

## Analysis of the Principles Applicable to the Review of Exclusive Broadcasting Licences Under EC Competition Law

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*This article discusses the Commission's review of exclusive broadcasting licences under EC competition law. It concludes that the Commission's practice suffers from a number of inconsistencies both as concerns market definition and substantive analysis.*

*The authors submit that exclusive licensing is a legitimate and recognised practice for the commercial exploitation of broadcasting rights. There should therefore be a presumption in favour of the validity of such licences. Market definition and substantive analysis should be consistent with the competitive issue under examination. If the competitive issue is foreclosure, then competition authorities need to acknowledge the existence of alternative content that serves the needs of competing broadcasters equally well, regardless of the existence of dedicated viewer groups.*

*A particular content's share of the relevant content market should serve primarily as a filter to eliminate licences involving low market shares from further scrutiny. Such licences a priori cannot raise competition issues, irrespective of their duration or scope. High market shares, on the other hand, do not automatically translate into an appreciable restriction of competition. Even in the case of high market shares, right-holders retain the right to grant licences on an exclusive basis. However, in such cases the duration and scope of the licence may need to be assessed in more detail, taking into account the full economic and legal context of the licence.*

*An obligation for right-holders to license their content or to grant licences on a non-exclusive basis can only be contemplated in exceptional cases. Refusal to license, as such, even by a dominant undertaking cannot warrant such an obligation.*

*The assessment of licences for new media rights should follow the same principles as the assessment of licences for traditional broadcasting rights. EC competition law should not be used as an instrument to make media policy. Competition law is platform neutral and does not provide a legal basis to favour or promote certain media platforms over other platforms. Indeed, using competition law as a media policy instrument would distort free competition and create serious legal uncertainties.*

### I. INTRODUCTION

Media content is commonly exploited by means of exclusive licences. In its landmark *Coditel II* judgment of 1982, the Court of Justice recognised that an exclusive film licence does not infringe Article 81 EC.<sup>1</sup> Likewise, the European Commission has accepted that exclusive licences of media content are not, as such, contrary to European competition law.<sup>2</sup>

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<sup>1</sup> Case 262/81, *Coditel II*, [1982] ECR 3381, 15–16; see also joined Cases T-185/00, 216/00, and 300/00, *Métropole II*, [2002] ECR II-3805, 64.

<sup>2</sup> See for example Case IV/32.150, *Eurovision I*, OJ 1993 L 179/23, 21; Case IV/36.033, *KNVB/Sport*, OJ 1996 C 228/4; A.M. Wachtmeister, *Broadcasting of Sports Events and Competition Law*, Commission Competition Policy Newsletter 1998(2); Alexander Schaub, *Sports and Competition: Broadcasting Rights for Sports Events*, Speech, Madrid 26 February 2002; Jean-Francois Pons, *Sport and European Competition Policy*, presentation made at the Fordham International Antitrust Conference, 14–15 October 1999, available on the Commission's website.

Underlying this case law is the recognition that exclusivity is crucial to protect the value of existing content and to create the financial incentives necessary for the production of future content. In *Coditel II*, Advocate General Reischl confirmed that the appointment of several licensees in a given territory would destroy the value that could be generated from the exploitation of the copyrighted content. He concluded that:

“the specific subject-matter of the copyright in a film comprises not only the right to exclude unauthorised third parties from its exploitation but also, where appropriate, the right to have it exploited by a single person, whether it be the owner of the right himself or an exclusive licensee to whom the right is assigned for valuable consideration.”<sup>3</sup>

In certain circumstances, however, exclusive licences for media content may infringe competition law. As noted by the Court, this may be the case where a licence creates artificial barriers that are not justified by the needs of the right-holders.<sup>4</sup>

The principal competition issue that may arise from exclusive licensing of media content is the possibility of foreclosure where the duration and/or scope of an exclusive licence exceeds what is necessary to protect the right-holder’s interests.<sup>5</sup> The concern is that an excessively long duration or overbroad scope may exclude competing broadcasters from access to attractive content and thereby distort competition in the downstream broadcasting market.<sup>6</sup> In addition, horizontal competition issues may arise in cases where right-holders jointly sell and/or broadcasters jointly purchase media rights.

This article discusses the principles applicable to a review of exclusive broadcasting licences under EC competition law. Section II provides an overview of market definition for the licensing of broadcasting content; Section III deals with the competitive assessment of broadcasting licences; Section IV deals with the concerns raised by joint selling and joint purchasing; Section V describes possible remedies for competition concerns; Section VI discusses the implications of new media technologies for broadcasting licences; and Section VII sets forth our conclusions.

## II. MARKET DEFINITION FOR THE LICENSING OF CONTENT

Market definition sets the analytical framework used to identify potential foreclosure risks by delineating types of media content that are sufficiently close

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<sup>3</sup> Opinion of Advocate General Reischl in Case 262/81, *Coditel II*, as note 1 above, at p.3404.

<sup>4</sup> *Coditel II*, as note 1 above, at 17-19.

<sup>5</sup> See Wachtmeister, as note 2, above.

<sup>6</sup> Licences may also raise other concerns not directly linked to exclusivity. For example, the Commission is currently examining “most favoured nation” clauses in licences between movie studios and pay-TV operators. Such clauses require a pay-TV operator to pay a licence fee that is at least as high as the fees paid to other studios. The Commission is concerned that these clauses may lead to price rigidities in the licensing of film content.

substitutes for the needs of broadcasters.<sup>7</sup> Two market levels must be distinguished in this respect:

- (i) the upstream market for the licensing of broadcasting content; and
- (ii) the downstream market for the broadcasting of the content to viewers.<sup>8</sup>

The following discussion focuses on the definition of markets at the upstream level, since this is the level at which right-holders and broadcasters interact. However, as explained further below the competitive conditions at the downstream level may influence the competitive effects of an exclusive broadcasting licence at the upstream level.<sup>9</sup>

#### A. THE COMMISSION'S APPROACH

The Commission's case law on upstream market definition is characterised by a successive narrowing of relevant markets. A first distinction that the Commission drew already in its early case law is the distinction between premium content with particular mass appeal and other content that is less attractive.

In *ARD*, the Commission noted that feature films are a particularly important component of programming. They achieve high ratings and often are more popular than television films and series.<sup>10</sup> Although the Commission did not explicitly discuss market definition in that case, these remarks suggest that the Commission's analysis was based on a notion of premium content that is capable of attracting particularly high viewer shares.<sup>11</sup>

In *BIB/Open*, this idea was spelled out more explicitly. The Commission there defined a separate market for the wholesale supply of film and sports channels observing that movies and sports are "key sales drivers" for pay-TV operators.<sup>12</sup> The main elements guiding the Commission's conclusion were that film and sports programmes achieve "very high viewing rates" and are able to command higher prices at the wholesale level than other content.<sup>13</sup> Similarly, in *TPS I* the Commission explained that films and sport events were the most popular television products and that pay-TV

<sup>7</sup> For a general discussion of market definition see the Commission's *Notice on the definition of the relevant market*, OJ 1997 C 372/5. For the media sector, see the economic and legal reports on *Market Definition in the Media Sector* of November and December 2002 prepared for the Commission by Europe Economics and Bird & Bird, available on the Commission's website.

<sup>8</sup> There may be several intermediate markets between the supply of the content to broadcasters and the dissemination of the content to viewers (see E. Jane Carter, *Market Definition In The Broadcasting Sector*, 24W.Comp.1 at p.97). For the purpose of the present discussion, however, these intermediate markets can be ignored.

<sup>9</sup> For a detailed discussion of the definition of downstream broadcasting markets see Carter, as note 8 above, at pp.93-124.

<sup>10</sup> Case IV/31.734, *ARD*, OJ 1989 L 284/36, 22.

<sup>11</sup> See also Case IV/29.559, *RAI/UNITEL*, OJ 1978 L 157/39, a case concerning exclusive broadcasting rights for leading opera singers, where the Commission distinguished between "little-known artistes" and "highly successful artists".

<sup>12</sup> Case IV/36.539, *BIB/Open*, OJ 1999 L 312/1, 28.

<sup>13</sup> *Ibid.*, at 28-29.

operators needed to have rights to such content to put together sufficiently attractive programmes.<sup>14</sup>

In *BIB/Open* and *TPS I*, the Commission left the question open whether the premium segment should be subdivided further into separate markets for films and sport events.<sup>15</sup> In *Bertelsmann/CLT*, the Commission stated that sport rights should be distinguished from films and other fiction. In *Eurovision II*, the Commission went further, stating that there was “strong likelihood for separate markets for the acquisition of some major sporting events”;<sup>16</sup> In *UEFA*, the Commission identified evidence suggesting that there may be a separate market for broadcasting rights to football events.<sup>17</sup> This was confirmed in *Champions League*.<sup>18</sup>

#### B. INCONSISTENCIES IN THE COMMISSION’S PRACTICE

The review of the Commission’s case law raises a number of important questions. First, it is not clear what the reasons are that warrant a distinction between different types of premium content. In *Bertelsmann/CLT*, the Commission stated that sport rights should be distinguished because sport programmes achieve high audience ratings and are particularly suited for carrying advertisements.<sup>19</sup> The Commission, however, failed to explain how this distinguishes sports content from feature films and other premium content since such content also generates high viewer shares and is well suited to carry advertisements.<sup>20</sup>

Indeed, the concept of premium content suggests that the premium market should be extended beyond feature films and sport, rather than narrowed. The essential criterion to identify premium content is its mass appeal. There are good grounds to argue that content of high mass appeal is not substitutable by other content, because such content is essential for the broadcasters’ ability to compete effectively downstream, be it for viewer subscriptions in the case of pay-TV or advertising revenue in the case of free-to-air-TV. It may well be therefore that not all films or sport broadcasts will qualify as premium content, but only those with the potential to achieve relatively high viewer

<sup>14</sup> Case IV/36.237, *TPS I*, OJ 1999 L 90/6, 34.

<sup>15</sup> *BIB/Open*, as note 12 above, at 29; *TPS I*, as note 14 above, at 34.

<sup>16</sup> Case IV/32.150, *Eurovision II*, OJ 2000 L 151/18, at 43. The Court of First Instance discussed the Commission’s market definition in *Métropole II* but did not take a position on this. Instead, the Court confirmed that the Commission could leave the exact market definition open because it had based its analysis on the narrowest possible definition, *Métropole II*, as note 1 above, at 54 and 57.

<sup>17</sup> Case IV/37.576, *UEFA*, OJ 2001 L 171/12, at 28; see also Commission Press Release, *Canal+/RTL/GJCD*, of 13 November 2002, IP/01/1579, where the Commission appears to rely on a similar market delineation.

<sup>18</sup> Case COMP/37.398, *Champions League*, decision of 23 July 2003, 77.

<sup>19</sup> Case IV/M.779, *Bertelsmann/CLT*, decision of 7 October 1996, at 18.

<sup>20</sup> Similarly, in *Sogecable/Canalsatélite/Via Digital* and *NewsCorp/Telepiu* the Commission distinguished between feature films and football, but again failed to give reasons for this distinction. Instead, the Commission noted that both types of content were driving forces for pay-TV, which would suggest that both types of content could serve the needs of pay-TV operators equally well (Case COMP/M.2845, *Sogecable/Canalsatélite/Via Digital*, decision of 14 December 2002, at 21-24; and COMP/M.2876, *NewsCorp/Telepiu*, decision of 2 April 2003, at 49-66). See also Carter, as note 8 above, at p.111.

ratings.<sup>21</sup> On the other hand, there appears to be no inherent reason to exclude *a priori* other types of content, such as for example television shows or series that generate high viewer shares.

Second, the methodology the Commission uses to reach its conclusions on market definition remains unclear. It is interesting in this respect, to compare the Commission's reasoning in *Eurovision II* and *UEFA*. In *Eurovision II*, the Commission seemed to rely principally on the observation that major sport events such as the Football World Cup, the Wimbledon Finals or the Olympic Games attract dedicated viewer groups. According to the Commission, viewers watching one major sport event (e.g. the World Football Club) would not switch to another major sport event (e.g. Wimbledon Finals) and *vice versa* even if the two were broadcast at the same time.<sup>22</sup> The Commission in that case thus relied on the preference of viewers in the downstream market.

In *UEFA*, on the other hand, the Commission explained that markets for broadcasting rights should be defined in accordance with the number of programmes that can achieve a desired purpose for broadcasters. The question was whether a certain type of content (e.g. football) fulfils a particular need of broadcasters that cannot be fulfilled by other content, such as generating high viewer shares on a sustained and continuous basis, attracting audiences particularly attractive for advertisers, or conferring a special brand image.<sup>23</sup>

It is apparent that the Commission's reasoning in the two cases is inconsistent. While the Commission in *Eurovision II* examines upstream markets from the viewers' perspective, it switches to the broadcasters' perspective in *UEFA*.<sup>24</sup> The question therefore arises whether the two perspectives are interchangeable or whether there is only one correct way of defining upstream markets.

### C. DEFINING UPSTREAM MARKETS IN THE CORRECT WAY

Clearly, upstream content markets should be defined from the perspective of broadcasters. The proper test is to delineate types of content that allow broadcasters to compete equally effectively against each other. While viewer preferences at the downstream level influences the type of content broadcasters purchase at the upstream

<sup>21</sup> In *ARD*, the Commission raised concerns even though the licence in question covered only 4.5% of the total worldwide film stock *inter alia* because the licence related to films of "particular mass appeal," *ARD*, as note 10 above, at 43. In *Seagram/Polygram* and *Vivendi/Canal+/Seagram*, the Commission distinguished between mainstream films and non-mainstream films, Case COMP/M.1219, *Seagram/Polygram*, decision of 21 September 1998, at 39-41; and Case COMP/M.2050, *Vivendi/Canal+/Seagram*, decision of 13 October 2000, at 18.

<sup>22</sup> *Eurovision II*, as note 16 above, at 42. In a recent speech, a Commission official appeared to follow this approach, arguing that content markets should be defined narrowly because "a viewer who wants to see a given sports event is unlikely to be satisfied with coverage of another event," Torben Toft, *TV Rights of Sports Events*, speech, Brussels, 15 January 2003, available on the Commission's website; see also Schaub, as note 2 above; and Pons, as note 2 above.

<sup>23</sup> *UEFA*, as note 17 above, at 26 and 30-41. The Commission used the same reasoning in *Champions League*, as note 18 above, at 57-77.

<sup>24</sup> This seems also to be the perspective used in *ARD*, *BIB/Open*, and *TPS I* (as notes 10, 12 and 14 above).

level, such preferences do not alone determine the definition of upstream content markets. Individual viewers may well consider different types of content to be imperfect substitutes for each other. However, this is of no concern to broadcasters provided each type of content is capable of attracting a significant number of viewers. Upstream market definition therefore needs to focus on the perspectives and needs of broadcasters.

This conclusion is confirmed by the fact that market definition should be guided by the competition law question under examination.<sup>25</sup> In the present context, the question is whether an exclusive licence for specific content risks foreclosing competitors because broadcasters lack alternative content to compete effectively. As a consequence, it is the perspective and the needs of broadcasters that should determine market definition at the upstream level.

Also, it is reasonable to assume that viewer preferences should not influence market definition at the upstream level if they do not do so at the downstream level. Yet, the Commission has never defined downstream subscription or advertising markets according to viewer preferences for specific content at the downstream level. Instead, the Commission at the downstream level regularly opts for a broad distinction between free-access and pay-TV.<sup>26</sup> As a result, the Commission's approach at the downstream level does not support a definition of content specific markets at the upstream level.

This is consistent with the fact that broadcasters do not compete at the downstream level by showing the same identical content. Viewers are not won by producing uniform TV programmes. Instead, broadcasters compete by creating programmes that distinguish themselves from the offerings of competing broadcasters. Broadcasters therefore do not need access to the same identical content to compete effectively. All content of sufficient mass appeal provides a viable substitute for broadcasters' needs.

It follows that focusing on the broadcaster's needs is the correct way of defining upstream content markets.<sup>27</sup> This allows a number of important conclusions on upstream market definition to be drawn:

*The existence of dedicated viewer groups for specific content is immaterial.* Many forms of content will attract dedicated viewer groups. Precisely for this reason, these different types of content may be interchangeable from the perspective of the broadcaster, as long as all of them have mass appeal. Thus, the observation of the Commission in *Eurovision II* that the Football World Cup and the Wimbledon Final attract dedicated viewers who would not switch to the other event if both were shown at the same time is a *non*

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<sup>25</sup> See Commission Notice on the definition of the relevant market, as note 7 above, at 12.

<sup>26</sup> In *CLT/Disney/Super RTL*, the Commission discussed whether there was a separate market for advertising in children-oriented programmes, but concluded that such a market did not exist, Case IV/M.566, *CLT/Disney/Super RTL*, decision of 17 May 1995, 15.

<sup>27</sup> This is also the conclusion of the legal report on *Market Definition in the Media Sector*, prepared by Bird & Bird for the Commission, as note 7 above, at 233.

*sequitur.* Given that both events have mass appeal (just as other types of premium content), broadcasters may well be indifferent as to which one they acquire, particularly if both events are to be broadcast simultaneously, since both will, according to the Commission, have a significant number of dedicated viewers.

*Time horizons matter.* Content generating short term peaks in viewer shares will not impact on the ability of broadcasters to compete effectively, as long as all broadcasters have the ability to create attractive programmes over the long run. Thus, for example it may well be that the finals of the Football World Cup reach particularly high viewer shares even within the premium content category. These shares, however, are only generated for about 90 minutes every four years. Their competitive effect therefore will be cancelled out by the body of other premium content with high mass appeal. Such other content thus offers viable substitutes for competing broadcasters.<sup>28</sup>

*Differences in TV-operators must be taken into account.* Different types of TV operators may have different needs in terms of content. For example, the Commission has noted in a number of cases that pay-TV operators need access to first window rights to compete effectively, since second window rights do not satisfy their need equally well.<sup>29</sup> Such considerations, on the other hand, seem not to play a role in the case of free-TV. More generally, it would appear that free-TV operators have a broader basis of substitutable content than pay-TV operators. As a result, it may well be that the relevant market should be defined more broadly in an assessment of a broadcast licence for free-to-air TV than in the case of a licence for pay-TV.

*Price variations are not indicative of separate markets.* In general, price differences of content will reflect differences in the rating potential of the content in question. This, however, should not necessarily be taken as support for market segregation. On the contrary, variations in ratings and price within a certain range allow broadcasters to make price-rating tradeoffs without impact on their overall competitive effectiveness. As a result, it is possible for content with differing price levels to form part of the same relevant market. Accordingly, the recent economic report on "Market Definition in the Media Sector" prepared for the Commission rejects price differences as reliable evidence for separate markets.<sup>30</sup>

*Upstream markets may be asymmetrical.* Because market definition is context specific, it may be that content A is in a separate market from content B, but that content B is in the same market as content A. For example, assuming that the Commission's analysis in *UEFA* is correct, it is possible that when assessing licensing for league football such content must be placed in a separate market from other premium content because no other content can satisfy the broadcasters' needs equally well. On the other hand, when

<sup>28</sup> Presumably for these reasons, the Commission in *UEFA* focused on the ability of league football to generate consistent high viewer shares over a sustained period and attract viewer groups that are particularly attractive for advertisers. Such an ability may indeed be more pertinent for market definition, as it could give one broadcaster a competitive edge that others may find difficult to match (assuming that there is indeed no other content with comparable potential).

<sup>29</sup> See for example *Vivendi/Canal+/Seagram*, as note 21 above, at 18-21; *Newscorp/Telepiu*, as note 20 above, at 59.

<sup>30</sup> *Market Definition in the Media Sector*, as note 7 above, at pp. 91-92.

assessing licensing for other premium content, (e.g. the Wimbledon Championships) league football will form part of the broader premium market because league football can satisfy the needs of broadcasters at least as well as other premium content.

### III. COMPETITIVE ASSESSMENT OF BROADCASTING LICENCES

The Court's judgment in *Coditel II* made it clear that exclusivity granted for the exploitation of media content as such is not contrary to EC competition law.<sup>31</sup> The Advocate General explicitly pointed out that such exclusivity may legitimately lead to absolute territorial protection since this is due to the fact that public performance (or broadcasting) of media content is not subject to exhaustion.<sup>32</sup> The exclusivity of a broadcasting licence therefore cannot itself be challenged. Only elements that go beyond the exclusivity as such may raise concerns.

The principal elements that may be subject to scrutiny are the duration and the scope of the licence. An excessive duration or scope may raise concerns that competing broadcasters are foreclosed from content necessary to compete effectively in the downstream market. However, duration and scope cannot be assessed independently. A licence must be analysed in its full economic and legal context. Elements to be taken into account are the market share covered by the licence, the market position of the licensee, and the way in which the rights are sold. In many cases, no single aspect will be decisive in itself. Instead, the competitive assessment will have to consider a number of different aspects and weigh them against each other.

#### A. MARKET SHARE

Market shares should serve primarily as a filter, excluding licences with low market shares from further review. Such licences regularly will have little or no potential to raise competitive concerns independent of their scope or duration. However, this does not mean that licences with high market shares will automatically raise competition concerns. The *Coditel II* judgment suggests that a right-holder is entitled to license content on an exclusive basis, even if it accounts for a high share of the relevant market. In such cases, however, the scope and duration of the licence will have to be examined more closely.

Also, market shares can guide the competition analysis only if the corresponding markets have been properly defined. Thus, in *ARD*, the fact that the licence in question covered only 4.5 percent of worldwide film stock was not considered decisive because the share was based on a broad definition of film stock, including films outside the premium segment.<sup>33</sup> By the same token, market shares based on too narrow market

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<sup>31</sup> *Coditel II*, as note 1 above.

<sup>32</sup> *Ibid.*, at pp.3412-3413.

<sup>33</sup> *ARD*, as note 10 above, at 43.

definitions will not be indicative of potential foreclosure risks, since they will ignore viable competitive alternatives for broadcasters.

## B. SCOPE

The broad scope of an exclusive licence may raise competition concerns. Thus, in *Screensport*, the Commission observed that Eurosport enjoyed a privileged position over Screensport because it was granted access to the Eurovision system's entire content.<sup>34</sup> Similarly, in *ARD* the Commission found that the broadcasting licence granted by MGM covered an unusually large number of rights.<sup>35</sup>

A discussion of the scope of a licence raises the question of how one should define individual units of broadcasting content. In the case of films, it is easy to see that a single film will constitute the smallest meaningful unit. In the case of a TV series, the smallest meaningful unit is probably the entire series, and not a single episode. With respect to sports rights, Commission officials in the past have stated repeatedly that exclusivity for a single sport event or one championship season should not raise competition concerns.<sup>36</sup> This suggests that the smallest meaningful unit amounts to one season, in the case of seasonal events, such as national championships, and to one single event, in the case of irregular events, such as the World Football Cup.

The recent *Champions League* and *Bundesliga* cases, however, suggest that this may not always hold true. In those cases, the Commission required as a condition for the closure of its investigation that the broadcasting rights for a football season be subdivided into several separate lots.<sup>37</sup> This indicates that in the Commission's view the smallest meaningful unit for seasonal sport events can be smaller than a single season. However, note that, in the *Champions League* and *Bundesliga* cases, the Commission was concerned with joint selling of broadcasting rights owned by a number of individual clubs. It is therefore relatively easy to see why in that case the settlement included a subdivision of the broadcasting rights for one season into separate lots.

Where the broadcasting rights are owned by a single entity such a subdivision may be less straightforward. Even if a sport event could be theoretically sliced into different sub-events (e.g. each match of the Wimbledon Championships) this may undermine the value and attraction of the event since the whole event can represent more value than the sum of its parts. In such cases, the event as a whole should be treated as the smallest meaningful unit for purposes of competition law.

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<sup>34</sup> Case IV/32.524, *Screensport*, OJ 1991 L 63/32, at 61.

<sup>35</sup> *ARD*, as note 10 above.

<sup>36</sup> Schaub, as note 2 above; Mario Monti, *Competition and Sport the Rules of the Game*, Speech, Brussels, 26 February 2001.

<sup>37</sup> *Champions League*, as note 18 above (see also Article 19(3) Notice, OJ 2002 C 196/3, and Commission Press Releases, IP/02/806 and IP/03/1105); *Bundesliga*, Commission Press Release, IP/03/1106.

### C. DURATION

For sport events, the absolute duration of the licence will be less of an issue than the number of events covered by the licence.<sup>38</sup> Thus, a broadcasting licence for two Summer Olympics would have a duration of eight years but would only cover two events. As a general matter, the acceptable duration of an exclusive broadcasting licence (just as its acceptable scope) will depend on the particular circumstances of each individual case. Nevertheless, a Commission official has indicated in a recent speech that a 3-year period would often be acceptable while the Commission would normally not accept exclusivity periods exceeding 5 years unless special circumstances such as enabling new entry or protecting significant investments required a longer duration.<sup>39</sup>

The need to protect investments will be particularly relevant in cases where a sport has never had large appeal or has lost such appeal in the region covered by the rights in question, or in cases where interest levels in an event fluctuate or are difficult to predict. The greater the investments required, the longer the acceptable duration should be. Other considerations should also be able to justify an extended duration such as, for example, the need of the rightholder to rely on a secure source of funds, or the cost, time, and effort needed to negotiate the agreements in question. Arguably the period of the exclusivity should be sufficiently long to avoid a situation in which the rightholder, at worst, is obliged to engage in continuous negotiations in each period of exclusivity in order to select the licensee for the following period and to negotiate the applicable contractual terms.

In the past, the Commission has been prepared to accept relatively long durations if the parties could show that this was necessary for legitimate reasons.<sup>40</sup> Thus, in *ARD*, the Commission held that an exclusive film licence for 15 years was caught by Article 81(1) EC but could be exempted under Article 81(3) EC because the licence resulted in cost efficiencies and improvements of distribution.<sup>41</sup> In its investigation of the broadcasting agreements for the Formula One championship, the Commission found that the protection of investments justified a duration of up to five years for certain of the agreements.<sup>42</sup> In the *English Football* case, the Commission accepted a five year duration for the broadcast agreements concluded between the English Football Association with BBC and BSkyB, because BSkyB required such a duration to facilitate its entry into the satellite market.<sup>43</sup>

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<sup>38</sup> Wachtmeister, as note 2 above.

<sup>39</sup> Toft, as note 22 above. In the *Champions League* case, the Commission required that licences should not be concluded for a period in excess of three years, Article 19(3) Notice, as note 37 above. In the *KNVB/Sport 7* case, the Commission objected to an exclusive broadcasting agreement with a duration of seven years, Case IV/36.033 *KNVB/Sport 7*, OJ 1996 C 228/4; in *NewsCorp/Telepiu*, the Commission required NewsCorp as a precondition for its approval of the merger with Telepiu to limit future broadcasting agreements to two years with football clubs and to three years with film studios, in the case of direct to home (DTH) transmission, and to waive all exclusivity concerning transmission through other means (e.g. terrestrial, cable, UMTS and Internet), *NewsCorp/Telepiu*, as note 20 above, at 225.

<sup>40</sup> Wachtmeister, as note 2 above.

<sup>41</sup> *ARD*, as note 10 above, at 49-53.

<sup>42</sup> Commission press Release, IP/01/1523. See also Wachtmeister, as note 2 above.

In *TPS I*, on the other hand, the Commission considered that a ten year exclusivity granted to a new French pay-TV service for general interest channels was excessive and had to be reduced to three years.<sup>44</sup> The Commission reached its conclusion on the excessive duration of the exclusive licence, even though it explicitly noted that competing pay-TV operators did not require the content in question to compete effectively.<sup>45</sup> The Commission limited itself to arguing that the licence excluded competing broadcasters from access to that content. This reasoning is not convincing.

The licence's exclusion of access to the licensed content is immaterial if competitors have access to alternative content meeting their needs at least equally well. In such a case, the exclusivity will not result in foreclosure or distort competition. For the same reason, the 3-5 year rule set out above appears to be too rigid. Where alternative content is readily available, licence periods of more than 5 years should not raise concerns and should not require the licensor and licensee to justify the particular duration of the licence.

#### D. MARKET POSITION OF THE LICENSEE

The market position of the licensee, both in the downstream and the upstream market, may be of significance in the assessment of an exclusive broadcasting licence. Indeed, in the case of exclusive supply arrangements, the Commission's *Vertical Restraints Guidelines* indicate that the buyer's market position should be the primary focus of the competitive assessment.<sup>46</sup> While the *Vertical Restraints Guidelines* are not directly applicable to broadcast licences, the principles underlying the Commission's analysis may nevertheless provide some guidance in this area.

As explained by the *Guidelines*, exclusive supply arrangements should not result in adverse effects where the buyer has no market power downstream.<sup>47</sup> This should equally hold true in the case of exclusive broadcast licences since it is hard to see how consumers may be harmed by an exclusive licence if the licensed broadcaster is subject to competitive pressure downstream.<sup>48</sup>

On the other hand, it may well be that restrictive effects do not result from any individual licence but rather from the fact that the same broadcaster has concluded a multitude of exclusive licences that translate into a strong market position down-

<sup>43</sup> Pons, as note 2 above. In *TPS I*, the Commission considered that a ten year exclusivity for establishing the pay TV services of TPS was excessive and had to be reduced to three years, *TPS I*, as note 14 above, at 134.

<sup>44</sup> *TPS I*, as note 14 above, at 134.

<sup>45</sup> *Ibid.*, at 106.

<sup>46</sup> *Commission Guidelines on Vertical Restraints*, OJ 2000 C 291/1, 204.

<sup>47</sup> *Id.*

<sup>48</sup> It is thus difficult to see why in *TPS I* the Commission took such a strict view on the duration of the exclusive licence granted to TPS given that the Commission stressed the strong competition that TPS would face from other pay-TV operators both in upstream and downstream markets, see *TPS I*, as note 14 above, at 44-69 and 123-134.

stream.<sup>49</sup> In such a case, however, remedies should not focus on a single licence but should address the underlying structural concern, for example by adopting an appropriate sub-licensing scheme. Where remedies are directed against the bundle of licences, individual licences should be affected only if they contribute to an appreciable degree to the cumulative effect for example because their duration exceeds what is necessary.<sup>50</sup>

The number of licences concluded by a single licensee may also become relevant in the context of a merger assessment. For example, in *Newscorp/Telepiu*, the Commission required as a precondition for the approval of the merger a substantial reduction in the exclusivity of Newscorp's existing and future broadcasting licences with football clubs and film studios.<sup>51</sup>

#### E. TENDER PROCEDURES

The way in which broadcasting rights are licensed may influence the assessment of an exclusive licence. Thus, the implementation of an open and non-discriminatory tender procedure for the sale of broadcasting rights may create a counter-balance against possible foreclosure concerns raised by exclusive licensing. This is because the exclusion of competing broadcasters resulting from the licence is compensated by the fact that all broadcasters are given an equal chance to acquire the rights concerned. Conversely, if broadcasters are not given an equal opportunity to acquire the rights, this may increase concerns about possible foreclosure.

The implementation of open and non-discriminatory tender procedures have been part of settlements reached in the Commission's *Formula One*, *Champions League*, and *Bundesliga* investigations.<sup>52</sup> These cases, however, suggest that an open tender procedure alone may not always be sufficient to remove all competition concerns since these settlements included a combination of different remedies.

In reviewing the openness and transparency of the procedure chosen for selling broadcasting rights and the duration of a broadcasting agreement, the Commission has also focused on options to renew an existing broadcasting agreement or a right of first negotiation for subsequent agreements. A binding option giving the incumbent licensee the right to automatically renew the agreement effectively prolongs the contract period and therefore needs to be taken into account in the duration of the exclusivity. A right of first negotiation, on the other hand, does not lead to such an automatic prolongation. However, such a right may deny competing broadcasters an equal chance to acquire the

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<sup>49</sup> Note that the Court of Justice has stated that the existence of a bundle of agreements is not sufficient in itself for a finding of foreclosure even if it has a considerable effect on the opportunities to gain access to the market since it is only one factor among others determining opportunities of access (Case C-234/89, *Delimitis*, [1991] ECR I-935, at 20).

<sup>50</sup> See *per analogiam*, Case C-214/99, *Neste*, [2000] ECR I-11121, at 27.

<sup>51</sup> *Newscorp/Telepiu*, as note 20 above, at 225.

<sup>52</sup> Cases COMP/35.163 and COMP/36.776 *FLA*, Article 19(3) Notice, OJ 2001 C 169/5; *Champions League*, as note 18 above; *Bundesliga*, Commission Press Release, IP/03/1106.

rights concerned for subsequent periods. In *ARD*, the Commission raised concerns with respect to the right of first negotiation granted by MGM/UA to ARD because in the Commission's view this right restricted MGM/UA in selecting its contractual partners and adversely affected the negotiation position of other broadcasters.<sup>53</sup> Similarly, in *Sport 7/KNVB*, although the Commission did not take a final decision, it stated that among its main concerns with the arrangements was a renewal clause in favour of Sport 7, "which seemed to be unjustified".<sup>54</sup>

#### IV. JOINT SELLING AND JOINT PURCHASING

##### A. CONCERNS

Joint selling and joint purchasing may raise both horizontal and vertical concerns. The principal concerns are price coordination, output restrictions and market sharing in the case of joint selling, and the creation of high cost commonalities leading to coordinated conduct in the case of joint purchasing.<sup>55</sup>

At the vertical level, joint selling and joint purchasing may create foreclosure effects. Thus, the pooling of independently held rights resulting from joint selling may lead to a disproportionate concentration of relevant content in the hand of a single or a limited number of broadcasters,<sup>56</sup> while purchasing power created through joint purchasing may allow participating broadcasters to consistently outbid and thus marginalize smaller competing broadcasters. On the other hand, joint purchasing may have pro-competitive effects by improving distribution or allowing small broadcasters to bid effectively against larger broadcasters.<sup>57</sup>

The Commission recently settled investigations into the joint selling of the UEFA's Champions League and German Bundesliga broadcasting rights after the parties concerned offered substantial remedies including subdividing the rights into separate packages and giving individual clubs more opportunities to exploit their rights independently.<sup>58</sup> Another investigation into the joint selling of broadcasting rights for the English Premier League is currently pending.<sup>59</sup>

In the area of joint purchasing, the Commission threatened to withdraw the immunity from a joint-purchasing arrangement notified by Spanish broadcasters

<sup>53</sup> *ARD*, as note 10 above, at 47.

<sup>54</sup> *Competition Report 1997*, p.145.

<sup>55</sup> *Commission Guidelines on Horizontal Cooperation*, OJ 2001 C 3/2, at 128 and 144-147.

<sup>56</sup> See the Commission *Press Releases and Background Memo on the Champions League*, (IP/02/806, IP/03/1105, and MEMO/03/156) and the *Commission Press Releases on the English Premier League* (IP/02/1951) and the *German Bundesliga* (IP/03/1106).

<sup>57</sup> See Wachtmeister, as note 2 above.

<sup>58</sup> *Champions League*, as note 18 above; and Commission Press Releases, IP/02/806 and IP/03/1105; *Bundesliga*, Commission Press Release, IP/03/1106; see also Toft, as note 22 above.

<sup>59</sup> *English Premier League*, Commission Press Release, IP/02/1951 and Toft, as note 22 above. Interestingly, the UK Restrictive Practice Court accepted the joint selling of the rights by the English Premier League in a decision of 1999, see [1999] UKCLR 258. On the development of the English Premier League case, see also Aiden Robertson, *The Application of European Competition Law to Sports Broadcasting*, 25W.Comp.4, at p. 423.

Telefonica Media and Sogecable. The two broadcasters responded by agreeing to adopt a sub-licensing scheme on an interim basis.<sup>60</sup> The case was closed following termination of the joint purchasing arrangement as a result of the merger of Sogecable with Via Digital.<sup>61</sup>

In the *Eurovision* case, the Commission concluded that the joint purchasing of sports rights by EBU members was caught by Article 81(1) EC but could be exempted under Article 81(3) because the Eurovision system improves distribution of television services and enhances consumer choice.<sup>62</sup> The Commission took into account that the EBU had adopted a sub-licensing scheme to give non-member parties access to Eurovision content.<sup>63</sup> Upon appeal, the Court of First Instance annulled the Commission's exemption decision on the ground that, contrary to Commission's conclusions, the EBU's sub-licensing scheme did not sufficiently guarantee third party access to unused Eurovision content.<sup>64</sup> The Court did not engage in a substantive analysis of the Eurovision system but limited itself to identifying an inconsistency in the Commission's reasoning.

#### B. IMPLICATIONS FOR BROADCASTING LICENCES

If a joint selling or purchasing arrangement is found to violate Article 81 EC, the question arises as to the impact of this finding on broadcasting licences concluded at the vertical level by the joint purchasing or joint selling grouping and a third party (e.g., a broadcasting agreement concluded between a joint selling football league and a pay-TV operator).

As a general matter, it should be noted that the invalidity of a joint selling or joint purchasing arrangement does not extend to vertical agreements linked to such an arrangement.<sup>65</sup> Accordingly, the Commission has never taken the position that the illegality of a horizontal arrangement would cause the invalidity of vertical agreements concluded between the members of an invalid horizontal arrangement and a third party. Instead, the Commission has required in certain cases that the members of the horizontal arrangement allow the third party in question to renegotiate or cancel such agreements.<sup>66</sup> Whether the Commission, indeed, has the power to adopt such orders is controversial. In the *Liner Conferences* case, the Court of First Instance annulled for lack of reasoning a Commission order requiring the members of a horizontal arrangement to

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<sup>60</sup> See Commission Press Releases, IP/00/372 and IP/00/1352.

<sup>61</sup> The merger was cleared by the Spanish authorities in November 2002 after referral by the Commission under Article 9 EECMR. As a condition for clearance, the merging parties agreed to grant third parties access to rights on reasonable and non-discriminatory terms. In addition, the transaction resulted in the termination of the joint purchasing arrangement with Telefonica. See Commission Press Release, IP/03/655.

<sup>62</sup> *Eurovision II*, as note 16 above, at 84-90.

<sup>63</sup> *Ibid.*, at 103.

<sup>64</sup> *Métropole II*, as note 1 above, at 83. For a summary of the judgment see also Alasdair Bell and Peter Turner-Kerr, *Broadcasting Rights in Europe*, Competition Law Insight, November 2002, pp-26-27.

<sup>65</sup> Case T-395/94, *Liner Conferences*, [2002] ECR II-875, at 412-414.

<sup>66</sup> Case IV/32.745, *Astra*, [1993] OJ L 20/23; Case IV/34.446, *Trans-Atlantic Agreement*, [1994] OJ L 376/1.

allow renegotiation or cancellation of vertical agreements. The Court noted that the order was “not obviously necessary” and did “not correspond to an established line of Commission decisions”.<sup>67</sup>

As a result, the invalidity of a horizontal joint selling or joint purchasing arrangement does not entail the automatic invalidity of vertical broadcasting licences concluded with the joint selling or purchasing entity. The compatibility of a broadcasting licence with Article 81 EC will always have to be assessed on its own merits.

## V. REMEDIES

Where exclusive licences are found to run contrary to Article 81 EC, the parties have a number of different options to remedy the situation, such as reducing the duration of the licence, limiting its scope, implementing a non-discriminatory tender procedure, or adopting a sub-licensing scheme. As illustrated by the *Formula One*, *Champions League*, and *Bundesliga* cases, it may sometimes also be appropriate to adopt a combination of different remedies. In any event, remedies should be tailored to the concerns identified in a given case.

Thus, for example, where concerns are due principally to the existence of a joint purchasing arrangement, such concerns are the result of the licensee’s not the licensor’s conduct. Consequently, remedies should focus on the licensee rather than on the licensor, for example by requiring the adoption of a sub-licensing scheme, while remedies imposed on the licensor would be inappropriate. Similarly, requiring a subdivision of rights into separate lots may be appropriate in the case of a joint selling arrangement, but may be inappropriate where no joint selling is involved.

## VI. BROADCASTING LICENCES AND NEW COMMUNICATION TECHNOLOGIES

In a number of recent cases, the Commission has expressed an interest in how right holders deal with the licensing of new media rights i.e. the right to disseminate content through new communication technologies such as the Internet or third generation mobile phones. Clearly, the rules relied upon to assess new media rights licences under EC competition law should not differ in principle from the rules governing the assessment of traditional broadcasting licences.

### A. EXCLUSIVITY

The Internet is by default a global medium. The question therefore arises whether right-holders can only grant global Internet licences or whether they may require their

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<sup>67</sup> *Liner Conferences*, as note 65 above, at 415.

licensees to limit Internet broadcasts to a certain territory by appropriate technical means.

The Commission's *Vertical Restraints Guidelines* indicate that the Commission deems restrictions on distributors to use the Internet for promoting or selling their products over the Internet as an unlawful passive sales ban.<sup>68</sup> This statement, however, applies only to the sale of physical copies of media content where the Internet is used as a marketing instrument (e.g. a website for the sale of DVDs), not to the broadcasting of content where the Internet is the platform for the exploitation of the content itself (e.g. streaming a movie over the Internet). Indeed, licences for the exploitation of media content are not covered by the *Vertical Restraints Guidelines*.<sup>69</sup>

Moreover, there is a crucial difference between the sale of physical copies over the Internet and the broadcasting of content over the Internet. The sales of physical copies is governed by the distribution right of Article 4(1) of the *Copyright Directive*<sup>70</sup> and is subject to the exhaustion doctrine as stipulated by Article 4(2) of the *Copyright Directive*. Such sales therefore fall under the competition law rules applicable to vertical distribution agreements. Broadcasting over the Internet, on the other hand, is governed by the right of communication-to-the-public under Article 3 of the *Copyright Directive*. This right, as explicitly recognised by Article 3(3) of the *Copyright Directive*, is not subject to exhaustion. Therefore, the principle established by *Coditel II* for traditional communications-to-the-public rights, namely that exclusivity can be granted even if this leads to absolute territorial protection, also applies to broadcasting of content over the Internet.<sup>71</sup>

As a result, it is legitimate for right-holders to grant Internet rights only for a certain territory and to require their licensees to limit their broadcasts through technical measures to that territory. The fact that the Internet by default is a global medium is not relevant. This is merely a technical characteristic that can be changed by appropriate technical measures.<sup>72</sup> The relevant point is that communication-to-the-public rights are territorial in nature and are not exhausted by individual acts of exploitation. Right-holders therefore must be able to separately exploit these rights for each territory if they wish to do so.

## B. TRADITIONAL BROADCASTING RIGHTS AND NEW MEDIA RIGHTS

In its *Champions League*, *German Bundesliga*, and *English Premier League* investigations the Commission noted that the bundled sale of rights for both traditional and new media technologies to a single licensee may slow down the adoption of new

<sup>68</sup> *Guidelines on Vertical Restraints*, OJ 2000 C 291/12, at 51.

<sup>69</sup> *Ibid.*, at 30.

<sup>70</sup> *Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*, OJ 2001 L 167/10.

<sup>71</sup> *Coditel II*, as note 2 above; see also the Court's *Coditel I* judgment, where the importance of the distinction between the different forms of IP rights was first recognised, Case 62/79, *Coditel I*, [1980] ECR 881.

<sup>72</sup> For example, through so called geolocalization technology.

technologies.<sup>73</sup> The Commission is also investigating the new media rights policy of the International Olympic Committee suggesting that the Olympic Committee should license Olympic content to new media operators.<sup>74</sup>

The Commission seems to view sport content as a “driving force” for the development of new media platforms and wants right-holders to give new media operators access to such content.<sup>75</sup> Where traditional and new media rights are bundled, the Commission appears to be concerned that TV broadcasters may have little incentive to exploit new media technologies since such technologies could become competing platforms for traditional TV broadcasts. This line of thinking appears questionable for several reasons.

First, the Commission’s approach seems to go against its own principle that competition law should be platform neutral. With respect to free TV and pay-TV platforms, the Commission has stressed in the past that “competition rules are neutral with respect to different types of broadcasters and do not provide a legal basis for favouring one category over another”.<sup>76</sup> This principle is also valid for new media platforms. While it may be desirable from the viewpoint of general media policy to promote the use of new platform technologies, EC competition law does not provide a legal basis to engage in such a policy.<sup>77</sup>

Second, the Commission’s premise that sport content in some way could be decisive for the development of new media technologies does not seem to be based on any detailed or systematic analysis. Indeed, it is hard to see why sport content should be more decisive than other content for new media platforms or what the justification could be for singling out certain types of such content for an obligation to license it to new media operators. For example, with respect to the Olympic Games, any suggestion that a lack of access to Olympic content could affect the development of new media technologies seems tenuous, given that the Olympic Games only takes place every four years and last for only two weeks.

The kind of standard the Commission is applying to qualify a certain type of content as a “driving force” to be made accessible to new media operators is also not

<sup>73</sup> *Champions League*, Commission Press Releases, IP/01/1043 and IP/03/1105; *Bundesliga*, Commission Press Release, IP/03/1106, *Premier League*, Commission Press Release, IP/02/1951. In the *Champions League* and *Bundesliga* cases, the parties concerned undertook to grant new media rights licences separately from traditional broadcasting licences and to allow individual clubs to exploit new media rights more extensively; see also Toft, as note 22 above.

<sup>74</sup> See Mario Monti, *Competition enforcement and the interests of consumers—stable link in times of change*, Speech, Athens, 14 February 2003, available on the DG Comp’s website; Schaub, as note 2 above.

<sup>75</sup> Herbert Ungerer, *Competition policy and the issue of access in broadcasting markets: the Commission perspective*, Speech, Brussels, 14 January 2003, and *Access to Content and Platform Competition*, Speech, Brussels, 23 April 2002, available on the DG Comp’s website; Toft, as note 22 above.

<sup>76</sup> Wachtmeister, as note 3 above, see also the Commission’s recent *Communication on barriers to widespread access to new services and applications of the information society*, COM(2003) 410 final of 9 July 2003, p.3.

<sup>77</sup> EC Institutions have adopted various programmes to support new media technologies. These measures rightly focus on stimulation of supply and demand rather than regulatory intervention, see for example *Council Resolution on interactive media content in Europe*, OJ 2003 C 13/8; *Council and Commission eEurope Action Plan*, agreed at the European summit of Feira 19-20 June 2000; Commission econtent programme <www.cordis.lu/econtent>; Commission Press Release, *Towards development of broadband content*, 15 July 2003, IP/03/1016; Commission Communication, *Towards The Information Society*, COM(95) 224, 31 May 1995.

clear. Is it sufficient that the content give the media platform a competitive advantage or does the content have to be *indispensable* for the operation of the platform? In line with the Court of Justice's *Bronner* and *Magill* judgments, one would assume that the latter should apply.<sup>78</sup> Indeed, to contemplate a licensing obligation in a specific case, the Commission presumably would have to show that the rightholder in question holds a dominant position<sup>79</sup> and has committed an abuse within the meaning of Article 82 EC. The Community Courts have made it clear that a refusal to grant a licence as such, even by a dominant company, cannot constitute an abuse.<sup>80</sup> In light of the *Magill* judgment, the Commission would have to demonstrate that the refusal to license prevents, without any justification, the emergence of a new product for which the IP rights in question are indispensable and that there would be significant and constant potential consumer demand for such a product, or in the alternative, that an obligation to license is necessary to remedy abusive conduct that goes beyond the mere refusal to license (for example monopoly leveraging or tying).

Finally, concerning the simultaneous licensing of traditional and new media rights to the same licensee, it is important to note the interdependency of the different rights. Sports content derives an important part of its value from its novelty character. Broadcasting a sport event through new media platforms such as the Internet will exhaust its novelty character and thus reduce the value of traditional broadcasting rights. Typically this loss in value will be greater than any added value that the right-holder may hope to achieve from new media rights. To avoid cannibalisation of the rights, the right-holder thus has a legitimate interest to grant a single licence for both traditional and new media rights. Moreover, contrary to the Commission's concern that single licences may lead to under-exploitation, such licences allow the licensee to experiment with cross-platform offerings, creating new and enriched media offerings.

Where traditional and new media rights are licensed to two independent parties, the right-holder should have the right to provide for appropriate safeguard measures that protect traditional media rights against ambushing from new media rights. For example, in the *UEFA* case, the Commission accepted an embargo provision prohibiting the broadcasting of matches over the Internet until midnight on the night of the match.<sup>81</sup> In the case of sport events with global appeal, embargo periods may have to be extended to take into account time differences, since TV broadcasters often will not broadcast such events live but reserve them for prime-time to attract the largest possible audience.

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<sup>78</sup> Joined Cases C-241 and 242/92, *Magill*, [1995] ECR I-743; Case C-7/97, *Bronner*, [1998] ECR I-7791.

<sup>79</sup> Note that exclusivity over a given piece of media content will not automatically give the right-holder a dominant position within the sense of Article 82 EC (Case 78/70, *Deutsche Gramophon*, [1971] ECR 487, at 16). Exclusivity will only confer dominance if there is no appropriate substitute for the specific piece of media content in question (Case 40/70, *Sirena*, [1971] ECR 69, at 16).

<sup>80</sup> *Magill*, as note 78 above, at 48-50; see also the order of the President of the Court of First Instance in Case T-184/01, *IMS*, [2001] ECR II-3193 and the Opinion of Advocate General Tizzand in Case C-7a8/01 *IMS* of October 2, 2003, pp. 60-61.

<sup>81</sup> *Champions League*, as note 18 above.

On the other hand, broadcasts over new media platforms can serve as an effective complement to traditional TV broadcasts, for example by broadcasting league games that are not shown on TV or making available archive material. Parties to exclusivity arrangements for traditional TV rights should thus ensure that their arrangements do not go beyond what is effectively necessary to protect the value of the rights granted.

## VII. CONCLUSIONS

A review of the Commission's practice on exclusive broadcasting licences reveals a number of inconsistencies and contradictions both as regards market definition and the substantive assessment of exclusive licences. Such inconsistencies lead to a significant degree of legal uncertainty for companies active in the licensing of broadcasting rights. This is of particular concern in the light of the abolition of the notification procedure taking effect in May 2004 as part of the Regulation 17 reforms.<sup>82</sup>

Under the new regime, private companies will lose the ability to obtain the comfort of a negative clearance or exemption decision for their agreements. They will have to assess for themselves whether their agreements fall outside Article 81(1) EC or meet the conditions of Article 81(3) EC. This assessment will be subject to challenge before the Commission or any national competition authority or national court.<sup>83</sup> It is thus important that companies can rely on a clear, consistent, and predictable set of rules for the assessment of their agreements. It is submitted that the application of EC competition law to exclusive broadcasting licences should be guided by the following principles:

- (i) Exclusive licensing is a legitimate and recognised practice for the commercial exploitation of broadcasting rights. There should therefore be a presumption in favour of the validity of such licences.
- (ii) Market definition and substantive analysis should be consistent with the competitive issue under examination. If the competitive issue is foreclosure then competition authorities need to acknowledge the existence of alternative content that serves the needs of competing broadcasters equally well, regardless of the presence of dedicated viewer groups.
- (iii) Market shares of the content concerned should serve primarily as a filter to eliminate licences with low market shares from further scrutiny. Such licences *a priori* cannot raise competition issues, irrespective of their duration or scope. High market shares, on the other hand, do not automatically indicate a restriction of competition. Even in the case of high market shares, right-holders retain the right to grant licences on an exclusive basis. However, in such cases the duration and scope of the licence may need to be

<sup>82</sup> Article 1(2) of the newly adopted Regulation 1/2003 declares that agreements that are caught by Article 81(1) EC but satisfy the conditions of Article 81(3) EC are not prohibited, without needing a prior decision to that effect.

<sup>83</sup> Article 5 of Regulation 1/2003.

assessed in more detail, taking into account the full economic and legal context of the licence.

- (iv) An obligation for right-holders to license their content or to grant licences on a non-exclusive basis can only be contemplated in exceptional cases. Refusal to license as such even by a dominant undertaking cannot warrant such an obligation.
- (v) In the event that an exclusive licence raises competition law concerns, remedies need to be tailored in accordance with the concern at issue. A remedy may be appropriate for certain concerns, but may be disproportionate in other circumstances.
- (vi) The assessment of licences for new media rights should follow the same principles as the assessment of licences for traditional broadcasting rights. EC competition law should not be used as an instrument to develop media policy. Competition law is platform neutral and does not provide a legal basis to favour or promote certain media platforms over other platforms. Indeed, using competition law as a media policy instrument would distort free competition and create serious legal uncertainties.