 TV ratings, comparable to the position of Moto GP alone, Moto GP having a greater cumulated audience. As for Italy, in 2005, there is only one top TV rating (i.e. volleyball) out of 50 which is not for Moto GP, Formula One or Football.',[207] which essentially may be 'translated' as a warning to the main players of motor and broadcasting industries about careful respect and adherence the principles of the EC competition law and policy. Bearing in mind that the technique of definition of a relevant market has been strongly criticized for the presence in it some elements of a consequentialism (i.e. 'the end justifies the means' formula), it is very likely that in the future the relevant markets for media rights to

[206] Case, M.4066, CVC/SLEC Supra
[207] Case, M.4066, CVC/SLEC Supra

major sporting events in Spain and Italy will be defined more narrower and would separate motor sports media rights in a distinct relevant market indeed.

With regards to geographic market, the Commission kept its previous approach in *Premier League, UEFA Champions League, Bundesliga* and *Eurovision* decisions, stating the relevant geographic market has to be defined as a national, because 'the majority of free-to-air broadcasters are domestic businesses with a focus on national programming'. The fact that actual signal is often transmitted by them outside the borders of their country of origin does not change much, since the sports media rights are predominantly marketed on a country-by-country principle, because of the very reason of particularities in language, cultural preferences, distribution models, as well as national regulatory regimes. In addition there are no general unanimity between Member States with regards to which sports events have to be considered as of major importance. These issues depend rather on the national preferences of sports supported in each country.

In accordance to the Commitments of *CVC/SLEC*,[208] which they submitted to the Commission, the companies concerned have promised in order to remove any doubts of the Commission with regard to notified merger, '(a) Dorna will not enter into a binding contract to license the rights to live television broadcasting in Spain of Moto GP; and (b) the Formula One Group will not enter into a binding contract to license the rights to live free-to-air television broadcasting in Spain of the FIA Formula One World Championship'.[209] Such a format of dealing with proposed concentration will be seen by the Commission as tolerable.

3.3.2. Downstream market for media rights

A proper definition of the relevant downstream market for management of the media rights for sports events is one of the central questions of the present domain. At this stage there has been already quite sequentially identified by the European case law several product markets. The Commission distinguishes, in particular, as a separate market pay TV services, free TV, as well as a market for operation with new media rights, such as IPTV and video via 3G mobile devices, in particular for on-

[208] Commitments to the European Commissions, Case, M.4066, CVC/SLEC Notification On, 31 Jan 2006

[209] Commitments to the European Commissions, Supra

demand sport content services. The findings of the sector inquiry into 3G, which was concluded in 2005, confirmed the analysis with regard to mobile networks. These last markets may be modified in the future, since they still remain to be confirmed by the case law. That is due to many critics of such a narrowing down of the markets by the Commission, especially from the traditional TV companies, which consider the new media rights operators potentially as their direct competitors in the future, and insist upon consistent applying of the declared principles of 'platform neutrality'. The issue of the definition of the geographic market the Commission generally compares to its inquiries on upstream markets and usually considers them as national or regional without any chances of applying European-wide widening approach. This is the case due to substantial difference in the TV market, stipulated by the national character of content distribution, as well as discrepancies in national regulatory regimes, linguistic difference, cultural preferences and lack of genuinely European-wide broadcaster (at least for the moment).

There are two fundamental approaches to the definition of the downstream relevant market. The position of the Commission and direct competitors of the main buyers of sports media rights is based on the narrow ramification of the market. This allows to find a dominance more easily. The opposite approach is taken by the companies directly involved into acquisition of media rights for sporting events. They generally do not see their transactions as a separate market. The second position has bigger support in academia. Thus, *Van der Brink* says ,There does not seem to be a separate product market for football broadcasting on free television. Ratings are important; advertisers are only attracted to popular programmes and advertisement must cover the costs of the acquired broadcasting rights, including sports rights. Increasingly, people "zap" around the different channels; viewers also change comparatively easily between football and other programmes. Due to this substitutability of football as a product on free access television, the ownership of football broadcasting rights is not absolutely essential, even though it does deliver the highest television ratings'[210]

[210] Jens Pelle Van den Brink E.C. Competition Law and the Regulation of Football: Part 1, European Competition Law Review, 2000, 21(8), 359–368

3.3.2.1. MSG Media Service

In the recent Commission decision[211] related the concentration between Bertelsmann AG, Deutsche Bundespost Telekom and Taurus Beteiligungs GmbH into joint venture under the name of MSG Media Service Gesellschaft fuer Abwicklung von Pay-TV und verbundenen Diensten mbH the Commission declared the proposed concentration incompatible with the internal market. The object of the notified joint venture between Bertelsmann (the common parent company of the leading German media group, which had activities primarily in book and magazine publishing, book clubs, printing, music publishing and sound recording, and has holdings in commercial television), Taurus (a holding company belonging to the Kirch group, which was the leading German supplier of feature films and television programming and is also active in commercial television and Telekom (the public telecommunications operator in Germany, which is active, either directly or through subsidiaries, in all areas of telecommunications services and had a monopoly of the German telephone network and is the owner and operator of nearly all the German cable television networks)[212] was the technical, commercial and regulatory maintenance of television operator, active primarily on a pay-TV market and some *neighbouring* telecommunication services, such as subscriber customer management, conditional access and the management of certain infrastructure equipment for the supply of such services, including eventual takeover German premium *Premier* TV channel, which is the most successful pay-TV operator within the relevant market.

The parties concerned indicated that the launching of MSG undertaking had neither the aim nor the effect of coordinating the market conduct of the parent companies, which continue to preserve their financial and administrative independence. However these undertakings committed to commercial obligations to refrain from the participation in any other pay-TV service within German-speaking geographic market for the duration of the joint venture of pay-TV broadcasting without the preliminary agreement of the other parent companies.

The Commission found that the proposed merger had an influence on the administrative and technical services for operators of pay-TV market, which is

[211] Case M.469 Commission Decision of 9 November 1994 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (IV/M.469 - MSG Media Service) (94/922/EC)
[212] MSG Media Service Case, Supra

separate relevant market and is not compatible with free-to-air TV market. The commercial fundaments of the latter are based on the commercial advertising and/or special administrative funds for financing of public broadcasting through taxes and to some extent through advertising. The subject structure of the free-to-air television consists of two main actors (TV channel and relevant advertiser), whereas in the case of pay-TV industry there is a direct commercial relationship between the TV channel and the end user as subscriber. The discrepancy in the structure of two types of TV operators is quite substantial. It means that the conditions of competition for the two types of commercial broadcasters accordingly differ as well. It is also the case if comparing the importance of the media rights to premium sports events. If for advertising based TV operators premium sports rights are merely 'desirable', for many pay-TV companies they are indeed indispensable, since these media rights constitute a driving force for a launching of a wide range of neighbouring services, such as pay-per-view, near-video-on-demand, video-on-demand, home banking and teleshopping, as well as offering other specialized channels (initially as a bonus for subscribers of premium sports channels).

The parties submitted that it is not reasonable to stipulate its definition of the relevant market by the technical platform, via which the media services are offered. It means that they proposed to make no difference with regards to the way, in which the TV content is delivered to the end users: each format of the signal transmission is generally easily substitutable and cannot be decisive factor for subscription for television services. That is not the case for the very nature of the channel. The same rational is proposed also to both digital and analogue signals. Lastly, there is no longer a separate relevant market for cable TV companies due to the fact that the launching of digital data transmission has eliminated the deficit in the means of TV signals.

The Commission did not support, however, that general approach, by stating that 'regardless of whether the form of transmission is analogue or digital, television can be broadcast via terrestrial frequencies, satellite or cable networks. There are considerable differences between the three means of transmission, as far as the technical conditions and financing are concerned. While terrestrial transmission and satellite television only require the viewer to install an aerial or a satellite dish at his own expense, cable television presupposes the maintenance of a cable network

financed by the viewer through cable fees. It makes a difference to the final consumer whether he has to incur a large amount of expenditure on a one-off basis for one form of transmission (for example, for the satellite receiver) or whether he prefers to incur low-level, regular payments in the form of cable fees'.[213] It is especially relevant for the area with the landscape specificity, where the only one or another platform is supposed to be reasonably acceptable by the most of consumers. The difference is relevant from the TV operators' point of view as well. Due to the fact that the costs of receiving the channel which is transmitted solely via satellite signals is much more expensive as compare to cable signal. The satellite and cable signals are not interchangeable in terms of expenses. Finally the Commission refused as not relevant the reasoning of the parties, which stipulate that the fast evolution of data transmission alongside with digital compression would in the predictable future eliminate the shortage of the cable capacity to serve the sufficient quantity of media channels. The Commission explained it by referring to relatively marginal effect of this long-term process on the current commercial side of the telecommunications relations between the TV operators and viewers. That is why the Commission recognized that cable TV services constitute a separate relevant market.

The following *Bertelsmann/Kirch/Premiere* case[214] also relates the notification pursuant to Article 4 of the Merger Regulation of a proposed concentration whereby CLT-UFA SA and Taurus Beteiligungs-GmbH & Co. KG would acquire joint control, within the meaning of Article 3(1) of the Merger Regulation, of Premiere Medien, BetaDigital and BetaResearch. The Commission did not authorized this merger as well, since the proposed concentration 'threatened to create or strengthen a dominant position, as a result of which effective competition would be significantly impeded on six markets in Germany, each constituting a separate geographic market within the meaning of Article 9(7) of the Merger Regulation'.[215] The provisions of the merger stipulate that Kirch should close down its pay-TV channel and transmit its assets to new channel Premiere. The Commission defined a relevant product market confirmed that pay-TV a relevant product market separate from that for free-

[213] MSG Media Service Case, paragraph 41 Supra
[214] Case M.993 Commission Decision of 27 May 1998 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.993 - Bertelsmann/Kirch/Premiere)
[215] Case No IV/M.993 - Bertelsmann/Kirch/Premiere Supra

to-air television, since the former is financed by the subscribers, whereas the latter gains its revenues from the advertising or public funds.

3.3.2.2. Bertelsmann/CLT case

Two years after filing their the application the Commission received a notification[216] of a proposed concentration by which Bertelsmann Aktiengesellschaft and Audiofina S. A. are planning to concentrate their radio and television commercial activities in a newly established joint-venture called CLT-UFA. Unlike in the previous case the Commission decided that the notified agreement falls within the scope of application of Council Regulation No 4064/89 and raise no substantial objections as to its compliance with the internal market goals.

In the course of defining a relevant market the Commission reaffirmed its previous approach that free-to-air TV constitutes a relevant product market for TV advertising where the broadcasters compete for advertising revenues. The Commission recognized that in so far as pay-TV channels are also financed by advertising, these commercial activities may also be considered as the same market for TV advertising. The market for TV advertising differs from the markets for advertising via other media. The big theoretical question whether the companies which compete with each other compete on the separate relevant market (i.e. more narrower definition of a relevant market than previously proposed) still remains to be decided.

It has been also reaffirmed that pay-TV industry constitutes the separate relevant market as well, in as much as it is based on the trade relationships between TV operators and subscribers, but the Commission rightfully predicted that the distinction between the businesses organized on TV advertising and pay-TV subscription will gradually eliminating, because of the launching of digital technologies, which allow to combine different services of free-to-air TV operators and their pay-TV counterparts.

As regards the acquisition of broadcasting rights to major sports events the Commission said that 'a distinction can be made between film and other fiction

[216] Case M.779, No IV/M.779 - Bertelsmann/CLT Notification of 04.09.1996 pursuant to Article 4 of Council Regulation No 4064/89

rights on the one hand and sport rights on the other. Sport programs covering widely popular sports or major international events are often able to achieve high audience ratings and are generally considered to be particularly suited to carrying advertisements, as reflected by the amount of sponsorship involved. The TV rights for sport events must be acquired in advance of the event, but their attractiveness may change considerably depending on the actual participation and success of teams or participants appealing to national or regional audiences. Sport rights have, therefore, specific features as compared with film and other programme rights'.[217]

It has been however stipulated that in the present case, it can be left open whether or not there are separate relevant markets since, because even on the basis of a narrowest market definition the announced merger would not cause to the creation of a dominant position. That is why the Commission left also open the question whether or not there are separate relevant markets for free-to-air TV-rights and media rights for pay-TV.

The issues related to definition of the relevant geographic market have been decided in the traditional to this category of cases way. It has been pointed out that although in certain niche markets there are already programs broadcast throughout Europe, TV broadcasting still generally takes place on national markets, due to different conditions of competition prevailing in the various markets, distinctive regulatory regimes, long-term language barriers and some other cultural factors, as well as separate consumer preferences, which is decisive element for TV advertising.

A separate market may in some cases be defined in a slightly broader (or, depending on the context, narrower) manner and comprised the borders of certain linguistic region rather than country as a whole.

[217] Bertelsmann/CLT Notification Supra

3.3.2.3. British Interactive Broadcasting/Open Case

British Interactive Broadcasting/Open[218] is another important decision of the Commission in the area of merger control. In 1997 the parties submitted notification to the Commission about their intentions to establish a joint venture company British Interactive Broadcasting Ltd (BiB, or Open) and requested the Commission to provide the negative clearance and/or exemption pursuant to Regulation No 17. BiB's parent companies are BSkyB Ltd, BT Holdings Limited, Midland Bank plc and Matsushita Electric Europe (Headquarters) Limited. The main activity of BiB is provision of a new model of telecommunications service, digital interactive television, to consumers in the United Kingdom, which allows consumer oriented companies, such as travel agencies, supermarkets, banks and shopping centres to communicate directly with their costumers via interactive television in order to conduct financial and some other sorts of transactions and offer such interactive television services as home shopping, home banking, holiday and travel services, downloading of virtual games, movies and music, learning on-line, entertainment and leisure, sorts, motor world an access to e-mail etc.. These process of communication is provided by set top box – digital communication device, which allows transformation of the signal into understandable for consumer audio and video language. As it usually happens with the launching of new businesses the BiB committed to subsidize set top boxes for an initial period of times in order to attract new consumers. In addition BiB will provide certain direct communication cervices for consumers. The joint venture agreement has been authorized by the Commission subject to a set of conditions.

The main interest of the present research constitutes the Commission's definition of a relevant market. The Commission confirmed its evaluation of pay-TV market, which is separate market, as compared with free-to-air television. It has been also reaffirmed that there is no necessity to make a distinction between markets for analogue and digital pay TV. The way of signal compression is of minor importance for market evaluation and constitutes purely technical issue. In addition the rapid development of digital technologies and their undisputable advantages will completely eliminate analogue signal from the market of pay TV services in

[218] Commission Decision of 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/36.539 British Interactive Broadcasting/Open) (notified under document number C (1999/2935)) (1999/781/EC)

predictable future. In its definition of a relevant market for the wholesale supply of films and sports channels for pay-television the Commission stated, in particular that 'to be successful as a pay television operator, it is essential to include film and sports channels as part of the service.... BSkyB has itself identified .movies and sports as key sales drivers. Pay-television operators' demand for particular channels reflects the demand of their subscribers. Pay-television channels composed of recently released films and live exclusive coverage of attractive sports events attract the largest viewing figures'.[219] That is why the price to such channels is the most expensive. Sports and movie channels essentially constitute driving force for the development of addition content oriented services. The fact that premium sports as well as top Hollywood movies reach the highest viewing audience is decisive, given that it is the only way to develop ancillary services. This shows that a relevant market for movies and sports event exists. As it is known now, that was only the first steps of the Commission in its attempts to narrow down the relevant market for major sports events and particularly European football clubs competitions.

3.3.2.4. BSkyB/KirchPayTV Case

This case[220] also related merger authorizing. In 1999 the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation. This document contained request for approval the acquisition by BSkyB 24%of KirchPayTV from KirchGruppe. In light of submitted commitments of the parties the Commission has concluded that the notified transaction falls within the scope of EC merger requirements and does not particular doubts as to its compatibility with the internal market.

Similar to its previous definition of a downstream relevant market the Commission reaffirmed the distinction between free to air television market and pay-TV market. It also confirmed its previous opinion concerning the definition of a relevant geographic market, limiting it essentially to national or linguistic borders.

As to of sports media rights it has been stated that 'it is universally accepted that films and sporting events are the two most popular pay- TV products. It has been

[219] British Interactive Broadcasting/Open Case, Supra
[220] Case No COMP/JV.37 – BSkyB / KirchPayTV Notification of 22 December 1999 pursuant to Article 4 of Council Regulation (EEC) No 4064/89

acknowledged by the Commission... that it is necessary to have the corresponding rights in order to put together programmes that are sufficiently attractive to persuade potential subscribers to pay for receiving television services. Films and sport are therefore pay-TV's 'drivers'. There is no need for the purposes of this case to determine whether separate markets exist for film broadcasting rights and rights to broadcast sporting events'.[221] The Commission also concluded that media rights for sports events are broken down into rights for broadcasting in clear, pay-TV and pay-per-view formats. Which is an implicit confirmation that sports media rights may be separated on a downstream product level not only by the criteria 'free to air' or 'pay TV', but also by 'pay-per-view' format. Although pay-per-view format constitutes pay-TV as well, it substantially deviates from the traditional pay-TV scheduling and has sufficient characteristics for defining it as a separate downstream market.

3.3.2.5. Newscorp/Telepiu Case

The most recent (and probably, the most meaningful) merger case[222] related to downstream market of premium sport content has been launched by the notification of a proposed merger by which the undertaking Newscorp (a media operator active in many developed countries and current owner of landmark 'Wall Street Journal' newspaper; which activities include the creation and delivering of motion pictures and TV content, TV satellite and cable telecasting, the publication of many leading newspapers, magazines and books, the production and distribution of promotional and advertising products and services, the development of digital broadcasting business, as well as the development of conditional access and subscriber management systems and the production and distribution of on-line programming) expressed its intentions to perform acquisition of shares of Italian pay-TV operators Telepiù (Italian digital pay TV operator of satellite broadcasting, controlled by Vivendi Universal S.A. and operating mainly through its subsidiaries) and Stream (Italian pay-TV operator transmitted its signal predominantly via satellite technologies, but also via cable networks) in order to merge their activities in combined direct-to-home satellite pay-TV platform. After the following examination

[221] Case BSkyB / KirchPayTV Supra

[222] Commission Decision of 02.04.2003 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M. 2876 . Newscorp / Telepiù)

of the notified proposal the Commission decided to launch proceedings in accordance with Merger Regulation.

As regards the product market, the applicants submitted that the proposed transaction should be seen in the connection with the overall market for television broadcasting in Italy not making distinction between pay TV operators and free TV broadcasters, since there is elaborated case law, where Commission has recognised some elements of interaction between these two segments. It has been also pointed out that in a certain sense all broadcasters compete for the audience.

Newscorp also stressed that in relation to the Italian market there may be substantial reasons for the Commission to make a conclusion that the relevant product market should include both pay TV operators and free TV companies, since the strength of free-TV broadcasters in the specific case of Italian television environment constitutes a workable barrier for the pay-TV broadcasters. The Commission did not accept these arguments. And it continues to differentiate these two markets. It is, in particular, the case since the very business strategy of both is substantially different; each has its own priorities, technologies and commercial models of market development. If free-to-air TV operators predominantly rely on revenues stemming from advertising or public contributions, the operators of pay-TV services are dependent on their subscription fee and (to a less extent) on advertising services. The audience constitutes the decisive factor only for free-to-air operators, whereas pay-TV companies may get their revenue having substantially less viewers and become much more commercially successful.

These factors, although are never decisive, in each particular case may play an important role during the market definition, since the procedure is characterized by its inductive nature, 'case-by-case' approach and unpredictability of the final results. However the Commission did not accept the way of reasoning, proposed by Newscorp. Its comprehensive market investigation has demonstrated that in Italian media context there is sufficient distinction between pay-TV and free-to-air TV markets. The difference is reflected both in consumer preferences and loyalty, as well as intentions of the content producers to offer the different programs depending on the format of distribution.

In the course of extensive investigation the Commission has been consulted by many national and regional broadcasters, the vast majority of which confirmed its

initial approach with regards to differentiation between the market for pay-TV and free-to-air broadcasting services. They in particular, submitted that the difference concerns primarily program schedules announced by pay-TV operators and their free-to-air counterparts. In addition, this difference is also recognized on a upstream level, since many producers (this is especially the case with regards to Hollywood movies industry) insist upon licensing their rights in accordance with marketing windows. In such system the free-to-air operators receive the chance to broadcast the premium movies content only after its release on pay-TV market.

After the assessment of the submitted arguments the Commission made a conclusion that 'the two markets are substantially different essentially because of four elements: (a) business model that makes the two products different from the supply-side point of view, (b) dimension, (c) contents and (d) programme schedules. Leaving aside the first three elements, which have already been discussed, as regards programme schedules, it is important to underline that free TVs have a fixed .programming schedule throughout the course of the day and of the week, whilst pay-TVs (especially thematic channels offered through pay-TV platforms) have a program schedule that allows various .replays of the same content/program at various moments during the same day and week. Consequently, viewers of a pay-TV are able to watch the program of their choice (within a pay channel) on various occasions on the same day and also during the same week'.[223] At the same time it has been acknowledged that pay-TV is much recent business model and its operators are of necessity to act in the well-developed and deeply penetrated free-to-air market which may hypothetically have some positive consequences during the general assessment of the case.

As to media rights for sports events, it has been reaffirmed that football matches play the important role for pay-TV development. Furthermore, free-to-air operators generally do not compete with their pay-TV vis-à-vis for the acquisition of the main broadcasting rights for premium Italian sports events, such as football matches in Seria A and Champions League tournaments: 'in view of (a) the fact that pay TV platforms have the possibility to broadcast several matches at the same time, and (b) that football teams, especially medium and small ones, prefer to sell their rights to pay-TVs in order to preserve attendance at stadiums, as well as (c) the

[223] Newscorp / Telepiù Case, Supra

characteristics and the market conduct of most suppliers of rights in respect of football events, it can be concluded that there is a clear difference in the products for which it is possible and convenient to bid'.[224] This information has been confirmed by Italian association of consumers, which concluded that after application of small but significant and non-transitory increase in price it is unlikely that this would induce the viewers to switch over to free-to-air TV.

All abovementioned factors indicate that pay-TV and free-TV comprise in Italian context two different markets distinct markets. The Commission, however, recognized that the technological situation in these markets is subject to rapid changes and did not exclude that the distinction between the two markets may not become increasingly blurred in the future, for reasons linked *inter alia* to the evolution of technology in general and the progress of digitalisation in Italy. The future introduction of DTT in Italy will certainly bring about changes in the television landscape. Furthermore, the general convergence trend between different audio-visual media on the one hand and convergence between media and telecommunications on the other is likely to bring about an increasing proximity between the different ways in which entertainment and information are brought to consumers, and the ways in which these consumers enjoy them'.[225] The Commission did not exclude that in the future it would be possible to define relevant market more narrowly and to separate each type of specialized channel into a relevant market, but it decided not to make a conclusion on this issue at that particular period of time.

Consequently the Commission concluded that after the announced acquisition Newscorp will have the monopoly on the market of pay-TV in Italy, which will guarantee for Newscorp an access to the most attractive and most expensive 'must have' content, in particular the possibility to utilize the media rights to premium football events in Italy, top Hollywood movies but also other important TV products. Eventually no other undertaking will be able to compete with this TV operator, since the premium content is very limited in scope and size asset, the ontological nature of which is stipulated by the permanent scarcity and consumers' demand, overweighing existing supply.

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[224] Newscorp / Telepiù Case, paragraph 31 Supra
[225] Newscorp / Telepiù Case, paragraph 39 Supra

The Commission has therefore decided that contracts allowed the merged undertaking exclusive rights with movie studios will foreclose potential market entry for new operators. Moreover, 'rights to premium movies for pay-TV purposes can be acquired in different formats (so-called windows) depending on the timing of the allowed exhibition. The closer this timing to the timing of theatrical release, the more valuable the window and thus the premium content. Second window rights are usually valued at a fraction of the first window pay-TV rights. It can reasonably be argued that, owing to their price differential and to their different time of broadcasting, first and second window rights to premium movies are *de facto* dissimilar products'.[226] The empirical data show that newly merged company will essentially hold the biggest part of the most lucrative media rights in both central content industries: premium sports events and Hollywood movies industry. In addition the very possibility for a newcomer digital satellite broadcaster, which is not able to establish its own infrastructure, to be in a position to become operational will directly depend on Newscorp' commercial willingness not to raise protective barriers when giving access to its services.

For the purpose to obtain clearance for the merger concerned, in 2003 the Newscorp submitted its' new version of commitments. This action plan has been finally accepted by the Commission with the subsequent clearance of the merger. The summary of commitments includes, in particular, obligation of Newscorp to waive its on-going exclusive rights with respect to TV platforms other than satellite (i.e. terrestrial, cable, 3G, IPTV etc.). In addition, the parties shall suspend any protection rights as regards means of transmission other than satellite, as well as exclusive rights on its pay-per-view content, video-on-demand and near-video-on-demand on all available platforms. As regards the obligations to future contracts, Newscorp shall 'not subscribe contracts exceeding the duration of two years with football clubs and of three years with film Studios. The exclusivity attached to these contracts would only concern DTH transmission and would not apply to other means of transmission (for example, terrestrial, cable, UMTS and Internet...the parties shall waive any protection rights as regards means of transmission other than DTH. As regards football rights and world-wide sports events, the contractual counterparts shall be granted a unilateral right to terminate contracts on a yearly basis..., not

[226] Newscorp / Telepiù Case, paragraph 188 Supra

acquire protection rights for DTH and will waive exclusive rights for pay-per view, video on demand and near video on demand on all platforms...not acquire, through future contracts or re-negotiations of the terms of the existing contracts, any protection or black-out right with respect to DTH'.[227] This condition raised a lot of debates. The mere fact of distinction between the transmissions of sports media products via different platforms should essentially signify that they represent separate market, while the Commission in the course of investigation refused to narrow down the relevant market and concluded that for the present case the platform neutrality concept should to be applied. This presumption has been grounded by analysis of the following commitments of Newscorp to offer third parties, on a unbundled and non-exclusive ground, the possibility to distribute on platforms other than satellite any premium contents (including sports rights) if and for as long as Newscorp offers such premium contents to its retail customers. Such offer has to be made on the basis of the retail minus principle under the fair and transparent cost-oriented formula. The length of the sublicensing as well as its supplementary provisions has to be provided on a non-discriminatory basis. It is important to underscore that the present commitments have been done only until 2012, are limited solely to Italy and impose no obligation with regard to any other commercial activity of Newscorp outside the limits, stipulated in the document.

Summary

EC Competition law enforcement in the area of broadcasting rights constitutes the quintessence of our research. The reason for this is twofold. Firstly, this is a subject with mature and consistent case-law and doctrine. Broadcasting relations are situated in the middle of commercial and public domain. Their influence on the society is tremendous and the regulatory instruments are quite imperative. Another reason to pay a particular attention lies on technological side. Digital revolution put on the agenda substantial changes within the area of broadcasting.

The experience of the viewers is changing rapidly, their demand becomes more selective and refined (which does not necessarily mean 'better'). In order to satisfy the more sophisticated consumers' demand, broadcasting operators striving to

[227] Newscorp / Telepiù Case, paragraph 225, (d), (e), (f) Supra

improve their technological facilities, following the newest trends within the area. They are ready to bid for a radio spectrum and are looking for the new ways of transmission. However the most tough battle with the competitors occur on the level of broadcasting content. Sports rights in these fights usually play the pivotal role, since top-sport contests together with first-window Hollywood movies and some 'ancillary' services constitute so called 'premium content'. This is essentially 'must-have' broadcasting products, which often serve as a driving force for marketing of the channels.

The initial holders of sports rights (i.e. sports leagues, clubs and federations) are fully aware of their de facto monopolistic status within the market and are trying to exploit this position for gaining the maximal revenues. This constitutes the first threat for the European competition environment. Collusive conduct and/or abuse of a dominant position by the initial rights holders is a matter of major importance for this area. However, the main problem with competition law occurs during the selling of broadcasting rights to sports events. It is media operators, who are striving to acquire *exclusive* rights for top sporting events in order to maintain and/or reaffirm their commercial position within the market.

It is quite usual practice within the industry, when powerful broadcasting corporations acquiring a whole range of premium sports rights without intentions to exploit it entirely. From the commercial standpoint it is better to suffer some short-term losses, but eliminate the access to the premium content by the competitors, rather than to buy only that part of sports rights, in which there is direct broadcasting interest of the operators. This is the reason why all media giants prefer to overbid their competitors in course of the auctions and to buy all packages of sports rights.

Such conduct has all characteristics of abusive behaviour and if the companies concerned possess the dominant position within the relevant market, the instruments of Article 82 EC may and have to be applied. That is why it is of crucial importance to analyse the issues related to the relevant markets definition. There is no unilateral approach within the European Union to the narrowness of the relevant markets in the broadcasting industry. The general tendency however is to narrowing the market. This is particularly clear with sports media rights. While two decades ago all TV content has been considered as the one product market with all TV operators as direct competitors, further case-law shows the trend of defining as a relevant market

some segments of media rights. In particular, sports events often are seen as a separate market. Furthermore, according to the European case-law some kinds of sports (e.g. football) or even it regular contests (e.g. Champions League) become to be considered as a separate market.

This part of our research explores the existing tendency and prepares theoretical background for the analysis of the European competition law and policy in the area of new media rights and the role of sports content as a driving force for commercial deployment of such new media platforms.

Part IV

European Competition Law and New Media Rights

Although the Commission adopted clear and comprehensive approach with regard to management of sports rights by TV-operators, there are several arising technologies, which are new within the market. As *Hatton* and *Wagner* say, '[T]he Commission's approach to encouraging competition in the sale of football rights may need to adapt quickly to reflect rapid advances in media technology and user patterns. The solution proposed by the Commission in the UEFA and Bundesliga cases was based on technology and patterns of usage in existence at a time when the main threat to competition came from powerful satellite and cable pay-TV networks purchasing all premium rights and becoming dominant. As a result, the Commission proposed a solution which created separate packages for TV and the internet. This solution appears increasingly outdated as TV and the internet converge'[228].

It is very likely that the viewer experience of sport over cell phones and similar devices is substantially different from TV, this is not, however very plausible for IPTV. There is many proves that TV over Internet may become a real substitute to traditional TV consumption. Internet football viewing may emerge as a substitute for pay-TV viewing or may transform into another form of pay-TV distribution

This is the reason why on January 30, 2004 the European Commission has launched[229] and on September 21, 2005 officially accomplished[230] the Sector Inquiry[231] into the provision of sports content over third generation mobile

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[228] Catriona Hatton, Christoph Wagner, Fair Play: How Competition Authorities Have Regulated the Sale of Football Media Rights in Europe, European Competition Law Review, 2007, 28(6), 346–354

[229] Press release IP/04/134 'Commission launches sector inquiry into the sale of sports rights to Internet and 3G mobile operators', Brussels, January 30, 2004. http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/134&format=HTML&aged=1&language=EN

[230] European Commission's Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks Published in accordance with Article 17(1) of Regulation 1/2003, 21/09/2005 http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/final_report.pdf

[231] Sector inquiry is the institute of the European Competition law which was introduced by the Regulation 1/2003. It substituted the previous instrument the Commission investigation – general inquiry. Under the Regulation 1/2003 the Commission may initiate sector inquiry which provides a particularly appropriate instrument for investigating cross border market concerns. It allows the

networks[232]. The main aim of this sector inquiry was to find and/or to establish the appropriate balance between TV companies on the one hand and the mobile communication companies on the other with regard to acquisition of and operation with rights on the premium sports events.

The essence of the problem is based on the attempts of mobile communication companies, which provide access to the premium sports content over third generation mobile technologies (i.e. video and audio reels – for the present moment – mostly, short term). This sports content are mainly football matches of the top five European national championships and Champions League – European football tournament on the level of football clubs. The attempts of mobile communication companies meet permanent and intensive disagreements of their rivals (TV companies), which used to be considered as 'classical' holders and operators of premium sports content.

Since for many TV companies the matter of access to premium sports rights is a question of the very existence, they are willing to pay to the initial owners of sports rights (sports leagues, national federations and/or clubs) substantially higher prices in order to receive *exclusive* rights on this content for as long as possible period of time.

The mobile communication companies can hypothetically afford the involvement into price competition with their vis-à-vis on the phase of selling these rights by their initial holders (*downstream market*), but still they are not well-prepared to invest such high amount of costs into the sector of premium sports broadcasting because of various commercial reasons.

Therefore they are insisting on the cancellation of the whole sports rights selling system of which is basing solely on the principles of their *exclusivity* and *indivisibility*. The main line of the argumentation of mobile communication companies is based on the regulatory-oriented approach to the EC competition law.

Commission to analyse allegedly anti-competitive practices in a systematic and transparent manner and gives the opportunity to national authorities to launch their own parallel national investigations on the basis of the Commission's findings. The Commission may initiate it into those sectors of the economy where it believes competition might be restricted or distorted.

[232] According to the Commission, the third generation mobile phone market is still in its infancy which makes it all the more important to ensure that it is not barred from key content. The provision of a range of new services and, in particular, the transmission of images and sound from sports events via mobile telephony handsets to subscribers is the essential advantage of 3G networks compared to the previous generation infrastructure.

They propose the active involvement of the European Commission, which should use – according to them – the EC competition law as a tool of protection of the new-establishing branch of business (i.e. sports content providing over the third generation mobile networks) from 'unfair', 'anticompetitive' and 'abusive' market practices of their direct rivals – TV companies.

Convergence of platforms

Traditionally TV companies were considered to be the main (and, until very recently, practically, unique) subject of the exploitation of sports broadcasting rights. But within the active and rapid introduction of digital technologies into media, communication and entertainment industries, the existing frontiers between previously clear-cut defined specialisation of each industry have been eliminated.

Nowadays media, entertainment and communication industries have a range of fields for fruitful interplaying[233]: media are partly becoming entertainments; entertainments are partly becoming communications; communications are partly becoming media etc. To remain successful, they are trying to multiply the offer and (which is directly relevant to the present problem) their platforms – technique, by which ordered services reach the final customers.

Basically, in the predicable future, the variety of entertainments, communications and media services, which until very recently have been transmitted via different platforms (phone, TV-set, video record player, tape recorder, computer, newspaper, radio and so on) can been received by the eventual user via one device (at least there would be no technical obstacles for this).

In the context of rigid borders elimination between different industries and content delivering platforms the situation on the market of acquisition and exploitation of premium sports content appears to be extremely interesting for research from the academic as well as from the practical perspectives.

The aim of this chapter is dual. On the one hand it intends to give a clear analysis of a contemporary state of a play in the area of the premium sports rights

[233] This circulation and interplaying of platforms in the present topic can be illustrated by the example of establishing of sports clubs their own TV-channels; providing by cable-TV companies voice-telephony services or vice versa – broadcasting by mobile communication companies TV-signals.

management (i) just before; (ii) in the very process and (iii) right after the final decision of the European Commission, presented in the Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks *Published in accordance with Article 17(1) of Regulation 1/2003*, 21/09/2005. On the other hand, we are intended not to limit the research solely on the 'officially' existing reality, which is 'authorised' by the European Commission, but also to present and (to a certain extent) to elaborate the alternative concepts of the eventual correlation and inter-balance between traditional (TV) and alternative (3G) operators of premium sports rights.

The launching by the European Commission the Sector Inquiry into the provision of sports content over third generation mobile networks allows us to collect the official positions of the main subjects of the market. But in view of the subtle sensitivity and crucial importance for many market players in this field their commentaries were rather political, regulatory and subjective then purely legal. Furthermore, even that substantial portion of the official positions of the main subjects of the market of premium sports rights, which nevertheless is characterised of maturity and objectivity, is still suffering from a lack of academic argumentation. The attempt to conceptualise this topic was made by a slight quantity of authors on both sides of Atlantic. The relevant parts of their argumentation will be presented in this paper as well.

This Part of the paper consists of two chapters. The first one is devoted to presenting the official position of the European Commission, based mostly on the results of respective Sector Inquiry. The aim of this part of research is to examine the existing inter-platform tensions in the sports broadcasting area from the point of view of the European Commission. It would be appropriate here to emphasize that our premises are basing on the presupposition that European competition law may be (*ab*?)used by the Commission as an instrument of attaining the general purposes of the European welfare.

For the sake of research comprehensiveness the second chapter of this Part IV is exploring the main argumentation of the major subjects of the discussion. Since the European Commission is tending to be persuaded by the supporters of platform-oriented approach of the sports broadcasting rights distribution (i.e. that TV-platform and 3G-platform have different relevant markets), the main argumentation of that

point of view will be presenting in the first chapter of Part IV. Therefore, the bigger attention in the second chapter is devoted to survey of the argumentation of supporters of the opposite, content-oriented approach (i.e. that TV-platform and 3G-platform have substantially the same relevant markets).

Finally the main theoretical issues will be scrutinized from the perspective of the very essence of the sports rights administration. In those sections the analysis of all substantial features of two main approaches to platform convergence (TV-platform vs. 3G-platform) will be done. Basing on the central argumentation of both approaches we are trying to demonstrate the general situation in the area of sports broadcasting rights administration in the digital epoch from the perspective of the European competition law.

In view of the limits of the present study we were not concentrated on the comparative issues of the solving the tension between TV-platform and 3G-platform in the other jurisdictions[234].

It positively was not the aim of this Paper to establish 'right' and to find out 'wrong' answers on the deep inter-platform conflicts' dilemmas. We were not intending also to put under hesitation the main findings of the Commission during the respective Sector Inquiry, but rather undergo them by intensive theoretical scrutiny.

4.1. Sports broadcasting rights: in the Digital Epoch the '*Official* reality'

The aim of Chapter I of this Paper is to define the present-day situation in the field of sports broadcasting rights distribution system with relation to tensions between traditional subjects of the market (TV companies) and their rapidly growth vis-à-vis (the mobile-communication companies).

The starting point of the research is basing on Press release IP/04/134 'Commission launches sector inquiry into the sale of sports rights to Internet and 3G mobile operators', Brussels, January 30, 2004 and the European Commission Issue

[234] The example of the US regulation of this problem appears to be the most important and relevant.

Paper on the preliminary findings of the Sector Inquiry into New Media (3G), May 2005[235].

By analysing these documents we are trying to clarify the main prerequisites and intensions, which impel the European Commission to launch the sector inquiry on the issue of regulation the differences between platforms in the premium sports broadcasting rights distribution system, as well as the preliminary conclusions of the European Commission on this issue.

The last section of the Chapter I of the present Paper is devoted to the exploring the final stand of the European Commission, made after collecting and analysing the whole set of the positions, submitted by the relevant parties in the Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks *Published in accordance with Article 17(1) of Regulation 1/2003*, 21/09/2005. In this section we are not limiting our view solely on the establishing the current situation, but also trying to analyse the general tendencies of the European Commission's way of looking and its general approach to the argumentations of the relevant parties.

4.1.1. Sports rights and digitalisation

Sports broadcasting rights belong to the most attractive television content from the very beginning of television industry's existence. They are fully corresponding with the three 'classical' requirements for spectators' interest (i.e. unpredictability, regularity and performance) and are commercially attractive *inter alia* because of the low price costs of its producing as well.

The commercial attractiveness of sports broadcasting rights, however, has been drastically increased after the entrance on the TV market the digital and multimedia technologies in the areas of broadcasting, communication, entertainment and media. Since the scope of sports content still remains on the previous level, but the instruments of its broadcasting are multiplying, the competition for gaining the sports rights becomes more and more strict.

[235] European Commission's Issue Paper on the preliminary findings of the Sector Inquiry into New Media (3G), May 2005
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/issuespaper.pdf

The appearance of new subjects (i.e. the mobile communication companies and Internet broadband companies) on the market of premium sports broadcasting leads to the fundamental tensions between them and traditional operators of sports rights (i.e. TV companies). This situation impelled the Directorate General Competition of European Commission and EFTA Surveillance Authority to launch the Sector Inquiry into the provision of sports content over third generation mobile networks.

The main aim of this action was to avoid potentially anticompetitive behaviour that might distort the establishing the new market of broadcasting the premium sports events by mobile communication companies.

4.1.2. Preliminary findings of the European Commission

The first official document which clarifies the intention of the European Commission to launch the sector inquiry into that issue was the relevant Press release IP/04/134 'Commission launches sector inquiry into the sale of sports rights to Internet and 3G mobile operators', Brussels, January 30, 2004.

In this document the Commission recognizes the sports rights as an important driving force for the sale of pay-TV subscriptions and an instrument for development new media markets. '*In the interest of entrepreneurship, consumer choice and innovation, the Commission wants to make sure that access to this key premium content is not unduly restricted*'.

Afterwards, not on behalf of the Commission as the collective body with the wide scope of economic interests (including the protection of *entrepreneurship, consumer choice and innovation* as well), but on behalf of DG Competition the position of European Competition Commissioner Mario Monti is quoted: '*it is the task of competition regulators to ensure that access to sports rights remains open and non-discriminatory*'.

4.1.2.1. The aim(s) of the Sector Inquiry

The main problems which seem for the Commission to be restrictive with regard to the competition in the internal market are as follows: (i) refusals to supply; (ii) the bundling of TV rights with new media/UMTS rights; (iii) the existence of embargoes favouring TV coverage over new types of coverage and (iv) the purchase of new media/UMTS rights on an exclusive basis.

This presumption was made by the Commission in the context of the previous investigations of the sale of the media rights to the Champions League European football tournament and the sale of the rights to the English and German premier leagues.

The official aim of the sector inquiry was declared as establishing 'whether current commercial practices infringe the European competition rules, in particular the prohibition of restrictive practices and abuses of dominant position (Articles 81 and 82 of the EC Treaty)'. After collecting the commentaries from the interesting parties and the relevant work on it (for 15 months period), the Commission issued the Paper on the preliminary findings of the Sector Inquiry into New Media (3G).

According to the item 2 of the document, this inquiry is '*also in line with the consistent Commission policy of keeping the markets for premium media content open*'. That statement can be immediately considered as an implicit recognition by the DG Competition of the European Commission its own role as an instrument of achievement the general Communities policy (which is '*keeping the markets for premium media content open*')[236].

The next statement of the Commission's Issue Paper makes this presumption even more explicit: '*The Commission ... wish(es) to ensure that the development of the 3G sector is not hampered in the EEA, and in particular curb any anti-*

[236] The analysis of conformity with the principles of the EC Competition law of this instrumentalisation of DG Competition will be present in the relevant section of this Paper.

The similar position has International Olympic Committee: 'As the Issues Paper ... explains at p. 2, "[t]he choice of the 3G sector, and the focus on access to sports content, reflect the value of the sector inquiry tool for addressing anticompetitive behaviour that might impair the development of this key emerging market". (Emphasis added) This formulation suggests that the Commission already had a predetermined opinion about the relevance of sports content before the start of the sector inquiry and thus engineered its inquiry with this opinion in mind'. International Olympic Committee Comments on Preliminary Finding of the Sector Inquiry into New Media (3G) http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/ioc.pdf

competitive behaviour of powerful established players in neighbouring markets'. Grounding on these statements one can presuppose with the substantial part of probability that the main purpose of this sector inquiry is rather economical and political then legal, namely:

- '*...keeping the markets for premium media content open*';
- To *ensure the development* of mobile communication sector with regards to sports broadcasting.

In order to make a clear picture of the current situation in the sector of sports broadcasting rights distribution the Commission sent questionnaires to a number of representative sport organisations and other holders of sports rights, including agencies, broadcasters and mobile network operators with a view of acquiring as broad and wide a view as possible of market evolutions and practices.

In the first stage of its sector inquiry the Commission sent the questionnaires to the major and most advanced market players of all three main categories of subjects: producers of sports rights, TV companies and the mobile communication companies. After a while, basing on the receiving answers, the Commission tripled the addressees (including in the list not only actual, but also potential competitors) and sent to them the elaborated form of the previous questionnaires. The major companies received the enhanced version of questions once again.

4.1.2.2. Presumably anticompetitive practices

The next important stage of the Commission's sector inquiry was to define which commercial practises would be considered as harmful and would risk having impact on competition within internal market. For this purpose it is important to distinguish two potential sorts of competition: inter-platform and intra-platform (with respect to 3G operators).

In case of inter-platform competition (competition between TV companies and 3G operators) the Commission defines following presumably anticompetitive behaviours: (i) exclusivity; (ii) joint selling; (iii) cross platform bundling; (iv) refusal

to supply; (v) lump-sum charging and (vi) excessive charging. In case of intra-platform competition (competition between 3G operators) this practices would be limited on (i) exclusivity; (ii) joint selling and (iii) coverage restrictions.

With regard to exclusivity it should be noted that this practice applies on the regular basis in the sphere of sports rights broadcasting. The Commission is trying to limit the scope of exclusivity but does not prejudice it as such. The exclusivity (as well as collective selling) belongs to inalienable feature of the whole sports broadcasting industry. In the context of existential tensions between the different platforms the way of operation with exclusive sports rights becomes most important.

4.1.2.3. '81' or '82'?

The next step of tension between platforms consists in trying to define the limits of cross-platform bundling rights. In some sports mobile rights are sold separately for different transmission platforms – TV, mobile networks, and the Internet. But this practice does not constitute a common rule. Under the Commission, bundling of rights across platforms represents a restriction which is likely to prevent mobile operators from purchasing sports rights, as the value of the TV rights is several times more than the value of the 3G mobile rights. So it is TV companies who manage to buy the whole set of sports rights and eliminate the potential rivals from the market.

The sector inquiry also found that concerns were raised by mobile operators with regard to fix and excessive pricing. These practices can be used with the object of distortion competition. But this matter belongs rather to the cartel restriction, usually is harmful per se and does not constitute the substantial academic interest.

In the area of sports rights operation the competition within internal market may be distorted mainly in case if the relevant company abuses its dominant position. Namely these practices appear to be most controversial and questionable. Article 81 (1) of the Treaty would be applied solely in cases of hard-core cartel practices (e.g. network of similar agreements or price discrimination).

According to Commission the substantial characteristic of the distortion of competition is basing on four important questions. The first three have usual

application in the EC competition law: (i) does the rights owner have market power; (ii) is the event represents a separate market and (iii) is the mobile operators' access to rights restricted (or some operators are favored over others). But the fourth precondition appears to be rather political: (iv) is the event an important driver of 3G demand.

From the Issue Paper is not clear if these three circumstances should be applied cumulatively or alternatively. If the conditions of hypothetical harm for 3G development are considered as additional 'aggravate circumstances', this situation does not seems to be substantially objectionable. If, however, the issue of 3G developments is representing as the main argument, which afterwards is (synthetically) justifying by the first three arguments then the very nature and the aim of the European competition law can become contestable enough[237].

4.1.3. Market definition

The main reason why the Commission launches the sector inquiry is basing on the significance of sports rights for 3G networks in particular in relation to other 3G content. The Commission considers these rights as potential marketing instrument for those companies, since '*there seems to be an identifiable demand for 3G sports content that is distinct from the demand for other content provided via mobile networks*'.

On this stage of sector inquiry the Commission comes to a preliminary conclusion that its results '*tend to indicate that coverage of sports events over mobile networks can be considered to be in a separate market to that of other content distributed over those networks due to the branding power of sports and their ability to attract targeted subscribers*'. Hence, under Commission, for intra-platform competition (between 3G companies) the sports broadcasting rights (in all likelihood) constitute the separate market. The question if some sports and sporting events per se may constitute a separate market requires additional assessment.

[237] If the European competition law is really law it should constitute some value. This value is indicated in the 'constitutional' provisions of the Treaty (Art. 81, 82 et sequitur) and in the decisions of the ECJ. The way of instrumentalisation of the European competition law, trying to solve using it the other important Communities' priorities (in this case it is the development of 3G services) eliminates the distinction between the European competition law and the European (competition) policy.

4.1.3.1. Substitutability

The crucial question for present research is as follows: if the sports rights, which are broadcasted by TV platform, and that one which are broadcasted by 3G platform may/can/must be considered as substitutable? Under the preliminary results of Sector Inquiry, the most respondents do not consider these services as substitutable. In means that 3G services are used *in addition to* but not *instead of* the main platform of sports rights broadcasting via TV industry.

This difference on the demand side is justified by several arguments: (i) screen size; (ii) quality of images and sound; (iii)comfort of viewing and ability to watch in a group; (iv) mobility of viewing via 3G; (v) cost of usage; (vi) battery/power capacity and (vii) ability to personalise the viewing experience. At the present day any of these features of 3G service couldn't be considered as decisive individually, but accumulatively they appear to be persuasive enough to conclude that the scope of substitutability is (at least) very limited. Moreover, 3G services allow for a more targeted form of content delivery than traditional media delivery systems, making it possible to identify narrow consumer markets, because they are distributed on point-to-point (and not point-to-multipoint) level.

The present Sector Inquiry constitutes that mobile operators give less value to sports content than pay TV-operators, reflected by the difference in price level between sport rights for mobile and television transmission. For mobile operators do not consider access to premium sports content as the most important drivers of consumer demand. However, sports rights present for them compulsory element of branding and marketing. Is it sufficient element for pretending to access to sports rights on the more favourable conditions then TV companies? – Even taking into account the willingness of mobile operators to invest more in acquiring mobile sports rights than they could directly recuperate through subscription fees, the question remains relevant.

The answer, presented by the Commission in Sector Inquiry evokes future steps of discussion. On the one hand it recognize that '*the coverage of sports events, especially those sports events that are expected to accelerate consumer take-up, over mobile networks may be in a separate market to that of other content distributed over*

those networks', but immediately makes for this statement substantial reservation: '*However, considering that mobile sports content has only been introduced recently on the market, the European Commission will carefully assess the factual circumstances in each individual case situation to validate the findings of the Sector Inquiry*'.

Apparently, although the logical tool, used by the Commission, is basing on formula '*Yes, but*', what it can really mean is rather '*Yes and No*'. Taking into account that Commission is willing not to provide the general rule but rather to assess the future situation on case-by-case basis, the consequences of the Sector Inquiry represent sufficient empirical but relatively poor conceptual contribution into solving the fundamental tensions between different platform operators with sports rights.

4.1.3.2. Bottleneck problems

In the area of particular commercial practices which may distort competition on the sports rights market, the final document constitutes the willingness of the Commission to focus its attention on bottleneck problems, which restrict the availability of mobile sports content. As most critical in restricting the availability of mobile sports content the next practices was defined: (i) cross-platform bundling; (ii) overly restrictive conditions; (iii) joint selling; and (iv) – exclusive access to the content.

The first practice constitutes the crucial importance for present research. It is the cross-platform bundling issue which presents the very essence of the inter-platform conflict. Under the Commission, '*bundling of rights across platforms may represent a restriction which, due to the strong asymmetry of value between the TV rights and mobile rights, prevents operators that offer mobile services from purchasing meaningful rights*'. It basically means that Commission recognizes the imbalance in prices of the same sports content, depending on the platform. This paradigm appears to be perfectly correct in case of static situation. However, in the context of technological boom it is very likely that TV-sets would acquire some traits and options of mobile phones and vice versa, this prerequisite does not seem absolutely persuasive. The present situation appears to be even more weird bearing in mind the fact that 3G operators do not produce by themselves the signal directly

from the stadium, but are pretending to exploit the signal, produced by their potential rivals – TV companies.

All other argumentations of the Sector Inquiry are derivative. If we believe that one and the same product, broadcasted by different platforms, may constitute the separate market, then we can easily find many examples of buying the rights of TV companies, which subsequently, have not been exploited via 3G technology.

The European Commission considers that whereas bundling practises essentially result in output restrictions, such behaviours seem to be anti-competitive. A number of the arguments, which were represented by upstream owners of sports rights and TV operators in support of bundling, have fairly limited implications from the Commission's point of view. So, *'in order to maximize consumer choice and enhance the development of new innovative services the European Commission... favours an unbundled sale of rights to avoid the risk of output limitations'*.

The second important form of the anticompetitive practices is over restrictive conditioning the access to the sports rights. It may become apparent in the length of the event that can be transmitted (full broadcast or only highlights) and in the timing of the coverage (live or deferred). The Sector Inquiry indeed found evidence of serious restrictions on all 3G rights in terms of transmission length and timing.

In some cases the restrictions resulted from clauses included in broadcasting contracts, limiting third party access to 3G rights. Although content owners mentioned that they have limited the length of the coverage to highlights because of the technical restrictions faced by mobile networks or handsets, the real reason is basing exactly in the tension between TV companies and 3G operators. By applying this limitation the rights owners are trying to protect the value of sports rights.

The position of the Commission in this context is very clear and logical. It recognises hypothetically the possibility of restriction, but solely in cases when/if mobile rights do adversely affect the value of TV rights, but *'as there is little evidence of direct substitution between mobile sports services and TV sports services, the licensing of mobile rights may be expected to have only a limited effect on the value of TV rights'*. This position of Commission may implicitly means that in case of real substitutability of the platform, the normal competitive practice between rivals will be authorized by this authority.

The conclusion of this part of Sector Inquiry seems to be however, slightly ambivalent. On the one hand the Commission recognizes the probability of substantial improvement of a transmission technology, which allows 3G companies in the future easily broadcast the whole sports events (not only highlights), but on the other it does not presuppose the possibility of much substitutability between different platforms: *'As transmission technology may improve and as the substitution between 3G and TV content is limited, the European Commission... will carefully assess in future cases where restrictions may reduce the incentives of mobile operators to invest in innovative technologies to overcome technical barriers'.*

4.1.3.3. Joint selling

With regard to joint selling which constitutes the third anticompetitive practice it does not represent sufficient harm for the broadcasting industry, if anything. On the contrary, it is rather TV (and hence 3G) operators who are profited from joint selling, because this practices are generally facilitating acquisition of sports rights on the exclusive basis. Against of this practices are usually that companies which can not win the competition for sports rights acquisition, but joint seller (sports leagues) prefer not to separate the offer. They may portion or divide the rights in separate packages only after substantial intervention of the relevant competition authority.

The European Commission does not have categorical position to joint selling. It may tolerate them, since they can have pro-competitive effects under certain circumstances and does not necessarily lead to less mobile coverage being available to consumers. But joint selling should not lead to situations where mobile rights are not exploited. De facto the Commission accepts in the most circumstances the efficiency argument with regard to joint selling of sports rights.

The last but not least anticompetitive practice, which falls under the scrutiny of the Commission's Sector Inquiry, has form of exclusive access. Commercially exclusive rights constitute probably the unique possibility to keep TV companies interested in sports content. The very nature of TV industry presupposes exclusivity as fundamental feature of TV channels.

Under the Commission, *'anti-competitive effects could arise when exclusive access to premium content, provided that the content is a very strong driver of*

demand, contributes to 3G operators obtaining or protecting positions of market power'.

4.1.4. The European Commission's final findings

In the final stage the Commission issued Concluding report on the Sector Inquiry into the provision of sports content over third generation mobile networks. The premises and conclusions of that Paper are relatively differing from the first preliminary document – Issue Paper on the preliminary findings of the Sector Inquiry into New Media (3G). First of all, it is because of the elaboration of the Commission's attitude towards the whole matter, but also owing to the active position of the main players of the sports broadcasting market.

The main attention in this document was paid to the definition of relevant markets and competition practices. Markets definition is an instrument that enables the European Commission to make an accurate account of commercial power of the parties. The Sector Enquiry collected the different opinions of market participants about the competitive constraints between several eventually substitutive services: (i) sports services transmitted over mobile platforms and sport services transmitted over non-mobile platforms (TV platform); (ii) sports services offered over mobile platforms using 3G technologies (3G sports services) and sports services offering using alternative mobile technologies and (i) 3G sports services and 3G non-sports services.

Under the Final conclusions, the majority of TV operators do not find the threat of exclusivity as a result of the availability of new media rights significant enough. Hence, the Commission concludes that '*currently the different demand characteristics suggest that there is insufficient substitution between mobile sports services and TV sports services for these to be considered as part of a single relevant market. Indeed, TV and mobile services are consumed in a very different manner, for technical, as well as for social reasons*'.

With regard to mobile sports services offered through Internet technologies, Commission came to conclusion that these technologies may become viable on the market in the near future. This does not exclude that the competitive constraints between market players may change when new services are offered with similar

product characteristics in terms of price and usage, regardless of the underlying technology, platform or provider.

We believe, however, that the main emphasis should be put by Commission not on the technical aspects, but on the real substitutability of the offered services. Bearing in mind the future technological boom, it would be difficult even to follow apart from to regulate the situation on the sports rights operation.

Applying this logic sports rights would be separated on the as much packages as there are available platforms on the market. This situation may and would affect the very nature of the IP rights of the parties, pushing them to perpetual 'taking into account' the development of new technologies, rather then optimal exploitation of available rights. The Commission has, however slightly different approach: *'although market players are exploring new technologies, the commercialisation of other mobile content platforms is not foreseen in the near future and is still dependent on outcomes of pilot projects'.*

This part of research represents the analysis of the official position of the European Commission concerning the tensions between TV channels and mobile communication companies for obtaining and exploitation of the sports rights. In the end it must be noted that the sports broadcasting rights is an area with characteristics that may easily lead to competition concerns. It is because of the limiting scope of the main players on each level, but also because of the rapid technological development in this sector.

The position of the European Commission in the Sector Inquiry was explicitly 'creative'. Although the inquiry was coordinated by DG Competition it might have been seen as a tool of development the other European policies: '*In order to maximise consumer choice, encourage innovation and foster competition, the European Commission advocates a competition policy that assures that access to sports rights for distribution over mobile platforms is not unduly restricted through anti-competitive practices resulting in output limitations*'. There are no doubts about efficiency of this policy for consumers and 3G technology developments, but there some reasonable questions with regard of using the European competition law as a tool for improving some European policies. We are trying to articulate and answer them in the Second Chapter of this Paper.

4.2. Sports broadcasting rights in the Digital Epoch: the '*alternative* reality'

In this chapter we are analysing the official positions of the main players of the market of premium sports broadcasting – i.e. TV companies (and their associations), 3G companies (and their associations) and the initial sports rights holders (mostly, professional sports leagues and clubs). Since the European Commission was tending to accept the logic of argumentation, presenting by 3G companies, rather then logic of their opponents from TV industry, the position of former was reflected in the Sector Inquiry by the Commission and was presenting in the Chapter I of this Paper.

Consequently, for the sake of avoiding the substantial duplication, the present chapter will represent mostly 'alternative reality', which is backed and 'created' by TV companies. It does not mean, however, that we will leave without analysis the main argumentation of their platform rivals (3G companies), especially those parts of it, which do not find the theoretical support by the Commission during the Sector Inquiry.

This argumentation is derived from the great number of commentaries, written responses, submissions and preliminary findings, provided by the most major and middle-size actors of the sports rights market as the reaction to the European Commission issue Paper on the preliminary findings of the Sector Inquiry into New Media.

4.2.1. Definition of the legal borders

The substantial controversies between TV companies exist over decades. Most of them concern the issues of competition for content. In this context TV companies represent themselves as direct rivals. The similar tensions between them are coming to light during the battles for frequencies, advertisers, subscribers and in many other areas. It is quite difficult to find the field in which all (or at least most) of TV companies would back the consensual position.

The discussion about the mode of sports broadcasting rights distribution, however, appears to be exactly the case, when the most of TV companies are expressing their unconditional corporate solidarity.

The core of the conflict between the position, represented by TV companies on the one hand and that, supported by 3G operators on the other is basing on their appraisal, understanding and qualifying of the scope of sports broadcasting market, namely the moment of sports rights exhaustion.

Vast majority of 3G operators believe that sports rights should not be treated as an exclusive undividable unit, but rather multiply them in the way which allows 'obtaining already obtained' (i.e. sports rights, already sold to TV operators may be re-sold again to 3G operators under condition of non-exclusivity). On the contrary, TV companies are strongly persuaded that sports rights (e.g. certain football match) cannot be sold twice in the same time (to TV companies and 3G operators). Exactly here the dichotomy is constituted between two corporate positions: TV companies and 3G operators.

The quintessence of the inter-platform conflict for sports broadcasting rights is based on the border of three areas:

- IP law
- Competition law
- Innovation-oriented Communities policy

None of these three areas are represented in the current tension in its pure essence. Quite the opposite, they are permanently instrumentalized and interplayed by the main players of the sports content battles. Hence, solving these problems in political way is limited to finding the proportion between these three areas. Very often it may mean just to find the 'center of gravity' of the problem[238].

But the legal aspect of this conflict can not be exhausted solely by policy-making practices of the main subjects of the issue (including the major one – the

[238] Therefore, it is so important to define and to evaluate the initial intentions of the Commission, which impelled it to launch the Sector Inquiry. According to European Commission's Issue Paper on the preliminary findings of the Sector Inquiry into New Media (3G), May 2005, its main aim inter alia was 'to ensure that the development of the 3G sector is not hamper in the EEA, and in particular curb any anti-competitive behaviour of powerful established players in neighbouring markets', which may be interpreted as performing innovation-oriented Communities policy, applying the rules of European competition law.

European Commission). Legal logic is not always 'logical' from the policy-makers point of view. For this reason it is the issue of fundamental importance to define correctly the paradigm of correlations between IP law, competition law and innovation-oriented policy. Furthermore, the achieving by the Commission the general Communities aims (*mutatis mutandis* – innovation prosperity) using as the European competition law a tool, is substantially contradicting to judicial practice of the European Court of Justice. However, the position of ECJ with regard to 'exclusivity as immanent IP-object feature' is not so unambiguous[239].

4.2.2. The main argumentation of TV companies

After the pronouncing of the European Commission's Issue Paper on the preliminary findings of the Sector Inquiry into New Media (3G), the substantial amount of responses has been received from the main actors in the sector. As regards TV operators, their main cumulative position may be presented as follows[240]: '*Our Company welcomes the opportunity to respond to the European Commission's Issue Paper. We share the key objectives which prompted the Commission to launch the sector inquiry, namely to ensure that 3G services succeed and that the market for content is open and competitive. However...*'

Afterwards each TV-company represented its own contra-argumentations, using the different logic of justification of their positions, but founding it generally on the following points:

1) Relevant market issues:

- convergence of platforms will lead in the predictable future to the substantial elimination of the technical differences between the path of providing the

[239] As example of alternative (and widely dominant) approach to the role of the antitrust policy (and law) see e.g. position of Makan Delrahim's article 'Maintaining flexibility in Antitrust Analysis: Meeting the Challenge of Innovation in the Media and Entertainment Industry' (Columbia Journal of Law and Arts, Spring, 2005): 'Challenging questions inevitably arise concerning the proper application of competition law and policy to technological advances. What role should antitrust play in ensuring that new technologies flourish? Could overzealous enforcement inhibit new technological growth, and how do we strike the proper balance? Over the past two decades, antitrust policy makers have learned that a flexible, market-reality based approach to enforcement is far superior to stark rules that may unnecessarily prohibit procompetitive activity.'

[240] E.g. BBC response to the Commission's Issues Paper 'On the preliminary findings of the sector inquiry into New Media (3G)'
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/bbc.pdf

signal ('*how-transmit*'-system) and, subsequently, will focus the competition between actors of the sports rights delivering market on the issues of content ('*what-transmit*'-system);

- slight inter-platform difference – it is not substantial difference;
- selling of sports rights without establishing the special packages for 3G operators is not bundling;

2) Technological aspects issues:

- access to 3G platform via Internet may lead to consuming the sports content over big screen devices;
- TV companies will pretend to operate on the market of mobile communications themselves in the predictable future;
- diversity of platforms in the digital epoch consequentially leads to the absence of necessity to concentrate the efforts of the Commission exclusively on the promotion of 3G technology;
- sports content does not comprise for 3G operators the driving force for investments in the area of innovations;

3) Regulatory issues:

- the Commission should avoid risk of over-regulation of emerging markets;
- sports content does not constitute *news*, hence, no rules of Directive 'TV without frontiers' should apply to it;

4) Issues of essentiality:

- telecom operators have enough financial power to compete with TV companies for acquisition of sports rights;
- 3G operators are not willing to produce their own signal, but merely to exploit the signal, creating by TV companies. Hence, they may justify their rights only basing on the essential facility doctrine;

- access to the sports rights for 3G operators should not be considered as 'must have' or essential facility;

4.2.2.1. Relevant market

4.2.2.1.1. Convergence of platforms

The argument of the TV companies about convergence of the platforms, by means of which the digital signals are transmitted, appears to be the quintessential point of the whole battle for sports rights between TV companies and 3G operators. If they will manage to demonstrate the substantial removal of importance from the issues, related to technology solution (which are the central elements of the '*how-transmit*'-system) and redirection of competition to the issues of content (which is the main element of '*what-transmit*'-system), they will have more chances to succeed[241] in the present theoretical conflict between TV- and 3G operators.

The essence of competition between content-delivery companies shifted from (previously) striving to be presented at the market physically (which automatically meant 'being consumed' by the viewers, who operated with a very limited supply of channels) to (the present-day) where they are 'being picked out' by consumers[242]. The content-delivery companies' commercial success (for many, even survival) decisively depends on their place in the 'fixture list' of consumers preferences. The crucial factor for pushing them into the top places in these races is sports content.

Taking into consideration the positive influence of digitalisation in the sphere of content production, it should not be disregarded that the multiplicity of possibilities does not always lead to the diversity of relevant choices[243]. Since the production of content is much more time-consuming task than the artless laying of 'wires' (or wireless connection), the influence of digitalisation has led to the chaotic

[241] (From the theoretical point of view, at least).

[242] This tendency was neatly called by Darren McAuley as 'the battle for the football remote control'. – See McAuley, Darren, 'Exclusivity for All and Collectivity for None: Refereeing Broadcasting Rights between the Premiere League, European Commission and BSkyB' ECLR, 2/2004.

[243] This context has in mind solely commercial broadcasting (and respectively entertainment content) and does not regard the public elements of it. However, the second one has cultural and fundamental rights characteristics and could not be examined with regards to 'commercial successfulness'.

accumulation of poor-quality programs rather than to increasing those offers of adequate quality.

With such a lack of high-grade content, the competition between fast-growing content-delivery companies became increasingly tough. The only two products which still attracted high attention of coddled European audiences are premieres of Hollywood movies and broadcasting of top sports events.

Unlike most other businesses it is impossible to apply the classical economic formula *quality defines a price* to content-delivery industries. In this case the most appropriate definition would be *winner gets all*. Viewers are not intended to consume low-quality sport matches, even for a substantially lower price. Hence, the reducing prices for premium sports content, offered to 3G operators by initial rights holders (sports leagues) and, moreover by secondary rights holders (TV companies) would be present sort of 'cannibalization' of both. Therefore, for the time being sports broadcasting rights are typically offered for all content-delivery platforms neutrally, exactly in order to avoid such 'cannibalization'.

In this context the future situation can be presupposed when near-live highlights of premium sports events would be broadcasts by 3G operators via *almost-TV* devices and this practice will lead to substantial reduce of value for the whole sports event, broadcasted on, e.g. pay-TV basis.

It should be mentioned, however, that nowadays[244] 3G services are provided on a *one-to-one* principle, which still may be considered as distinguished from *classical* broadcasting path (*one-to-many* principle). On the other side, such broadcasting services as pay-per-view as well as pay-TV (both of them are basically provided on *one-to-one* principle) are considerably diminishing this criteria for separation mobile services from 'classical' broadcasting.

[244] But situation seems to be changed in the future.

4.2.2.1.2. Slight inter-platform difference – is not a difference

Even accepting the most drastic argumentation of TV companies about future convergence of the content-delivery platforms, it remains to be quite obvious that each and every path for signal's transmission will always hold its own distinctive features.

The thesis of platforms convergence is not based on the presumption of their complete identicalness. It is the case from many perspectives: signal quality; mobility; fastness; size; convenience; accessibility; costs etc.

The essential difference between services is not the equipment but the method of access – free-to-air or pay-TV[245].

The crucial question for competition law is to what extend can very similar products constitute the same relevant market, if they are continuing to contain some of their specific features[246]. The answer is given by applying the method of substitutability. In our case for the purpose of receiving broadcast services, cell-phones do not differ from other devices substantially more than other content-delivery tools for TV services differ from one another[247].

Actually, all delivery platforms (even inside exclusively TV industry) would constitute some specific distinctions, and there are no substantial reasons to prioritise 3G operators over their TV vis-à-vis. The mere statement that mobile technology differs from the TV broadcasting does not constitute inevitably sufficient precondition for pleading the existence of two separate markets on their own rights. Basically, platforms convergence is not more then recognizing the substantial overlapping between them but not the complete elimination of their ontological essence.

[245] BBC considers that even this distinction is now increasingly vague.

[246] The formula of this evaluation is as follows: 'Is Coca-Cola in the plastic bottle can be considered as different product than Coca-Cola in the glass bottle?'

[247] E.g., 'The BBC offers its digital television services over all three existing broadcast platforms in the UK – terrestrial, satellite and cable. The audiovisual content is the same. However, the different platforms offer different picture and audio quality and different performance potential for interactivity. This causes the final experience of viewers of the same programme over different platforms to differ... Different platforms also have different capacities in terms of number of channels and services. Arguably, the difference in available choice of services between, for example, digital terrestrial TV and digital satellite TV makes a considerable difference to the way television is experienced in terrestrial and satellite households'. (Ibid., [BBC])

It would be appropriate to mention here the statement of the European Broadcasting Union with regard to platform substitutability: 'The Issues Paper does not, however, define what it means by "television" and "3G content". Does "3G content" also include mobile television or on-demand television offered by television operators? From the broadcasters' point of view broadcasting needs to be regarded from a platform-neutral perspective, covering all possible transmission platforms. This approach is confirmed by the recent debate on extending the scope of the Television without Frontiers Directive'[248].

'The alternative position, which not completely overlaps with the official approach of the Commission, should be mentioned as well. According to Grimaldi & Associati[249], 'The new mobile generation is the last step of a continuous evolution process of the telecommunications sector. This evolution is due to broadband technologies which increase the possibility to carry different contents on different platforms, thanks to the digitalisation process of the information. This new mobile generation is very attractive as it is easier for users to access a big variety of contents. Competition between different existing platforms is thus increased'.

It is important to emphasize in this context that pay-TV is recognized by the Commission as separate from free-TV market with regard to premium content. However, the platform neutrality in that issue has been analysed relatively slightly, since pay-TV constitutes separate market independently on the path of delivering the signal. All means of broadcasting would be acceptable here – terrestrial, satellite and cable. Moreover, there is no dependence on the encrypting of the signal: both, analogous and digital pay-TV broadcasting represent the same market.

[248] EBU Comments on the Issue Paper on the Preliminary Findings of the Sector Inquiry into New Media (3G) http://www.ebu.ch/CMSimages/en/leg_pp_newmedia_3G_010705_tcm6-39181.pdf

[249] Grimaldi e Associati . Comments of Gromaldi e Associati on the the Preliminary Findings of the Sector Inquiry into New Media (3G) http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/grimaldi.pdf

4.2.2.1.3. If the selling of sports rights without establishing the special packages may be considered as bundling?

The response to this question is derivative from the solving the most important dilemma, namely, if 3G broadcasting may constitute the separate product market. Naturally, most TV companies emphasizing on the essential neutrality of the system of sports rights packaging with regard to platform.

Some of them do not believe that offering cross-platform bundled rights is *per se* restrictive for competition. For instance, no competition concerns should arise if the purchaser of the bundled right has, itself, exploited the 3G rights or if it sublicenses the 3G rights to another service provider for exploitation[250].

For initial holders of sports rights there is not important *how* these rights will be broadcasted. However, the motivation of primary sports rights' owners should not been considered as final criterion for evaluation.

It should be mentioned as well that for many companies the holding of premium sports rights is not a question of direct commercial success but rather the matter of prestige and branding. Under International Olympic Committee, '...brand images can only arise from differentiation and hence exclusivity, because it permits the creation of a product that stands out from the offerings of competitors... [T]he IOC questions whether the purpose of EC competition law is to provide companies with access to branding and marketing opportunities, as the Paper suggests. Even to the extent that branding opportunities might be considered to assist in driving demand, it is hard to see how any such opportunity could ever be said to be indispensable for competition within the meaning of the Community Courts' case-law.'[251] In this context the necessity in the existing the separate package for 3G operators appears to be doubtful.

Speaking of bundling the fundamental principles of intellectual property law should be kept in mind. Valuable contribution on this aspect of discussion has been done by European Broadcasting Union: 'The bundling of rights requires there to be different rights which can be bundled. However, copyright law draws no distinction

[250] ' Formula_One_Administration Comments by Formula One Administration Limited to the Commission's Issue Paper http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/foa.pdf

[251] Ibid, [IOC Reports]

between broadcasting over different transmission platforms. It recognizes the broadcast right as covering all transmission platforms... It is a characteristic of the "broadcast right" product that it covers all broadcast platforms. It is, furthermore, a characteristic of the market that rights are traded exclusively for all broadcast platforms. Limiting exclusivity to one broadcast platform would mean artificially amputating copyright and would interfere with the Member States' competence to define the scope of the right to communicate to the public and the contractual freedom of the rightholders'.[252]

In this context it should be stressed that the *orthodox* TV-companies approach, which presupposes existing no additional rights depending on the platform (all rights should be sold in its *unity* and not *multiplicity*), basically means that no special 3G/New Media rights should be offered by initial sports rights seller. Despite of its explicit rigidity, it fully justifies the logic of platform neutrality (selling content independently on the platform). However, since 3G/New Media rights are offered by the initial rights holder (who is free to offer its rights in the most relevant to his view proportions and modifications) it would be quite another matter. If it is the case, buying 3G rights by TV companies without no active exploitation of them may (and, probably, *must*) be considered as an abuse of dominant position (refusal to deal – under European competition law) or/and as unfair competition practice (under national civil law).

The situation with compulsory offering of 3G packages by initial sports rights holders is comparable with the practice of blocking the transmission signal of sports event in the city of its performance. Sports leagues are performing such practice for the sake of gaining the interest in the consumers to attend the stadiums, instead of merely watching match over the TV. One could argue about commercial reasons of such actions, but from the legal point of view it would be difficult to find out some anticompetitive behaviour of rights holders.

The question is if sports leagues are *obliged* to sell their sports rights can be scrutinized solely from the standpoint of the essential facility doctrine. If the response would be negative, the same *mutatis mutandis* must be applied with regard

[252] Ibid, [EBU]

to 3G rights: it is up to rights holder to decide on its portioning into separate packages[253].

4.2.2.2. Technological aspects

4.2.2.2.1. Access to 3G platform via Internet

Technological characteristics of 3G platform allow the consumers to receive the signal via Internet. Hence, the signal may be transformed back to TV-size screen. This feature of 3G proves the statement of the partial overlapping of 3G platform with the market of TV broadcasters. If it is the case, the main argumentation of 3G companies (and the Commission's itself) about existing of two separate product markets (TV and 3G) becomes doubtful.

Furthermore, this ability of 3G technology clearly demonstrate the marginalisation of the '*how-transmit*'-system and, vice versa, shows the raise of importance of '*what-transmit*'-media system. At the present time the possibility to use 3G platform for watching the entirely football match appears to be awkward at least, but technically it is already possible, e.g. to redirect received via 3G signal into TV-set.

Hence, the possibility of straight competition between TV companies and 3G operators already exists, because some consumers may prioritize using sufficiently lower prices for 3G broadcasting to subscribing on pay-TV channels and to watch interested sports content using TV-out option.

It should be acknowledged that this example demonstrates only small and minor amount of direct overlapping of sports right downstream markets, but applying to this case dominant in Europe competition practice 'efficiency approach' (and, consequently, method of cumulative constellation the insufficient *per se* evidences) it will still remain actual.

[253] The main argument about development of innovation may be took into consideration solely as the political appellation with no legal consequences, because (making caricature) one day somebody may decide that innovation of 3G technologies would be developing substantially faster if 3G operators will continue broadcasting sports match after its ending (e.g. discussion in the dressing room and so on).

4.2.2.2.2. TV companies as potential mobile communication's operators

The interoperability of platforms will impel also the TV companies to offer multimedia services to their consumers. It means that TV companies will pretend in the predictable future to operate on the market of mobile communications themselves. Hence, the benefits, received by 3G operators *presently* may have the negative impact on the competition on the market of delivery content to portable handsets *in future*[254].

In the predictable future the access via a handset to broadcast signals will not considerably differ from that of receiving personalised audio and visual services[255]. Hence, TV companies as the major content holders will initiate the offering their large amount of content through multimedia mobile communication technologies. This would virtually lead to direct competition within 3G operators, and subsequently it may be considered as the substantial argument of unwilling TV companies to open access to the content to their potential rivals from mobile communication industry[256].

Although this argumentation must be seen as irrelevant from the rule-oriented approach to competition law ('competition law *sensu stricto*'), it is not a case in the present-day dominated in Europe efficiency-oriented, instrumentalized approach to competition law ('competition law *sensu largo*', 'competition policy' or – one can say – '*pseudo*-competition law').

4.2.2.2.3. Diversity of alternative to TV platforms

The digital revolution is multiplying the possibilities for the creation, transmission and operation of information. This influence is visible in the myriad spheres of social relations. The most drastic changes, however, where caused in the media and communication sectors.

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[254] If one would check how the top Hollywood blockbusters of 1980s had been predicting the next 100-years future it will appears laughable: huge boxes with multicolour lamps-indicators as super-high-tech computers. It is the same with regard to interoperability and coherence of content-delivery platforms, which we could neither fully predict, nor even imagine.

[255] According to BBC report, there are several examples of this occurrence already. In the UK, Virgin is trailing a mobile handset with a DAB chip; the DAB signal will include both video and audio channels. In Finland 3G phones are already DVB-H compatible. In France whole TV channels are being simulcast to mobile devices.

[256] E.g. Eurosport Preliminary Findings of the New Media (3 G) Sector Inquiry. http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/eurosport.pdf

The rapid development of innovations impels substantial quantitative growth of platforms as technological solutions for transmission of audio and video signals.

The parallel evolution of alternative visual media – such as the Internet and 3G along with the improvement of effective technical instruments of broadcasting by satellite and cable networks marginalized the previous importance of the ways, by which the information is been spread. Therefore many TV companies consider prioritizing by the European Commission solely 3G platform as inappropriate and generally wrong.

Some TV companies '*see the possibility for consumers to access media on mobile devices as an opportunity which extends beyond 3G technology narrowly defined*'[257] Such technology is only one of many possible solutions for delivering sports content to handheld portable devices users[258].

Hence, even accepting the general logic of the Commission, which is intending to stimulate the innovation-oriented model of European economy, it not clear why the priority must be given solely to one of the variety (basically competing and to some extent self-substitutable) technologies (i.e. 3G).

For more precise analysis some TV companies were even proposing to the European Commission to include producers of equipment among the subjects of the survey during respective Sector Inquiry.

However, substantially different position with regard to 3G technology has been presented by Grimaldi & Associati[259]: '3G is a collective term for the new communication procedures, standards and devices that will improve the speed and quality of services available on the move. 3G takes the form of handsets that can combine the functionality of a mobile phone with that of a personal computer and a personal organiser/PDA. 3G devices generally have greater transmission abilities, both in terms of speed and capacity, than their predecessors'. But even accepting the broader definition of 3G technology, it is generally recognized that there are many other 'family-technologies', which are not covered by 3G definition but still may represent real or hypothetical content-delivering platform.

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[257] Ibid., [BBC]

[258] E.g., according to BBC report, it might be also Digital Video Broadcasting-Handheld (DVB-H), Digital Multimedia Broadcasting (DMB), Digital Audio Broadcasting (DAB) as well as the Integrated Services Digital Broadcasting (ISDB) system which is being developed in Japan.

[259] Ibid, [Grimaldi e Associati].

4.2.2.2.4. Sports rights do not constitute essential driving force for innovation investments by 3G operators

The main plausible reason of regulative initiatives of the Commission with regard to sports rights market can be explained as the willingness of European Commission to develop the Communities based on the principles and priorities of knowledge-based economy and Lisbon Strategy.

However for such *per se* political (not legal) regulatory practice the Commission must operate with convincing amount of factual proves that these interventional measures will be, at least, efficient and proportional. The present situation on the market of sports rights broadcasting shows that for 3G operators' premium sports content constitutes neither unique nor indispensable element of the future development of their 3G services.

There are many other niches of entertainment, which are substantially more appropriate for 3G operators' market growth and innovational investments[260]. It can be proved *inter alia* by inability of 3G operators to charge higher rates for sports content. If it is the case, it would be difficult to justify prioritizing of 3G operators over other content-delivery companies even from the point of view of innovational development of the EC.

Some subjects of the Sector Inquiry are going further, declaring that even if the Commission would treat the sports rights as an important factor of 3G technology development, not every sport event will constitute the separate market. Furthermore, they even insist that it still will be impossible to consider the whole sports content as the separate market.

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[260] E.g., according to FOA report, 'Many types of content and services can be expected to contribute to the rapid take-up of 3G technology and services. Information services, multimedia messaging services (MMS), email, Internet access, shopping, games, betting, banking/finance as well as video/TV services are all important 3G applications. Indeed, according to certain press reports and industry reports, sport does not feature as one of the main types of content that consumer's desire from 3G mobile. Ibid, [FOA].

Furthermore, according to the Nokia White Paper (Available at http://www.nokia.com/downloads/solutions/mobile_software/mobileterminals_net.pdf#search='nokia%20white%20paper%20mobile%20terminal%20software') to the top 3G services would belong: sending SMS messages; local traffic and weather information, use as a camera; getting latest news headlines; sending photos to friends; use as a video camera; getting info for movies; listening to radio; requesting specific songs.

Such approach of initial sports rights holders is consistent to their position in the 'parallel' debates in the context of TV industry: if every indispensable sporting event must constitute its own separate market. Sports leagues and some other initial sports rights holders are permanently intending to convince competition authorities that the definition of the relevant market for sports broadcasting must be as wide as possible. They insist on the existing the strong substitutability between different sports rights, and between sports rights and other entertainment rights.

4.2.2.3. Regulatory issues

4.2.2.3.1. Avoiding of over-regulation by the Commission

The enthusiasm, with which the DG COMP of the European Commission launched the Sector Inquiry, may[261] indicate the willingness of the Communities regulatory authority to overstep the existing mission of the European competition law, using it as an instrument to develop other Communities policies. Whilst the mere Sector Inquiry has rather consultative then purely legal consequences[262], it is implicitly demonstrating the general approach of the Commission towards protection and development of new technologies (even harming by doing so the operators of existing technologies).

This policy may be considered as destructive especially in the context of the great deal of unpredictability of the new platforms' development. The following passage demonstrates the main concerns of TV companies: 'Whilst we welcome the debate, we would caution against drawing conclusions about future market developments based on data available today. As the Commission recognises in several points of the 'Preliminary Findings', such data is by necessity limited and patchy and the history of media development has shown the difficulty in predicting what will ultimately drive take up. The Commission should remain focused on the enforcement of Competition Law to potential anti-competitive activities for which there is clear evidence, and avoid the perils of over-regulating an emerging market'[263]

[261] But, certainly, not 'must'.
[262] Its primary aim is to present, to demonstrate and to evaluate the reality, but not to apply the law directly (although it might become as chronological consequences in practice).
[263] Ibid., [BBC]

If to consider the application of the Commission regulatory power from the point of view of efficiency, some private broadcasters should receive the same possibility to compete for the premium sports content which possesses the cartel of public broadcasters – e.g. European Broadcasting Union.[264] Furthermore, Court of First Instance already expressed its doctrinal support for the present issue.

4.2.2.3.2. Sports content does not constitute *news*

It is essential to draw a clear distinction between sports rights as commercial product and sports highlights as general public information.

UEFA report[265] shows the example for possible regulatory intervention of the Commission. Namely, UEFA complaining about the practices of broad interpretation of Directive 'TV Without Frontiers', according to which every *channel* has the rights to broadcast short highlights of the premium sports events. Hence, some 3G operators were demanding UEFA to provide them with the relevant reels of highlights and then offered this sports content to their customers under 'pay-services' basis.

The opinion, which is directly opposite to the UEFA position, has been presented by Reuters[266]. According to its official response, 'sports is news as well as premium entertainment. The sports pages of newspapers are ample evidence of this. In the broadcasting context, where minute-by-minute premium entertainment rights to a major sports event may be sold exclusively to a single broadcaster, other non-rights holding broadcasters are generally able to include highlights of the same event in their general news bulletins. A general news service without access to sports news content would not be comprehensive, just as a general news service without access to political, economic or other types of news content would also not be comprehensive'.

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[264] This point was stressed by VPRT, Association of Private Broadcasters and Telecommunication in Germany Comments on the European Commission's Issues Paper on the Sector Inquiry into New Media (3G) and Sports Rights.
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/vprt.pdf

[265] UEFA. 3G Sector Inquiry.
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/uefa.pdf

[266] Reuters. Sports Content over Third Generation Mobile Communications Network: Response by Reuters.
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/reuters.pdf

The approach to qualification the premium sports content as news is dominative over all main news providers and informational agencies. Their main paradigm of argumentation is based on 'fundamental right to information' that no content's owner may abuse.

The right to information, especially with regard to short sports highlights appears to be more persuasive than willing to put all this matter in the frame of European competition law. But if it would be a case, then selling of sports rights for 3G platform with reduced prices should be limited exclusively on short highlights, offered to customers as news. It will still remain unsolved the question if such highlights might be transmitted in the 'live' or 'near to live' format, because the latter, actually, is substantially more than 'just news'.

4.2.2.4. Essentiality

4.2.2.4.1. The financial power of telecom operators

One of the main arguments for state (Commission) intervention into the market-regulated economy is the lack of capacity of the present company, region or industry to compete effectively. In these situations certain level of public financial (or regulatory) support exceptionally may be allowed.

However, in the context of investments, which major telecom companies permanently performing in the many areas of telecommunication industry it is quite obvious that 3G operators are very far from poverty. There are no relevant doubts about the financial capability of telecom operators to compete for sports rights with TV companies on the equal basis.

Furthermore, telecom operators hold very strong market position in the areas of their direct businesses – telecommunication industry. According to Mediaset, 'entry today in such market is almost impossible unless further spectrum can be made available to new entrants. Even if more spectrums can be offered to the market, the fact remains that building and deploying a mobile network requires huge network investments and extensive marketing efforts... It is not therefore a coincidence that a number of National Regulatory Authorities have already decided to intervene in

order to restore competition at the retail consumer market'.[267] So, the insisting of some telecom operators on open access to the sports rights may be considered as lack of consistency[268].

Some parties of Sector Inquiry emphasize that 3G technology is growing nowadays because of substantial subsidies from telecom operators, which basically sell services with loss. Hence, offering to them sports rights for considerably lower prices would lead to indirect dumping of the whole content-delivering industry.

4.2.2.4.2. Who should produce the signal for 3G operators?

Assuming that sports broadcasting constitute two different markets with regard to TV companies and 3G operators, it would be logical to consider that performance of these separate rights should also be made independently by each company.

However it is difficult to imagine the situation when 3G operator would invest substantial efforts to produce the signal from the football match. Fast-growing technology of creation the visual stream from the stadium has its long history of development, and this history is exclusively connected with TV industry.

Furthermore, it would be economically inadequate to invest big financial and technical forces for virtual duplication of the signal, already made by TV companies. So, in the context of the Sector Inquiry as well as in the context of the whole history of sports content transmission via 3G, telecom operators pretend to use a signal, created by their 'non-rivals' – TV companies.

For the sake of consistency we should presuppose the situation when sports rights, already obtained by telecom operators would clash with unwillingness of some TV-company, which is also holder of the same sports rights, to share the signal, created by them.

If such position of TV-company would breach some elements of European competition law? It is difficult to imagine the other situation of potential harm for competition than application of essential facility doctrine. If it is the case, the video

[267] Mediaset. Written Submission on Commission Consultation: Preliminary Findings of the Sector Inquiry Into 3G Sports Rights.
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/mediaset.pdf
[268] It, however, has no direct relation to the logic of competition law's argumentation.

signal will present some facility, which no other company may produce by itself with the relevant conditions of efficiency[269].

It is the aim of the next section of the Paper to perform the analysis of appropriateness of application the essential facility doctrine in the case of compulsory sharing the video signal. Here we are limiting these considerations for statement that no other legal instruments exist to push TV operators for compulsory access to their signal by 3G operators.

In this section we should just stress that acknowledgement of compulsory sharing of signal may lead at least to two obvious losses for TV-companies.

The first one is in devaluation of the price and interest of the whole TV-channel if it was planning to sell their full-length service via 3G platform[270]. It would occur if 3G operator will have direct access to the premium sports content, it may lose the interest in buying of the whole channel[271].

The second case is in preparation of TV-company to offer 3G services by itself. In this case it will lose temporal advantages for gaining the customers and access for new market before its vis-à-vis from already existing 3G operators. In both situations, however, some elements of indirect bundling clearly are presented. This may serve as contra-arguments for 3G operators. However, then theoretical question arises it is possible to demonstrate the existence of bundling practice, if we are dealing not with the cases of supply, but exactly opposite: refusal to supply (*bundlingly*)?

[269] E.g. there is neither reason nor possibility to build 'alternative' railroad or install 'alternative' telephone cable networks.

[270] Eurosport Preliminary Findings of the New Media (3 G) Sector Inquiry. http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/new_media/3g/eurosport.pdf

[271] Because in several countries, television broadcasts are simulcast via mobile telephony.

4.2.2.4.3. Essential facility issues

Albeit TV companies would convince the Commission (or ECJ) in all their argumentation, 3G operators will still have the 'secret power', which may eliminate all previous argumentation. This weapon's name is *essential facility doctrine*.

To avoid hypothetical demand of 3G operators to apply the essential facility doctrine in the issues of sports broadcasting rights management, some TV companies elaborated and presented to Commission their alternative argumentation. Actually it is basing on the market examinations which show that sports broadcasting rights do not constitute for 3G operators crucial and indispensable element for existence, however, still remain very important driving force for future development.

The idea of essential facility, as well as the whole system of competition regulation, ontologically belongs to the economy rather then legal theory. Indeed, a purely legal mind in all probability will have problems understanding the justification for most of the institutions of competition law, especially dealing with Article 82 of the Treaty establishing the European Community (hereafter the Treaty)[272].

Semantically, the term essential facility would be used solely for tangible infrastructure-related issues (e.g. refusing to grant the access to ports, bridges, local loops etc. – i.e. essential facilities *sensu stricto*). But the existing academic tradition also recognizes the wider application of the essential facilities definition, spreading the essential facility doctrine to IP-related issues as well. Hence it might (and really did) appear in the argumentation of some 3G operators, in particularly in the context of establishing new companies, whose specialization would be limited solely on sports broadcasting[273].

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[272] The very nature of clauses related to the behavior of competitors in the market might conflict with the freedom of contracts, and obliges companies not to deal in certain ways (Art. 81 of the Treaty) and furthermore to deal only in definite way (Art. 82 of the Treaty).

There are a great number of ambiguous clauses from a classic civil- or common- law point of view, which are represented in the European Competition rules. However, the apotheosis is the requirement of compulsory cooperation with a competitor in the case that a company operates unique and non-reproducible infrastructure (essential facility).

[273] More detailed analysis is done in the section dealing with argumentation of 3G operators.

Neither in the Treaty nor in the secondary legislation is the term essential facility mentioned explicitly. The broad interpretation of paragraph 1, Art 82 of the Treaty, however presupposes and justifies this: 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.'

Although the substantial part of this doctrine was invented in the U.S., nowadays the most fruitful soil for it is found in the EU[274]. The European doctrine of essential facility was elaborated both by the European Commission and European Courts (ECJ and CFI). Initially this concept was applied to the essential facilities *sensu stricto,* but in due course of time it was extrapolated to the cases related to intellectual property rights.[275]

An IP-object, by its nature, has its own *potential* separate market, protected by IP law. Therefore, theoretically, every object of IP rights could constitute the essential facility. Hence, the very nature of the fundamental right of property would appear to be under the threat.

Not surprising is the existential battle[276] between the 'constitutional' right of property and the rather 'operational' principle of protection of competition, was won be the former. Legally it was expressed by the ECJ in its Judgment on Magill[277] and then founded in Bronner[278] by means of formulating '... an obligation to contract, to which an undertaking holding a dominant position would be subject, can be based on Article 86[279] of the Treaty only in exceptional circumstances... [which]... exist only if the dominant undertaking's refusal to supply is likely to eliminate all competition in a downstream market .'.

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[274] Probably, after the resonant Judgment of the U.S. Supreme Courts in the Trinko Case in 2005 the concept of 'Essential Facilities' in the U.S. will start (continue?) to be marginalized (See e.g. Geradin, Damien, Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Courts Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telecom CMLRev, 1, 2005).

[275] 'Revolution' starts with Magill TV Guide Case [1989] OJ L 78/43 .

[276] The background of which is based already in landmark Consten and Grundig v. Commission Case 56 and 58/64 [1966] ECR 299 .

[277] Magill TV Guide Case [1989] OJ L 78/43.

[278] Bronner v Mediaprint Case C-7/97 [1998] ECR I, paragraphs 26, 27 .

[279] Art 82 of the revised Treaty .

There are more than reasonable doubts to consider that demand of 3G operators in sports broadcasting rights may constitutes this '*exceptional circumstances*'.

With time, the criteria of essential facilities doctrine enforcement in IP-related issues were substantially developed by judgments of the European courts as Opinions of Advocates General and Decisions of the European Commission in the *Ladbroke*[280] , *IMS*[281] and *Microsoft*[282] cases.

Generalizing, the present-day European concept of essential facility can be presented as follows:

As essential in IP-related cases would be considered the facility, which is (1) owned by the undertaking, dominating on that proper or neighbouring (Tetra Pak[283] Case) market; (2) constitutes an indispensable source for the real or potential (Magill) competitor's main activity on the separate downstream (in relation to this facility) market.

The access to this Facility should have no reasonable alternatives (Magill, Bronner). The owner of such Facility should not at all (ECJ–IMS[284]) or fully (A.G. Tizzano–IMS[285]) exploit that downstream market himself inasmuch as it should leads to lack of possibility to carry out the new (ECJ–IMS) or relatively new (A.G. Tizzano–IMS) products for which there is potential consumer demand. The abuse of the dominance on the market would be constituted in refusing to deal without objective justification (Telemarketing[286] Case). Such objective justification presumed to owners of IP rights ipso facto apart from the exceptional circumstances (Magill and Ladbroke). The burden of proving this circumstances lies on the plaintiff or other interested party.

Comparing these criteria with the level of indispensability of sports broadcasting rights for 3G operators one can state with sufficient part on plausibility that the present situation does not constitute the case of essential facility.

[280] Tierce Ladbroke v Commission, Case T-504/93 [1997] ECR II 923.
[281] IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, Case C-418/01 .
[282] Microsoft Case COMP/C-3/37.792 .
[283] TetraPak v. Commission , Case C-333/94 ECR [1996] .
[284] Ibid.
[285] Ibid.
[286] Centre Belge d'Etude de Marche-Telemarketing v. CLT, Case 311/84 [1986] 2 CMLR 588 .

Hence, the Sector Inquiry into the provision of sports content over third generation mobile networks *Published in accordance with Article 17(1) of Regulation 1/2003* represent the first significant step in the area of the crucial existential conflict between traditional and new technological content-delivering platforms.

We are of the view that 3G (as well as many other technologies) will play the leading role in the future content-delivering. On the initial stage of the evolution of this highly innovative industry some regulatory interference of the official European authorities might be considered as tolerable. We hesitate, however, if particularly European competition law would be the most appropriate instrument for the development of 3G services[287]?

According to our beliefs, nowadays the misleading understanding of the essence of the competition law, its aims and instruments of application are drastically dominated. Worldwide enthusiasm towards economy/efficiency-based approach reflects the essence of prominent tale of Hans-Christian Anderssen 'Story of Necked King': permanent referring on the efficiency at the end of the day may eliminate the competition law *as a law* and transform it into *competition policy.*

This underestimation of legal nature of competition law (as well as its subsequent coherence with other fields of law – e.g. IP law) has its roots in the homonymic wording, but essentially different meaning of two categories *'competition'(within internal market) vs. 'competitiveness' (within international market).* Such new European 'icons' as Lisbon Strategy, as well as the general aspiration of innovation development are issues of *competitiveness* of European economy, but there are no direct links between this general European aims and the European competition law, which should remain neutral to the political agenda.

[287] The positions of leading European scholars, who are support opposite, efficiency-based, approach to the question of sports rights regulation via competition law implicitly show the same logic of argumentation, but remarkably reverse conclusions (e.g. Damien Geradin, in his article 'Access to Content by New Media Platforms: A Review of the Competition Law Problems', European Law Review, 1, 2005, stressed that: '... from a public policy standpoint, exclusive rights for premium content can hardly find any justification. The pervasiveness of such rights has transformed the competition paradigm in the media industry into a regime of competition "for" the market. Competition "for" the market is a model that can be recommended in markets holding natural monopoly features, such as water systems, but clearly should have no place in markets where competition "in" the market is possible...'

It should be stressed that under primary European law, the European Commission adopts its decisions as undivided collective authority. For this reasons it is quite uneasy task to separate the initial intentions and the central logic of argumentations of the special competition division of the European Commission (DG COMP)[288] from the matters of general Communities importance and priorities. If the protection of the competition within internal market would be performed by hierarchically independent competition agency, the official administrative position of the Communities would have other paradigm of argumentation and slightly other stresses and accents.

Summary

New media rights for sporting events play very important role in the contemporary development of European competition law. Their technological convergence fosters regulatory shifts, since traditional antitrust instruments not always may be effectively applied within the new environment. Against this background the launching by the Commission sector inquiry into the provision of sports content over third generation mobile networks *Published in accordance with Article 17(1) of Regulation 1/2003*, 21/09/2005 represents clear example of the regulatory response to technological challenges.

It is not obvious yet which model of platforms coexistence will win the battle. On the one hand, the position of Commission is in favour of the new generation media, such as 3G and IPTV operators, which cannot currently compete with traditional TV operators for the market of sports rights broadcasting. The position of TV companies, especially those, who play the dominant role on sports rights auctions, is also characterized by consistency and legal rationale. Pleading in favour of platform convergence, they insist on equal approach of the European regulators to

[288] As indirect justification of our presumption may serves the position of Director General of DG COMP, Philip Lowe in his relevant Key Note Speech (Key Note Speech by Philip Lowe, the Sector Inquiry into New Media (3G). http://europa.eu.int/comm/competition/speeches/text/sp2005_007_en.pdf): 'The competition rules require no market outcome, rather they require a market process and a market structure. I am sure that 3G will prove to be a great success, but the competition rules are not there to ensure that success. Rather they are there to ensure that the opportunity for success is available'

all media companies, including those, who operate on 3G and IPTV-technologies basis. The reason of such claim is based on the presumption that digital technological (r)evolution is eliminating the difference between the devices, which are currently considered by consumers as different. TV-sets will be mobilized while cell-phone will fully exploit the option of the transmission of TV signals. This is particularly actual within the context of fast development several wireless Internet technologies, which facilitated and substantially increase the capacity of Internet providers to transmit the data online without physical cables.

Another side of convergence is in the widening by current operators their marketing strategies. TV operators become more and more interested in the area of traditional electronic communication services, while telecommunication giants become more and more interested in content side of the industry.

This trend shows that the current borders between TV and telecommunications industries are rapidly eliminating. This means that in a predictable future there will be eventual possibility to consider both industries as the same market for acquisition of sports media rights. This is, however hardly possible to do nowadays, since the differences between two types of the industry are still tremendous.

The purpose of this part of our study was to demonstrate the main lines of argumentation by the main actors of new media rights' market. The dialectical methodology of our research immunizes us from the rational necessity of making one-part-oriented conclusions.

This is the reason of showing two 'realities' – that of the Commission and new media rights operators on the one hand and traditional TV companies on the other. Since this area of economy is still in its regulatory infancy, its future development will be significantly dependent on the regulatory measures, adopted by the Commission within the next few years, as well as on paradigm of the future technological development of the industry.

Current situation with the separation of sports rights into different packages, including the compulsory existence of the new media rights packages, shows that 3G and IPTV operators will be benefited from the benevolent attitude of the Commission and national competition authorities. This situation however may be changed as soon as new media broadcasters will gain more power within the

markets, which were traditionally dominated by TV operators. Only after abandonment by the Commission its proactive regulatory policy it will be possible to analyse the industry from the perspectives of the traditional antitrust. For the time being regulatory patterns appear to be dominated over the traditional negative competition law.

Conclusions

Over the last two decades sport has clearly become an industry of considerable commercial importance. Although sport is not explicitly mentioned in the EC Treaty, it does not prevent the Commission from modelling an European sports policy with the competition rules as its core instrument to achieve market integration goals. This is not an easy task, since the history of inter-state relations within the EC shows many examples how states are striving to protect their competences over European Communities. We should also recognize however that for the time being the Commission manages to regulate the sport related sectors of the European economy using its implicit competence within the area. The main instrument of this political conduct of the Commission is the interpretation of sport as an economic activity within the meaning of Article 2 of the EC Treaty.

Hence, the main objective of this thesis has been to demonstrate the legal and political state of affairs with sport related areas in the European Union. Methodologically it has been performed in a deductive way. We started with our interpretation of the European competition law. Into this category we included also European regulatory policy, since quite often positive regulatory instruments are applied by the Commission in order to protect, but also to improve, create or modify competition within certain specific markets.

From the legal stand point European regulatory policy (we call it 'positive competition law') substantially differs from the traditional antitrust law (i.e. 'negative competition law'), since the former is rather ad hoc political decisions, while the latter is a genuine legal concept. But the influence of both on the competition within the sports sector is very big. Furthermore, they have the same object for regulation (i.e. European competition). For these reasons we analysing them together in the first part of our thesis. Bearing in mind paradigm shift of the Commission towards effect based approach, it is important to predict the consequences for the European sports policy. This is particularly the case for abusive conduct.

In the Discussion paper on Article 82 EC the Commission demonstrates its inclinations towards Chicago schools' postulates of 'protection the competition rather than competitors'. This policy has long-term consequences for the sport domain. Since the very nature of the economic interpretation of competition does not pay particular attentions to the issues, related to legal certainty and predictability of the regulatory conduct, it is plausible, that sports industries will be regulated by the Commission in a more dirigistic manner.

We conclude that effect based approach to the competition is not a panacea from market failures and its short-term benefits for the particular groups of consumers and/or industry can not be seen as a sufficient substitution for decreasing the regulatory predictability of the markets. It is the legal certainty and Harvard School's structure-based approach, which has its deep roots in European Freiburg School and ordoliberalism. Being in favour of strong regulation of competition within European markets, we do not express our support to the proponents of *ax ante* regulation as case-by-case ad hoc regulatory alternative to the classical antitrust. Since *ex ante* regulation ipso facto stipulates regulatory intervention in order to 'establish' or to 'improve' the competition within certain market, it may negatively reflect on the actors' expectations to operate in a predictable regulatory environment.

There are however also another interpretation of the situation with sport and reformed European competition law. As former judge of ECJ, Professor Wathelet indicates in his commentaries on White Paper on Sport, 'In short, the EU is limited to having marginal control (namely respect for free competition and fundamental freedoms) over any abuse of power by sports sector stakeholders, including national and international federations. International federations (mainly UEFA and FIFA) and to a lesser extent the IOC, disputing European jurisprudence, believe that this case by case approach by the ECJ and the Commission generates an intolerable level of 'legal uncertainty and confusion' and that in order to remedy the situation it would be necessary to exempt sport from the application of Community law (by virtue of its claimed specificity) and to reaffirm the regulatory autonomy of the federations (particularly international federations) over Community law'.[289]

[289] Melchior Wathelet, Sport Governance and EU Legal Order: Present and Future. On the future relationship between governance in European sport and in particular professional football and the European Union legal order, September, 2007 (not published yet)

The debates over the selection of the most appropriate model of competition for the European Union constitute the quintessence of the competition law and policy. The aims of competition law and competences of competition authorities always are *ultimo ratio* of each legal dispute. It is the case, because the very purpose of law quite often gets the priority over the procedural issues, especially if that purposes correspond to general public policies. Because traditional negative competition law has its long theoretical and regulatory history, it serves the European Communities as a predictable and solid legal instrument.

The reform of EC competition law towards elimination of its notification *ex ante* nature shows the general direction to contextual interpretation of the conduct of undertakings concerned. It means that the undertakings are required to monitor their own behaviour in conformity with the principles and norms of EC competition law. That by no means can be interpreted as a lack of legal consistency and winning of effect-based approach. With this in mind it was important for us to offer the general guidelines for application of doctrinal competition principles to sport related areas. In addition to that it should not be ignored that EU often strives to use sport policy to implement a range of its social, cultural and economic objectives.

As Parrish emphasises, 'Sport is a policy area that has experienced considerable agenda expansion in recent years. Sport became linked to the operation of the Single European Market despite lacking a Treaty base. This is not unusual. At its inception the EU lacked a cultural, media, education and environmental policy. Today, the EU has extensive involvement in these and other important policy sectors'.[290] That is why we are of opinion that the narrowing down of competition law to its antitrust core with the methodological aim to formulate the close epistemological system appears to be the only way not to loos comprehension of the subject.

The second part of the thesis is fully devoted to the analysis of the fields of intersection between European competition law and sports. We also provide detailed analysis of a new European *soft-law* document White Paper on Sport and try to conceptualise this programming declaration, putting it within the context of the existing European legislation and case-law on sport related issues. White Paper on

[290] Parrish Richard, 'The politics of sports regulation in the European Union', Journal of European Public Policy 10 2 246 262, 2003

Sport supposed to be a mixture of a political and legal agenda of the European Union in the area of sport. This document in particular reserves a significant role in regulation of sport related issues to European competition law.

The specificity of sport plays a very important role within this part of our research. We explain why certain limits of allegedly collusive coordination are pivotal in order to perform the sports contests. Unlike in all other industries, where the incomes of competitors negatively reflects on the opportunity of a manufacturer to sell its product and generate revenues, sport industry require from each actor its permanent coordination with the competitors in order to make a sport product at all. This is because of the very nature of sport entertainment. Sport competitors need their vis-à-vis and they are quite often in a situation where their own profits depend on the rival's performance even more than their own quality of the game. This specificity of sport is partly recognized by the Community case law and legislation. However there is currently no sufficient comprehension of the consequences of the application of European competition law as an instrument for sport regulation in situations where competition law applies as an intermediary to achieve some other Communities' goals.[291]

While the second part analyses competition law and sport, part three is fully devoted to the quintessence of the European sports policy, which is broadcasting rights to sports events from the perspective of EC competition law. This area constitutes a core of our research, not only because of its enormous importance within the current relations between European sports leagues, TV-operators and national competition/regulatory authorities, but also because it has a very high potential for its future development. This is the case because of the growth of innovations and digital technologies. This trend facilitates the possibility to transmit digital signals and drastically increase the ability of TV operators to offer the content to their viewers. In the environment with highly increased competition within the market of visual media, the main condition for commercial success becomes the operation with the premium content. Major sporting events, in particular, European football tournaments undoubtedly belong to this category.

Neither joint selling nor joint buying of sports media rights is not a per se violation of the EC competition law. In order to be deemed anticompetitive, such

[291] Such as market integration or elimination of interstate regulatory barriers

behaviour has to be characterized some ancillary features, such as excessive exclusivity and blocking effect or situation when operators acquire the sports rights without intention of their further exploitation but in order to prevent the competitors from the selling of such a content.

Nowadays premium sports events constitute a 'must-have' content for commercial TV operators, if they intend to expand their position on the market. This is the main reason for toughening of the inter-industrial relations between the competitors, which is particularly the case during the acquisition of the media rights to sporting events. The conditions of the auctions, as well as the behaviour of the main actors, often become an issue for concern from the European (and national) competition authorities. European Union already has well developed case-law related to this area.

This topic will be relevant in the future as well, since the scarcity of premium sports content only increase proportionally with the rapid growth of the media providers. In our research we provide some innovative solutions for future regulation of the sports media rights by the European competition law.

The last part of the thesis is a consequential deduction of the research into the most new segment of intersection between competition and sports. In this part we provided analysis of the regulation of selling of sports rights to new media companies, such as 3G and IPTV operators. Although this area is quite new, the European Commission has already performed a massive survey of the state of affairs within the area by performing sector inquiry pursuant to Article 17(1) of Regulation 1/2003. The results of this procedure are explored in the relevant part of the thesis.

The general trend of the present inquiry, which is an attempt of the Commission to facilitate the fast development of new communications technologies, poses many questions regarding the ontological nature of EC competition law and more important its application by the main regulators and media actors. There are no objections of the necessity to deploy new mobile technologies into European market, but some main operators of traditional TV platforms express their doubts about the interventional way of doing it. Sports media rights are acquired on free-accessed auctions and their commercial value to a large extend depends on exclusivity. Since the Commission together with most new media rights operators proposes separation of the premium content into different packages, this may negatively reflects on the

interests of most powerful media operators and can not be explained by traditional antitrust, but only by a positive competition policy.

It goes without saying that from the competition policy standpoint the arising of a new efficient and highly competitive market will bring the benefits to all main actors of the industry, including those who are currently back an opposite side. However, the ways of creation or improvement of competition should be organized by regulators very carefully, since the very essence of antitrust is purely negative (i.e. *protection* but not *development* of competition). This is metaphysical condition of the functioning of antitrust law. Antitrust goes always with legal certainty, because both institutes are basing on the doctrinal meta-level of legal principles. The positive competition policy, on the contrary, is effect oriented a priory. It is designed in a such consequentialist manner which allows it not to pay particular attention on a legal principles if its ignoring or overcoming appears to bring some tangible benefits for society.

The regulatory dilemma of positive vs. negative competition law runs all through our thesis. Our dialectic methodology did not impel us necessarily to the solving of that *aporia*. Quite the opposite, its presence serves us as a benchmark of ontological controversy of the competition law in policy. We do not propose any clear-cut answers, but were striving to pose the most relevant questions.

We leaved outside of the scope of this paper very important doctrinal issue of sports property ownership. Since Article 295 EC Treaty stipulates that the Treaty does not prejudice the rules in Member States governing the system of property, the Commission has to conduct its regulation of sports broadcasting rights for new media in a way which precludes it from the direct interference into regulation of property law. On the other hand, it does not mean that all regulatory measures of the Communities, which directly or implicitly affect the property rights, are prohibited. This dichotomy is always presented within the area of sports rights, since the freedom to provide a licence often contradict to obligation of respectful attitude to the competition law requirements. In its Coditel I[292] judgement ECJ expressed its partial support to the autonomy of intellectual property in respect to eventual restrictions of freedom to provide services.

[292] Case 62/79, Coditel v. Ciné-Vog Films (No 1), 1980, ECR

We tend to believe that the similar rationale will be applied by the British courts in the hypothetical case of Premiere Leagues vs. operators of pubs and other public recreational facilities.[293] The fact of the matter concerns the restriction of British professional football league Premiere League to provide parallel broadcasting of its tournaments from the third countries, which are EU Member States. Its essence demonstrates the contradiction between intellectual property rights, 'four freedoms', market integration goals and insufficiency of application the 'exhaustion doctrine'.

Coming back to antitrust analysis it is important to point out that already during the first year after regulatory abolition of single buyer strategy within the market of acquisition of media rights to football events, the broadcasting industry in the United Kingdom already gained a new powerful actor, which eventually may interrupt a monopoly of BskyB within this particular segment of the media business[294].

The example mentioned above shows that after the launching by the European and national competition authorities the practice of portioning the sports media rights into several packages with prohibition of a single buyer principle, the competition within the market substantially increased. This might be, however, only a short-term trend. In the course of next years it will be possible to analyse this tendency, basing on more empirical evidences.

For a time being we can observe very promising trends towards an increase of the value and commercial interests in premium sports media rights. But should the commercial efficiency of the current European competition policy in the area of sport industry be interpreted as a *carte blanche* for the future dirigistic measures of the Commission? The answer to this rhetorical question depends on the ideological, doctrinal postulates of the thinker. Neither our interpretation of the philosophy of antitrust nor our methodological approach to the present research precludes us from drawing such an optimistic conclusion.

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[293] The case is not reported yet

[294] According to Sportbusiness and Q&Q Annual Survey of the UK's Media Consumer' 2007 The new competitor of BskyB on the market of broadcasting of premium football matches within the UK, media group Setanta now has about 2 million pay-TV subscribers in the UK - with an extra 1.6 million potential subscribers waiting in the wings. Given that 45 per cent of Setanta subscribers do not take Sky Sports, O&O suggested that the broadcaster is opening up a new market for pay-TV sport - and there are more customers out there.

Annexes

Table 1: Solidarity payments to the national associations for their clubs[1]

Association	Amount in EUR	Association	Amount in EUR
Albania	470 000	Latvia	640 000
Andorra	230 000	Liechtenstein	140 000
Armenia	400 000	Lithuania	640 000
Austria	610 000	Luxemburg	400 000
Azerbaijan	470 000	Malta	400 000
Belarus	542 000	Moldova	570 000
Belgium	420 000	Netherlands	400 000
Bosnia-Herzegovina	570 000	Northern Ireland	420 000
Bulgaria	630 000	Norway	820 000
Croatia	470 000	Poland	610 000
Cyprus	680 000	Portugal	210 000
Czech Republic	610 000	Republic of Ireland	710 000
Denmark	560 000	Romania	420 000
England	350 000	Russia	210 000
Estonia	610 000	San Marino	230 000
FYR Macedonia	570 000	Scotland	310 000
Faroe Islands	500 000	Serbia	610 000
Finland	500 000	Slovakia	610 000
France	490 000	Slovenia	640 000
Georgia	570 000	Spain	280 000
Germany	350 000	Sweden	610 000
Greece	280 000	Switzerland	890 000
Hungary	470 000	Turkey	520 000
Iceland	500 000	Ukraine	280 000

[1] UEFA official website, www.uefa.com

Israel	510 000	Wales	470 000
Italy	280 000	TOTAL	EUR 25 080 000
Kazakhstan	400 000		

Table 2: Total broadcasting payments to Premier League clubs for domestic television for season 2005[2]

Club	*£'000*	% of total	*Club*	*£'000*	*% of total*
Chelsea	26,660	6.54	Charlton Athletic	17,933	4.4
Manchester United	26,571	6.52	Newcastle United	17,626	4.32
Arsenal	26,390	6.48	Birmingham City	16,935	4.16
Liverpool	23,577	5.79	Fulham	16,805	4.13
Everton	22,528	5.53	Blackburn Rovers	16,173	3.97
Bolton Wanderers	21,120	5.18	Portsmouth	15,806	3.88
Middlesbrough	20,008	4.91	West Bromwich Albion	15,356	3.77
Manchester City	19,992	4.91	Norwich City	14,601	3.58
Tottenham Hotspur	19,341	4.75	Southampton	14,396	3.53
Aston Villa	18,663	4.58	Crystal Palace	12,257	3.01

[2] Premier League Football Research into viewing trends, stadium attendance, fans' preferences and behavior, and the commercial market Analysis advising the Commission of the European Communities relating to a proceeding under Article 81 of the EC Treaty in case COMP/C/38.173 – FAPL (Source Deloitte and Touche Annual Review of Football Finance, June 2005, Appendix 19b)

Table 3: UEFA Champions League 2006/07 Revenue Participating[3]

Club	Fix amount and additional bonus	Match participation	Performance bonus	Market pool	1st knockout round	Quarter-finals	Semi-final	Final	Total EUR
Group A									
PFC Levski Sofia	3 000 000	2 400 000	-	164 000					5 564 000
Chelsea FC	3 000 000	2 400 000	2 700 000	18 862 000	2 200 000	2 500 000	3 000 000		34 66 2 000
Werder Bremen	3 000 000	2 400 000	2 100 000	10 969 000					18 46 9 000
FC Barcelona	3 000 000	2 400 000	2 400 000	12 702 000	2 200 000				22 70 2 000
Group B									
FC Spartak Moskva	3 000 000	2 400 000	1 200 000	610 000					7 219 000
Sporting Portugal	3 000 000	2 400 000	1 200 000	1 161 000					7 761 000
FC INternazionale	3 000 000	2 400 000	2 100 000	19 882 000	2 200 000				29 58 2 000
FC Bayern Munich	3 000 000	2 400 000	2 700 000	15 932 000	2 200 000	2 500 000			28 73 2 000
Group C									
Liverpool FC	3 000 000	2 400 000	2 700 000	12 418 000	2 200 000	2 500 000	3 000 000	4 00 0 000	32 2818 000
Galatasaray SK	3 000 000	2 400 000	900 000	7 658 000					13 95 8 000
Girondins de Bordeaux	3 000 000	2 400 000	1 500 000	9 220 000					16 11 2 000
PSV Eindhoven	3 000 000	2 400 000	2 100 000	19 400 000	2 200 000	2 500 000			31 60 0 000
Group D									
FC Shakhtar Donetsk	3 000 000	2 400 000	1 500 000	483 000					7 383 000
Olimpiacos CFP	3 000 000	2 400 000	900 000	4 584 000					10 88 4 000
Valencia CF	3 000 000	2 400 000	2 700 000	9 801 000	2 200 000	2 500 000			22 60 1 000
AC Roma	3 000 000	2 400 000	2 100 000	18 886 000	2 200 000	2 500 000			31 08 6 000

[3] UEFA official website, www.uefa.com

Group E									
Real Madrid SF	3 000 000	2 400 000	2 400 000	11 026 000	2 200 000				21 026 000
FC Dynamo Kyiv	3 000 000	2 400 000	600 000	437 000					6 437 000
FC Steaua Bucuresti	3 000 000	2 400 000	1 200 000	1 786 000					8 386 000
Olimpieque Lyonnais	3 000 000	2 400 000	3 000 000	12 047 000	2 200 000				22 647 000
Group F									
SL Benfica	3 000 000	2 400 000	1 500 000	893 000					7 793 000
Manchester United FC	3 000 000	2 400 000	2 400 000	16 033 000	2 200 000	2 500 000	3 000 000		31 533 000
Celtic FC	3 000 000	2 400 000	1 800 000	6 288 000	2 200 000				15 688 000
FC Kobenhavn	3 000 000	2 400 000	1 500 000	5 268 000					12 168 000
Group G									
Arsenal FC	3 000 000	2 400 000	2 400 000	9 274 000	2 200 000				19 274 000
FC Porto	3 000 000	2 400 000	2 400 000	1 519 000	2 200 000				11 519 000
CSKA Moskva	3 000 000	2 400 000	1 800 000	674 000					7 874 000
Hamburger SV	3 000 000	2 400 000	600 000	8 327 000					14 327 000
Group H									
AEK Athens	3 000 000	2 400 000	1 800 000	4 147 000					11 347 000
RSC Anderlecht	3 000 000	2 400 000	1 200 000	4 812 000					11 412 000
LOSC Lille Metropole	3 000 000	2 400 000	2 100 000	8 345 000	2 200 000				18 045 000
AC Milan	3 000 000	2 400 000	2 100 000	17 392 000	2 200 000	2 500 000	3 000 000	4 000 000	39 592 000
TOTAL	96 000 000	76 880 000	57 600 000	271 000 000	35 200 000	20 000 000	12 000 000	11 000 000	579 600 000

Table 4: Reformed system of UEFA Champions League media rights management[4]

Package number	Title	Description	Availability	Exclusivity/territoriality	Sales conditions/Platforms	Form of marketing
1	Gold package: Live TV	First pick and third pick per match day. Final. Highlights for purchased games. (31 games out of 157).	Live for first pick. Live or two hours delay for third pick. Highlights usable as from Thursday midnight.	Exclusive per territory (Europe). Nonexclusive for highlights.	Sold by UEFA to free and/or Pay TV.	Central marketing
2	Silver package: Live TV	Second pick and fourth pick per match day. Highlights for purchased games (30 games).	Live for second pick. Live or two hours delay for fourth pick. Highlights usable as from Thursday midnight.	Exclusive per territory (Europe). Nonexclusive for highlights.	Sold by UEFA to free and/or Pay TV.	Central marketing
3	Highlights: TV	Ten minutes per game on all games.	Available from 22.45 (or 15 minutes after the game ends) on a match night, within a six-day limit or the following Monday if a match week.	Shared territorial exclusivity (Europe) with packages one and two and six and eight.	Sold by UEFA to free TV stations. Obligation to broadcast as from 22.45 on match nights.	Central marketing
4	Live all other games (five-16): Pay TV/PPV	Live games from pick five to 16. Group Stage 1 (five to 16) and Group Stage 2 (five to eight) (96 games).	Live transmission.	Exclusive on a territorial basis (Europe). No highlights.	Sold by UEFA to Pay TV/PPV; possibility to sell the rights exclusively until one week after the draw for the first group stage (see Principles regarding rights packages four and five).	Central marketing
5	Live all other games (5-16): Pay TV/PPV	Live games from pick five to 16. Group	Live transmission.	Non-exclusive on a territorial basis (Europe). No highlights.	Sold by "home" clubs to Pay TV/PPV; subject to the following	Club marketing

[4] TV Rights Agreement, European Commission and UEFA

		Stage 1 (five to 16) and Group Stage 2 (five to eight) (96 games).			conditions: a) UEFA has not already sold the rights on a given national market - b) no bundling with other matches to create competing UCL programming (see Principles regarding rights packages four and five).	
6	Delayed club games (full or edited): TV	All club home and away games (full or edited).	Available as from midnight one day after the last of the games of the relevant match week (i.e. currently Thursday midnight).	Non-exclusive/ Worldwide.	Sold by clubs on a non-exclusive basis ('clubbranded'); no bundling with rights of other clubs to create a "competing" UCL programming offer.	Club marketing
7	Archives: magnetic storage devices (DVD, VHS, CD-Rom, etc..)	All club home and away games (full or edited).	Available from the previous season backwards. Embargo: 48 hours after the final.	Non-exclusive / Worldwide.	Available for clubs for retail commercial exploitation.	Club marketing
8	Delayed all games (full or edited) : TV	All games (full or edited).	Available as from midnight one day after the last of the games of the relevant match week (i.e. currently Thursday midnight).	Non-exclusive / Worldwide.	Sold by UEFA on a non-exclusive basis.	Central marketing
9	Archives: magnetic storage devices (DVD, VHS, CD-Rom, etc..)	All games (full or edited).	Available from the previous season backwards. Embargo: 48 hours after the final.	Non-exclusive / Worldwide.	Available for UEFA for retail commercial exploitation.	Central marketing
10	Outside of Europe: TV	All games live or delayed.	Live or delayed.	Exclusive per territory, outside of Europe, without prejudice to the delayed rights granted to the clubs in package six.	Sold by UEFA to TV stations outside of Europe.	Central marketing

11	Wireless	All games : near live clips for UEFA, home and away games; near live clips for clubs.	Available five minutes after the event happens.	Non-exclusive on a territorial basis.	Production joint venture: content made available to clubs by UEFA on request, may be customised and edited by clubs for a club branded and focused exploitation. Clubs may, if they request, obtain access to the 'raw' television feed; wholesale price must be fair, transparent and non-discriminatory; arbitration system to solve eventual disputes (see Principles applicable to package 11).	Co-exploitation or partnership
12	Internet	All games (full or edited): UEFA; Home and away games (full or edited): clubs.	Available from midnight after the game	Non-exclusive worldwide.	Service built by UEFA and exploited on uefa.com and the club websites through a revenue share system. Production joint venture: content made available to clubs by UEFA on request, may be customised and edited by clubs for a club branded and focused exploitation. Clubs may, if they request, obtain access to the 'raw' television feed; wholesale price must be fair, transparent and non-discriminatory; arbitration system to solve eventual disputes.	Co-exploitation or partnership
13	Live games: radio	Live all games: UEFA; live home and away games: clubs (subject to space availability and technical facilities).	Live	Non-exclusive on a territorial basis (Europe).	Sold or exploited by UEFA and clubs on a nonexclusive basis.	Co-exploitation or partnership

14	Live rights: Internet audio	Live all games: UEFA; live home and away games: clubs (subject to space availability and technical facilities).	Live	Non-exclusive worldwide.	Non-exclusively exploited by clubs on their websites and UEFA on uefa.com. UEFA will propose a payment mechanism allowing clubs to participate in revenue sharing.	Co-exploitation or partnership

Table 5: the costs of the European rights to Olympics for the EBU[5]

(Million USD)

Year	Costs of summer rights		Costs of winter rights	
	Nominal	Real	Nominal	Real
1984	22	30,5	4,1	5,7
1988	30,2	31,3	5,8	6,0
1992	94,5	85,4	27	24,4
1994	–	–	24	19,9
1996	240	181,4	–	
1998	–	–	72	51,3
2000	350	238	–	
2002	–	–	120	81,6
2004	394	267,9	–	
2006	–	–	135	91,8
2008	443	301,2	–	

[5] Decision relating to a proceeding pursuant to Article 81 of the EC Treaty *Supra Source:* BCC/IOC/Godard/Koranteng.

European case-law

1. JOINED CASES 56/64 AND 58/66, CONSTEN AND GRUNDIG, [1966] ECR 429
2. VOLK V.VERVAECKE CASE 5/69 [1969] ECR 295
3. CONTINENTAL CAN CASE 6/72 [1973] ECR 215
4. COMMERCIAL SOLVENTS CASE 6/73 [1974] ECR 223
5. CASE C-36/74 WALRAVE AND KOCH V UNION CYCLISTE INTERNATIONALE (1974) ECR 1405
6. SIERENA V. EDA CASE 40/79 [1971] ECR 69
7. SACCHI CASE 155/73 [1974] ECR 409
8. CENTRAFARM V. STERLING DRUG CASE 15/74 [1974] ECR 1147
9. CASE 26/76 METRO SB-GROßMÄRKTE GMBH & CO. KG V COMMISSION [1977] ECR 1875
10. CASE C-13/76 DONÀ V MANTERO ([976] ECR 1333
11. UNITED BRANDS COMPANY, CHIQUITA CASE 27/76 [1978] ECR 207
12. HOFFMANN-LA ROCHE (VITAMINS) CASE 85/76 [1979] ECR 461
13. CASE 62/79, CODITEL V. CINÉ-VOG FILMS (NO 1), [1980], ECR
14. CASE 322/81 MICHELIN V COMMISSION [1983] ECR 3461
15. FORD V. COMMISSION JOINT CASES 228 & 229/82 [1984] ECR 1129
16. PRONUMPTIA CASE 161/84 [1986] ECR 353
17. CENTRE BELGE D'ETUDE DE MARCHE-TELEMARKETING V. CLT, CASE 311/84 [1986] 2 CMLR 588
18. MAGILL TV GUIDE CASE [1989] OJ L 78/43
19. CASE M.993 COMMISSION DECISION OF 27 MAY 1998 RELATING TO A PROCEEDING PURSUANT TO COUNCIL REGULATION (EEC) NO 4064/89 (CASE NO IV/M.993 - BERTELSMANN/KIRCH/PREMIERE)
20. AKZO CASE 62/86 [1991] ECR I-3359
21. VOLVO V. VENG CASE 238/85 [1988] ECR 6211
22. HILTI V. COMMISSION CASE T-30/89 [1990] ECR I-163
23. PORTO DI GENOVA CASE C-179/90 [1991] ECR I-1979
24. DELIMITIS CASE C-234/89 [1991] ECR I-935
25. CASE NO COMP/IV.37 – BSKYB / KIRCHPAYTV NOTIFICATION OF 22 DECEMBER 1999 PURSUANT TO ARTICLE 4 OF COUNCIL REGULATION (EEC) NO 4064/89
26. COMMISSION DECISION OF 19 FEBRUARY 1991 RELATING TO A PROCEEDING PURSUANT TO ARTICLE 85 OF THE EEC TREATY (IV/32.524 - SCREENSPORT/EBU MEMBERS) OFFICIAL JOURNAL L 063 , 09/03/1991 P. 0032 – 0044
27. CASE M.469 COMMISSION DECISION OF 9 NOVEMBER 1994 RELATING TO A PROCEEDING PURSUANT TO COUNCIL REGULATION (EEC) NO 4064/89 (IV/M.469 - MSG MEDIA SERVICE) (94/922/EC)
28. COMMISSION DECISION MSG/MEDIA SERVICE [1994] OJ L 364/1
29. CASE C-415/93 UNION ROYAL BELGE DE SOCIETES DES FOOTBALL ASSOCIATION ASBL V. JEAN-MARC BOSMAN, [1995] ECR I-4921
30. COMMISSION DECISION NORDIC SATELLITE DISTRIBUTION [1995] OJ L 053/20
31. VIHO V. COMMISSION CASE T-102/92 [1995] ECR II-17
32. TETRA PAK II CASE C-333/94 [1996] ECR I-5951
33. BRONNER V MEDIAPRINT CASE C-7/97 [1998] ECR I
34. COMMISSION DECISION RTL/VERONICA/ENDEMOL [1996] OJ L 124/32
35. METROPOLE TÉLÉVISION SA AND RETI TELEVISIVE ITALIANE SPA AND GESTEVISIÓN TELECINCO SA AND ANTENA 3 DE TELEVISIÓN V COMMISSION OF THE EUROPEAN COMMUNITIES. JOINED CASES T-528/93, T-542/93, T-543/93 AND T-546/93 ECR 1996

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