

Unbundling of Sports Media Rights

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Introduction

The European Commission's announcement on 17 September 2004 that it had reached a preliminary agreement with the German football league, the Bundesliga, on sales of match broadcast rights drew a muted response. At first glance, it represents a minor triumph for EC Commissioner, Mario Monti, who has fought an unsuccessful battle to curb the powers of the leagues since the late 1990s. But critics can be forgiven for wondering aloud whether the structural trends that have shaped the market for TV rights to key sporting events over the last twenty years may be too powerful to regulate, let alone curb.

The catch cry has been "unbundled", by which most people mean that broadcasting and other media rights to sporting events be sold in discrete packages ideally to a variety of buyers and/or that rights pooling arrangements would be broken up. The aim is to create a market in which there are multiple sellers (by for example allowing clubs to sell the rights to their own games independent of the event organiser) and multiple buyers (by encouraging broadcasters other than the most powerful pay-TV operators to bid for, and obtain rights). To understand the plight of the regulators today – and the zeal with which they have followed an agenda driven by the desire to unbundle the sale of rights – it is necessary to place the evolution of the TV rights market in an historical context.

History & Background

Once upon time – or before the mid 1980s at any rate – all TV coverage of major sporting events was sold as a package, "bundled" together. It was only during the course of the 1980s that new categories of rights beginning with "video rights" and "overseas rights" were first sold separately. This took place at roughly the same time the relationship between event organisers and the broadcasters began to go through something of a sea change. Importantly, the liberalisation of the broadcasting industry in mainland Europe led to former state monopolists facing challenge for the first time from commercial operators hungry for content. The onset of pay-television – whose operators were even hungrier for content – at the end of the 1980s and the beginning of the 1990s swept away the old structures that had underpinned the contracts with the state-owned terrestrial broadcasters since the 1960s.

With the arrival of pay-TV services viewers began to notice the gradual migration of sporting coverage they had previously grown accustomed to on the schedules of the free-to-air broadcasters. In the UK, the most obvious example was the treatment of top-flight football. In 1988 the previous tripartite agreement between the BBC, ITV and the Football League was replaced by a new deal in which the

BBC was cut out of the equation. ITV enjoyed rights to screen matches live on an unprecedented basis, most of which featured the leading clubs of the First Division. Radical as this deal was, it paled into insignificance when set against its successor. Neither ITV nor the Football League featured as parties to the agreement entered into 1992. The member clubs of the First Division had resigned from the Football League to form the Premier League, a mechanism that was designed primarily to allow them to retain a greater proportion of the revenues accruing from the sale of TV rights. ITV in turn was outbid by BSkyB (formed only in 1990), who were able to drive the sale of the receivers needed for its pay service by offering would-be subscribers the lure of exclusive live coverage of the newly established Premier League.

Attempts to Control Pay-TV and Sports Rights

The passage of the UK Broadcasting Act 1996 featured a great deal of high profile debate on the implications of the changing face of the marketplace for TV rights to major sporting events. For a start the Listed Events provisions of the Broadcasting Act 1990 which permitted the Home Secretary to draw up a simple list of sporting events that were to be available only on free-to-air terrestrial television services was replaced by a far more complex approach that sought to try to satisfy both the terrestrial viewer and the pay-TV operator by creating provisions relating not just to coverage per se but to live broadcasts and highlights. There was also debate as to how to contain the escalating price of rights fees since it was feared that terrestrial broadcasters would never be able to compete with the pay-TV operators. During a debate in the House of Lordsⁱ former Minister of Sport, Lord Howell argued that the Copyright Tribunal should be given powers to set those fees:

We seek to provide that the rights to live TV coverage, recorded coverage, and live radio broadcasting – It is important to include that -- are sold separately and to prevent hoarding of material a broadcaster cannot use himself. That is what happened with the Ryder Cup. It is what was going to happen in the cricket World Cup until we tabled the amendment. As I said earlier, we have managed, in the case of World Cup cricket, to get Mr. Murdoch to sell to the BBC at a price he turned down two or three months ago. That is a significant advance. I do not in any way want to suggest that we should not take note of it.

I am advised that the proper place to decide the price, if there is a difficulty, is the copyright tribunal. I do not feel that the Minister or anyone else could object to the word "reasonable" appearing in an Act. In the 40 years I have been in Parliament I must have passed hundreds of Acts referring to reasonable people or reasonable men. If reasonable people do not agree, they go to the copyright tribunal.

In spite of Lord Howell's arguments, such provisions did not feature in the 1996 Broadcasting Act, but that statute perhaps represented the first attempt to reign in the pay-TV operators and event owners. Ultimately however, the restrictions that feature in the Listed Events provisions seek to guarantee availability of coverage of certain events to the viewing public by preventing the "hoarding" of rights by broadcasters; a scenario that was always difficult to envisage – even in 1996 – when the expression "content is king" was already clichéd.

Involvement of the Regulators

The history of subsequent attempts to regulate the market follows a similar trend. The UK Office of Fair Trading (“OFT”) began proceedings in the Restrictive Practices Court against the Premier League in 1998 arguing, among other things, that the League itself was an illegal cartel and that the clubs should be free to sell rights to their matches on an individual basis. This amounted to a radical form of unbundling that attracted considerable opposition amongst football supporters. Indeed, the Premier League was even able to count among its witnesses a former Chancellor of the Exchequer, Ken Clarke. The OFT lost its case the following year but the campaign for unbundling was continued by Mario Monti of the European Commission who argued that the 1997 BSkyB/Premier League deal – approved under the now repealed Restrictive Trade Practices Act 1976 by the Restrictive Practices Court – was contrary to Articles 81 and 82 of the EU Treaty.

The European Commission

In June 2001, Monti and his colleagues in the Commission began an investigation into the joint selling of media rights to Premier League matches; earlier Premier League arrangements having been heavily scrutinised in Brussels. A year later, the Premier League notified its joint selling arrangements to the Commission and requested clearance. The Commission objected to the arrangements because it argued that joint-selling restricts price competition and limits output. The Premier League then tried to address Brussels' competition concerns by dividing the main live package into four, rather than three, separate packages and granting additional rights to Internet and mobile phone operators. However, BSkyB won each of the four packages (as part of a deal worth more than £1 billion) and the Commission intervened once more in December 2002 to try to protect its cherished dream of unbundling. In June 2003 BSkyB agreed that the rights to eight of the matches be made available to terrestrial broadcasters by way of auctionⁱⁱ. Unfortunately for the Commission, BSkyB's reserve price was not met and so it has retained the rights to all eight matches.

Implications of the Emergence of New Platforms

The Commission had clearly hoped throughout that the emergence of new platforms for exploitation of events – bringing with them new set of rights to be sold by event owners – would provide competition in the sale of rights. The fact that streamed video could be accessed on the Internet certainly impacted on the commercial value of TV rights, but could not in truth be advanced as a genuine new competitor to broadcast quality coverage. Even now in 2004 - with penetration of broadband gathering paceⁱⁱⁱ – the commercial value of new media rights is dwarfed by the value of exclusive live broadcast coverage.

The commercial imperative of exclusivity is what really mitigates against the Commission's crusade - and the value of exclusivity to the pay-TV broadcaster having to persuade subscribers to part with their hard earned income cannot be underestimated. For example, the International Olympic Committee (“IOC”) put out the rights to coverage of the 2008 and 2010 Games to tender on a public basis in which the rights were separated out into four distinct packages: audiovisual transmission; mobile platform transmission, audio transmission and shared fixed memory media (video/DVD). Far from the Commission dream of multiple purchasers of different rights all competing with each other for the attention of the consuming viewer/surfer the reality was that virtually the entire package was sold – as

on previous occasions – to the EBU on behalf of European public service broadcasters^{iv}.

The Future

Can unbundling be made to work? The example of the Bundesliga offers a glimmer of hope, but the commercial value of German football is arguably less than that of Premiership football, particularly in light of the fact that the Bundesliga deal with Premiere had arisen specifically because the current rights holder, Infront, had chosen not to exercise its option apparently concerned that the rights were over-valued^v. Not that that discouraged the Commission press office, which claimed that the Bundesliga had liberalized the way it sells television rights, "particularly in connection with new media such as UMTS and broadband Internet. German football fans will have the chance to see more live matches."^{vi} Mario Monti boasted that "top-class sport is crucial for encouraging the growth of the new media. More live broadcasting rights for the new media will benefit consumers, the media and the clubs." The Commission was able to report that starting with the 2006/2007 season the league's central marketing unit would provide at least 90 minutes' live reporting with all highlights on the internet. This is bolstered by the fact that clubs will also be able to market their home games themselves directly after the game has finished and will also be able to distribute their matches live via 3G mobile phone handsets.

The Commission can also lay claim to the deal it struck with UEFA in relation to coverage of the Champions League. The Commission's refusal to provide clearance for UEFA's original proposal to sell all Champion's League TV rights in one package to a single broadcaster on an exclusive basis for up to four years at a time (in which some of the games would not have been broadcast live or distributed on new media platforms) resulted in a significant change in the means by which rights were made available. In order to alleviate the Commission's complaints that the original proposal would have meant (a) some of the rights granted not being exploited, (b) an excessively long period of exclusivity and (c) the clubs were unable to sell the rights on an individual basis, the new arrangements now mean:

- UEFA will continue to market centrally the television rights to live mid-week matches (split into two separate rights packages, Gold and Silver, with the winning broadcaster entitled to choose the two most attractive fixtures);
- UEFA will initially have the exclusive right to sell the remaining live rights of the Champions League (the Bronze package). However, if it does not manage to sell this package by a certain cut-off date, the individual clubs will be able to market the matches themselves;
- both UEFA and the clubs will be able to offer Champions League content to Internet and mobile phone operators;
- individual clubs will also be entitled to exploit TV rights on a deferred basis and to use archive content, e.g. for the production of video/DVD; and
- UEFA will not sell the rights for a period longer than three years and will do so through a public tender procedure allowing all broadcasters to put in bids.

In some respects the attempts to regulate the “media rights” market are extremely patronising. Event owners are only too aware of their responsibilities to their sports and the need for an integrated programme maximising revenues while retaining exposure for the short-term benefit of sponsors and the long-term benefit of the sport’s popularity. These factors militate against valuable content being sold in its entirety to pay-TV broadcasters with relatively few subscribers^{vii}. Moreover, once technology permits newer media platforms to offer genuine competition to traditional broadcasting an integrated approach will be required if primary values are to be maintained.

This all presupposes that event owners enjoy at least comparable bargaining power with their broadcasting counterparts. Clearly that is not the case for all sports. For instance, in the UK skating, darts, wrestling and gymnastics – which until the late 1980s formed a staple feature of the terrestrial broadcasters’ sports coverage – have all but disappeared from the schedules. Clearly, only those sports that can guarantee viewers and new subscribers have benefited from the new broadcasting landscape. However, in some markets even football rights holders enjoy considerably less market power than broadcasters. For instance, no Israeli broadcaster was willing to pay \$250,000 for the rights to their national team’s recent European Championship qualifier against France. This was in spite of the offer of the Israeli Football Association to contribute to the costs of any broadcaster wanting to obtain a licence of the rights from Eurosport, who were acting as the French Football Association’s agents. It would be difficult to justify enforced unbundling in such circumstances.

Conclusion

The Commission is no doubt not oblivious to these considerations and it may well be that their ambitions fall some way short of those of the OFT in its case against the Premier League. European rights holders appear to be moving towards a grudging accommodation with Brussels. Although the Commission requires a degree of unbundling by offering a package of separate rights by tender according to the relevant distribution platform, the experience of the Olympics and the Premier League may be sobering (but not as sobering as the experience over recent years of lower profile sports). It is difficult to escape the conclusion that regulatory intervention is unlikely to produce radically different outcomes to those that the parties would have delivered without that regulation in the first place.

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ⁱ It is perhaps instructive that the UK – where so much of the Commission’s efforts have been concentrated in recent years – is the only major market to feature a rise in the rights fees payable for the most recent round of negotiations for Champions League coverage.

ⁱⁱ IP/04/1110 – 17 September 2004

ⁱⁱⁱ Swiss sports marketing agency Infront Sports and Media decided not to exercise an option to acquire the league’s media rights for two seasons for €295 million and €300 million respectively.

^{iv} With the exception of Italy.

^v Belgium had the highest domestic broadband penetration rates in Europe at the end of 2003, followed closely by the Netherlands, Denmark and Switzerland. Lowest penetration rates were in Ireland and Greece. Source: Strategy Analytics, May 2004

^{vi} OJ C115/3 – 30 April 2004

^{vii} Hansard 6 February 1996: Column 157