

EU Commission May Red Card English Premier League TV Deal.*

Introduction.

Recent newspaper reports suggest that the EU Commission may find that the English F.A. Premier League Stg£1bn television rights deal with BSkyB is in breach of EU competition law. The Commission launched an investigation into the agreement after the UK Restrictive Practices Court ruled that the agreement was not in breach of UK competition law.

As in *Mars/HB* therefore, the Commission may overrule a decision of a national court under national competition law. It should be noted, however, that the UK Office of Fair Trading brought the case under the UK's old competition legislation rather than the 1998 Competition Act, which replicates the provisions of Articles 81 and 82. Equally interesting is the fact that the Commission exempted an earlier exclusive rights agreement between Sky and the Premier League clubs.¹

Is the Premier League a Cosy Cartel?

The OFT had alleged that by selling the broadcasting rights collectively, the Premier League clubs had effectively operated as a cartel. It objected to the fact that the exclusive arrangements prevented individual clubs selling the rights to games other than those being broadcast by Sky under the terms of the agreement.

The Court rejected the view that the league “cartel” restricted output, although the evidence showed that

BSkyB would have liked to show more than the 60 live matches allowed by the agreement. The Court seems to have concluded that, if the Premier League had wished to maximise its revenue, it would have agreed to the broadcasting of more games. In order to increase prices, cartels must reduce output.

Sports Clubs Cooperate to Compete.

Some economists have questioned whether the teams which make up a league constitute competing entities in competition law terms. The very essence of professional team sports, such as football, is that the teams involved in a particular game try to beat one another, and each team in the league tries to finish higher than its rivals. The operation of the league, however, requires considerable cooperation between teams, in order for it to operate successfully, and attract supporters to matches. No team can produce even a single unit of output - one game - on its own. Only by acting collectively can a league and its member clubs produce a full season of games resulting in a championship competition. Games which are a component part of such a contest constitute a far more attractive product than individual games organised on an ad-hoc basis between any two teams. Consequently, it is argued that a sports league and its teams should be treated as a single economic entity.

This view seems to have been accepted by the UK Court, as Fettes, J. put it:

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“...if a club were to withdraw from the FA PL for whatever reason it could not produce the derived product it helped to produce as a member of the PL cartel. A widget producer continues to be a producer of the same widget when he quits the cartel.”

Similarly in *NCAA* the US Supreme Court noted that “league sports” were “perhaps the leading example” of a business activity that “can only be carried out jointly.” The Court nevertheless found that a collective agreement to sell broadcasting rights was illegal because it prevented individual teams selling television rights to games not being broadcast under the agreement.²

How Much Cooperation is Necessary?

Some argue that the common interest of teams in sports leagues extends beyond the need to coordinate arrangements for matches. It is argued that measures to ensure a relative degree of equality between the teams in a league are necessary to ensure the uncertainty of outcome of any particular game that is an essential feature of sports. US sports leagues share revenues from collective selling of broadcasting rights evenly among the league members in order to ensure that each team has an equal opportunity to hire the best players.

It would seem possible to distinguish between activities which have to be undertaken collectively by the league and its members, and those which may be conducted by member teams individually. An agreement on a set of rules and a coordinated fixture list comes into the former category, while the sale of match tickets and broadcasting rights fall into the latter.

There is some evidence that revenue sharing does not improve the competitive balance in a league. Similarly, while although the gap between the Premier League clubs and those in lower divisions is generally considered to have widened, this does not appear to have reduced the spectator appeal of cup games between Premier League teams and those from the lower divisions, i.e. reduced uncertainty has not reduced attendances at such games.

Clubs Have divergent Interests.

The teams in most European soccer leagues do not have common interests to the same extent as teams in most US sports leagues. Most European soccer leagues involve promotion and relegation between different divisions with the result that league membership changes from year to year, unlike the US, where league membership is fixed. If they only operated in their own national league, it might be in the interests of bigger European soccer clubs to have a relatively even distribution of resources in order to make games more competitive and increase spectator interest. The top teams in national leagues in Europe, however, qualify to play in Europe wide competitions such as the UEFA Champions League. It is clearly not in the bigger clubs interests to have a more evenly balanced domestic league which would reduce their chances of qualifying for such competitions as this would have a serious negative impact on their revenues.

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¹ *Football Association/BSkyB Football*, 1993 OJ, C94/6.

² *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 US 85, 101 (1984).