Contents

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The Premier League-European Commission Broadcasting Negotiations

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ABSTRACT

This intervention analyses the new arrangements for the sale of live television rights to FA Premier League (FAPL) games. The new procedures have been produced as a result of ongoing discussions between the FAPL and the European Commission. To ensure compliance with European Union competition legislation, the Premier League has accepted the Commission's calls for an end to its exclusive distribution of live broadcast rights, bringing to an end BSkyB's 15-year monopoly of its main subscription driver (Buck and Terazono, 2005). Here, we examine the aims of the European Commission in pursuing the FAPL's exclusive deal with BSkyB (Sky) and consider whether the deal that has been brokered provides any tangible benefits to the consumer.

KEYWORDS

Broadcasting - Competition Law - Sky - Football Association Premier League - European Commission

INTRODUCTION

The latest round of negotiations between the FAPL and the European Commission appears to be the endgame of a protracted campaign by the Commission to prevent Sky from owning the exclusive rights to televise live Premier League football games in the UK. The Commission claims that it is acting for the benefit of the ultimate consumer, the football fan, and that by bringing to an end Sky's monopoly it is ensuring better access to live games. On the other hand, the FAPL claims that it is securing not only the best deal for its constituent members, the clubs, but is also brokering a deal that is in the best interests of football as a whole, including the fans. Throughout the negotiations, the two cornerstones of the FAPL-Sky deal, collectivity and exclusivity, came under almost constant scrutiny. 1

In this context, collectivity is where a group of clubs act together to form a league, play in competitions and negotiate commercial deals as one entity. It is the last part of this definition, when the FAPL is acting for commercial rather than for sporting reasons, that has concerned the Commission as it raises the prospect that the FAPL may be acting as a cartel/monopoly. This issue had been addressed previously by the Commission in its Statement of Objections concerning UEFA's selling of its Champions League games (European Commission, 2001). The Commission claims that by limiting the number of live games that can be televised, and thereby maximizing its revenues, the FAPL is abusing its position as a monopoly supplier. The FAPL counters this by arguing that its commercial agreements need to be organised collectively in order to manage efficiently the interests of its 20 members and to help maintain as level a playing field as possible in respect of the distribution of the revenues received. 2

Exclusivity is the means by which a broadcaster can effectively guarantee large audiences for a popular product. By paying an exclusivity premium to the FAPL, broadcasters can ensure that consumers can only view the event through one medium. This enables a satellite broadcaster such as Sky to coax subscriptions from consumers with the enticement of programming unavailable elsewhere. Such an arrangement is also extremely beneficial to the rights holder, the FAPL, because it too can maximise its revenue potential. 3

Whether exclusivity and collectivity can be reconciled with promoting consumer choice and increasing competition in the broadcasting market were the questions that the Commission sought to answer. The paradox remains, however, that the Commission, in claiming to act in the best interests of consumers, may perhaps be chasing an ideal that in reality may not exist and further may be unwanted by the stakeholders whom it is seeking to benefit. 4

THE PREVIOUS AGREEMENTS AND THE PROBLEMS OF EXCLUSIVITY

Since 1992, the FAPL and Sky have entered into four successive exclusive deals, running from 1992-97, 5
1997-2001, 2001-04 and 2004-07 (McAuley, 2004 and Geey. 2004). Apart from during the currency of the first deal, the Commission has been in almost constant discussion with the FAPL over reducing the length of each successive deal and restricting the collective and exclusive natures of the deals. Strikingly, when a challenge was made during the second year of Sky's first five-year contract with the FAPL, an exception to the competition provisions was granted under what is now Article 81(3) for the entire period of the contract (European Commission, 1993). The exception was acknowledged as being necessary because British Satellite Broadcasting (who were about to merge with Sky to become BSkyB) had only begun to broadcast in 1990 and needed the certainty of a longer term contract in order to develop within the British broadcasting industry.

Yet since the ruling, Sky has signed deals with the FAPL for four years in 1996 and three years in 2000 6
without the need for the protection that it received during the first deal. The rationale for the decision was understandable in 1993, with an infant broadcasting group, but there was little need for this type of exclusive protectionism to continue unchallenged once Sky became an established broadcaster. If exclusivity is to be used to protect new entrants to the market, as was the reason for the initial exception, it should not have the undesirable consequence of foreclosing the market to others in a similar position. Far from encouraging new entrants, the exclusivity conferred on Sky in 1993, and left unchallenged in the next two deals, allowed Sky to become the dominant broadcaster in this market rather than enabling the same concessions to be exploited by other embryonic broadcasting companies. Sky's entrenchment was further guaranteed because new rival broadcasters would be unlikely to be able to afford an exclusive rights package when faced with huge exclusivity premiums and a broadcasting company, such as Sky, with a dominant and entrenched position to protect and a huge cost base over which to spread its rights expenditure.

The negotiations for the 2004-07 agreement signalled the beginning of the end of a number of long- 7
running debates between the FAPL and the Commission concerning the use of a single broadcaster and the maintaining of a single exclusive rights package to broadcast live games. The FAPL unbundled its broadcasting rights into four distinct packages. The gold package covered 38 games to be played on a Sunday afternoon, the silver package 38 games on Monday evenings and two bronze packages of 31 games each to be played at 1.45pm and 5.45pm on Saturday afternoons. The different grades of package were designed to reflect the perceived attractiveness of the games that they covered with the best games contained in the gold package. These packages were marketed separately to ensure equality of opportunity in the auction so that broadcasters who could not afford the product as a whole, i.e. all four packages, could use their more limited resources to bid for a single one of the packages.

The Commission surmised that this would liberalise the market for live FAPL rights and be of benefit to 8
smaller broadcasters who would no longer be hampered by having to bid for one homogenous product that was prohibitively expensive. There would be greater choice at both the supply and demand level. The suppliers (broadcasters) would be exposed to greater competition at the upstream level whilst the consumers would be able to choose their preferred product from a range of different providers and, in theory at least, pay lower prices for the product. The Commission was far from happy when Sky bid for and won all of the packaged rights. It was adamant that for the 2007-10 broadcasting deal, exclusivity would be a broadcasting characteristic confined to the past and that at least one set of packaged rights could not be purchased by Sky (IP/05/1441). If the same number of games are sold as packaged rights for the next auction there will be six packages of 23 matches each, with each package supposedly containing games of equal appeal to football fans (Milmo, 2005 and Zetaria, 2005). Indeed some have seen the proposed merger between NTL and Virgin Mobile as potential competition to Sky and its attempts to maintain dominance over FAPL games on its subscriptions channels.

With exclusivity no longer operating as a bar to entry into the FAPL live rights market, speculation has 9
been rife over which of the many current, and indeed new, broadcasters may enter the fray in order to fight over what the Commission and others have long viewed as being perhaps the most effective subscription-driver and a major asset to, particularly, a pay-TV broadcaster's portfolio. Indeed only 15 years ago, Sky was on the brink of extinction before securing the FAPL rights thereby establishing itself at the heart not just of English football, but British broadcasting.

Despite the bar on exclusivity, Sky will still be able to bid for five of the six packages, representing almost 10
85% of the available live games. It was reported that the Commission was seeking to limit Sky's live penetration rates to not more than 50% of available games (Griggs and Smith, 2005). Interestingly, a proviso to the last auction process was added ensuring that the current deal would be the last where Sky

would be able to secure exclusive rights to live games. This agreement would seem to suggest that although neither side is completely satisfied with the outcome of the negotiations, concessions have been made and agreed upon in order, at least on the face of it, to aid consumer choice, whilst at the same time giving alternative broadcasters a platform from which to enter a previously closed market. Sky welcomed the Commission's approval of the next auction process by stating,

> It has been known since 2003 that live matches will be offered by more than one broadcaster under the Premier League's next rights agreements. Today's statements offer more clarity on those arrangements (Griggs and Smith, 2005)

COLLECTIVITY, EXCLUSIVITY AND THE NEW DEAL

Whereas the exclusive nature of the FAPL-Sky deals has been the main focus of the Commission's investigations, the collective nature of the deals, where the FAPL negotiates on behalf of its constituent member clubs, has caused far fewer problems. A league acting as a central organising and negotiating body is far less anti-competitive for broadcasters and consumers alike when compared to the effect of exclusivity clauses. Collective bargaining ensures that the clubs are not competing against each other in the market and can ensure a fairer distribution of revenues to its members. In this way, collectivity could even be seen to be pro-competitive. To this end, the German and US federal legislatures have found it necessary to recognise the weight of such arguments by introducing statutory exemptions to anti-trust legislation to prevent potential legal conflict with collectively negotiated deals, respectively in section 31 GWB, BR-Dr, 852/2/97 and The Sports Broadcasting Act 2000, 15 USCA ss1291-1294. 11

The disadvantages of collective agreements are supposedly twofold. The first disadvantage is the ability of the selling league to fix the price of the overall package at a disproportionately high level. It is able to do this by restricting the flow of content to the market by not allowing broadcasters to negotiate with individual clubs, instead forcing them to buy a complete package from the central negotiating body, for example the FAPL. The second is that the selling league can limit overall output by restricting the number of games that can be televised. As both of these restrictive practices occur with the collusion of the member clubs, the risk is that the league is acting as a cartel and distorting the market for its product contrary to Art 81(1) or that it is abusing its dominant position in the market as the sole seller of the rights contrary to Art 82. 12

The Commission has been careful not to label collective selling as illegal per se as the effects of collectivity do not necessarily foreclose markets: 13

> Joint selling may be an efficient way to organise the selling of TV rights. However, the manner in which the TV rights are sold may not be so restrictive as to outweigh the benefits provided (European Commission, 2001).
>
> Although not entirely conclusive in their assessment of collective selling, it perhaps demonstrates a veiled criticism of exclusive agreements, by way of the *manner* in which they are sold. It does lend more weight to the argument that perhaps the Commission is more concerned with the detrimental effects of exclusivity than collectivity.

Conversely, the most potent side effect of exclusivity is that by its very nature it forecloses broadcasting markets by leaving one incumbent broadcaster with the exclusive right to broadcast the product. The Commission has therefore allowed collectivity to continue, where justifiable, whilst abolishing exclusivity by requiring at least two broadcasters to purchase the available packages of live rights. Its aim is to introduce more competition to Sky, not to create competition between the clubs, and to make more games more widely available (Cassy, 2003). 14

It seemed inevitable, therefore, that the FAPL would be forced to realign its rights package auction process to conform to the reformed Champions League deal of 2002 (IP/03/1748). This should have meant an end to Sky's exclusive deal and, if the UEFA format followed, all 360 Premier League games being available for screening. Despite speculation that a terrestrial broadcaster would be guaranteed one of the two available 'bronze' live rights packages, Sky successfully secured the rights to all of the 138 live games made available by the FAPL. 15

Although Sky won the live rights in an open auction by bidding the highest amount, the Commission were still disappointed that Sky had been able to retain its status as the exclusive broadcaster of FAPL games. This in turn has resulted in the Commission forcing through the changes to the bidding process that has just been completed for the 2007-2010 rights. 16

THE ECONOMIC IMPACT OF THE NEGOTIATIONS

Until recently, the received wisdom in broadcasting negotiations was that income would be maximised if a premium could be charged for a single exclusive package. Following the collapse of ITV Digital and the precarious financial position of many clubs, fear was mounting that Sky would not pay such a huge sum for a non-exclusive deal. This fear was fuelled by the comments of BSkyB's majority shareholder, Rupert Murdoch, who publicly condemned the amount that Sky had been forced to pay for the last FAPL deal (Campbell, 2002). As can be seen in figure one below, the price per match that Sky now pays has jumped to astronomical levels over the course of its relationship with the FAPL. 17

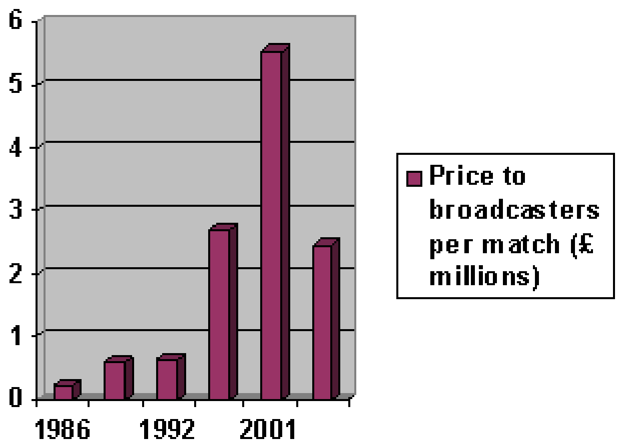

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FIGURE 1

18

In light of these comments, it is interesting to note the price per match decrease on the most recent FAPL contract. This was always likely to occur because of the different broadcasting packages that were available and the risk associated with a failure to secure exclusivity. Although the total figure paid for the 2004-07 rights (£1.02bn) was similar to that paid by Sky for the previous contract (£1.1bn) that it was able to screen over twice as many live games for the investment marked a significant shift in the balance of power. Despite a halving of the price per game, the packaged model for tendering broadcasting rights could be viewed as a successful strategy, especially in the light of the then depressed advertising revenues and an increased unwillingness on the part of broadcasters to pay what they saw as such exorbitant fees, even for the guaranteed audiences associated with events like the FAPL.

In the future, a further fragmenting of the product may be the best approach to maximising broadcasting revenues; a tactic that would also, conveniently, appeal to the Commission and its attempts to purge football of exclusive deals. Armed with its new approach to rights packages and negotiated in conjunction with the Commission, UEFA received more money for the televising of its Champions League competition through a non-exclusive contract with ITV and Sky than it had previously done by solely and exclusively contracting with ITV (Gibson, 2002). 19

Despite the amendments to the tendering process introduced for the 2004-07 FAPL live broadcasting rights, further changes have had to be made for the next round of negotiations due to start in the summer of 2006. Although the Commission has not sought to challenge the collective nature of the FAPL as a rights-selling organisation, it will no longer accept that one broadcaster alone can have the exclusive right to screen the limited number of live games that will be offered. A specific term of the bidding process is that no one organisation can hold the entirety of the FAPL's live broadcast rights, even if it has the will and financial capability to do so. In view of the Commission's warnings that exclusivity is anti-competitive in the context of the right to broadcast a sporting competition such as the FAPL, there was, in reality, little option but to introduce a procedure along these lines. Following the re-formatting of the Champions League broadcasting settlement between UEFA and the Commission, the FAPL has followed this blueprint for its next round of negotiations. 20

CONCLUSIONS

At the beginning of the FAPL's live rights auction in August 2003, exclusivity of its broadcasting contract was viewed by many as a fading memory. Market access was supposed to be secured for new broadcasting companies whilst at the same time providing real competition to Sky in the public tendering process. The negotiations were no longer supposed to follow the model of a zero-sum auction where the company with the most money was able to outmuscle other broadcasters from the bidding process. Although Sky obtained the rights for all of the available packages for three years from 2004, the newly implemented process did at least signal to other broadcasters the Commission's future intent; that Sky, for the first time in nearly two decades, should face real competition in the auction for the 2007-10 live rights packages. 21

One concern that may well be expressed, especially by Sky, is that the exclusion from the complete auction process of any one broadcaster may be anti-competitive in itself. The idea that the Commission, in guaranteeing access to the market to other broadcasters, is open to the accusation that it is distorting or even preventing competition by effectively barring the incumbent broadcaster from freely participating in a fair auction, is a strike at the very heart of the legality of its aims to protect competition throughout the EU. 22

This determinedly interventionist stance is almost certainly explained by Sky having maintained its exclusive hold on FAPL live games in 2004 by its bidding for and winning all of the available packages of rights. This auction tactic outmanoeuvred the aims of the Commission and failed to provide it with a satisfactory outcome. The absolute prohibition on Sky gaining all six of the rights packages for 2007-10, thereby guaranteeing access to FAPL live games for other broadcasters, ensures that what the Commission intended would occur during the last round of negotiations must occur this time around. 23

Neelie Kroes, the European Competition Commissioner, was encouraged to state that the new deal would, 'give British football fans greater choice and better value' (Griggs and Smith, 2005). Previously, there had been accusations emanating from the Commission that earlier FAPL-Sky broadcasting agreements had led to higher prices for consumers and reduced innovation by the entrenched broadcaster (Griggs and Smith, 2005). Whilst there is no direct comparator for Sky's subscription fees, as no other broadcaster can televise live FAPL games, it is difficult to argue that Sky's interactive digital services are anything other than at the forefront of technical innovation. 24

Until the auction process is completed and the packages bought, the theoretical benefits that the Commission ascribes to the new tendering arrangements could in fact result in serious financial detriment to fans as they may in future be required to purchase more than one subscription, should another pay-TV channel secure one of the packages, and perhaps additional hardware, such as an additional set-top-box, to be able to watch the various FAPL packages on what will now be a divergence of channels. Very few people have doubted the quality of Sky's FAPL broadcasts and continue to pay the not inconsiderable subscription fee of £34 per month to view Sky Sports. With the end of exclusivity, consumers are likely to have to pay more for their football in a market that may also be more confusing than the current one-stop-shop provided by Sky (see further Ofcom, 2005). 25

There appear to be four main reasons behind the Commission's campaign against Sky's exclusive access to the FAPL's live rights. First, it claims that the abolition of exclusivity will promote consumer choice by enabling access to the games through a greater number of broadcasters. Secondly, that it will reduce consumer cost because a single broadcaster will no longer need to pay an 'exclusivity premium' to secure the entire package of live rights. Thirdly, that it is abolishing a monopoly situation that could be abused to the detriment of the consumer through artificially high subscription fees. Fourthly, that the collective, joint selling, arrangement had the potential to operate as a cartel that could (but currently isn't) demand an artificially high price from the broadcasters. 26

The Commission has focused its rhetoric on the first reason, consumer choice, whilst focusing its action on the third, the abolition of the exclusive, potentially monopolistic, nature of the deal. What it has not considered is the lack of consumer complaint about the current broadcasting deal and the potential for increased costs that will almost certainly be faced by consumers when this deal is implemented. Although Sky has created a monopoly situation by securing all of the available live rights packages, it cannot be said to be distorting the market if it is paying the market rate for those rights, nor is it abusing its dominant position in the market by charging consumers market rates to watch their broadcasts. All of which begs an intriguing question: is it really the Commission that is distorting competition in the market for FAPL live rights by preventing one organisation from securing all of the available rights in an open, competitive auction? This summer, we will find out for sure whether the Commission's actions were 27 genuinely for the benefit of the consumer, or merely a witch hunt of a media organisation that it felt had simply got too powerful.

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