United Nations TD/B/C.I/CLP/50

United Nations Conference on Trade and Development

Distr.: General
2 May 2018

Original: English

Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Seventeenth session
Geneva, 11–13 July 2018
Item 3 (a) (ii) of the provisional agenda

Competition issues in the sale of audiovisual rights for major sporting events

Note by the UNCTAD secretariat

Executive summary

The economic dimension of sporting events has become increasingly important and, in recent years, the sale of audiovisual rights has revolutionized the sector. The intensification of competition in the context of a stable number of major sporting events has transformed the sale of audiovisual rights into a lucrative business capable of attracting substantial revenue. The acquisition of audiovisual rights is an enormous cost for media content providers and pay television operators and constitutes a large share of their total spending on programming. The sale and acquisition of audiovisual rights for sporting events is subject to rules on competition, notably the prohibition of anti-competitive agreements between undertakings and the abuse of dominant positions. The tendency to broadcast important sporting events through pay-television or pay-per-view models has generated a sharp increase in piracy and illegal broadcasts.

This note highlights the contribution of competition law enforcement to the provision of access by viewers to broadcast sporting events along with balanced protection for audiovisual rights. In addition, the note considers international best practices in this area, for reference by developing countries.

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Introduction: Cultural, social and economic aspects

1. Sports are a cultural and social activity practiced and valued by millions of people worldwide, in which people participate for reasons related to health, leisure, entertainment or pleasure. Sports have a unifying potential and are capable of lessening differences between people, whether these are racial, sex-related, cultural, social or economic. The cultural and social dimensions of sports transcend borders and reach all corners of the world.

2. There is a wide range of evidence of the contributions of the sport and recreation sector, in particular to improving public health, reducing crime and antisocial behaviour and fostering social cohesion. In addition, there is significant evidence of several positive social impacts from participation in sports and exercise. The highest quality evidence is of the health-related benefits, including reducing or preventing physical and mental health problems and increasing savings on health-care costs. With regard to impacts on social capital, there is evidence that sports are a type of social glue, in particular with regard to bonding.
Studies have demonstrated positive outcomes, including in reducing social and ethnic tensions and leading to greater collective action and community involvement, in particular volunteer work.

3. The economic dimension of sports is becoming increasingly important. The execution of a major sporting event assists in developing infrastructure, generating employment, securing an inflow of foreign capital and fostering players and athletes, thereby contributing significantly to national economic development. It may therefore be said that the impact of sports on society and the economy is multidimensional.[1]

4. Sport and media are closely connected. Those wishing to watch a sporting event are not always able to physically attend and therefore need a different way of participating in the live experience. Media providers can assist in this regard by ensuring access to first-hand information about the event through news reporting and/or full direct coverage through live broadcasts. In order to provide the latter, media providers need to acquire transmission rights, which are particularly valuable with regard to premium sporting events. Providers therefore tend to prefer being exclusive rightsholders of such events, to profit from advertising revenue and fees from subscribers.

I. Evolution of the sale of audiovisual rights and impact on sporting events

5. In recent decades, the sale of audiovisual rights has revolutionized the sports sector. From the 1950s to the mid-1980s, the limited number of sporting events broadcast kept retransmission prices down, and event organizers received little or no compensation from broadcasters. This situation began to change in the late 1980s and early 1990s, spurred by the progressive liberalization of broadcasting markets and by technological developments. The number of actors on the demand side rose exponentially. As a result, public broadcasters faced increasing competition from cable and satellite pay-television broadcasters and telecommunications operators. The intensification of competition in the context of a stable number of major sporting events transformed the sale of audiovisual rights into a lucrative business capable of attracting substantial revenue.

6. At present, there is a symbiotic relationship between sports and media. Sports are a source of content for the public and commercial media sector, which may even use sports as a draw to increase the number of pay-television subscribers. Similarly, the sale of television rights is a source of basic funding for sports organizations, clubs and athletes, who obtain substantial sums for both television rights and sponsorships. Premium sports content is particularly valuable for media content providers at various levels. Sports content

[1] United Nations Inter-Agency Task Force on Sport for Development and Peace, 2005, Sport as a tool for development and peace, Final report.

has a unique potential to attract large audience shares and, in general, is not substitutable by other leisure activities.

7. Due to the increased demand for premium content and the number of premium events capable of attracting substantial audiences, such content has become a scarce resource, which has contributed to a significant increase in rights-related fees. The acquisition of audiovisual rights for sporting events is a substantial cost for media content providers and pay-television operators and constitutes a large share of their total spending on programming. For example, in 2009, broadcasters in the European Union spent around €5.8 billion on the acquisition of rights, representing nearly 17 per cent of their total spending on programming of €34.5 billion.[2]

8. Among the most significant and attractive rights for media content providers are those for major international and global sporting events and the top-level championships of major sports. Other events, such as Formula One races and those of sports such as cricket, rugby and tennis, usually come in at a distant second position in total spending on audiovisual rights. In addition, there is a range of other events that vary in audience popularity by country, such as skiing in Austria, cycling in Belgium, handball in Denmark, boxing in Hungary, baseball in Japan and basketball in the United States of America.

9. Finally, the current tendency to broadcast important sporting events through pay or pay-per-view television has generated a sharp increase in piracy and illegal transmissions.

II. Economic relevance of broadcasting in sports

10. Fees for media rights for premium sporting events have increased substantially in recent decades. For example, fees for the International Federation of Association Football (FIFA) World Cup have increased by over 900 per cent in the last 20 years. The sale of audiovisual rights has become, at 40–60 per cent, one of the main pillars of the revenue stream for professional sports, along with sponsorships, ticket sales for live events and merchandising. The revenue derived from the sale of audiovisual rights for premium content is particularly central in football, as indicated in the *FIFA Financial Report 2016*. Worldwide revenue from the allocation of audiovisual rights for the FIFA World Cup increased from €84 million in 1998 to over €2.4 billion in 2014. As may be expected, amounts paid in individual national markets vary considerably. In 2016/2017, the fees for audiovisual rights for major professional leagues worldwide, in millions of euros, were as follows: National Football League (United States), 5,567; Premier League (20 teams from England and Wales, United Kingdom of Great Britain and Northern Ireland), 3,044; Major League Baseball (United States), 2,374; National Basketball Association (United States), 2,245; La Liga (Spain), 1,450; Champions League (Union of European Football Associations (UEFA)), 1,404; Bundesliga (Germany), 1,159; and Formula One, 520.

11. The Olympic Games are the most viewed sporting event in the world. The Games in 2016 were viewed by half the global population, with online consumption rising to 7.2 billion views on social media platforms, double the figure for the Games in 2012. Between the two events, television coverage increased by 13.5 per cent and digital coverage by a substantial 198.6 per cent. Audiovisual rights have been the greatest source of revenue for the Olympic Movement for over three decades. Compared with the broadcast revenue of $1.2 million from the Games in 1960, the revenue from the Games in 2016 was an estimated $4.1 billion and represented 74 per cent of the revenue sources of the Games.[3]

12. The main sporting events organized by UEFA are also illustrative of the increase in fees. In 2016, including for the European Championship, audiovisual rights revenue was €3,185 million, with €1,404 million for the Champions League and €311 million for the Europa League. In 2015, the income received by the latter two competitions was

[2] European Parliament, 2017, Audiovisual rights in sports events: [A European Union] perspective, European Parliamentary Research Service briefing.

[3] See https://www.olympic.org/broadcasters.

€1,395 million, showing an 18 per cent increase in the billing of audiovisual rights in one year.[4]

13. In 2017, the global sports market was expected to generate revenue of around $91 billion. The worldwide sporting events market is expected to increase at a compound annual growth rate of 3.6 per cent in 2017–2021.

III. Legal nature of audiovisual rights

14. Given the social role of sporting events and their macroeconomic impact on the economy, defining the limits and scope of their legal protection constitutes an important challenge for legislators. A growing part of the economic value of sports is linked to intellectual property rights. However, there are many diverging views among stakeholders and national legislators on the form and scope of the protection to be granted to sporting events. Issues concerning the relationship between sports and media have become crucial, as media coverage is one of the main sources of income for professional sports.

15. At the international level, the World Intellectual Property Organization has indirectly addressed the relationship between media and sports through treaties and conventions related to the protection of the related rights of producers and broadcasting organizations. The latter can produce recordings of sporting events and thereby benefit from the related rights protection granted to producers of audiovisual works, whereby their authorization is required for reproduction, distribution and communication to the public of the recordings.

16. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) establishes minimum standards of international protection for broadcasting organizations, and states that they have exclusive rights for 20 years to authorize or prohibit certain acts, including rebroadcasting of their broadcasts, fixation (recording) of their broadcasts, reproduction of fixations of their broadcasts and communication to the public of television broadcasts if such communication is made in venues accessible to the public in return for the payment of an entrance fee. The Convention provides a basic level of protection, yet important developments in technology and the marketplace have taken place since its adoption that are not addressed. In 1997, World Intellectual Property Organization members initiated a review of existing standards in the ambit of the Standing Committee on Copyright and Related Rights, aimed at creating an international legal framework that adequately and efficiently protects against the piracy of broadcast signals. To date, an agreement has not yet been reached on how this should be done and what further rights, if any, broadcasters should be given.

17. Member States of the European Union, in domestic legislation, do not consider that sporting events qualify for such related rights, due to the absence of any original or creative form of expression, the unpredictability and uncertainty of the execution of events and the lack of a script or plot with regard to games and competitions. The Court of Justice of the European Union confirmed this interpretation in 2011, in its judgment in *Football Association Premier League Limited and Others v. QC Leisure and Others* and *Karen Murphy v. Media Protection Services Limited*. According to the Court of Justice, sporting events, in particular football matches, which are subject to rules of the game, leave no room for creative freedom for the purposes of copyright, and as such are excluded from copyright protection. However, the reproduction, distribution or communication to the public of audiovisual work still requires the authorization of the rightsholder.

IV. Legal framework for access to major sporting events

18. The introduction of legislation related to major sporting events has been justified by claims that, in the absence of such legislation, coverage of high-profile sporting events will tend to migrate from free-to-air broadcasting to pay television. Notably, in Europe, since

[4] UEFA, 2017, *Financial Report 2015/2016*, Nyon, Switzerland.

the 1990s, live television coverage of top-level domestic football events has largely shifted from free-to-air to pay television. In the United States, the migration of coverage to pay television has been less apparent, yet in recent years, there has been a discernible shift in the availability of premium sporting event programming, from free-to-air to cable and/or satellite pay television. For example, there was some controversy when the pay-television broadcaster Entertainment and Sports Programming Network acquired the rights to the traditional Monday Night Football broadcast beginning in 2006, which had been available to viewers on a free-to-air television network for over 30 years.

19. The growth of pay television has provided significant benefits for both viewers and sports organizations yet does not diminish the argument for legislation for major events, which is based on their potential to promote and/or preserve cultural citizenship. The regulation of sports-related broadcasting at the national level reflects particular domestic historical, political and cultural traditions. Various types of regulation in this market may be distinguished for the purposes of comparative analysis.

20. First, in free market regimes, sports-related broadcasting is left to the market, under a less strict regulatory framework, to ensure free-to-air television coverage of major events. Sports-related broadcasting in Brazil, South Africa and the United States may be characterized as predominantly market driven, as there is no legislation with regard to major sporting events. In the United States, the free market approach has been a defining feature of broadcasting since its inception. There are three key points in this regard, of which the first two demonstrate the free market approach. First, the Public Broadcasting Service has been overpowered by commercial networks in bidding processes for rights to popular sporting events. Second, in the 1970s, rules introduced by the Federal Communications Commission, the national broadcasting regulator, designed to prevent cable broadcasters from acquiring the rights to broadcast specific events, such as the World Series of Major League Baseball, the Super Bowl of the National Football League and the Olympic Games, were successfully challenged in court on the grounds that they infringed on the right to freedom of speech provided for in the First Amendment to the Constitution of the United States. However, despite these two developments, commercial free-to-air broadcasters continue to play a leading role in sports-related broadcasting. Third, the Sports Broadcasting Act (1961) was designed to ensure that competition law in the United States would take into consideration the special features of sports-related broadcasting and permit the collective selling of audiovisual rights by the major national leagues.

21. Second, in strong regulation regimes such as in Australia and India, public service or commercial free-to-air broadcasters are granted a dominant role in sports-related broadcasting. For example, legislation in India provides for strong regulatory protection for the coverage of major sporting events on free-to-air television by the public service broadcaster Doordarshan. The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act (2007) prevents any pay-television broadcaster from carrying live coverage of a sporting event of national importance unless it simultaneously shares its signal with Doordarshan. In addition, major events legislation in India specifies that the sharing of television rights for listed events should take place based on a revenue-sharing agreement between the parties, with advertising revenue shared between the content rightsholder and/or owner and Doordarshan, at a ratio of not less than 75 to 25. However, the law offers little guidance on the criteria used to select sporting events of national importance, which may be most problematic with regard to coverage of the national cricket team. Cricket is the most popular sport in India and the legislation leaves it to the discretion of the Government to decide which international matches will be shown through free-to-air coverage.

22. Third, in other regulation regimes such as in the European Union, both approaches are balanced. In the European Union, legislation regarding major events was first adopted in the late 1990s as part of a renewed directive on television without frontiers, and subsequently incorporated into Directive 2010/13 of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audiovisual media services, known as the Audiovisual Media Services Directive. The legislation is based on a dual rights system, whereby audiovisual rights related to the main football leagues are exploited by operators who charge a fee for

access to content. However, there are certain events that, due to their greater general interest, must be issued on free-to-air television. In this regard, the European Commission, in 2007, in its white paper on sport, recognized the crucial role of audiovisual rights as the primary source of income for professional sports. The potential conflict between the fundamental rights of citizens, such as the right to access and receive pluralistic information, and economic principles applicable to the exclusive sale of audiovisual rights, such as the freedom to enter into a contract and property rights, was addressed by the Council of Europe in the European Convention on Transfrontier Television, as amended according to the provisions of Protocol No. 171, which entered into force in 2002. The Convention aimed to limit the conditions for the sale and acquisition of exclusive audiovisual rights. Similar concerns were raised at the level of the European Union in Directive 2010/13. The two sets of rules in this regard, in the context of both the Council of Europe and the European Union, are the legal provisions on the broadcasting of events of major importance to society and on the right to make short reports of events of high interest to the public. The former implies the coverage of certain events, as identified by member States, by free-to-air broadcasters.

23. The self-regulation of international sports organizations is also a relevant factor. Such organizations have a long tradition of self-regulation and governance. Historically, they have set their own rules and regulation in several areas, including internal functioning and inter-organizational relationships, rules of the game and financial rules. The Council of Europe was the first intergovernmental organization to recognize the right of voluntary sports organizations to establish autonomous decision-making processes, under the European Sports Charter (1992; revised in 2001).

24. The development of the broadcasting sector is characterized by increased competition among pay-television operators and the rise of new technological means, including the shifts from traditional terrestrial television to cable and satellite television and from analog to digital television, which have directly contributed to the globalization of the sports economy and the significant increase in revenue for sports organizations derived from the licencing of audiovisual rights for sporting events. The sale of audiovisual rights represents one of the most significant sources of revenue for major sports organizations such as FIFA and the International Olympic Committee.

V. Enforcement of competition law in sales of audiovisual rights

25. The sale and acquisition of audiovisual rights for sporting events is subject to rules on competition, notably the prohibition of anti-competitive agreements between undertakings and of abuse of dominance. Viewer interest varies greatly depending on territorial criteria and content, and is important in defining the relevant market. Globally, many variables make markets prone to possible anti-competitive practices. Competition law has played an important role in the enforcement of audiovisual rights, in particular with regard to sporting events in high demand, and has a fundamental impact not only on consumers, the ultimate beneficiaries of the process, but also on industries linked to this market. Athletes and tournament organizations are directly concerned with the sale of rights, yet the following are also concerned: free-to-air broadcasters; pay-television or pay-per-view broadcasters; telecommunications companies; advertisers; sponsors; and economic groups, which in recent years have invested significant amounts in some sports.

1. Definition of relevant market

26. Given the diversity of sports, the varied interest of viewers and national viewing habits, one of the main challenges in applying competition law in this area relates to the definition of the relevant market. In some instances, the definition is simple, as the tastes of consumers are evident with regard to a particular sport; in other instances, tastes are more varied, and it is necessary to perform a more exhaustive analysis of the substitutable character of a sport in comparison with other leisure activities, depending on the territory. The temporary aspect of sporting events and tournaments that have a large audience but are

held irregularly must also be considered, such as the FIFA World Cup, the Olympics and the UEFA European Championship. For example, the European Commission, in Decision 2003/778 of 23 July 2003, with regard to the joint selling of the commercial rights of the UEFA Champions League, considered that the relevant product market could be defined as the market for the acquisition of television broadcasting rights for football events held regularly throughout the year. This definition would therefore include national first and second division events, as well as championship events and Champions League and Europa League events. The broadcast of football events would create a particular brand image for a television network and allow the broadcaster to reach a particular audience that could not be reached by other programmes. The European Commission considered the geographical scope of the different markets as national or confined to linguistic regions. Audiovisual rights for football events such as those of the Champions League are normally sold on a national basis due to the national character of distribution, which is defined by national regulatory regimes, language barriers and cultural factors. Furthermore, pay-television broadcasters normally sell subscriptions only to viewers in a certain territory and advertising is typically adapted to conform to the tastes and languages of a certain territory. Similar considerations appear to apply to new media services.

27. In the United States, few judicial antitrust decisions involving professional sports have devoted significant attention to the definition of the relevant market. The Supreme Court has addressed the market definition twice, in a decision in 1959 involving the promotion and broadcasting of boxing, which upheld a lower court's determination that the relevant market was limited to championship boxing matches, and a decision in 1984 involving the broadcasting of college football games, which approved a lower court's determination that the relevant market was limited to broadcasts of college football events. Recent decisions, however, have suggested that professional sports face competition from many varied sources. The decision of the Court of Appeals in *American Needle Incorporated v. National Football League* stated that the "league competes with other forms of entertainment for an audience of finite (if extremely large) size, and the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success".[5] In a case involving licencing by Major League Baseball, the Court considered evidence that the league competed with both other sports and non-sports licensors in licencing team logos. Whether these factors will lead courts to adopt broader market definitions remains an open issue.

2. Collective selling of audiovisual rights

28. To date, the application of competition law to sports-related broadcasting has focused mainly on collective selling by sports leagues of the rights to broadcast exclusive live coverage of their events. The argument for regulatory intervention is based on the claim that collective selling through a league means that teams act as a cartel. From this perspective, collective-selling agreements restrict competition in three main ways, by:

(a) Giving a league market power to dictate the price of audiovisual rights, which leads to inflated prices both upstream, for broadcasters, and downstream, for consumers;

(b) Limiting the availability of rights for sporting events, as teams may be concerned that live broadcast coverage of events will undermine attendance revenue;

(c) Strengthening the market position of the most important broadcasters, as they may be the only operators able to bid for all the rights in a package.

29. Due to the particularities of this sector, the marketing of audiovisual rights for sporting events raises two main competition-related concerns, namely with regard to joint selling of audiovisual rights and territorial exclusivity.

30. Joint selling of audiovisual rights for sporting events has become the dominant practice since two European Commission decisions, with regard to Bundesliga, the Premier League and the UEFA Champions League, clarified the legality of this practice under strict

[5] See https://caselaw.findlaw.com/us-7th-circuit/1291215.html.

conditions.[6] Prior to these decisions, national competition authorities had prohibited joint selling on the basis of national rules on competition. In the 1990s, competition authorities in Germany, Italy, Netherlands and the United Kingdom had initiated actions with regard to the joint selling of media rights for football events and found that they were anti-competitive. The European Commission has consistently ruled that joint selling constitutes a horizontal restriction of competition and contravenes article 101(1) of the Treaty on the Functioning of the European Union. However, joint selling arrangements may be covered by the exception in article 101(3) since, as stated in Decision 2003/778 of 23 July 2003, such agreements may:

(a) Lead to improvements in production or distribution, by creating a quality branded league-focused product sold through a single point of sale;

(b) Increase efficiency, by reducing transaction costs for audiovisual operators and clubs and responding to broadcaster demands;

(c) Provide for marketing advantages, such as the branding of uniform league-focused products and services;

(d) Allow consumers to profit from the benefits deriving from an agreement.

31. The European Commission considered that the joint selling of audiovisual rights for Champions League events was unlikely to eliminate competition with regard to a substantial part of the audiovisual rights in question. The European Commission negotiated several important changes to the way UEFA sold the rights to Champions League events, including the introduction of a three-year limit on the length of any exclusive deal, the division of television rights into a number of separate packages and the unbundling of new media rights. The same principles were applied in the decisions with regard to Bundesliga and the Premier League, in which the European Commission required different modifications and commitments involving, for example, a short duration and limited scope for exclusive rights, a transparent bidding procedure, the retention of sales of certain audiovisual rights by clubs and a fall-back clause, whereby certain unsold rights might revert to the clubs for individual marketing. The approach adopted in competition law in Europe at both the national and European Union levels has been to treat audiovisual rights for exclusive live sports programming, in particular with regard to football, in accordance with the essential facilities doctrine.

32. Of these conditions, the most significant limitation to contractual freedom introduced by the European Commission may be the no-single-buyer rule, which is a commitment by national football leagues in Europe, including Ligue 1 (France),[7] Bundesliga,[8] Serie A (Italy)[9] and the Premier League,[10] to ensure that no single bidder may

[6] Commission Decision of 22 March 2006 relating to a proceeding pursuant to article 81 of the [Treaty Establishing the European Community]; Commission Decision of 19 January 2005 relating to a proceeding pursuant to article 81 of the [Treaty Establishing the European Community] and article 53(1) of the [Agreement on the European Economic Area].

[7] Relevant provisions are codified in articles L333-2 and L333-3 of the sports code and permit joint selling of sports media rights by professional leagues; rights must be offered through a public and non-discriminatory bidding procedure in different batches for a maximum duration of three years.

[8] In 2016, the German Football Association and the German Football League submitted a list of commitments to the Federal Cartel Office concerning criteria for the awarding of media rights for the games of the first and second divisions from the 2017/2018 season onward, including, in particular, a no-single-buyer rule, whereby no single bidder will be able to acquire the rights to broadcast all live Bundesliga matches; the Federal Cartel Office declared the commitments legally binding.

[9] Legislative Decree No. 9 (2008) regulates the compulsory joint selling of audiovisual rights for sporting events; article 3 states that audiovisual rights for sporting events are jointly owned by the organizer of the relevant competition and the organizer or host of each event pertaining to that competition.

[10] The Office of Communications Decision of 8 August 2016, carried out under Competition Act (1998), on whether Premier League selling arrangements restricted or distorted competition, took into account the Premier League decision to increase the number of matches available for live broadcast in the United Kingdom to a minimum of 190 per season from the start of the 2019/2020 season, an

be awarded all exclusive audiovisual rights for live broadcasts of tournaments. The main criticism of this rule concerns the penalization of end users. That is, if applied, the rule means that viewers must pay for at least two subscriptions to watch all events of a particular team.

33. The example of Spain may be considered with regard to the sale of rights. Until recently, audiovisual rights were sold individually by football clubs. The Professional Football League managed these rights until the 1997/1998 season when, following an agreement by the general assembly of the League in 1996, each club began to negotiate sales of its own rights. This changed further with the adoption by the Government of Royal Decree Law 5/2015 on urgent measures in relation to the commercialization of the rights of exploitation of audiovisual contents of professional football competitions, which regulates the commercialization of audiovisual rights of broadcast football matches, as well as the distribution of the income generated.[11] In addition, the law introduces the joint selling of audiovisual rights and entrusts the Professional Football League to manage the rights related to La Liga and the National Cup and the Royal Spanish Football Federation those of the King's Cup. This change has meant an increase of 32 per cent in annual income for La Liga.

The National Commission on Markets and Competition oversees agreements between the Professional Football League and broadcasters and, in 2015, reported on the League proposal for the joint selling of audiovisual rights for the 2016/2017 and 2018/2019 seasons.

34. With regard to territorial exclusivity, the European Commission accepts territorial restrictions on access to content, but not when territorial exclusivity is absolute. Absolute territorial protection means that licensees are prohibited from selling not only actively in the territories of other licensees but also passively, that is, by responding to unsolicited demands from customers located in other countries. The Court of Justice of the European Union, in the decisions related to the Premiere League, ruled that the system of territorially exclusive licence agreements put in place by the Football Association Premier League, which forbade licensees from supplying decoding devices that would enable access to the subject matter of rightsholders protected against use outside the territory under the licence agreement, constituted a restriction on competition prohibited under article 101 of the Treaty on the Functioning of the European Union. According to the Court of Justice, partitioning markets with the sole aim of creating artificial price differences between member States and thereby maximizing profits was irreconcilable with the Treaty. In this case, such territorial restrictions did not qualify for an exemption under article 101(3) of the Treaty, which provides an exception based on contributing to improving the production or distribution of goods or to promoting technical or economic progress. This judgment may be likely to have far-reaching ramifications for current business practices in the broadcasting sector, not only with regard to sports, but also motion pictures and other premium content offered by satellite pay-television operators. In February 2017, the European Parliament reached an informal agreement with the Council of the European Union on a draft regulation on the cross-border portability of online content. From 2018 onward, European nationals travelling to another member State of the European Union will be able to retain subscriptions for online content, such as sports, music, games and films; portability will not be restricted in time and will apply to all subscription service content and to free services that wish to participate.

35. In the United States, some activities related to the broadcasting of professional sports are exempt from antitrust laws. The Sports Broadcasting Act (1961) exempted from antitrust laws the pooling of sponsored audiovisual rights for sale as a package by the professional baseball, basketball, football and hockey leagues. The Act overturned the decision of a district court that had declared that a contract between the National Football League and a major television network was prohibited under the terms of an injunction entered as a result of an earlier antitrust suit. Thus, even if collective television contracts are subject to scrutiny under the Act, they may still be permitted, as a league is viewed as a

increase of at least 22 matches per season over the number sold for live broadcast in the Premier League auction in 2015.

[11] See http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-4780.

single economic entity in marketing its games or because collective action by the teams is deemed either ancillary to the legitimate aims of the joint venture or otherwise reasonable. The most prominent Supreme Court decision, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, involved broadcasts of college football games and related to the limits that the Association placed on televised broadcasts of such games. This case is widely cited even in areas beyond college-level sports.

36. In New Zealand, there are no statutory provisions permitting professional leagues or federations to sell television rights to games of their respective member teams as a package without violating competition law. To date, however, there has been no challenge in the courts to the practice of pooling sports-related audiovisual rights.

37. In India, competition law has had little impact on sports-related broadcasting. However, given the importance of cricket for pay-television broadcasters, the Competition Commission of India, in an order dated 29 November 2017 under case No. 61/2010, addressed the granting of franchise, media and sponsorship rights by the Board of Control for Cricket in India in the context of the Premier League and found that the Board had abused its dominant position.

38. Competition issues in the sale of audiovisual rights for major sporting events are relevant both for developed and developing countries, due to the shared interest of viewers in broadcast events and the transition to digital broadcasting systems in most developing countries. Technological convergence has promoted competition, and competition authorities in several developing countries have therefore faced market access issues and anti-competitive practices in recent years.[12] Regulatory challenges faced by more experienced competition authorities and the decisions undertaken may serve as important references for small and young authorities addressing the restrictive practices of international actors.

VI. Future challenges

39. Professional sports are a product of substantial consumption worldwide. The recognition of the positive effects that major sporting events can have on society emphasizes the importance of their being broadcast, as it is unlikely that everyone interested in an event will be able to physically attend. This implies that free-to-air live coverage of the most relevant events remains an important gateway for the effective achievement of objectives related to the right of citizens to information.

40. There are at least two challenges that affect the sale of rights in sports-related broadcasting, namely digital disruption and the increase in piracy and illegal streaming.

41. Digital disruption in sports-related broadcasting occurs worldwide. The emergence of new technologies has had a profound effect on how viewers consume sports-related broadcasts, as consumption moves to mobile-first, as is also occurring in the music and motion picture industries. This change involves the following three broad underlying factors:

(a) A shift in the viewing behaviours and consumption habits of modern sports fans;

(b) The everchanging media rights landscape and the proliferation of digital media;

(c) The emergence of new technology, which can be leveraged to create unprecedented levels of engagement, including increased levels of broadband speed, the exponential growth of free Wi-Fi, including at the premises of sporting events, and the increasing sophistication of smartphone cameras.

[12] See the compilation of documents of the Global Forum on Competition of the Organization for Economic Cooperation and Development, available at http://www.oecd.org/competition/competition-television-broadcasting.htm.

42. In recent years, there has been a reduction in broadcasting of the most in-demand sports on free-to-air television, in favour of pay television, and this has generated a substantial increase in piracy and illegal streaming.

43. In the 2012–2013 season, there were approximately 33,000 unauthorized live streams of Premier League games and about 17,500 such streams for Bundesliga games; the latter is a substantial 647.8 per cent increase compared with the figures for the 2009–2010 season. The quality of such streams is improving rapidly, due in part to the widespread availability of low-cost technology that facilitates the illegal retransmission of broadcasts. Illegal streaming has also moved beyond individual users to commercial premises.[13]

44. The scale of the challenge faced by sporting event broadcasters in combating piracy is shown by the fact that more than half of millennials watch illegal streams of live events. According to one survey, 54 per cent of millennials have watched illegal streams of live sporting events and a third admit to regularly watching them, compared with 4 per cent of those over 35, and those aged 18–24 are also half as likely, at 12–24 per cent, to have subscriptions to pay television services.[14] The unauthorized streaming of live sports transmissions over the Internet has become one of the main concerns in sports media, as broadcasters have lost billions of dollars' worth of sports-related broadcasting contracts and sponsorship deals.

45. The scale of this problem has caused serious harm to both sports rightsholders and broadcasters. Given the substantial economic investment required to obtain exclusive licences for sporting events, the infringement of intellectual property rights causes considerable harm to rightsholders. In the long term, it also puts at risk the value of those rights and, therefore, the revenues of sports organizations. A report of the National Observatory for Telecommunications and the Information Society indicates that, in Spain, in 2015, the cost of loss of income due to piracy was €1,669 million, given illegal access to 4,307 million items of digital content with a market value of €24,085 million, of which €186 million represented serial programmes, €573 million represented movies and €174 million represented football.[15] A progressive increase in piracy and illegal streaming over the Internet could reduce the billing of television operators, organizations and sports teams and clubs. In certain sports, revenue from television rights represents more than 50 per cent of the billing of clubs; taking this into consideration, it is clear that the impact of such practices can affect the continuance of professional sport in its present form.

VII. Conclusions and questions for discussion

46. The sale of audiovisual rights in sports is a topic of great importance for the maintenance of professional elite sport worldwide. At present, more than 50 per cent of the funding of sports organizations and teams at this level is financed by the sale of audiovisual rights. Similarly, television operators obtain higher profits from advertisers or subscribers if broadcasts of major sports programmes are included in their programming. The symbiosis between broadcasting and professional sports has led to a considerable increase in the price of audiovisual rights and generated higher profits for organizations and teams, which in turn has raised the level of the salaries and contracts of elite athletes, with the consequent risk of needing to address such payments if the sector enters a financial crisis.

47. Competition authorities play an important role in the sale of audiovisual rights. They need to monitor both the criteria applied to the sale of such rights and the duration of contracts, to allow for a rotation in access to content by broadcasters in the market.

[13] European Parliament, 2017.

[14] *The Guardian*, 2017, More than half of young people watch illegal streams of live sports, study finds, 26 April.

[15] National Observatory for Telecommunications and the Information Society, 2016, Observatory of piracy and habits of consumption of digital content, available at http://lacoalicion.es/wp-content/uploads/ejecutivo-observatorio-2015-vd-es.pdf (accessed 2 May 2018).

48. Guaranteeing viewer access to the content of sports events through televised broadcasts, in particular for major events of general interest, and facilitating equity in the participation of broadcasters in the process of selling audiovisual rights are aspects of concern for public authorities, in particular competition authorities, which have had to intervene to establish guidelines in the sale of such rights.

49. New technology has led to an increase in piracy and the illegal retransmission of programmes over the Internet, and this is an important challenge, given that piracy and illegal streaming are decreasing the turnover of television operators. Responses to such challenges depend on youth who have already adopted new viewing habits for major sporting events using the latest generation of digital media and who are also exposed to challenges related to the development of new technology. If the trend of piracy and illegal streaming continues, the risk of a financial crisis in the sports-related broadcasting industry may be exacerbated.

50. The Intergovernmental Group of Experts on Competition Law and Policy may wish to consider the following questions for discussion:

(a) Rising fees for audiovisual rights paid by television broadcasters have increased the profits of sports clubs and the salaries of athletes, yet is this sustainable over time, and what measures may be undertaken to ensure sustainability?

(b) Pay television needs to propose major sporting events to appeal to subscribers; in order to ensure equal access to such content, are current competition rules sufficient or is a specific regulation necessary on this matter?

(c) There is a growing trend to grant audiovisual rights to pay-television and pay-per-view broadcasters; as access to content by viewers is thus made more onerous, in particular in developing countries, is it advisable to expand open-access viewing of major sporting events and what criteria should be applied to the sale of rights in developing countries to ensure competition between broadcasters, and what role might competition authorities play in this regard?

(d) There has been an increase in piracy and illegal streaming, and young viewers are increasingly unwilling to pay to watch major sporting events instead of viewing them for free; could this put the financing of elite sport at risk and what strategies may be implemented by authorities, sports organizations and broadcasters to reduce illegal streaming?

(e) Given the interest in broadcast sporting events in developing countries, are there any specific challenges and recommendations that should be discussed?