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Following the Rules of the Game?
A Competition Law Study
of the Collective Sale
of Sports Broadcasting Rights

ELISABETH EKLUND

LAW No. 99/1

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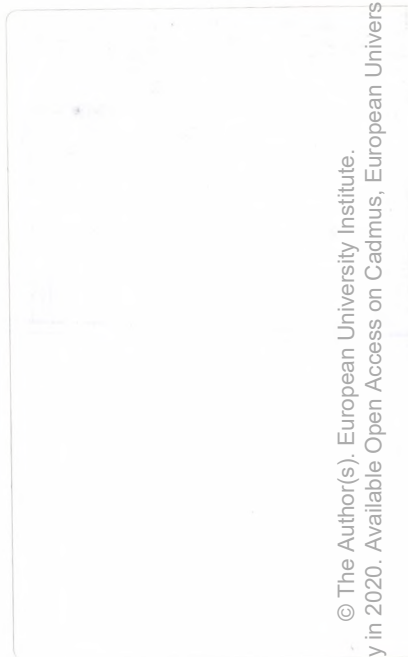


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of Sports Broadcasting Rights**

ELISABETH EKLUND

BADIA FIESOLANA, SAN DOMENICO (FI)

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Printed in Italy in February 1999
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
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List of abbreviations

A.G.	Advocate General
BGH	Bundesgerichtshof (Federal Supreme Court)
Cir.	Circuit Court of Appeals
CML Rev.	Common market Law Review
DFB	Deutscher Fußball-Bund
E.C.	European Community
E.E.C.	European Economic Community
ECJ	European Court of Justice
E.C.L.R.	European Competition Law Review
ECR	European Court Reports
E.U.	European Union
F2d	Federal Reporter, 2 nd series
F.Supp	Federal Supplement
FFF	Fédération Française de Football
FIFA	Fédération Internationale de Football Association
JCP	La Semaine Juridique
KNVB	Koninklijke Nederlandsche Voetbal Bond
LNF	League National de Football (France)
LNFP	National League of Professional Football (Spain)
O.J.	Official Journal of the European Communities
SEW	Tijdschrift voor Europees en economisch recht
UEFA	Union des Associations Européennes de Football
U.S.	United States Reporter (indicates that the case was heard by the U.S. Supreme Court in the year shown)
WuW	Wirtschaft und Wettbeverb

Chapter 1 - Introduction

1.1 Sport in a changing environment

The sports sector has traditionally been a self-regulating area, establishing its own rules both for the functioning of the games and of the sport bodies. However, it must be borne in mind that the society in which these sports activities take place is already regulated by national and international laws and, in the Member States of the European Community (E.C.), by Community law. Thus, there is a pluralism of laws as the sporting bodies have to abide both by the laws of society and by their own internal rules.¹ Legal scrutiny of the sports sectors' rules occurred very rarely until recently since the rules of the international sports federations stipulate, to a great extent, that disputes shall be subject to arbitration.² Nevertheless, this independence from legal control is now being questioned in an environment where sports activities constitute an important sector of national and international economic activities. There is an interest in the legal assessment of sports, not least from a competition law view-point. This is due to the specific characteristics in the functioning of team sports which distinguishes them from other sectors of the economy and because of the actual restrictions in competition that exist, of which not all are necessary for the functioning of sports, but which merely constitute anti-competitive behaviour.

1.2 The aim and purpose of this paper

This LL.M. thesis deals with the development of sports into what may be defined as an "entertainment industry" and the legal complications related to this development. It thereby examines the applicability of competition law to sports, focusing on an assessment of the collective sales of broadcasting rights to sport events, specifically football matches. The limits for the applicability of competition law to sport bodies is analysed, taking into consideration that some horizontal restraints are necessary for the very existence of sports leagues. The competition law analysis is partly made as a case study of a judgment from the German Federal Supreme Court of December 1997, prohibiting the Deutscher Fußball-Bund, (DFB) - the German Football Association - from collectively selling the broadcasting rights for the home matches of German teams

¹ See e.g. Auneau, Gérard & Jacq, Patrick, *Les particularismes des contentieux sportifs*, JCP, Éd- G, No. 28, 1996, p. 285.

² Cf. Article 59(1) of FIFA's (the International Football Federation) Statutes provide that: "National associations, clubs or club members shall not be permitted to refer disputes with the Federations or other associations, clubs or club members to a court of law and they shall agree to submit each one of such disputes to an arbitration tribunal appointed by common consent." FIFA Article 59(3) provide that: "Even if the law of a country allows clubs or club members to a civil court any decision pronounced by sport bodies, clubs or club members shall refrain from doing so until all the possibilities of sports jurisdiction within, or under the responsibility of, their national association have been exhausted. The national associations shall ensure, as far as they can competently do so that their clubs and club members observe this obligation and that they are aware of the consequences of disregarding it."

participating in the various European Cups.³ This invokes some questions regarding the economic specifics of professional teams sports, that is, whether it is legitimate to apply competition law to the sports sector, who in fact is the owner of the broadcasting rights to a sporting event, and to what extent the football clubs may cooperate within the league? In order to analyse these questions this thesis is divided into three main parts:

Part I presents an analysis of the economics of professional sports and the applicability of competition law;

Part II investigates the attribution of the broadcasting rights to sports events; and

Part III uses two case studies in assessing competition law of the collective sale of broadcasting rights to sport events.

Finally, there is a concluding Part IV which deals with the future application of competition law to the sports sector.

1.3 The scope of this paper

This thesis deals with the applicability of competition law to the sports sector, the attribution of sports broadcasting rights, and the legality of the collective sale of broadcasting rights to football matches. A number of other interesting questions regarding sport broadcasting rights are connected to these issues; however, it is considered that those questions fall outside the scope of this paper. Nevertheless, these questions may be briefly mentioned. The first one to be raised is the purchase of exclusive sports rights for major sporting events, because, if they are too extensive in their scope, they may create barriers to entry into the sports rights market. The European Commission has established a policy to the effect that rights should not normally be granted for longer than one season since that risks foreclosing the market.⁴ Another question concerns access to sport rights through over-intensive cooperation between broadcasters. A joint venture between a number of broadcasters - part of the *Eurovision* system of the European Broadcasting Union and a private sports channel - was condemned by the Commission in the *Eurosport* decision as anti-competitive.⁵ A third issue is the establishment of an increasing number of pay television channels which has caused a debate on the question of public access to sports events on terrestrial television. In order to protect the viewers the revised version of the Television Without Frontiers Directive⁶ provides the possibility for the Member States of the

³ Decision of the Federal Supreme Court (BGH) of 11 December 1997, (KVR 7/96), WuW/E DE-R 17 "Europapokalheimspiele" (hereafter "DFB").

⁴ For a brief comment on this issue see section 5.2.2 *infra*.

⁵ See Commission decision of 19 February 1991, *Screensport/EBU Members*, O.J. 1991, L63/32; see also regarding the establishment of the channel in a modified version in the notification in Case No IV/34.605 - *Eurosport Mark III*, O.J. 1993 C76/8.

⁶ Directive 97/36/E.C. of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities, O.J. L202/60 of 30.07.1997 "Television Without Frontiers Directive", (TVWF Directive). This Directive must be implemented by 30 December 1998.

European Community to protect certain events in the "public interest" so that they may be broadcast on free television.⁷ This raises several questions on the limits of the right to information, as well as balancing the interest between the TV and the sports business and the rights of viewers to free broadcasting.

1.4 Method

Sport is a widely accepted concept referring to a great number of both team sports and individual sports which are played on an amateur or at a professional level. This paper analyses behaviour in the professional team sports sector, if not clearly stated otherwise. Team sports have been chosen because they show economic characteristics which distinguish them from individual sports, that is, interdependence between the parties and, to certain extents, a natural cartel situation. The discussion on the economic characteristics of sports relates to all team sports, whereas the analysis on the legitimacy of competition law application to the sports sector refers to all sports. The competition law analysis is limited to an assessment of football⁸ broadcasting rights. The reason for this choice is simply the economic importance of football and the fact that football is the sport that is most commonly subject to competition law examination although, this analysis may be applicable to other team sports to a certain extent. However, the Commission stated in relation to its upcoming decision regarding the

⁷ The TVWF Directive, *ibid.* provides for the possibility to list certain events that must be broadcasted on terrestrial television. The motives for the protection of the rights to access to major events is, according to point 18 of the preamble, that "it is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic Games, the Football World Cup and European Football Championship; whereas to this end Member States retain the right to take measures compatible with Community law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events." Article 3a(1) provides that each Member State must ensure, in accordance with Community law, that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance to society. These broadcasts must not be presented in such a way that they deprive a substantial proportion of the public in the Member State of the possibility of following such events either live or by deferred transmission on free television. Every Member State have a possibility to draw up a list of events, national or non-national, which it considers to be of major importance for society. The list shall be established in a clear and transparent manner in due and effective time. The Member State concerned shall also determine whether these events should be available via whole or partially live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partially deferred coverage. Article 3a(2) provides that Member States which draw up a list have the obligation to immediately notify the Commission. The Commission shall, within a period of three months from the notification, verify that the measures are compatible with Community law. It shall also communicate them to the other Member States and seek the opinion of the Contact Committee. This list shall then be published in the Official Journal. The consolidated list of all the measures taken by Member States shall be published at least once a year. Under Article 3(a)(3) Member States has a duty by legislative measure to ensure that broadcasters under their jurisdiction, following the date of publication of this Directive, respect the lists established in other Member States in accordance with paragraph 1. This provisions permits the acquisition of exclusive rights for use in other Member States, but safeguards the interest of the state that has chosen to protect the event.

⁸ Note that football in the European context refers to soccer, whereas in the American context this term is equated with American football. However, for the sake of this competition law analysis, these forms of the game are considered to be equal. Hereinafter "football" and "American football" refers respectively to the two sports in Europe and in the United States (U.S.).

broadcasting of the Formula One World Championships⁹ that this decision will not necessarily be applicable to other sports due to the specificity of the organisation of every sport.¹⁰

The analysis of rights to sport events is illustrated by existing regulations within the football sector; nevertheless, similar provisions may be found for other team sports. The judicial approach mainly focuses on the German courts, since this is the country to which the main part of this competition law analysis is oriented in Part III. However, reference is also made to some alternative solutions found in other Member States. What regards the assessment of the legality of competition law, this is made from a E.C. competition law perspective. All the same, the importance of the application of the various national competition legislations is outlined since it also plays an important role in a Community context and, indeed, the cases judged at a national level have an interest in the E.C. The case studies examined are two national cases, due to the fact that no such example has yet to be assessed at a Community level. That the cases chosen occurred in Germany and in the Netherlands should not be surprising especially considering that they are two of the major football nations in Europe where restrictions on competition amongst the football clubs may have important consequences for the sport broadcasting rights market. Moreover, a comparison is also made with the application of United States antitrust law towards sports rights agreements, mainly in order to give this analysis some interesting comparative aspects as the approaches on the different sides of the Atlantic Ocean are radically different.

⁹ Notification of agreements relating to the FIA (Fédération Internationale de l'automobile) Formula One World Championship (Case No. IV/36.638 - FIA/FOA) O.J. 1997 C 361/05.

¹⁰ See Karel Van Miert's published speech, *Sport et Concurrence: développements récents et action de la Commission*, Forum Européen du Sport, 27/11/97.

PART I

**AN ANALYSIS OF THE ECONOMICS
OF PROFESSIONAL TEAM SPORTS
AND THE APPLICABILITY OF COMPETITION LAW**

Chapter 2 - The basics - economic characteristics of professional team sports

2.1 The importance of economic analysis

In considering the development of professional sports, and especially that of football into a more and more commercialised business, it is argued in this section of the thesis that professional sports is a sector that has to abide by the rules of competition. Competition law can correct anti-competitive behaviour in the market and makes sure that football clubs do not overstep the mark when claiming that they have to cooperate in order to provide a product. The point of this analysis is to determine on which grounds competition law should be applicable to professional sports and also what are the limits to its applicability. Although law and economics are two separate disciplines, they are very much interrelated, especially in the area of competition analysis. In this chapter, the economic characteristics of professional team sports are outlined, thus providing the basis for this competition law analysis. The applicability of Community law in general to sports bodies is summarised in the next chapter; it is followed by an assessment of the legitimacy of E.C. competition law, as well as an analysis as to whether national competition laws may be applicable in a general sense to sports bodies.

2.1.1 *The uncertainty of outcome hypothesis*

Football in Europe is mainly played within the context of national leagues and the clubs are associated to national football federations. It has long been questioned by economists whether sport can be comparable to other businesses due to the interdependence displayed between the parties, that is, the clubs playing against each other in a league.¹¹ W.C. Neale, as well as P. Sloane, claims that the economics of team sports are peculiar, since it is not possible to provide the product - entertainment - unless at least two teams, which are rival producers, cooperate.¹² This horizontal cooperation is seldom permitted in other businesses but is regarded as anti-competitive.¹³ In a competitive industry, the inefficient producer is driven out of business so that only efficient and viable firms remain in operation. But, in professional team sports, the situation is completely to the

¹¹ Neale, W.C.; *The peculiar economics of professional sports*, Quarterly Journal of Economics, LXVII, No. 1 February 1964, quoted by Sloane, Peter, Editorial: *The economics of sport, an overview*, Economic affairs, Vol. 17, September 1997, p. 2.

¹² See Sloane, P., *Sport in the Market? The Economic Causes and Consequences of the 'Packer revolution'*, Hobart Paper 85, The Institute of Economic Affairs, London, 1980, p. 15.

¹³ Cf. prohibition in Article 85(1) of the E.C. Treaty (hereafter Article 85): "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply". But cf. cooperation for research & development that is generally treated favourably, see for example group exemption for specialisation agreements, Commission Regulation 151/93, O.J. 1993, L21/8.

contrary as the clubs need to combine to survive. The individual clubs have a vested interest not only in the continued existence of other clubs, but also in their economic viability as competitors in order to maximise the interest of spectators and hence revenues through the sale of the product - the individual match.¹⁴ This so-called uncertainty of outcome hypothesis suggests that sporting competition must not be too unequal, because if one or two clubs become too strong then eventually spectator interest will wane.¹⁵ It is thus the nature of the product which creates the requirement of uncertainty regarding outcome.¹⁶ P. Sloane considers that the uncertainty of outcome in the result of games is the key to the economic analysis of professional team sports.¹⁷ He argues that it is on this hypothesis that the justification for sporting leagues rests, thus restricting competition in the price and the output of individual member clubs, as well as in their property right to players contracts.

2.1.2 *The necessity of sports cartels*

Cartelisation in the form of leagues is necessary in the sports sector in order to create a viable product in the first place.¹⁸ It has been argued that the major issues for 'the sporting cartel' - that is the league - are the number of producers or the size of the league, the location of production, the allocation of playing resources, admission prices and revenue-sharing arrangements.¹⁹ In addition, league organisations may also negotiate contracts for member clubs with TV companies, and industrial sponsors. The theory which deals with uncertainty of outcome and the necessity of the league to restrict competition between the clubs has created a debate among economists, disputing whether the league, rather than the club, is the equivalent of the 'undertaking' in a normal competitive industry or whether the league should rather be considered as a cartel which cross-subsidises its members.²⁰ This leads to the question of whether sport should be exempted from the scope of competition law since these markets are normally unstable and it is not feasible for all teams to be successful all the time, resulting in the revenues of unsuccessful teams being lower.²¹

Despite the economic characteristics of professional team sports it is argued in this LL.M. thesis that competition law should be applicable to the sports sector. However, as the judicial approach towards the uncertainty of outcome hypothesis makes clear, the question is not whether to permit or to prohibit restrictions on the

¹⁴ See Sloane, P., *Sport in the Market? The Economic Causes and Consequences of the 'Packer revolution'*, supra note 12, p. 16.

¹⁵ See Sloane, P., *The economics of sport, an overview*, supra note 11, p. 2.

¹⁶ See Sloane, P., *Sport in the Market? The Economic Causes and Consequences of the 'Packer revolution'*, supra note 12, p.16.

¹⁷ Ibid. p. 25.

¹⁸ Ibid. p. 40.

¹⁹ Ibid. p. 40.

²⁰ Ibid. p. 16.

²¹ Ibid. p. 16.

league in order to preserve competition between the teams, but how to do this in the less restrictive way. In any case the applicability of competition law does not mean that there is a *per se* prohibition on any cooperation between the league members. In this respect, the functioning of the league must play an important role in any competition law assessment.

Chapter 3 - With what legitimacy is competition law applied to the sports sector in Europe?

3.1 Introductory remarks

As was outlined in the previous chapter, the economic characteristics of sports suggest that they may have a special status in the legal context. It must be taken into account that the sports sector has long been self-regulating; indeed within each sport, there are between one and several levels to the hierarchical bodies which create the rules for their own individual needs and which then survey the application of them. These rules were previously rare subjects for any judicial proceedings, but, in subsequent instances of dispute, they have become a subject for arbitration.²² Therefore, this chapter examines the role of law as a control instrument to behaviour in the sports sector. Despite current self-regulation in certain aspects, the era of total 'immunity' from legal scrutiny seems to have ended. The turning-point in Europe is mainly attributed to the applicability of European Community law to the sports sector. The competence of the Community in relation to sports cannot be directly provided by the Treaty of Rome of 1957 establishing the European Economic Community (E.E.C.).²³ No specific provisions were established in this regard when the E.E.C. Treaty was signed and nor have any amendments been made subsequently. However, a protocol was added to the Treaty of Amsterdam signed in 1997 which recognises the importance of sport in society.²⁴ Nonetheless, this is only a declaration without legal value; therefore its importance in regard to the applicability of the Amsterdam Treaty to sports can be questioned. Community competence does not emanate explicitly from the E.E.C. Treaty nor the E.C. Treaty, which is the E.E.C. Treaty as amended by the Treaty of Maastricht in 1992. Therefore, an examination as to how the European Court of Justice - the highest interpreter of Community law - through its case law has developed a competence for the Community institutions to assess certain matters in relation to sports is presented. National courts have a competency in assessing matters which impose rights and obligations on individuals, so long as they do not conflict with Community provisions, that is, when the Community provisions have direct effect.²⁵ In addition, national courts may have possibilities to assess behaviour in the sports sector on matters that fall outside the scope of Community law but which lie within the scope of their national jurisdictions. The degree to which the

²² See section 1.1 *supra*.

²³ Treaty Establishing the European Economic Community (EEC Treaty), Rome 1957.

²⁴ The declaration on sports in the Protocol to the Amsterdam Treaty reads as follows: "The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sports are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport." Despite the declaration's lack of legal value it indicates that the Member States have recognised the place sport plays in society and its European dimension.

²⁵ For direct effect of Articles 85(1) and (2) and 86 see *C-127/73 BRT v SABAM* [1974] ECR 51, at 16, 17 and *C-66/86 Ahmed Saeed*, [1989] ECR 803 at 33.

legitimacy of Community rules is applicable to sports, and in what circumstances the Community and national competition rules might be applied, is developed in the remainder of this chapter.

3.2 Sport is subject to the E.C. Treaty when considered as an economic activity

It took almost twenty years of applying the E.E.C. Treaty before the question of its applicability to sports was brought up before the European Court of Justice in 1974, through the *Walrave* case.²⁶ The origin of this case was a request for a preliminary ruling from a national court under Article 177 E.E.C. for an interpretation of the Treaty. The national proceeding related to two Dutch nationals - Walrave and Kock - who were prevented from acting as pacemakers in, *inter alia*, the bicycle World Championships due to the rules of the Union Cycliste Internationale (the international association for cycling) according to which the pacemaker and the cyclist had to be of the same nationality. The European Court of Justice was thereby obliged to assess the applicability of Community law to sports in the context of Articles 7, 48 and 59 of the E.E.C. Treaty. It held that "[h]aving regard to the objectives of the Community, the practise of sports is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty."²⁷ Furthermore, the Court held that Community law could be applied to the rules of private sporting associations.²⁸

The Court of Justice confirmed its position regarding *Walrave* in 1976, when another preliminary reference, *Donà v Mantero*,²⁹ was made. The Court had to give its interpretation of Article 48 E.E.C. in relation to the free movement of football players because the rules of Federazione Italiana Gioco Calcio (FIGC) - the Italian Football Association - prevented the use of foreign players in Italian league football. Almost twenty years passed before the European Court of Justice was next confronted with interpreting the E.C. Treaty and the rules of sports bodies when in 1995 it gave its preliminary ruling in the *Bosman* case.³⁰

This case is one of the most renowned in the Court's history and the one that finally made the sports industry realise that the Community actually has an integral say in their doings. Furthermore, the case indicates that the Court intends to use this competence when it discovers breaches in the application and usage of the basic principles of the Community and of the Common Market. The legal issues in the *Bosman* case concerned a question as to whether the rules governing

²⁶ Case C-36/74, *Walrave and Kock v Union Cycliste Internationale*, ECR [1974] 1405.

²⁷ *Ibid.* at 4.

²⁸ *Ibid.* at 17-18.

²⁹ Case C-13/76, *Donà v Mantero*, ECR [1976] 1333, at 17-18.

³⁰ Case C-415/93, *Union Royal Belge des Sociétés de Football Association and others v Bosman and others ('Bosman')* [1995] ECR I-5078.

the Union of European Football Associations (Union des Associations Européennes de Football) - UEFA - transfer system of football players was compatible with Article 48 E.C. on the free movement of workers and with the competition rules provided for in Articles 85 and 86 E.C. Moreover, the Court also had to assess the compatibility of a limitation on the number of foreign players in a football team with the same Community rules. The Court began its ruling by confirming the applicability of Community law to sport when it is an economic activity within the meaning of Article 2 of the Treaty, as established in the case law of *Walrave* and *Donà*.³¹ It thereby rejected submissions from one party which tried to deny the admissibility of the case by claiming that the economic activity of smaller football clubs is negligible, neither was the Court persuaded by the argument that football is "in most cases" not an economic activity.³² After having found the case admissible, the Court assessed the rules under question through Article 48. It found that both the transfer rules and the limitation on foreign players were incompatible with Article 48. Because of this finding, it contented itself by answering the national court in its preliminary reference with its contention that the rules which the national court's question referred to were contrary to Article 48 regarding the free movement of persons and held that it was not necessary to rule on the interpretation of Articles 85 and 86 of the Treaty.³³ The outcome of this preliminary ruling in the *Bosman* case is that there now exists a prohibition on the payment of a sum of money for international transfers of professional players or amateurs turning professional, on the expiry of their contract, within the European Union (E.U.) and the European Economic Area (EEA). Moreover, it removed the limits which had been placed on the number of players from other Member States eligible to take part in club competitions.

3.3 Applicability of the competition rules?

A fundamental question arises: as soon as it is established that the Treaty is applicable to sport bodies, is it established that the Treaty's provisions on competition also becomes applicable? The case law of the European Court of Justice, is not much in evidence on this question. Unfortunately, the Court's preliminary judgment in the *Bosman* case does not give any indication at all on how to assess the compatibility of the rules of football's transfer system with the E.C.'s competition rules. The Court contented itself to state that it was not necessary to rule on the interpretation of Articles 85 and 86 of the Treaty.³⁴ Otherwise, this case would have been the first where the European Court of Justice confronted an assessment of the applicability of sports rules with the E.C.'s rules on competition. At the time of writing, no other cases have been

³¹ Case C-36/74, *Walrave*, supra note 26 and Case C-13/76, *Donà*, supra note 29.

³² Case C-415/93 *Bosman*, supra note 30, at 70 and 72.

³³ *Ibid.* at 138.

³⁴ See Case C-415/93, *Bosman*, supra note 30 at 138.

brought in front of the Court of Justice in this respect. However, Advocate General Lenz developed a view which, in his opinion on the *Bosman* case, held that the rules on competition were applicable when assessing the transfer system.³⁵ Other decisions have additionally been dealt with by the Commission and the Court of First Instance.³⁶ In order to establish the grounds upon which they based this applicability, the aim and the purpose of the competition law system, as well as its criteria for applicability, must be outlined.

3.3.1 *The aim and purpose of competition policy*

Competition law is the weapon utilised to deal with market behaviour which distorts competition in the Common Market. Certain market behaviour is considered as undesirable as it restricts competition and thereby affects consumer welfare.³⁷ The protection of consumer welfare is thus a central aim of competition policy. Another goal of competition policy is to provide for the freedom of action of smaller competitors in the market while promoting market integration in the Common Market.³⁸ E.C. competition policy does not make any distinctions between different business activities, but is in fact applicable to all sectors of the economy.³⁹ However, certain sectors have been given specific treatment due to special market circumstances. Richard Whish and Brenda Sufrin have commented that "social or political value lead to the conclusion that competition is inappropriate in particular economic sectors."⁴⁰ One example which is cited is agriculture with reference made to the Common Agricultural Policy of the Community. Thus, a question arises: what motivates such special treatment and indeed, can it be argued that sport, due to its specific economic characteristics, should not be subject either to the Community rules on competition or to national competition rules? This issue is analysed by first establishing what criteria are necessary for the applicability of Community competition rules and, secondly, by assessing whether the activities of sport bodies fulfil these criteria.

3.3.2 *Criteria for applicability of E.C. competition law*

The first criterion concerning the applicability of Article 85 is to establish the existence of an agreement or concerted practice between *undertakings or association of undertakings*. The other criterion is the existence of a restriction on competition which distorts inter-state trade and that such restriction is

³⁵ See Opinion of Advocate General Lenz on *Union Royal Belge des Sociétés de Football Association and others v Bosman and others* ('*Bosman*'), [1995] ECR 4932.

³⁶ See *Package tour decision* of 27 October 1992, O.J. 1992 L 326/31, and Case T-46/92 *Scottish Football Association v Commission* [1994] ECR II-1039.

³⁷ See e.g. Korah, *EC Competition Law and Practice*, 6th ed. 1997, p. 9.

³⁸ *Ibid.* pp. 10-11.

³⁹ *Ibid.* pp. 10-11.

⁴⁰ Richard Whish & Brenda Sufrin, *Competition Law* 3rd ed., Butterworths, London, Edinburgh, 1993, p. 7.

appreciable.⁴¹ The criteria in Article 85(1) do not give much indication as to whether any specific treatment should be given in the application of such criteria to sport bodies. Since there is little case law in this area, and few comments in literature, it is hard to consider whether Article 85(1) shall be applied to sports in just the same way as it applies to any other industry.⁴²

3.3.3 *Competition law may be applicable to sports bodies as soon as they undertake an economic activity*

The first thing to establish regarding the applicability of Article 85(1) is whether sport clubs or national federations constitute undertakings within the meaning of Article 85(1). The notion of undertaking under the E.C. Treaty encompasses, according to established case law "every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed."⁴³ Since professional football clubs engage in economic activity they fall within the notion of undertaking. Indeed, football associations, which are non-profit making associations, are included within this scope since the concept of undertaking does not suppose a profit-making intention.⁴⁴ The Commission held for the first time in the *Package Tour Decision* - which regarded the sale of tickets to football matches of the 1990 World Cup in Italy - that football clubs constitute undertakings within the meaning of Article 85(1).⁴⁵ Moreover, the Commission considered that associations of undertakings may be regarded as 'undertakings' as far as they engage in an economic activity. It thereby held that the Fédération Internationale de Football Association (FIFA) - the International Football Federation - and FIGC, *inter alia*, carried out activities of an economic nature and therefore should be regarded as undertakings.⁴⁶ Advocate General Lenz held in his opinion on the *Bosman* case that the individual football associations should be regarded as associations of undertakings within the meaning of Article 85, despite the fact that not only professional, but also amateur, clubs belongs to these associations.⁴⁷

In relation to the applicability of Article 85(1), it must also be established that the agreement in question prevents, restricts or distorts competition to a not

⁴¹ Cf. "Commission de minimis notice" Notice of agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty establishing the European Community, O.J. C 372/04, 9.12.97, the Notice does, however, not bind the Community Courts.

⁴² Dirk Brinckman, & Vollebregt, Erik, *The Marketing of Sports and its Relation to E.C. Competition Law*, [1998] E.C.L.R., 284, indicate that a not yet published draft paper of the Commission (Broadcasting of Sports Events and Competition Law) outlines the considerations DGIV are likely to consider when assessing agreements concerning TV broadcasting rights to sport events.

⁴³ See Case C-41/90 *Höfner and Elser v Macrotren* [1991] ECR I-1979 at 21.

⁴⁴ See joined cases 209-215 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125 at 88.

⁴⁵ The Commission established for the first time in the "*Package tour decision*, supra note 36 "that competition law is applicable also to sports federations".

⁴⁶ Ibid. at 49 and 53, see also Case T-46/92 *Scottish Football Association v Commission* supra note 36.

⁴⁷ See Opinion of AG Lenz in C- 415/93 *Bosman*, supra note 35 at 256.

insignificant extent⁴⁸ and that it affects trade between Member States; these criteria are not established further here. However, it shall be noted that, when there is an anti-competitive agreement or practice but the criteria of interstate trade and appreciable effect are not fulfilled, the Member States' national competition laws might be applicable. Several of these national competition acts act as mirrors to the provisions in Articles 85 and 86, save for the requirement of trade between Member States.

3.3.4 Legal assumption - restrictions must be necessary and indispensable

Having established that arrangements where sports bodies are involved formally implies that the rules on competition might be applicable, since these bodies constitute undertakings, it must be discussed whether the relationships between these bodies shall influence the legal analysis.

The specific economic characteristics of professional sports, especially regarding the uncertainty of outcome hypothesis, does not only play a role in the economic analysis. The economic characteristics of team sports have also been considered in the legal assessment of the professional sports sector. However, it appears that there is a limit as to how far different actions may be justified by the uncertainty of outcome. Advocate General Lenz emphasised in the *Bosman* case that the Court makes an evaluation under Article 85(1) and added that this "shows that only restrictions of competition which are indispensable for attaining the legitimate objectives pursued by them do not fall within Article 85(1)."⁴⁹ The Advocate General held that the Court regards restriction on competition as compatible with Article 85(1) if, taking all the circumstances of the particular case into account, it is apparent that without those restrictions the competition to be protected would not be possible at all.⁵⁰ Only restrictions of competitions that are "indispensable for attaining the legitimate objectives pursued by them" do not fall within Article 85(1).⁵¹ Advocate General Lenz proceeded to recognise that professional football is different from other markets due to the mutual dependence which exists between the clubs, wherefore certain restrictions may be necessary for the "proper functioning of the sector."⁵² Lenz held, in relation to the transfer rules at stake in the *Bosman* case, that, if they were not necessary and indispensable for the purpose of ensuring the proper functioning of the sector the positive effects may only be examined under Article 85(3) E.C., an assessment which has to be made by the Commission because it has got the exclusive

⁴⁸ Cf. de minimis notice, supra note 41 which states that for appreciability of the market share, a relevant market has to be established; cf. Commission Notice on the definition of relevant market for the purpose of Community competition law, OJ C372/03, 9.12.97.

⁴⁹ See Opinion of AG Lenz on *Bosman*, supra note 35, at 269.

⁵⁰ Ibid. where A.G. Lenz in note 340 referred in particular to Case 56/65 *Société Technique Minière v Machinenbau Ulm* [1966] ECR 235, at 250 and in note 341 to Case 250/92 *Gottrup-Klim v Dansk Landbrugs Grovvarerleskab* [1994] ECR I-5641.

⁵¹ See Opinion of AG Lenz on *Bosman*, supra note 35 at 269.

⁵² Ibid. at 270.

competence for granting an individual exemption from Article 85(1) by application of Article 85(3). It is presumed in this thesis that, even though the *Bosman* case did not concern the sale of television rights, the same principles shall account for the sale of broadcasting rights by football clubs; this thesis also holds that eventually restrictive measures must be necessary and indispensable for the functioning of the organisation of football in order to be found non-restrictive under Article 85(1) or exempted under Article 85(3).

3.3.5 *Distinction between consequences of a decision and applicability of a rule*

It is important to distinguish the establishment of applicability of a rule and the consequences of a decision due to this applicability. As exemplified by Advocate General Lenz, it does not matter for the free movement of persons whether a match lasts for 90 or only for 80 minutes or whether two points or three are awarded for winning a game. However, Lenz found, as did the Court, that the rules on transfers are different because they restrict free movement and thus are lawful only if justified by imperative reasons in the public interest.⁵³ Lenz further held that the eventual consequences of the judgment to the functioning of sports does not make the Community rules inapplicable, but do, however, have to be taken into account when answering the question.⁵⁴ As one author has commented on the *Bosman* case, “[o]ne would not have supposed the Court would have been prepared to place a particular industry uniquely beyond the jurisdiction of Community law. Although the Court was not unaware that its judgment could exert a profound impact on the football industry, it commented that ‘this cannot go so far as to diminish the objective character of the law’ (para 77). Its sole concession was a willingness to exercise its self-endowed power to limit the temporal effects of the judgment.”⁵⁵

This example of the applicability of the provisions on free movement to certain sports regulations may be seen as parallel to the rules on competition; competition law will not interfere with the rules of the game, and *vice versa*, unless there is serious reason for it to do so. The applicability of competition law to the sports sector does not mean any *per se* prohibitions. Competition law shall be applicable to, and regulate, the provisions that restrict or diminish competition, and, if they do not have justifying benefits for consumers, less restrictive solutions must be found. If certain rules regulating the functioning of sports comes under competition law, scrutiny of their purpose must be taken into account under such an assessment. Most important is consideration of the special economics of professional team sports, so that the uncertainty of outcome balance is not destroyed and the very existence of the league threatened.⁵⁶

⁵³ Ibid. at 215.

⁵⁴ Ibid. at 128.

⁵⁵ See Weatherill, Stephen, *Comment on Bosman*, CML Rev. 33, [1996] p. 1001.

⁵⁶ F. Romani, F., & F. Mosetti, *Il diritto nel pallone: spunti per un'analisi economica della sentenza Bosman*, Rivista di diritto Sportivo, 1996, p. 439 consider the effects of the *Bosman* case to be mainly positive for the

3.3.6 *Applicability of national competition laws*

Why present the previous discussion about the justifications of applying Community law and E.C. competition law to sport bodies when the case studies that are utilised in Part III of this thesis do not concern Community competition law because the cases have been assessed by national competition law authorities applying national competition law? The reasons for this are three-fold. First, it sets the limits for when Community law is applicable to the sports sector and, more specifically, distinguishes when Community competition law is applicable and what criteria must therefore be taken into consideration. Secondly, this emphasis on Community law stresses the international role of sports. Thirdly, the applicability of Community law to sport sets up a framework for the importance of the legal scrutiny of sports regulations to be examined in a national context.

The enforcement of Community law takes place at different levels and, despite the supremacy of E.C. law, the national courts still play a substantial role in implementing and formulating competition policy.⁵⁷ The national competition authorities may either apply Articles 85(1) and 86, when the conditions therein are fulfilled, or they may apply their national competition laws. The national competitions laws can be applied when the criterion on interstate trade is not fulfilled or, when the criterion of appreciable effect is not fulfilled, if the national acts have lower thresholds. A paradox exists, however, in that interstate trade is a widely defined concept,⁵⁸ wherefore many agreements fall within this concept although confined within one Member State. The trade of television broadcasting rights for football matches, for example, especially in an international context such as the various European Cups, may very well be interpreted to have a Community interest. Nevertheless, the Bundeskartellamt, the German Federal Cartel Office, decided to assess this case under German national competition law without ever mentioning a possible infringement of Article 85(1).⁵⁹ The same

football industry: "A nostro avviso, la sentenza *Bosman* farà molto meno danno di quanto non si tema, e la reale portata dei suoi effetti, probabilmente, non giustifica tutto il clamore che intorno ad essa si è generato. In relazione all'abolizione degli indennizzi, infatti, ci sembra che la pronuncia della Corte di Giustizia non avrà, tutto sommato, effetti particolarmente rilevanti, e certamente non comporterà modifiche nella circolazione dei calciatori. Per quanto concerne, invece, l'eliminazione del limite all'utilizzio dei calciatori stranieri, la sentenza avrà, al massimo, il benefico effetto di liberalizzare un mercato protetto e di aumentare la concorrenza."

⁵⁷ See Goyder, D.G., *E.C. Competition law*, 1993, pp. 426, 430-37.

⁵⁸ See Case C-8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 391, at 28-30 where the Court assessed the agreement of a trade organisation of which most Dutch cement dealers were members, that recommended the sales prices in the Netherlands. The outcome was that Article 85(1) was held to be applicable although the agreement was restricted to activities in a single Member State.

⁵⁹ It was only the Berlin Court of Appeals that touched on the possibility that the provisions subject of the proceeding actually have crossborder effects and therefore might infringe upon Article 85(1). The possibilities of crossborder effects of the agreement were briefly commented upon in relation to it rejecting the possibilities of exempting the agreement. It held that "it may be left open whether an exemption is ruled out if only for the reason that the central marketing of rights does not only violate Section 1 of the ARC but owing to cross-border effects possibly Art. 85(1) of the E.C. Treaty as well, and whether in the event of an exemption under Section 5(2) and (3) of the ARC a conflict with the exemption under Art. 85(3) of the E.C. Treaty might occur. An argument for the marketing practice actually having cross-border effects at any rate is that, e.g. an Italian TV

reasoning accounts for the sale of the television broadcasting rights for matches of the Dutch national football league by the Dutch Football Federation - Koninklijke Nederlandsche Voetbal Bond (KNVB) - which were assessed by the Ministerie van Economische Zaken - the Dutch Competition Authority - under the Dutch Competition Act. It is common that national leagues of top football nations acquire a great spectator interest from other Member States; thus a legitimate Community interest might be found here as well. However, it is generally recognised that the national competition authorities are reluctant to apply the Community's competition rules, even if the criteria are fulfilled, but, that they prefer to apply their respective national competition laws. This is, for instance argued by V. Korah, who is of the opinion that the national competition law authorities are more likely to invoke national law than the community provisions when assessing a competition law case.⁶⁰ Germany has a long tradition of applying competition law, wherefore the Bundeskartellamt, applies national competition law to a large extent, although it used to apply both systems in a dual application if all the criteria was fulfilled.⁶¹ In the Netherlands, the application of Community competition law has remained highly theoretical, even if the competition authorities have indicated that they consider themselves competent to apply those rules. However, the power exercisable under the Dutch competition Act, Wet economische mededinging, has not been used.⁶²

3.3.7 Conclusion: competition policy is, within certain limits, the right instrument to deal with anti-competitive behaviour in the sports sector

The establishment of the applicability of the Treaty to sport was due to several preliminary rulings in the European Court of Justice, especially on rules of national and international sport federations which prohibited the free movement of persons, one of the fundamental principles of the European Community. The Court advised the national court that rules of sports organisations fall within the scope of the Treaty when sport constitutes an economic activity. It is undeniable that many activities of sports organisations, especially professional ones, concern economic activities. It is argued that there is no need for Community law to interfere with the social and cultural aspects of sport, however, as the competition rules shall be applied to the economic aspects of the sports sector. Nevertheless, the principles of proportionality and subsidiarity must be taken into consideration

station may be considered as buyer of TV rights to an away match of an Italian club in Germany. This need not be examined more closely, though; for the central granting of rights is not exemptable under Section 5(2) and (3) of the ARC anyway." As was the case with competition law authorities in many other Member States, the Bundeskartellamt chose to assess the case under national competition acts. (see Decision of the Cartel Division of the Berlin Court of Appeals of 8 November 1995, DFB (Kart 21/94), WuW/E OLG 5565, at II.B.3).

⁶⁰ See Korah, *EC Competition Law and Practice*, supra note 37, p. 24.

⁶¹ See e.g. Schmittmann, M. & G.J. Thwaite, *The dualism of German and EC Competition Law: Some Prognostic Observations* in *Frontiers of Competition Law*, Ed. Dr. Julian Lombay, Institute of European law, University of Birmingham, 1994.

⁶² See I.W. VerLoren van Themaat et al, *National application of Community Competition Law*, SEW, 4 (1998) April, p. 142.

in this context. Competition law has an essential role to fulfil in order to ensure that there is competition in the sports sector; it is argued that this is especially important when conduct in the sports sector influences activities in other markets. An example of this phenomenon arises in respect to sports bodies' sale of rights for television transmissions. The sale of these rights to broadcasters, which are dependent on obtaining the sports television transmission broadcasting rights, highly influences the conditions in which the sports broadcasting market operates. However, when competition law is applied, it must be ensured that the economic characteristics of professional team sports are taken into consideration, so that the sports sector may continue to flourish and competition between the teams may be upheld, both on a market, as well as on a sports, level.⁶³

In accordance with Advocate General Lenz's opinion in Bosman, it is arguable that, if it is the less restrictive means which are used, the restriction may be found not to be anti-competitive. Moreover, an individual exemption from Article 85(1) may be granted by the Commission in accordance with the criteria in Article 85(3). The criteria for such exemption is that the agreement contributes to the production or to the distribution of the product (televised professional football matches), or to promoting technical or economic progress while allowing the consumers a fair share of the resulting benefits. Furthermore, the restrictions must be indispensable for the attainment of these objectives and not eliminate competition in respect of a substantial part of the products. Not only the Community institutions, but also the national courts and competition authorities, play an important role in the enforcement of competition policy within the European Community, that is, competition both in interstate trade and inside the Member States.

⁶³ Note that also state aid to sport organisations may interfere with the competitive balance between teams of different Member States where for the state aid in the sports sector needs to be taken into consideration through competition assessment.

PART II

THE ATTRIBUTION OF BROADCASTING RIGHTS TO SPORTS EVENTS

Chapter 4 - The economic importance of sports broadcasting rights

4.1 The increasing prices

The rights to the broadcasting of sports events and the assignment of such rights today plays an essential role in the economy of professional sports. Sports broadcasting is also of essential value both for commercial television channels, in order to attract advertisers, and to pay television channels, in order to attract subscribing viewers. The broadcasting sector, as well as the sports sector, has been subject to a dramatic transformation during the last ten years. The sports sector has become increasingly involved in commercial activities. The broadcasting sector has, having occupied one of the most regulated sectors in Europe, where the existence of state broadcasting monopolies was the rule, underwent drastic change due to deregulation and to the rapid emergence of new technologies. Diversity in the broadcasting sector was previously, for the most part limited due to the 'spectrum constraint', that is the scarcity of frequencies on the radio spectrum for delivering the signal.⁶⁴ At the present time, however, there are several alternatives to traditional terrestrial television including cable, satellite and digital television. There are even specialised sports channels. Consequently, a wide range of sport events are broadcasted today on numerous public and private channels. Hence, exclusive sports rights are sold for considerable sums because they attract audiences as well as advertisers. How the prices of these rights have increased lately is best illustrated by looking at some examples.

The rights for the highlights of the two professional football leagues in the Netherlands (Eredivisie and Eerste Divisie) were granted for approximately six million guilder in 1989, eighteen million guilder for the 1993-1994 season, and for the 1997-1998 season for 38.8 million guilder, that is; indeed the purchasing costs increased eight times during this period.⁶⁵ The rights to the English Premier League for the 1992-1996 season were sold for 62 million pounds sterling. The rights for the following five seasons - 1997-2001 - garnered a fee of 743 million pounds - more than ten times as much.⁶⁶ Competition for the rights to attractive events have certainly grown due to increased competition between the broadcasters. Nevertheless, it is questionable as to whether these high prices really are the effect of a sound market supply/demand reaction or whether they are influenced by the monopolistic cartel position that certain sports federations have ensured for themselves by setting prices and restricting competitive freedom for the sports clubs. This issue, which is developed in Part III of this thesis, is intimately linked to the question as to who actually owns the rights to a sporting event, an issue which is analysed below.

⁶⁴ See Motta, M., & M. Polo, *Concentration and public policies in the broadcasting industry: the future of television*, Economic policy, Vol. 1, 1997, Blackwell, Oxford, p. 295.

⁶⁵ See decision by Ministerie van Economische Zaken of 22 December 1997, *KNVB*, ES/MW 97080628.b3S, at 77.

⁶⁶ See *Idrottens affärer*, No. 1 February 1997, p. 11 citing Kagan World Media.

4.2 Disputes over the rights

The attribution of rights is a complicated issue and different sets of rules seem to clash with each other which invokes legal problems as to who the rights belongs. Consequently, several legal disputes have occurred recently where football clubs and national federations have been fighting over the rights. In order to present some background information for this discussion, as to who should be the rightful owner of an event, it firstly needs to be explained as to which entities may be involved in the organisation of a football tournament. Thereafter, their actions on the sports rights market are outlined. Then, different theories on the ownership of a sports event is discussed, both on a theoretical level and as illustrated through case law, in an attempt to present a solution to the question as to whom shall the ownership of a football match be attributed.⁶⁷ Finally, some concluding remarks try to present a solution to the question of the attribution of rights, that is the most suitable answer in various contexts.

⁶⁷ However, this is not an attempt to analyse the philosophical aspects of ownership, as this discussion is limited to who has the rights to an event in the context of professional sports.

Chapter 5 - Setting the scene - the football broadcasting industry

5.1 The hierarchical organisation of professional football

In order to understand the relations between the different actors organising a football match or a football tournament, it is necessary to describe the hierarchical organisation of a professional team sport such as football.⁶⁸ The same organisational structure may, nonetheless, also be applicable to almost any professional team sport.

5.1.1 Local level

Football at the local level is an organised team sport played in clubs. Although not every professional football club is an undertaking in a strict legal sense, those clubs abiding in some Member States by the rules governing associations, football clubs may generally be described as undertakings, because they organise the matches, sell tickets *et cetera*. Professional football clubs employ the players who are thus subject to employment contracts and who are then remunerated according to the terms of those contracts.

5.1.2 National level

Professional football clubs, as well as certain amateur clubs, are joined together in national associations. There is one football association in each Member State which organises the sport at a national level, except for, the United Kingdom, where for historical reasons England, Wales, Scotland and Northern Ireland each have their own individual football association. The responsibility of the national associations are, *inter alia*, to implement the international federation's rules, to set up rules for the national league, to organise national leagues and to set up a national team. In some countries, as for example in Germany, regional associations, based on *länder*, have a coordinating role between the clubs and the national association.

5.1.3 International level

The national football associations are joined together world-wide in FIFA, whose seat is in Zurich, Switzerland. The national associations have an obligation to implement the rules of FIFA within their respective countries. Every fourth year FIFA organises the World Cup on the territory of one host nation (in 2002, they will do so with two host nations) as well as the qualification tournaments. Within FIFA, there are several smaller groupings which are comprised of the associations of a particular geographical continent.

⁶⁸ For the organisational structure of football see e.g. Opinion of A.G. Lenz on *Bosman*, *supra* note 35 at 4-5. See also Townley, Stephen & Edward Grayson, *Sponsorship of Sports, Art and Leisure: Law, Tax and Business Relationships*, London, Sweet & Maxwell 1984, p. 18-19.

5.1.4 Continental confederations - UEFA

The national football associations in Europe adhere to the continental confederation UEFA.⁶⁹ In addition to the 18 associations of the E.C., there are a large number of other football associations in Europe, so that UEFA currently has around 50 members in all. UEFA also has its seat in Switzerland. UEFA has, *inter alia*, the function of organising every four years the European Championship - the finals and the qualifying competitions - for its constituent national teams. Moreover, UEFA has been handling three different tournaments for club teams - the European Champions' Cup, the European Cup Winners' Cup and the UEFA Cup (previously the Fairs Cup) - for over 30 years.⁷⁰

5.1.5 Additional bodies

In addition to the aforementioned sports bodies, there are also leagues and organising committees which can be set up for the specific organisation of an individual or ongoing tournament. Leagues are the form of organised competition in which clubs generally participate; sanction from the national federation is usually required as to where they are to operate at a national level.⁷¹ The leagues are sometimes more important as organising bodies than the national federations. Organising committees can arise at various stages throughout the hierarchy, since they are set up to organise a specific event or series of events. It is customary in most sports for the organising committee of an international event to be the national federation of the host country.⁷² In the case of football, organising committees are, for example, set up in the host country of the World Cup. Organising committees normally receive a percentage of income raised from that particular competition in order to ensure that some funds are available to offset the local costs of staging the event.⁷³

5.2 The development of the sports broadcasting sector

When football was first broadcast on television in the 1950's, it was considered by many to be a good means of promoting the sport, whereas others saw it merely as a threat to attendance figures in the arenas. However, the demand for sports broadcasting has grown enormously and the number of events that are broadcast increases year by year. This section of the thesis intends to describe the role and importance of sports rights in the broadcasting industry.

⁶⁹ The other five confederations have members associated from Asia, Africa, Oceania, South America and from CONCACAF (North America, Central America and the Caribbean).

⁷⁰ The Regulations on European Cup Winners' Cup and Article 1(1) and (2) of UEFA Cup Regulation provide that the national champions of the UEFA member associations take part in the European Champions' Cup matches. The respective national winners take part in the Cup Winners' Cup. The UEFA Cup usually consists of the teams placed between no. 2 and no. 5 in the national leagues of the biggest footballing nations: Germany, Italy *et cetera*. Apart from the finals of the Champions' Cup and the Cup Winners' Cup, all rounds of the three cup tournaments are played both as home and away matches.

⁷¹ See Townley, & Grayson, *Sponsorship of Sports, Art and Leisure: Law, Tax and Business Relationships*, *supra* note 68, p. 21.

⁷² *Ibid.* pp. 18-19.

⁷³ *Ibid.* p. 19.

5.2.1 *The supply and demand side*

Until recently, sports rights were frequently in the hands of monopolistic sellers and purchasers. The sellers were mostly the national federations controlling the television broadcasting rights to all matches taking place on their territory.⁷⁴ In the case of the World Cup and the European Football Championships, the rights were sold by FIFA, and UEFA respectively. The rights for other matches taking place in European countries were sold by the various national football associations. The purchasers of these rights in Europe were, to a great extent, the national public service broadcasters. Broadcasters with a public mission are usually members of the European Broadcasting Union (EBU), which was established in 1950 with its headquarters in Geneva. The EBU created a reciprocal exchange system for sports television programmes, called the *Eurovision* system where its members could take part. When a member broadcaster produced a sport event taking place on its national territory, it transmitted the signal to the other broadcasters within the *Eurovision* system free of charge; in turn, it would then be reciprocally guaranteed access to the signals for other events produced by the other Eurovision members.⁷⁵ However, the EBU system has been subject to legal proceedings by the European Court of Justice, with the result that private broadcasters without a public mission can now have greater access.⁷⁶ Today, due to deregulation in the broadcasting sector, there is intensive competition between public and private broadcasters. Moreover, sports rights agencies acting as intermediaries between sports bodies and broadcasters for the sale of television broadcasting agreements, entered the scene at the beginning of the 1990's, intensifying competition for sports broadcasting rights even more.

5.2.2 *The characteristics of the rights*

The television rights to sport events may be sold in different ways; indeed, these have to be determined by contract. The rights may be exclusive - that is, the rights to a certain event may be granted to a sole broadcaster - or non-exclusive. Moreover, they may be world-wide or limited to a defined territory. The time when the event is broadcast and to what extent it is broadcast are also important; the rights may be to live coverage or deferred, and may also include the whole event or a certain number of minutes in the form of highlights. Sports rights are most commonly sold as exclusive rights limited to a certain area; as such, this is an acceptable business practice that is well related to the characteristics of the

⁷⁴ Cf. UEFA Statutes, Article 14.

⁷⁵ See Commission decision of 11 June 1993, IV. 32.150 *EBU/ Eurovision system*, OJ 1993 L179/23, at 26-40.

⁷⁶ See Case C-320/96 P, O.J. 1996, C354/18 annulling judgment of the Court of First Instance of 11 July 1996 in joined cases T-528/93, T-542/93, T-543/93 and T-546/93 between Métropole Télévision SA, Reti Televisive Italiane SpA, Sociedade Independente De Comunicacao (SIC), Gestevisión Telecinco, and Antena 3 de Televisión v Commission of the European Communities, European Broadcasting Union, Radiotelevisión Italiana SpA (RAI), and Radiotelevisión Española (TVE).

rights.⁷⁷ The exclusive nature of the rights makes it possible for the broadcaster to recoup the money invested in the production and in most cases to make a sound profit. The necessity of exclusivity is also related to the ephemeral nature of sports broadcasting in distinction to for instance certain films which may be shown on television over and over again. Moreover, sports broadcasting rights constitute, together with film rights, a significant weapon in the ratings war between television channels in order to attract viewers and/or advertisers. However, if the scope and/or extent of the rights are excessive⁷⁸ - because, for example, the world-wide rights for an important event are usually granted to one broadcaster for several years at the time - serious barriers to entry onto the sports broadcasting market may be created. Consequently, the Commission has established a certain practice as to what may be considered as reasonable in this context.⁷⁹

Due to the development of sports programming as an essential part of television supply, the views on sports broadcasting agreements have changed drastically in the Community during the last few years. The football broadcasting agreements have turned from being agreements where the effect was regarded as insignificant - and one in which sport was considered as just another kind of television entertainment, substitutable by other programmes - to be considered as an important market of its own.⁸⁰

5.2.3 *The different markets for sports broadcasting deals*

There is no direct relationship between the television rights sold by sports organisations and the television viewers, because broadcasting requires access to broadcasting rights; the reference to sports broadcasting may therefore indicate the existence of two different markets. The distinction which follows is presented as a theoretical model; it is not generally applicable but the definition of the relevant market depends on the parties and the factual circumstances in each single case, that is, the substitutability of the products. The first market to be recognised is the market for the sale of sports broadcasting rights from the sport bodies to either sport agencies, acting as intermediaries, or directly to

⁷⁷ See e.g. van Miert, Karel, *Sport et concurrence, développements récents et action de la Commission*, Revue du Marché Unique Européen 4/1997, p. 10.

⁷⁸ In 1989, the Commission for the first time held, in the *ARD* decision, Decision 89/536EEC of 15 September 1989, *ARD*, OJ L284, 3.10.1989 (also called "Film purchase by German TV stations") that agreements relating to exclusive television rights can be contrary to the Community competition rules because of the number and the duration of these rights.

⁷⁹ Normally the rights shall not cover more than one season but exemptions from Article 85(1) may be granted for contracts which are justified for developing a new technology, see Draft notice pursuant to Article 19(3) of Council Regulation No 17 (OJ No. 13, 21.2.1962, p. 204/62) concerning a notification in Cases No IV/33.145 - ITVA (the Independent Television Association) /Football Authorities and No. IV/33.245 - BBC (British Broadcasting Corporation), BSB (British Satellite Broadcasting) and Football Association, OJ C94/6, 3.4.93 and Report on Competition Policy 1993, Annex III p. 459, BSB/Football Association, where the Commission states that it granted an exemption through a comfort letter for the notified agreement.

⁸⁰ Televising of Dutch professional football in the Netherlands constitutes a relevant market; see *KNVB*, supra note 65, at 53.

broadcasters, *the sports rights market*. From the rights market derives the second market, that is where these rights are broadcast, *the sports broadcasting market*. The suppliers to the rights market are the sports bodies. The demand side consists of either broadcasting companies or sports rights agencies. The suppliers on the broadcasting market are broadcasting companies. Since the relationship between supply and demand requires that a price be paid, the demand side may be constituted by paying television viewers in relation to certain cable television channels or through pay-per-view television. In the case of satellite television, the demand side does not consist of the viewers, but of the advertisers to whom advertising time is sold. Whether the markets shall be limited to access to the rights and/or broadcasting of football, sport in general, or entertainment in general, depends on the demand and supply substitutability in each case.⁸¹

⁸¹ See Commission notice on the definition of the relevant market for the purpose of Community competition law, O.J. C 372/03, 9.12.97.

Chapter 6 -Who has the rights to a sports event?

6.1 Introductory remarks

When a sporting event takes place, a fundamental question arises: which of the entities involved should be granted the right to dispose of the broadcasting rights to the event? This is a complex issue due to the number of entities that exists on different levels of the sports hierarchy and which are involved to various extents depending on the context of the game. In order to analyse this problem, it must be considered as to which of the entities involved in creating a match, which is broadcasted on television, has priority, and on what grounds it thereby should be attributed the right to sell the rights to broadcast the event. There are different theories regarding ownership. Should one, in this context, refer to the legal philosopher John Locke, for instance, who considered that "every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly His"⁸²? Whose "Body" should then be referred to in the context of football, since there are various actors that act, to a different extent, when a football match takes place? For example, take the question of a European league. The football players in the two teams are constituent parts of the actual performance. The match takes place in the arena of the home club which has undertaken all of the organisational tasks and has thus taken the economic risk. The national federation has set up the players scheme and, finally, the continental association, in this case UEFA, has established the cup competitions and the rules for them. In order to analyse this problem, the nature of broadcasting rights has to be established; thereafter, the existing regulations on broadcasting rights and the solutions established by jurisprudence are examined in turn. Another issue is thus raised: does the rights owner have legal right to protection within the context of the organised sport event. Such a right is not covered by any legal intellectual property conventions, nor is it covered by any national legislation except for an arena-right which exists under Brazilian law; however, this question falls outside the scope of this thesis.⁸³

6.2 The nature of the rights

Some questions arise regarding the nature of rights: what is the nature of the broadcasting rights which are subject to commercial transactions and assignments? Indeed, are any property rights or intellectual property rights connected to an organised sports event? It is clear that, when the event has been broadcast on television, the broadcaster gains an intellectual property right⁸⁴ over

⁸² Locke, John, *Two Treatises of Government*, (1690) ii 22.

⁸³ See Law on the Rights of Authors and Other provisions (No. 5 988 of December 14, 1973) and comments by Antonio Chaves in *Arena Rights - Legislative Problems Concerning Broadcasting of Large Shows (Sports or Other)*, Copyrights, Geneva, 1987, Vol. 23 pp. 310-319.

⁸⁴ Copyright protection for broadcasting includes generally protection from someone without permission: copying the broadcast or cable programme; issues copies of it to the public; shows or plays it in public, Broadcasts it or include it in a cable programme service.

it, protecting it from other players recording the transmission and retransmitting it. However, what is the status of the event before it has been broadcasted, that is, who has got the right to sell it to the broadcaster?

Property as defined, or rather not defined, in the legislation of most Member States refers to the legal relations between people and things and constitutes anything that can be owned. Thus, property is not a definite concept, but may be divided into categories of which the most important distinction which is often drawn is between real property and personal property; where real property is land or land other than leasehold and personal property is the rest. However, a sports event does not fall within any of the categories of property that are commonly defined in European jurisdictions, due to their ephemeral nature and to a lack of intellectual creation. Nevertheless, although it is not a property right, the organiser, in the legal sense, has a right to dispose of the sports event and, when it does not want to dispose of it may assign that right to someone else through a licence. This view is well illustrated by decisions taken in the German courts.

In 1985, the German Sports Federation and thirty-eight of its associated federations concluded a five-year agreement with the German public television broadcasting organisation for the broadcasting rights to *any* sports event organised within Germany by these federations. The legality of this agreement was examined in the case *Global vertrag* (Global contract).⁸⁵ The German Federal Supreme Court rejected the view that the granting of transmission rights could be understood as the transfer of property. It held that the organiser was not entitled to any intellectual property rights over the sports event, as distinct from the presentation of a performing artist (Section 81 of the Copyright Act). The German Supreme Court asserted that, for the protection of their economic rights and depending on individual cases, the organisers might resort to tort law or to unfair competition. It thus concluded that permission for an organiser to transmit a sports event via TV-broadcasts does not constitute a transfer of rights in the legal sense, but that it is instead a consent to infringing activities which the organiser could prohibit by means of the rights to which the reference already has been made.⁸⁶ The same view was taken by the Berlin Court of Appeals when examining the right to the television rights of a football match in the *DFB* case; here it held that “[t]he authorisation to broadcast sports events is not based on the acquisition of an exploitation right, but on an undertaking of the organiser in the legal sense not to assert its rights of action”.⁸⁷ Following an appeal in the *DFB* case, the Federal Supreme Court defined that “[t]o this participation of the clubs

⁸⁵ Berlin Court of Appeals of 8 July 1988, AfP 1989/466; Federal Supreme Court, decision of 14 March 1990, NJW 1990/2815, *Global vertrag*.

⁸⁶ Federal Supreme Court decision of 14 March 1990, NJW 1990/2815, *Global vertrag*, at 2817, referred to by Arnold Vahrenwald, in [1995] 1 ECLR, R-18-19.

⁸⁷ See Berlin Courts of Appeals in the *DFB* case, *supra* note 59, at II.B.2 referring to BGH WuW/E 2627. 2634 “Sportübertragungen”.

in the creation of a market for the assignment of TV rights to football matches corresponds the special right to ward off interference with property rights (Abwehrrechte) arising from section 1 of the Unfair Competition Act and the civil law provisions protecting absolute rights which the home club can assert to prevent recordings and transmissions.⁸⁸

6.3 Depending on the circumstances, there are various existing rules which regulate sports broadcasting rights

There exist at present various rules within the sports organisations that regulate the ownership to sports broadcasting rights. However, there are judicial solutions that have questioned these regulations.

6.3.1 National leagues

The question of who owns the broadcasting rights to matches in national leagues is normally regulated in the statutes of the national federation or in separate regulations.⁸⁹ These rights are often conferred to the national federation itself, which then sells the rights collectively. However, in France the national sports associations have been granted by statute a monopoly as the organiser of matches in their respective disciplines and are thereby also attributed the 'ownership' of the ensuing broadcasting rights.⁹⁰

Moreover, since the league matches are usually broadcast in other countries, there is also an interest in Article 14 of the UEFA statutes which, regulates intra-state broadcasting in Europe.⁹¹ UEFA Article 14(1) provides that "UEFA and its member associations hold the exclusive rights to authorise the audiovisual and broadcasting transmissions or reproductions of events which take place within their respective area of responsibility, as well as any other use and distribution by whatever audio-visual and sound broadcasting media, whether the transmission be live or deferred or of full length or in excerpts." Furthermore, UEFA Article 14(2) states that these "above-mentioned principles shall be implemented by special regulations ..., which in particular, shall govern the rights and obligations concerning the exploitation and international transmissions of televised pictures among the owners of the rights and other national associations."⁹²

⁸⁸ Decision of the Federal Supreme Court of 11 December 1997, *DFB*, supra note 3, at B.I.5.b.aa.

⁸⁹ As is developed in Part III of this thesis the attribution of rights to the national federation for the collective sale of rights has been subject to competition law scrutiny; see regarding the Dutch football association KNVB, supra note 65; proceedings against the Premier League are pending in the Court on Restrictive Trade Practises, see Communication from Office of Fair Trading, No 6/96, 6 February.

⁹⁰ Loi No 84-619 of 16 July 1984 Relative à l'organisation et à la promotion des activités physiques et sportives, as amended by Loi no 92-652 of 13 July 1992, (JCP 1992, éd G. III, 66523) which granted to the national associations a "mission de service public" and granted them the ownership for events which they organise.

⁹¹ Article 14 of the UEFA Statutes provides the mechanism for regulating crossborder transmission of football. However, the operation of this Article has been controversial and has led to complaints coming before the European Commission in cases taken by certain television broadcasters (TESN (Case IV/33.742) BSkyB (Case IV/33.245), and ITVA (Case IV/33.145).

⁹² UEFA Statutes, version of 1993.

Additionally, UEFA Article 1(1) of the implementing regulations reads as follows: "UEFA, its member associations, affiliated organisations and clubs holds the exclusive TV rights to football games within their respective area of responsibility."⁹³

However, it seems that this provision is not intended to regulate the ownership of the broadcasting rights, but merely allows the national associations to have the possibility of denying the right to broadcast a match from another football jurisdiction at the same time as a game is being played in their country. UEFA explained, in a letter to the Commission dated 6 August 1993, that "[t]hese texts are not intended to regulate the question of which entity owns the television rights to a football match. In other words, they do not create ownership rights nor take them away. Whatever entity owns the television rights to a particular game or games will continue to own that right after the new text of Article 14 and the Broadcasting Regulations have come into force."⁹⁴

In practical terms UEFA has, through Article 14 of its Statute, granted a monopoly to the relevant national federation in each of its member states to determine to which broadcaster in that particular country the broadcasting rights for matches played abroad may be sold. At present the Commission is examining the provisions because of several complaints from broadcasters.⁹⁵

6.3.2 *Matches between national teams*

When a national team is playing against another national team, this match competition is organised by the two national football associations. Naturally, the broadcasting rights for each individual match is usually granted to the home team.

6.3.3 *European Cups*

The television broadcasting rights to the finals of the European Cup Winners' Cup and the European Champions Cup, as well as the Champions League of the European Champions Cup, belong to and are marketed by UEFA.⁹⁶ For the remaining matches of the European Cups - the European Champions Cup, preliminaries, as well as the other matches in the European Cup Winners' Cup and the UEFA Cup - UEFA provides no regulations regarding the ownership of the broadcasting rights. However, pursuant to the regulations, the home club concerned is responsible for organising their tie.⁹⁷ Although, on one hand, the home clubs bear the entire organisational expenses - for example, the hiring of the

⁹³ UEFA implementing regulations, version of September 1993.

⁹⁴ See letter from UEFA referred to in Decision of the Cartel Division of the Berlin Court of Appeals of 8 November 1995, *DFB*, supra note 59, which refers to Vol. II, p. 14, 164 of the FCO files.

⁹⁵ Another disputed part of the provisions provided for the regulation of crossborder transmission wherefore it provides open, closed and deferred time slots.

⁹⁶ See Bundeskartellamt, 6th Decision Division 2 September 1994, B 6-747000-A-105/92, WuW/E BKartA 2682, ("Fußball-Fernsehübertragungsrechte I"), *DFB* at A.1.3.

⁹⁷ *Ibid.* at A.1.2.b.

stadium and the salaries of the players, trainers, coaches and managers - it can, on the other hand retain the revenue from such a game. If a game does not take place owing to force majeure, the clubs involved share the organisational and travel costs. Furthermore, the home club must take out third-party liability insurance and renounce any claims to damages from UEFA. Although the visiting club receives no remuneration for participating in a tie, its economic interests are protected by the fact that it is the organiser of the return game. UEFA operates certain amounts of its services through the national member associations. However, the interpretation as to who has the right to the broadcasting rights to European Cup matches varies in different countries. In, for example, Italy, Sweden and the United Kingdom, the broadcasting rights to a home match have regularly been sold on an individual basis by the organising club.⁹⁸ In Germany, to the contrary, the DFB sold the rights collectively for the participating clubs and divided the income between all the clubs in the league; in turn, this led to action by the Bundeskartellamt.⁹⁹

6.3.4 *The World Cup*

Article 49 of the FIFA statutes regulates the relations between television and radio transmissions. FIFA Article 49(1) provides that "FIFA, its member associations, confederations and clubs own the exclusive rights to broadcasts and transmission of events coming under their respective jurisdiction via any audiovisual and sound broadcasting media whatsoever - whether live, deferred or in excerpts."¹⁰⁰ This article is equivalent to UEFA Article 14. However, as is the case in the UEFA statutes, this does not give any indications in substance as to who is the legal organiser, and thus owner, of different events. The broadcasting rights for the World Cup are owned by FIFA as the main organiser, although the organising committee in the host country takes care of the practical arrangements.¹⁰¹ In general, the ownership of international sport events is a matter for negotiation between the international federation and the national association of the host country.

6.4 *The judicial approach - two main theories*

There are two main theories on how the right to an event should be attributed that may be derived from existing case law and also from the opinions of legal scholars. The first one, which is mainly put forward by German and Dutch courts, is that the correct holder is the organiser, due to its entrepreneurial risks and tasks.

⁹⁸ Ibid. at B.III. 3.b.dd.

⁹⁹ Ibid.

¹⁰⁰ FIFA Article 49(1).

¹⁰¹ The world-wide exclusive rights for the World Cup 1998 were sold to the International Television Consortium co-ordinated by the European Broadcasting Union for 230 million Swiss francs. The consortium also held the rights for the 1990 and 1994 World Cup Finals. The rights for the 2002 and 2006 World Cup have been granted to Sporis/Kirch group. The guaranteed offer for 2002 is 1.3 billion Swiss francs, plus a share of excess revenues. (See FIFA media advisory on the World Wide Web at <http://www.fifa2.com/script/runisa/dll?M2:MR2::6717300199E>)

The second, which is more rarely practised, consists of recognising that the organiser has the right to the broadcasting rights which - due to its ownership and/or control of the corporeal property - means the stadium where the event takes place. The club which holds control of the stadium thereby has the possibility of setting the conditions for the use of its facilities, thus refraining from using its right to televise the event but instead granting this right to someone else in return for a financial contribution. The two theories that are examined in the following sections are referred to as the "entrepreneurial theory" and the "corporeal theory".¹⁰²

6.4.1 The "entrepreneurial theory"

The entrepreneurial theory focuses on the right which is attributed to the entity that takes the organisational and economic risk for the event, and not the entity that merely handles the administrative tasks or in whose name the event is organised. These definitions are well illustrated in Germany through the case law which has developed via the Federal Supreme Court.

The first thing to establish is relatively straightforward: who is the organiser in the legal sense? This is important to determine because it is to this entity that the broadcasting rights must be attributed. The Bundeskartellamt and the Berlin Court of Appeals applied this theory when assessing whether the home club or the DFB held the broadcasting rights to the home legs of ties involving German clubs playing in the European Cup Winners' Cup and UEFA Cup.¹⁰³ The Berlin Court of Appeals held that "[i]t is the clubs hosting the football game concerned in a stadium owned or used by them which are the organisers in the legal sense and thus the owners of the rights. An organiser in the legal sense is responsible for organising and financing the event concerned, that is, who is charged with preparing and carrying the risk." It referred in this instance to case law established by the Federal Supreme Court.¹⁰⁴ It proceeded in its opinion by holding that in European Cup games, subject to this proceeding, that the owner is therefore the home club concerned. This finding was based on the fact that the home club has to provide the essential organisational conditions for holding the games; it continued "in particular it has to make available a site that meets the requirement and to ensure the smooth functioning of the game. Above all, it bears the economic risk."¹⁰⁵

The Amsterdam Court of Appeals dealt with the question of ownership in a judgment from 6 November 1996 in a proceeding between the KNVB and one of

¹⁰² There are no defined vocabulary for these theories since they are not much debated in legal doctrine but the definitions are created for the purpose of this paper.

¹⁰³ See Berlin Court of Appeals of 8 November 1995, *DFB*, supra note 59, at II.B.2.

¹⁰⁴ BGH 27/264, 266 "Boxprogrammheft"; 39/352. 354 "Vortragsabend"; BGH GRUR 1956/515 "Tanzkurse"; BGH NJW 1970/2060 "Bubi Scholz".

¹⁰⁵ See Berlin Court of Appeals of 8 November 1995, *DFB*, supra note 59, at II.B.2.

its member clubs, Stichting Feyenoord of Rotterdam. It came to the conclusion that the home club is the organiser in the legal sense and, therefore, the club is the entity which is entitled to sell the television transmission rights for matches in the Dutch professional football leagues.

6.4.2 The "corporeal theory"

One writer argues that "[i]t is a fact that the club concerned, or the promoter, of a public event has a recognized right of ownership, or at least a corresponding right of enjoyment, over the stadium or venue where the event is held".¹⁰⁶ Indeed, this author is also of the opinion that, since the corporeal object where the event takes place is under the authority of the promoter, it is therefore up to that person to define the conditions of access to it.¹⁰⁷

The Commission also put the corporeal theory forward in the *EBU/Eurovision systems* decision stating that television rights are normally held by the organiser of a sports event, who is defined as the person that is able to control the premises where the event takes place.¹⁰⁸ However, if the subject of the case had been the ownership of the sports broadcasting rights, and not the existence of the EBU/Eurovision system, it is possible that it would have developed the subject more and used another argument.

6.5 A third solution - rights imposed by legal statute

Besides these judicial solutions, there is also a third way of attributing rights - that is by legal statute. This is the current situation in France, and it used to be the case in Spain too although that legislation has now been abolished.

6.5.1 Legal rights granted to the organiser under French legislation of 1992

The right of an organiser is protected by law in France.¹⁰⁹ This provision confers upon one national association within each of the different sports the right to organise international, national or regional competitions within their discipline. In France, any other entity that organises a competition must ask for permission from the national association. The legislation also states that the broadcasting

¹⁰⁶ See Ascensão, de Oliveira, J. *The right over an entertainment or event*, Copyright bulletin, Paris, Vol. XXIV, No. 2, 1990, p. 5.

¹⁰⁷ Ascensão, de Oliveira, J., *The right over an entertainment or event*, supra note, 106, pp. 5 and 10. It should be noted that he further puts forward the view that: "The fact that an event may be free is not a decisive criterion. For events taking place on public land we must distinguish between those for which a right of use has been granted to promoter and those not subject to his or her authority. A procession moving along a street does not confer any right on anyone. A free recital by a famous singer in a park constitutes an event that belongs to the enterprise that organises it and gives it to the spectators." In addition, he comes to the conclusion that the organiser of the event is entitled to a neighbouring right to intellectual property rights which he bases upon custom, see *ibid.* p. 12.

¹⁰⁸ *EBU/ Eurovision systems*. Commission decision of 11 June 1993, supra note 75, at 22.

¹⁰⁹ Law of 1984 as modified in 1992: Loi No 84-619 of 16 July 1984 Relative à l'organisation et à la promotion des activités physiques et sportives as amended by Loi No 92-652 du 13 juillet 1992, (JCP 1992, éd G. III, 66523).

rights belong to the organiser of the event.¹¹⁰ A fundamental question arises: do the rights of the 'organiser' as previously defined, refer to the national association or to the organising entity? In practice it has been the French Football Association - Fédération Française de Football (FFF) - together with the French Football League - League National de Football (LNF) - which have signed the contracts for broadcasting rights to the matches of the French Football Championship and the French national league - Coupe de France - as well as matches of the French national team; however, the French teams taking part in the various European competitions had the option to assign their rights or to sell them on an individual basis.¹¹¹

6.5.2 The former Spanish legislation of 1990

In Spain, the Royal Spanish Football Federation used to negotiate the sale of broadcasting rights on behalf of the clubs; however, taking into account the changes that were taking place in the professional football sector, the football clubs were invited to found an association to take care of their common interests.¹¹² Consequently, the National League of Professional Football (LNFP) was established in 1983. The Sports Law that was established in 1990¹¹³ assigned to the LNFP the right to undertake certain economic activities, amongst which were the rights to receive and to negotiate the financial revenues obtained from the sale of broadcasting rights for football matches organised by the LNFP or in collaboration with other club associations. This right was granted for an initial period of twelve years.¹¹⁴ It was established in a competition law case in 1993 regarding compliance with the Spanish Competition Act upon the collective granting of the broadcasting rights for, *inter alia*, the Spanish league - there was no legal dispute, since the legislation granted the ownership of the television transmission rights to the LNFP.¹¹⁵ After that the decision, which was never actually implemented, lapsed, some clubs started to negotiate individually for their broadcasting rights. This was due to the fact that football clubs in Spain have since completed a financial restructuring, in the process becoming Public Limited Sports Companies. Thus, transitory provision 3 of the Sports Law from 15 October 1990 is no longer in force, and the clubs can therefore individually negotiate their broadcasting rights.¹¹⁶

¹¹⁰ See Article 18(1), *ibid.*, Loi No 92-652 du 13 juillet 1992.

¹¹¹ See Theophile, D. & P. Philipp, *Football et droits de retransmission télévisée en France: les limites de l'exclusivité*, JCP, Ed. entreprise, 1992, No.5, p. 30.

¹¹² See OECD, *Competition Issues Related to Sports, Roundtable on Competition policy No. 11*, OECD Working papers No. 62, Vol. V, OECD, Paris 1997, p. 61.

¹¹³ Ley 15 October 1990, Num. 10/1990, published in B.O.E. 17 October 1990, no. 249.

¹¹⁴ As long as the so-called Plan de Saneamiento del Fútbol is in force.

¹¹⁵ Tribunal de Defensa de la Competición, Resolution of 10 June 1993, Case 319/92.

¹¹⁶ See OECD, *Competition Issues Related to Sports, Roundtable on Competition policy No. 11*, *supra* note 112, p. 64 and note 1.

6.6 Concluding remarks - the attribution of rights to a sports event

As it has been shown, the question of ownership regarding broadcasting rights is not an issue that is necessarily easy to resolve. At least, it has been undisputedly established that the players do not have any claim to the broadcasting rights. They are remunerated for playing the game according to the terms of their contracts, but they have no further claims on the broadcasting rights to a match. It seems reasonable that the international sports federation holds these rights ultimately; in the case of football, FIFA owns the broadcasting rights to the finals of the World Cup as FIFA runs the overall organisation. Nevertheless, it still has to share this right by contractual arrangement with the host association. However, for the qualifying rounds the national associations take care of the organisation in their respective home countries and thus they are attributed the rights. The same procedure accounts for the matches in the qualifying rounds of the European Football Championship. This is in line with current practice. With regard to European club competition matches which are marketed by UEFA, on the contrary the rights are usually given to the home clubs which take upon themselves the whole economical and financial risk of organising the game. It has been argued that entrepreneurial theory is the best way of assessing this. Since the national federation only has a role in setting the dates for the matches, there is nothing which thereafter gives the right to broadcast games. On the basis of this entrepreneurial analysis, it is argued that ownership belongs to the home club if it can be established that it takes the organisational and economic risks, because thereby it may be considered as the legal organiser. However, the right to broadcasting rights may not be conferred upon the club that hosts the game merely on the basis of it exercising ultimate control over the stadium. The outcome of such an analysis must obviously be different if it is not the hosting club but, for example, the national association which takes upon itself the role of legal organiser. It is argued in this thesis that it is only in this case that the national association may claim any right to control of the broadcasting rights.

A joint sale by the national association of the rights belonging to the individual clubs is not in compliance with several national competition acts and although, it has not yet been determined, it is also probably not in compliance with the Community's competition rules, an argument which is developed in Part III of this thesis. The most complicated question remains in relation to who owns the rights to the national leagues. It is argued that if the home clubs have to uphold all of the economic costs and take all the risks, as well as taking upon themselves the whole organisation of those competitions, then the rights belong to them. If, on the other hand, the national federation acts as the entrepreneur of the league to a great extent, then the rights may instead be attributed to it. Nevertheless, it seems that the rights conferred upon the French national association, and which used to be conferred upon the Spanish national league, do not take this reasoning into consideration, but that they were merely granted a monopoly. It is now time for

French legislation to be changed, considering the outcome of several competition law decisions. The previous analysis on ownership of broadcasting rights focused on football, but could be applicable to other professional team sports as long as the same underlying conditions prevail. As is demonstrated in Part III, in cases where the collective sale of broadcasting rights may be justified, it is still possible, for example, for a national football association to sell the rights collectively. However, the factual circumstances in any specific case must then be taken into consideration. The more interest that sport retains and gains from television viewers and advertisers, the less likely it is that collective sales will be accepted; however, this only means that clubs which are the original owners of the rights will have to sell them on an individual basis.

PART III

A COMPETITION LAW ASSESSMENT OF THE COLLECTIVE SALE OF SPORTS BROADCASTING RIGHTS – TWO CASE STUDIES

Chapter 7 - Prohibition on cartels

7.1 Introductory remarks

There is no Community case law regarding, or any assessment of, the extent to which football clubs constitute cartels.¹¹⁷ However, some important cases have been brought at a national level. The first case in this area was brought in Germany by the Bundeskartellamt in 1994 and another decision was recently taken by the Ministerie van Economische Zaken; a third case is pending in the United Kingdom (UK) in the Restrictive Trade Practices Court. The assessment of a league cartel is therefore presented in conjunction with a case study of the decision taken by the Bundeskartellamt,¹¹⁸ recently confirmed by the Federal Supreme Court, prohibiting the German Football Federation from collectively selling the broadcasting rights to European club games. Comparisons are then made between this case study and a second which follows the reasoning within the Dutch Ministerie van Economische Zaken (Ministry of Economic Affairs). The summaries of these cases are followed by an analysis of the legal issues raised. Thereafter, this thesis' focus is turned across the Atlantic in order to examine the U.S. approach towards pooled broadcasting agreements. Since that solution is rather different to the ones found in Europe this U.S. antitrust analysis creates an interesting basis for the concluding chapter on the future assessment regarding sales of sports broadcasting rights in Europe.

7.2 The concept of a cartel

A horizontal cartel between competitors is recognised as one of the strongest ways of restricting competition. Although there are no *per se* prohibitions under E.C. competition law¹¹⁹, horizontal cartels are often regarded as incompatible with Article 85(1).¹²⁰ The same thing happens with national competition acts. Looking at the anti-competitive effects of a cartel, it is not surprising that cartels are often found illegal under competition rules, simply because they are an effective way of restricting competition. Korah argues that when cartels were lawful, in the days before the establishment of the Common Market, one of the most effective forms of cartels was the formation of a joint sales organisation wherein members gave up their own marketing practices in favour of the joint organisation.¹²¹

¹¹⁷ Although cases have only been brought at a national level thus far, the Commissioner responsible for competition, Karel van Miert, has expressed his concern about this practice, See Karel Van Miert, published speech *Sport et Concurrence: Developments récents et action de la Commission*, supra note 10, alt van Miert, *Sport et concurrence, développements récents et action de la Commission*, Revue du Marché Unique Européen 4/1997, pp. 10-11.

¹¹⁸ Bundeskartellamt 6th Decision Division 2 September 1994, *DFB*, supra note 96.

¹¹⁹ See Case T-17/93, *Matra Hachette v Commission*, [1994] ECR II-595, at 85.

¹²⁰ See Korah, *Introduction to EC Competition law and practice*, supra note 37, pp. 172-177.

¹²¹ *Ibid.* p. 179.

7.3 Should natural cartels be accepted?

Football leagues are natural cartels, because otherwise they would not exist.¹²² The question is, to what extent the league should be considered a cartel from a competition law perspective? When assessing the role of the league as a cartel, certain limits must be established. A football league can not justify *every* behaviour by claiming that it is necessary for the league; clearly, restrictions of competition that are not necessary shall be prohibited. At the same time, *some* behaviour that restricts competition must be permitted for the very survival of those leagues. The theory of uncertainty of outcome plays an important role in the assessment of the economics of sports, since it explains the necessity of balance between the clubs; thereby, it is also an essential factor in the legal assessment of cooperation within a league. If competition law is applicable to sports bodies, the question becomes: to what extent must a league be prohibited from functioning as a cartel and, thus, to what extent must the European Courts and national courts intervene in situations where the football clubs or their federations act in a way which has the objective or the effect of distorting competition? When the financial balance between the clubs is discussed, reference is mostly made to regulations regarding players transfers, how gate fees should be divided, and how this may create inequality between the clubs; on the other hand income from television rights agreements are referred to as an external source of revenue.¹²³ The question becomes one of whether the income from the sale of broadcasting rights, with its increasing economic importance, should be considered essential because of the uncertainty of outcome analysis and, thus, allow the collective sale of broadcasting rights by the national associations to be permitted, or whether such behaviour should be considered as an anticompetitive cartel?

¹²² Cf. *supra*, Chapter 2.

¹²³ Sloane, P. *Sport in the Market? The Economic Causes and Consequences of the 'Packer revolution'*, *supra* note 12, p. 43.

Chapter 8 - Assessment of cartel behaviour – the Deutscher Fußball-Bund case

8.1 The prohibited practice

On 2 September 1994, the Bundeskartellamt prohibited the DFB from centrally marketing the television transmission rights to home matches of German football clubs playing in the UEFA Cup and the European Cup Winner Cup's competitions. The DFB had granted the exclusive TV broadcasting transmission rights for the matches for a period of six years - the 1992-93 until 1997-98 seasons - to two sports rights agencies, UFA Film- und Fernseh GmbH (UFA) and ISPR Internationale Sportsrechteverwertungsgesellschaft mbH (ISPR). These agreements were based upon the television transmission rights conferred to the DFB according to Section 3 of its Lizenzspielerstatut (LSpSt) (Licensed Players' Statute).¹²⁴

The Bundeskartellamt held that the DFB's practice of centrally marketing the TV transmission rights to European home matches of German football clubs was likely to effect considerably the conditions on the German market for television broadcasting transmission rights of sport events and, thus, that it constituted a violation of the ban of cartels imposed by the Article 1 of the German Act against Restraints on Competition.¹²⁵ The Bundeskartellamt prohibited the DBF from continuing to implement the rules of the Licensed Players' Statute, on which it based its marketing activity. The decision was upheld by the Berlin Court of Appeals on 8 November 1995¹²⁶ and by the Federal Supreme Court on 11 December 1997.¹²⁷

8.2 The factual background: marketing of TV broadcasting rights

The organisational pattern of football has already been previously described.¹²⁸ However, some background information can be added; the DFB is associated with the regional football associations in Germany, the Regional- and Landesverbände. The football clubs of the first and second national leagues, that is the Bundesliga and the second Bundesliga, - the Linzenzligen - are in turn associated to these regional associations and are thus indirect members of DFB.¹²⁹

¹²⁴ Sections 3(2) and (6) of the LSpSt, in the version adopted by the DFB Executive Committee on 22 April 1989, contains provisions on the granting of audio-visual and sound broadcasting rights. The relevant provisions reads as follows: Section 3(2) states: "The DFB owns the right to conclude contracts concerning TV and radio broadcasting transmissions of domestic and international championship games with professional league teams." Section 3(6) states: "If only professional league clubs may take part in the game, the negotiations are conducted by the League Committee, otherwise by the DFB managing Committee, in the case of main rounds of the DBF cup, with the participation of representatives of the League Committee."

¹²⁵ Gesetz gegen Wettbewerbsbesch, published in Bundesgesetzblatt, BGBl, 20 February 1990 at 235 (hereafter "Act against Restraints on Competition").

¹²⁶ Decision of the Cartel Division of the Berlin Court of Appeals of 8 November 1995, *DFB*, supra note 59.

¹²⁷ Decision of the Federal Supreme Court of 11 December 1997, *DFB*, supra note 3.

¹²⁸ See supra, Chapter 5.

¹²⁹ See Bundeskartellamt, *DFB*, WuW/E BKartA 2682, supra note 96, at A.1.1.a.

Up to recently, the winner of the Bundesliga has participated in the Champions' Cup, whereas the teams which finished in the next four or five positions of the Bundesliga have participated in the UEFA Cup, unless they won the national cup competition, in which case they qualified for the European Cup Winners' Cup. The German clubs participating in the European competitions had until the end of the 1986-87 season marketed their own broadcasting rights individually. But, since the 1989-90 season, the DFB has centrally marketed the TV broadcasting rights to these home games. Initially, that is until seasons 1991-92, these rights were granted either individually or as a package to sports agencies or TV stations. Thereafter, most of these rights were granted as a package to sport agencies for the whole season. UFA and ISPR were, in annual rotation, between 1992-93 and 1996-97, granted exclusive world-wide (with the exception of Italy and Monaco) TV broadcasting rights for the whole season, for which they each paid sixty million Deutschmarks per season. This package did not include the rights to the final matches of the European Champions' Cup or, the European Cup Winners' Cup, or, indeed, the games of the Champions' League in the European Champions' Cup because these matches are all centrally marketed by UEFA.¹³⁰

At the time when the clubs sold the rights individually, they kept all of their income, except for ten per cent which was transferred to UEFA, in accordance with the Statutes of the different European club competitions.¹³¹ When the DFB took over the sale of rights from the football clubs, it continued to transfer ten per cent of the revenue accrued from the television transmission rights to UEFA. The remaining 90 per cent was shared out between the participants in the European competitions and the remaining clubs of the two Bundesliga. Of that balance to the participants and the other Bundesliga clubs, 20 per cent went into the so called 'live pool' which is shared between the clubs of the Bundesliga and second division of the Bundesliga on a 70:30 basis. This remainder was also shared in a way which reflected the success achieved by the participants; the rest was shared out in equal amounts between the German clubs that had not qualified for the European competitions. If a German club was eliminated from a competition at an early stage, the amount available in the live pool thus increased proportionally.¹³²

8.3 Application of Article 1 of the Act against Restraints on Competition to the collective sale of broadcasting rights

The DFB argued unsuccessfully that the Act against Restraints on Competition was not applicable to it because DFB operates as a non-profit sports association and was not engaged in a business activity, as well as its view that the clubs were dependent on each other, and that they were not competing on an economic

¹³⁰ Ibid. at A.1.3.

¹³¹ Ibid. at A.1.3.

¹³² Ibid. at A.1.3.

level.¹³³ The Bundeskartellamt rejected this argument and held that the football clubs constituted undertakings within the meaning of the Act against Restraints on Competition and that the DFB acted as an association of undertakings by taking decisions that influenced the economic activity of the professional league clubs.¹³⁴ It proceeded to state that central marketing limited competition on the German market with regard to the television transmission rights of sport events, a finding which it based on the following argument.¹³⁵ It stated that the German clubs that had qualified for the European competitions are considered as competitors in relation to their supply of broadcasting rights to their home matches.¹³⁶ The Bundeskartellamt submitted its view that the collective sale of these transmission rights, as based upon the relevant provisions in the 'Lizenzspielerstatut', forecloses competition between the clubs, both in regard to the price and to the conditions of sale.¹³⁷ Moreover, it held that individual clubs lose their contractual freedom because they are deprived of the opportunity to sell the broadcasting rights to their European home matches individually or as a package, and because they also lost the possibility of determining the conditions for their subsequent transmission.¹³⁸ The product market on which competition was restrained was defined by the Bundeskartellamt as the market for TV broadcasts of sports events, a product market in which the suppliers are the organisers of sports events and one in which the TV stations or the sport agencies act as buyers.¹³⁹ The geographic market had already been defined as sovereign territory of Germany.¹⁴⁰ Although the Bundeskartellamt did not consider the broadcasting of football matches to be a separate market, it remarked upon the importance of football as a source of television programming, emphasising that TV rights to football events in Germany are clearly more important than other sport events.¹⁴¹ The Bundeskartellamt recognised football matches to be of special importance to the buyers; this was due to the fact that the attractiveness of sporting events to spectators is high and because the expected amount of advertising revenue depends on the viewer ratings.¹⁴²

The Bundeskartellamt proceeded to assess each of the three main justifications for the collective sale of broadcasting rights that were put forward by the defendant, DFB.¹⁴³

¹³³ Ibid. at B.III.2.

¹³⁴ Ibid. at B.III.2.

¹³⁵ Ibid. at B.III.3.a.

¹³⁶ Ibid. at B.III.3.a.

¹³⁷ Ibid. at B.III.3.a.

¹³⁸ Ibid. at B.III.3.a.

¹³⁹ Ibid. at B.III.4.

¹⁴⁰ Ibid. at B.I.

¹⁴¹ Ibid. at B.III.4.

¹⁴² Ibid. at B.III.4.

¹⁴³ Ibid. at A.II.1.

- (i) it is the DFB, and not the clubs which is the rightful holder of television transmission rights;
- (ii) the league constitutes a single product and is marketable as such; and
- (iii) the financial viability of the league depends upon the collective sale of the broadcasting rights.

All of these arguments were rejected by the Bundeskartellamt on the basis that they withheld the restriction on competition; these were based upon the following conclusions.

8.3.1 The clubs are holders of the broadcasting rights

An assessment of the legality of collective marketing of broadcasting rights primarily depends upon determining who is the organiser in the legal sense and thereby the holder of the broadcasting rights. The DFB tried to argue that UEFA or DFB were the rightful owners of the rights to the matches, therefore, there was no breach of Article 1 of the Act against Restraints on Competition.¹⁴⁴ The Bundeskartellamt held the contrary view, stating that the clubs are entitled to these rights as the organisers of their respective home matches.¹⁴⁵ The Bundeskartellamt referred to the concept of organiser as established by the Federal Supreme Court in previous case law.¹⁴⁶ The organiser is, according to those judgments, the entity responsible from an organisational and financial point of view, that is the body or person that organises the events and thus takes the economical risks for it. Having established this fact, the Bundeskartellamt examined the actual situation regarding the organisation of European club competition matches.¹⁴⁷ According to the regulations for these tournaments, the home clubs concerned are responsible for organising their own game.¹⁴⁸ Each club bears the entire organisational costs of a home match and also keeps the revenue from such a game. If the match is cancelled due to force majeure, it is the participating clubs which bear the costs for the organisational and travel expenses. The clubs are obliged to take out third-party liability insurance and to refrain from any claim for damages from UEFA.¹⁴⁹

Considering these facts, the Bundeskartellamt came to the conclusion that the individual clubs alone - thus, neither the DFB nor UEFA - bear the entrepreneurial risk involved in organisation. Thus, the home club is the original and rightful holder of the television broadcasting rights.¹⁵⁰ The Bundeskartellamt proceeded to examine whether DFB or UEFA could be attributed any rights as co-organiser, but concluded by denying them this role and the consequent role as

¹⁴⁴ Ibid. at A.II.1.

¹⁴⁵ Ibid. at B.III.3.B.

¹⁴⁶ Ibid. at B.III.3b.aa.

¹⁴⁷ Ibid. at B.III.3.b.bb - B.III.3.b.cc.

¹⁴⁸ Ibid. at A.I.2.b.

¹⁴⁹ Ibid. at B.III.b.bb.i.

¹⁵⁰ Ibid. at B.III.3.b.aa.i.

co-rights holder.¹⁵¹ It based these findings on its consideration that the national federation and UEFA merely have an administrative task and the responsibility for the rules of the game, while the economic risk for the matches themselves remained with the participating clubs.¹⁵² It further observed that any argument that the DFB or UEFA, through its organisational contributions, should have the rights as the individual organiser was a contradiction. The Bundeskartellamt pointed specially to the fact that the home clubs receive the money charged for gate entrance. It noted that, in the logic of DFB, the football association should also have the right to this income, which is of course not the case. The conclusion that was therefore drawn was that only the home club is considered as the organiser in a legal sense, thereby it is the sole holder of the broadcasting rights for its home matches.¹⁵³

8.3.2 *The matches are separate products - not only parts of the league*

The parties involved in the defence invoked its view that the European club competitions had created a special and new product, whose organiser in the legal sense was the DFB or UEFA.¹⁵⁴ Moreover, the DFB argued that the individual matches had no value on their own, and that the services to which the television broadcast related was the competition as a whole rather than individual matches. The Bundeskartellamt did not accept this argument, but held that, despite the existence of the league the matches are separate events and marketable as such.¹⁵⁵ To support this view, it took into account the fact that previously the broadcasting rights had been sold on an individual basis by the German clubs participating in the European tournaments. Furthermore, it emphasised the fact that broadcasting rights to European matches in other countries - such as England, Italy, and Sweden - are sold individually.¹⁵⁶

8.3.3 *No justification for collective sale due to the financial viability of the league*

The Bundeskartellamt proceeded to debate the argument put forward by the DFB, claiming that collective sales were indispensable for the survival of the league and/or the European cup competitions.¹⁵⁷ The Bundeskartellamt found that the collective sale of rights was not indispensable for the financial viability, either of the league or of the individual clubs.¹⁵⁸ It took the pragmatic view that the

¹⁵¹ Ibid. at B.III.3.b.bb.ii - B.III.3.b.cc.

¹⁵² See ibid. at B.III.3.b.cc. The organisational tasks of the DFB includes the following: draw up the fixture list; plan the dates for domestic cup matches; change the dates for postponed matches and fix new dates; coordinate dates; confirm dates of international games; examine and grant the right to play; handle the transfers of players; and grant licenses and monitor the conditions imposed upon a club during the licensing procedure.

¹⁵³ Ibid. at B.III.b.cc.

¹⁵⁴ Ibid. at B.III.b.dd.

¹⁵⁵ Ibid. at B.III.3.b.dd.

¹⁵⁶ Ibid. at B.III.3.b.dd.

¹⁵⁷ Ibid. at B.III.3.c.

¹⁵⁸ Ibid. at B.III.3.c.

previous individual sale of rights up to 1986-87 did not seem to have effected the financial viability of the league. Moreover, it made a comparison with the situation in other footballing nations and found that the financial strength of other top football leagues - for example, England, Italy, and Sweden - was not threatened by their individual marketing of TV rights to European home matches.¹⁵⁹ Furthermore, it considered that there were other differences in the income levels between clubs, depending on several factors such as their relative geographical location and the interest of the local population in sports; therefore, the individual sale of broadcasting rights was not the only determinative factor in the club's economy. The Bundeskartellamt submitted its view that there were other, less restrictive, ways of supporting struggling clubs other than selling television rights collectively and then distributing the revenue through a 'live pool'. It preferred as an example the possibility of letting clubs sell the broadcasting rights individually, but that they could then establish a kind of solidarity fund to support the weaker clubs.¹⁶⁰

8.4 The Bundeskartellamt's decision

After having rejected all of the DFB's justificatory arguments, the Bundeskartellamt ruled that the central marketing of television transmission rights to European Cup games by the DFB was likely to influence the conditions on the market.¹⁶¹ In this case, the relevant market is the market for the televisual transmission of sport events, where the suppliers are sports organisations and the purchasers are sports agencies or television operators. The market includes all sporting manifestations organised by German sports bodies. The collective sale of rights appreciably affects competition. The buyers are dependent upon being able to broadcast sporting events in order to attract greater number of viewers. Some events such as football in general and the European club competitions in particular, are more attractive than others. The Bundeskartellamt refused to grant an exemption under Articles 5(2) and (3) of the Act against Restraints on Competition.¹⁶² The Bundeskartellamt thereby prohibited the DFB from implementing Sections 3(2) and (6) of the Lizenzspielerstatut and thus the underlying decision of the DFB Executive Committee.

8.5 The appellate decisions

Appeals against this decisions are not examined at length in this thesis as both the Berlin Court of Appeals and the Federal Supreme Court upheld the Bundeskartellamt's prohibition of the collective sale of broadcasting rights. However, some of the points raised by these courts are interesting and are further

¹⁵⁹ Ibid. at B.III.3.c.

¹⁶⁰ Ibid. at B.III.3.c.

¹⁶¹ Ibid. at B.III.4.

¹⁶² See Decision of the Cartel Division of the Berlin Court of Appeals of 8 November 1995, WuW/E OLG 5565, "DFB", supra note 59.

investigated because they flesh out some of the arguments used in the Bundeskartellamt's original reasoning.

8.5.1 *The judgment of the Berlin Court of Appeals*

The DFB, as well as the sport agencies UFA and ISPR, filed appeals against the Bundeskartellamt's decision. The Berlin Court of Appeals confirmed in its judgment of 8 November 1995 that the challenged provisions violated the ban on cartels under Section 1 of the Act against Restraints on Competition.¹⁶³ In relation to economic competition between the clubs, the Court of Appeals held that "[t]he interest in keeping the league complete does not require that the clubs do not engage in economic competition, as long as a sufficient number of clubs are [sic] ready and waiting to replace those that are eliminated. It is unlikely that a club is forced to drop out during the season, since the DFB admits the clubs to the national leagues in a particular season only after examination of their financial standing (Section 5(d) of the LSpSt). Moreover, the fact that the clubs - according to the appellant's allegations - must be expected to be unwilling to pay part of the TV revenue from the European Cup home games into a fund shows that the behaviour of the professional league clubs toward each other is dictated by economic considerations."¹⁶⁴ With reference to previous German case law, the Court of Appeals took the view that the home club was the organiser in the legal sense since it is the entrepreneur, and thus, owner of the broadcasting rights.¹⁶⁵ Whit regard to the financial viability of the league it made a distinction between the German football league and the European club competitions concluding that the stability of the league as such was not endangered by the revenue accruing from the broadcasting rights to the European club competitions.¹⁶⁶

The Berlin Court of Appeals shared the opinion of the Bundeskartellamt, holding that the matches constitute separate products. As an additional proof of this, it pointed to the fact that the sports agencies which bought the rights from the DFB sometimes sold the rights to individual games. Furthermore, it discussed the problem of insecurity for the buyer of the television rights since the interest of spectators in these matches depends on how far the German teams were successful in the various competitions.¹⁶⁷ The Court of Appeals found, however, that the purchasers of rights does not gain greater planning regarding programming of the matches by buying a 'package'. This does not reduce the risk of the German teams being eliminated. The risk has thus to be appraised by the buyer and limited by contractual arrangements. It concluded by stating that, if the seller of the rights is an individual club, the obvious solution would be to accord payment depending on the number of rounds in the course of the competition

¹⁶³ Ibid.

¹⁶⁴ Ibid. at II.B.2.

¹⁶⁵ Ibid. at II.B.2.

¹⁶⁶ Ibid. at II.B.2.

¹⁶⁷ Ibid. at II.B.2.

reached. Later in its decision, it held that individual marketing appears quite possible in view of the large number of buyers interested in acquiring football broadcasting rights.¹⁶⁸ It also took into account the fact that, as a result of central marketing, only a single supplier is left in a specific section of the market.¹⁶⁹ Finally, the Court of Appeals held that there are less restrictive means to ensure the survival of weaker clubs. It suggested, *inter alia*, an internal arrangement whereby the top clubs might make a proportion of their revenues available for distribution among the weaker clubs.¹⁷⁰

8.5.2 *The judgment of the Federal Supreme Court*

The DFB and the sport agencies concerned - UFA and ISPR - filed appeals on points of law against the Berlin Court of Appeals' decision with the German Federal Supreme Court. In its decision of 11 December 1997, the Federal Supreme Court held the appeal to be unfounded and confirmed the decision of the Court of Appeals.¹⁷¹ The Federal Supreme Court held that the provisions subject to these proceedings restricted competition within the meaning of Section 1(1) sentence 1 of the Act against Restraints on Competition.¹⁷² These provisions grant the DFB the right to conclude contracts regarding television broadcasting rights for the home matches involving German teams in the European club competitions. This then eliminated the individual clubs as suppliers of the said rights. The appellants had challenged the view that the provisions of the LSpSt eliminate competition as well as the conditions for the assignment of the rights. However, the Federal Supreme Court rejected this argument. Firstly, the Federal Supreme Court examined the ownership of these broadcasting rights. It held that the participating clubs were, at the very least, co-organisers of their homematches.¹⁷³ It based this argument on the fact that the home club is "the natural market participant that is entitled to market the services produced by acting in a combination with the opponent's club on a reciprocal basis agreed upon."¹⁷⁴ It also considered that, since there is no doubt as to the home club's right to sell tickets and to be involved in other commercial activities in the stadium, the same conditions should apply to the granting of TV rights.¹⁷⁵

However, it took a slightly different view than the lower courts on the relationship between the home club and the DFB, considering that it does not have to define who is the sole owner of the broadcasting rights. It held that the home club is, at least, an original co-owner of the rights.¹⁷⁶ The DFB was

¹⁶⁸ Ibid. at II.B.2.

¹⁶⁹ Ibid. at II.B.2.

¹⁷⁰ Ibid. at II.B.2.

¹⁷¹ See Decision of the Federal Supreme Court (BGH) of 11 December 1997, WuW/E DE-R 17, *DFB*, supra note 3.

¹⁷² Ibid. at B.I.5.a.

¹⁷³ Ibid. at B.I.5.b.

¹⁷⁴ Ibid. at B.I.5.b.aa.

¹⁷⁵ Ibid. at B.I.5.b.aa.

¹⁷⁶ Ibid. at B.I.5.b.aa.

considered as having an organisational role, a position which “does not render TV broadcasts of football matches possible at all, but merely serves better and more marketing”.¹⁷⁷ Secondly, the Federal Supreme Court rejected the DFB’s argument that the matches in the league constitute a single product, but, instead stressed the perception that each match is an individual product. It held that each home match is part of an overall competition, but that this fact does not deprive it of the character of an event that can also be marketed as such.¹⁷⁸ Nor was it held to be true that the games staged in the context of the competition can be marketed only as a package. The Federal Supreme Court referred to the fact that, the sport agencies that acquired the broadcasting rights as a package from the DFB marketed these rights separately, which it thus held as evidence to the contrary argument.¹⁷⁹

It should be noted that, towards the end of its decision, the Federal Supreme Court commented upon the relationship between competition law and internal sports policy rules. It stated that “[i]nsofar as the DFB and its members are market participants in their capacity as enterprises and also market professionally run football matches by granting TV broadcasting rights for a high remuneration, they also have to observe the limits drawn by the ARC [Act against Restraints on Competition] despite broader sports policy goals that are in principle not affected by the ban on cartels. Otherwise the purpose of the Act, which is to prevent market conditions from being affected by restraints on competition, would be largely frustrated. If therefore, the main aim consists in protecting competition as an institution and the indirect aim is to safeguard the freedom of action of other market participants, the justification for the violations of these goals cannot be that socially desirable conduct is financed by higher profits obtained in this manner at the expense of market participants.”¹⁸⁰

8.6 Comments

At this point, some comments might prove to be useful regarding the various courts’ reasoning in the *DFB* case and the impact of the German Federal Supreme Court’s decision for the sports bodies.

8.6.1 The sale of sports rights

The *DFB* case is clearly a landmark case in competition law, particularly in the area of sports. It was confirmed by the Federal Supreme Court that the DFB is not allowed to act as a cartel in relation to the sale of broadcasting rights to the home matches of German teams involved in the European club competitions. Although this case was brought up at a national, and not a Community, level, in time it will

¹⁷⁷ Ibid. at B.I.5.b.bb.

¹⁷⁸ Ibid. at B.I.5.c.aa.

¹⁷⁹ Ibid. at B.I.5.c.bb.

¹⁸⁰ Ibid. at B.I.5d.aa.

most certainly have an impact upon the assessment of similar practices in other Member States, particularly because there is no case law from the European Community Courts or from the Commission on this specific issue. This theory was recently proven by a decision from the Dutch Ministerie van Economische Zaken in December 1997 when it regarded the collective sale of broadcasting rights by KNVB. That decision, in which the reasoning was to a large extent based on the same grounds as that of the German courts' arguments in the *DFB* case, is analysed later. Firstly, however, some comments on the *DFB* case.

8.6.2 *The organiser concept*

The reasoning which underlay the competition law assessment is the civil law question on the determination of the legal organiser, in this case that is the entity recognised as the holder of the broadcasting rights. Already, there existed some well established case law on this question as developed by the Federal Supreme Court; therefore the Bundeskartellamt just had to apply the facts of the case. It came to the conclusion that the home clubs bear the entrepreneurial responsibility and, thus, that they should be regarded as organisers and consequently be recognised as the holders of the broadcasting rights. However, the Federal Supreme Court did not just content itself by only referring to the lower courts and to its own case law, but went further by looking at the logic behind the ownership of those rights.¹⁸¹ It appears justifiable that the organiser should bear the fruit of its own work and, as was pointed out, if the club has the right to sell tickets to spectators for the match and also has all other economical rights, what logic says that they should not have the right to sell the television transmission rights?

It is not possible to get around the prohibition on the collective sale of broadcasting rights by claiming that the rights have been assigned from the clubs to the DFB, and that the DFB thereby should be entitled to enact their collective sale on behalf of the clubs. The Berlin Court of Appeals denied the possibility of assignment as justification for the restriction on competition, stating that: "[a] distinction has to be made between the capacity of organiser in the legal sense and the rights of such an organiser which derive from that legal position. Who is to be regarded as organiser in the legal sense is determined, as the legal consequence, by a complex of constituent elements, in particular the bearing of risks. Naturally, the legal qualification as organiser cannot be assigned as such to another person. Rather, it can only be changed by changing the underlying constituting elements accordingly. But this did not happen in the present case."¹⁸²

It proceeded by going on to state that it is the individual clubs which are the organisers in a legal sense; thereafter it held that: "[i]nsofar, an instrument in which the illegal conduct materializes or which is part of an illegal course of action cannot possibly be considered to have any justifying effect. For the same

¹⁸¹ Ibid. at B.I.5.b.aa.

¹⁸² See Berlin Court of Appeals, WuWE OLG 5565, *DFB*, supra note 59 at II.B.2.

reasons, any direct assignment of TV rights to the DFB cannot be accepted as a justification for the established restraint to competition."¹⁸³ It is argued here that this assessment of the organiser, as the entity undertaking the entrepreneurial tasks, is the logical one. Neither UEFA nor the DFB have anything but an administrative role to play in organising matches; therefore the football clubs should have the rights to sell their respective broadcasting rights. Nor should it be possible to get around this, through an assignment of the rights from the clubs to the DFB, as the Berlin Court of Appeals correctly pointed out.

8.6.3 Obviously, matches are separate products

There is a peculiarity inherent in sports. Together, the competitors produce the products - the matches; at the same time, the matches form a part of another large product - the league. It was established in the German courts that the home clubs were the rightful holders of the television broadcasting rights to their respective home matches. Despite this, however, there was another problem: could the matches together be considered as a single product - in the case of the European competitions? This argument was rejected by the German courts and looking at the facts of the case, it is not difficult to agree with their decisions. The courts denied the DFB's view that the matches could only be marketed collectively and held, on the contrary, that each individual match has a value of its own and that there were several valid arguments which stated that they could be marketed separately. The reality of the situation speaks for itself, but it must be said that even this argument about the matches being one product appears to be a contradiction in itself, especially when taking into consideration the context of where the matches in fact take place. These proceedings related to the matches of German clubs taking part in two different European club competitions, the UEFA Cup and the European Cup Winner's Cup. Should the matches of the German teams then constitute 'a competition in the competition'? If this logic is followed, then all the participating countries should sell the rights for their respective teams as packages, which is not the actual case; compare this to the case of participating teams from England, Italy and Sweden, who sell their rights individually. Stretching this logic even further would lead to the view that it should not be the collective sale of the matches of one nation which should be viewed as important, but the collective sale of all the matches of these European competitions, because the DFB claimed that the individual matches have no independent value. Why then should the German matches taken together have a value? This argument is applied more logically to a national league, in this case the Bundesliga.

8.6.4 Marketing of football matches is not comparable with marketing of music

The DFB has tried to argue that there is a specific nature to football matches and, consequently, that this necessitates selling the matches collectively.¹⁸⁴ It based its

¹⁸³ Ibid. at II.B.2.

¹⁸⁴ See Bundeskartellamt, DFB, WuW/E BKartA 2682, supra note 96, at B.III.3.b.bb.i.

argument on U.S. case law, as established by the U.S. Supreme Court decision of 1979 in *Broadcast Music Inc. v Columbia Broadcasting System*.¹⁸⁵ The subject matter of the proceedings in that case was the question of *per se* illegality regarding a 'blanket license' for music under Section 1 of the Sherman Act.¹⁸⁶ These licences were issued by Broadcast Music, Inc., (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) for copyrighted musical compositions. These blanket licences gave the licencees the right to perform any, or all of the compositions owned by its members or affiliates,¹⁸⁷ as often as the licencees desired, for a stated term.¹⁸⁸ By granting licences and distributing royalties, the copyright organisations functioned as middlemen between the copyright owners and potential buyers.¹⁸⁹ In return, they were paid a percentage of profits or a fixed sum.¹⁹⁰ This system was rejected by the Columbia Broadcasting System (CBS), because it claimed that the blanket licence constituted an illegal price-fixing agreement between the composers and copyright organisations who had joined together in order to determine a set price.¹⁹¹ The Supreme Court did not agree with the analysis reached in the Court of Appeals, and held that the agreement had to be analysed under the rule of reason.¹⁹² Under this analysis, the Supreme Court emphasised the procompetitive aspects of the blanket licence in the contractual relationship between copyright owners and purchasers.¹⁹³ It pointed especially to simplified negotiations, substantially lower costs resulting from fewer negotiations, and an expansive choice of compositions.¹⁹⁴

The Bundeskartellamt rejected this argument regarding the applicability of U.S. case law. It held that the case referred to regarded intellectual property rights to music, and stated that an exemption for the collective sale of music is already provided for in Article 102 of the Act against Restraints of Competition. The Bundeskartellamt also rejected a parallel between the marketing of music by a blanket licence in order to protect intellectual property rights to music, and the collective sale of football matches. It might be noted that this reference to U.S. case law appears to have been a rather desperate attempt by the DFB, especially

¹⁸⁵ Ibid. at BIII.3 b dd, referring to *Broadcast Music Inc. v Columbia Broadcasting System*, 441 U.S.1 (1979).

¹⁸⁶ See *Broadcast Music, Inc.* 441 U.S.1 (1979), supra note 185 at 9-10.

¹⁸⁷ The Court noted that almost every domestic copyrighted composition was held by either one party or the other.

¹⁸⁸ *Broadcast Music, Inc.* 441 U.S.1 (1979), supra note 185 at 5-6.

¹⁸⁹ Ibid. at 4-5, 10.

¹⁹⁰ Ibid. at 5.

¹⁹¹ Ibid. at 6-8.

¹⁹² Ibid. at 19-25.

¹⁹³ Ibid. at 20-24.

¹⁹⁴ Ibid. at 20-22.

considering that the U.S. Supreme Court did not accept the application of *Broadcast Music, Inc.* for a pooled sports broadcasting rights agreement.¹⁹⁵

8.6.5 *An assessment of the characteristics of professional team sports*

A problem in many competition law cases is to prove that there is an anti-competitive behaviour and/or agreement. This was not a problem in this particular case because the football association constituted what is defined as an open cartel. The right to sell broadcasting rights was provided for in its statutes; indeed it was also openly known that it sold these rights because such deals are always widely reported in the media. The fact that the national football association sold the television broadcasting rights to matches that were part of European competitions when the actual owner of these rights were and are the individual clubs, is considered to be a clear example of horizontal price-fixing. The collective sale eliminates competition on prices and on the conditions of sale, because the football association has every say in these matters. Not only is competition eliminated, but the clubs are deprived of their right to freedom of action. Moreover, it has been established that the effect on the relevant market, defined as the selling of sports television broadcasting rights, is substantial, because football, and especially the European club competitions are considered to be such attractive sports events by the initial purchasers, the sport agencies and the television operators.

However, it is not sufficient to base an argument regarding a breach of the ban on cartels by merely establishing that the clubs are the rightful holders of the television broadcasting rights of their home games, and that the national football federation therefore constitutes a cartel when selling these rights collectively. A competition law assessment must also focus on the prevailing market situation and especially on the specific characteristics of the sports sector's market situation, one in which the clubs participating and competing in a league have to cooperate. This is the main distinction that can be drawn between professional team sport and other markets. It then has to be analysed whether the product they sell justifies a distinction. This raises the question: was this fact taken into account to a sufficient extent by the German courts? Indeed, two further central questions are: (i) is the collective sale necessary for the financial viability of the league; and (ii) to what extent should competition law uphold wealth distribution among football clubs, that is are there less restrictive means?

8.6.5.1 *Is the collective sale necessary for the financial viability of the league?*

An argument equivalent to the one brought forward by the DFB, regarding the necessity of restraint on competition due to the financial viability of the league,

¹⁹⁵ The application of *Broadcast Music, Inc.* 441 U.S.1 (1979), supra note 185, was denied in *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma et al.*, 468 U.S. 85, 113 (1984), see Chapter 9 infra.

could hardly be applied with success in any other part of the economy. It is generally considered that firms shall compete unless there is question about cooperation in the field of research and development, a sector in which cooperation may be permitted in order to promote technological progress. Restraints on competition in order to make the competitors survive is usually not heard of otherwise. However, this argument is important in a competition law assessment of rules concerning sports organisations.

The Berlin Court of Appeals drew a distinction between the European club competitions and the two professional German leagues. It held that participation in the former is something additional to the national leagues; thus, it is argued that the money which is earned through the sale of broadcasting rights is an additional income to the money generated through actions related to the national leagues. This distinction is important, but it is arguable that it fails to recognise the uncertainty of outcome hypothesis. After all, the clubs which take part in the league varies, depending on their results in the course of the league season. The better the results in the league, the greater the possibility to earn even more money as income from participating therein, as well as from qualifications for European competitions. However, a team's success is not only dependent upon on its income, but also from the players it manages to hire, their contracts, for example, and especially how they perform together - football is, after all, a team sport. This thesis therefore agrees that the Court of Appeals made a distinction which makes sense. It is not possible to equalise totally the income of teams. The question thus becomes: how far should wealth distribution between the clubs be permitted?

8.6.5.2 *To what extent shall competition law uphold wealth distribution among the clubs?*

This question calls for a parallel to be drawn with the *Bosman* case.¹⁹⁶ Although the European Court of Justice did not rule on the compatibility of football's transfer system with its competition rules, it might be considered that the *DFB* judgment shows some similarity to *Bosman* as both cases have had a certain impact on the wealth distribution between football clubs. However, the implications of both cases may not be as drastic as it first appeared for the football industry. For one thing, the enforcement of a system of wealth distribution between football clubs would still be feasible as a result of the ruling in *Bosman* prohibiting the transfer system.¹⁹⁷ The same might be said of the possibility of wealth distribution between football clubs as a consequence of the prohibition on the collective sale of TV transmission rights. It should be noted that the explicit terms of neither judgment decides that it is unlawful for the football industry to establish its own system of regulation designed to shelter the

¹⁹⁶ See C-415/93 *Bosman*, supra note 30.

¹⁹⁷ Cf. Weatherill, S., *Comment on Bosman*, CML. Rev., 33, 1996 p. 1012.

clubs from pure market-based solutions, but *only* that this cannot be achieved neither through the transfer system nor a sales cartel because it was found to be anti-competitive action.¹⁹⁸ In addition, what legitimises the cartelisation of broadcasting rights if the players, match tickets, and club souvenirs can be sold individually or collectively by each club and the revenue kept from them on an individual basis or sometimes shared with another team or teams? Indeed, it may also be asked: should not all these incomes be put in a central fund and then be divided between the different clubs in the various leagues?

The outcome of the DFB decision has been influenced by the actual market situation. The Berlin Court of Appeals held that individual marketing appears possible since there are several presumptive buyers. As a result of central marketing, a single supplier is left in control of a specific section of the market. But, a monopoly position is not prohibited as such, only abuse of that position. However, if this position is created by a joint sales agreement, this constitutes a cartel, which as such then becomes and is defined as anti-competitive. Due to deregulation, there is intensive competition between broadcasters and, as the courts recognised, football is now an important part of television programming.¹⁹⁹ It is necessary to adapt the sale of broadcasting right to the market situation so that the purchasers of the television rights do not have to encounter sale monopolies. This is true especially when there are no sport specific needs to justify the collective sale because their sole interest is the maximisation of profits. A solution whereby the collective sale of broadcasting rights might be prohibited is highly pragmatic, especially when taking into consideration, the fact that rights were previously sold individually in Germany and the fact that they are at present sold on an individual basis both by football clubs in several other European countries and, even more importantly by the sports agencies that bought the rights from the DFB. To allow the DBF to market the rights in a anti-competitive manner having considered these circumstances would have been paradoxical.

8.6.6 *The prospects for future litigation – the relationship between sports policy and competition*

Finally, it is well worth noting the remark put forward by the Federal Supreme Court regarding the relationship between sports policy and competition law, referred to previously in section 8.5.2 of this thesis. This is a policy remark which is worth recurring both in the German competition law decisions, as well as in decisions by the Community institutions and in other Member States. The remark also resembles a comment made by the Court of Justice in the *Bosman* judgment

¹⁹⁸ Cf. Weatherill, S.; *Comment on Bosman*, CML. Rev., 33, 1996 p. 1012.

¹⁹⁹ See German courts and the Dutch competition authority which recognised football broadcasting as a separate market; see Ministerie van Economische Zaken, 22 December 1997, *KNVB*, supra note 65, at 53 and see *infra* section 9.3.5.

as it held that "this cannot go so far as to diminish the objective character of the law."²⁰⁰

8.6.7 Prohibition on the collective sale of broadcasting rights – should national leagues be distinguished?

The DFB was prohibited from collectively selling broadcasting rights to various football matches part of European club competitions. The question is whether the same principle may be applicable to the collective sale of broadcasting rights to a league? Might it really be required that every team in the league - top or bottom ranked - sell their rights individually and not as part of a package? The Commission will soon have to deal with this question since the Deutscher Fußball-Bund has notified such an agreement under Regulation 17. The notification for negative clearance or exemption was published in the Official Journal 9 January 1999.²⁰¹ The notification concerns the collective selling of the television and radio broadcasting rights for the 'Bundesspiele' (that is the first and second Bundesliga and the national cup competition DFB-Vereinspokal) The duration of the contracts is two years with a possibility of extension. DFB claims, in order to justify an exemption, that the central marketing rationalises distribution of the broadcasting rights; it serves solidarity between financially stronger and weaker clubs by distributing the revenue equally; and it supports amateur and youth football wherefore in its opinion collective selling is indispensable. It will be very interesting to see what position the Commission will take towards these agreements. This is not yet decided at the time of writing but will surely give an important indication on such agreements compatibility with Article 85(1). A similar situation regarding legality of collective sale of broadcasting rights for the national professional football leagues, as examined by the Dutch Competition Authority, is analysed in the next chapter.

²⁰⁰ See C-415/93 *Bosman*, supra note 30, at 77.

²⁰¹ See Notification on Case No IV/37.214 - DFB - Central marketing of TV and radion broadcasting rights for certain football matches, O.J. 9.1.1999, C6/10.

Chapter 9 - National leagues as a cartel - the KNVB case

9.1 The decision of the Dutch Ministry of Economic Affairs

Shortly after the Federal Supreme Court took its decision in the *DFB* case, on 22 December 1997, the Dutch Ministry of Economic Affairs decided to prohibit KNVB from collectively selling broadcasting rights to the professional football leagues in the Netherlands.²⁰² In effect, this decision was a refusal of KNVB's request to grant an individual exemption for the collective sale of broadcasting rights. The KNVB had collectively granted the television transmission rights for the Dutch first and second leagues to two broadcasters for a total period of two and a half years. The disputed rights concerned summaries (to a maximum of fifteen minutes per match) and highlights (to a maximum of ninety seconds per match), but not the broadcasting rights to live television; these were granted to another television company through a different agreement, an arrangement which was not subject to the proceedings under discussion here. The Ministry of Economic Affairs held that the collective sale of television transmission rights constituted a restriction of competition in breach of Article 1(1) of the Act on Economic Competition dating from 1956 (*Wet economische mededinging*), because it restricted competition in the market, for the sale of football television transmission rights to broadcasters, by fixing prices and by limiting the commercial freedom of football clubs.

It is interesting to note that this disputed agreement became the subject of investigation by the Dutch Competition Authority following a complaint from a club which was discontent with this arrangement.²⁰³ The club claimed that broadcasting rights belong to the club organising the match; therefore the sale of collective exclusive rights constituted an illegal pricing agreement which was prohibited under Dutch competition law. The collective sale, that is where the KNVB sets the price, restricts the freedom of the clubs to set their own prices as well as depriving them of the ability to sell their own rights themselves. This view was challenged by the KNVB, as it claimed that, because it is the organiser of all the matches and because it constitutes the league as a whole it was being sold as one produce and not as individual matches.

As demonstrated through out the summary of this case and in the forthcoming analysis, the Dutch Ministry of Economic Affairs has to a great extent adopted the same position as the German courts, but the Dutch analysis varies from the German model on some important points.

²⁰² Decision by Ministerie van Economische Zaken of 22 December 1997, *KNVB*, supra note 65.

²⁰³ See OECD, *Competition Issues Related to Sports, Roundtable on Competition policy No. 11*, supra note 112, p. 55.

9.2 The facts of the case

The KNVB, had in accordance with Article 6(1) of its statutes and Article 59(1) of the Reglement Betaald Voetbal (Regulation on Professional Football),²⁰⁴ by an agreement which dated from 6 January 1997, granted the exclusive rights to the summaries and highlights of matches in the PTT Telecompetitie (the Eredivisie or premier league) and the Eerste Divisie (effectively the second division) to the Dutch public broadcaster NOS (Nederlandse Omroepprogramma Stichting) for a period of two and a half years. These rights did not include cable television rights, pay-per-view rights or radio broadcasting rights, however.²⁰⁵ Moreover, the private broadcaster SBS 6 (Scandinavian Broadcasting Systems) was also granted rights to highlights of the Eerste Divisie.²⁰⁶ If the broadcasters did not make use of these rights within twenty-four hours of the last match in that particular round of matches, it was stipulated that the rights to broadcast the match would then go back to the KNVB and/or to the playing clubs taking part.²⁰⁷

9.3 The legal analysis

This legal analysis concentrates on five major issues.

9.3.1 *The clubs as holders of the TV broadcasting rights*

The Ministry of Economic Affairs started by assessing to whom did the television transmission rights belong.²⁰⁸ It started to refer to the civil law proceedings in the judicial matter at hand, a proceeding against the KNVB which had been initiated by the club which had originally launched the competition law complaint. The Gerechtshof te Amsterdam (Amsterdam Court of Appeals) delivered its judgment on 8 November 1996, concluding that the television transmission rights belonged to the home club.²⁰⁹ Thus, the organiser, which was defined as the entity responsible both for the organisational and the financial aspects of a match, was declared as the rightful holder of the television rights.²¹⁰ The Ministry of Economic Affairs held that the facts of the case showed that the clubs both take the burden of preparation and the economic risk involved.²¹¹ It also found that the role of the KNVB was only to establish which teams were meeting in each round of matches, determine schedule of those matches, and decide the rules of the league.²¹² However, it found that the KNVB actually took no economic risk in the organisation of the games themselves.²¹³ Moreover, it stated that the clubs took

²⁰⁴ See Ministerie van Economische Zaken, 22 December 1997, *KNVB*, supra note 65, at 4-8.

²⁰⁵ Ibid. at 13 (Article 2.3 of the Agreement).

²⁰⁶ Ibid. at 17.

²⁰⁷ Ibid. at 16-17.

²⁰⁸ Ibid. at 22.

²⁰⁹ See Ministerie van Economische Zaken, 22 December 1997, *KNVB*, supra note 65, at 24, referring to Gerechtshof te Amsterdam 8 November 1996 (President Rechtsbank Utrecht 19 March 1996) Stichting Feyenoord/ Koninklijke Nederlandse Voetbalbond (KNVB).

²¹⁰ See Ministerie van Economische Zaken, 22 December 1997, *KNVB*, supra note 65, at 25.

²¹¹ Ibid. at 28.

²¹² Ibid. at 26.

²¹³ Ibid. at 26.

care of ticket sales for their respective home matches. Finally, it referred to the reasoning of the Berlin Court of Appeals in its judgment of the *DFB* case, which held that it was the home club which was the rightful holder of the television transmission rights.

9.3.2 *The matches are separate products, marketable as such*

The KNVB argued that a tournament should be considered as one product, and therefore that it had to be marketed as such. The same argument was used by the DFB in front of the Bundeskartellamt which then rejected that argument, just as the Ministry of Economic Affairs did, holding that each individual game is a single product.²¹⁴ It pointed out that the market value of the individual television rights may vary, depending on many factors: when the match takes place, which clubs are playing, the playing clubs' current positions in the tournament, at what time the match is broadcast and the extent of exclusivity of those rights.²¹⁵ It held that the same competition situation which operates between clubs with regard to the sale of tickets, the sales and purchases of players, the attraction of sponsors and in regard to merchandising also occurs with regard to the sale of broadcasting rights.²¹⁶ The Ministry of Economic Affairs also stated that it is possible that the TV rights for the summaries of less interesting matches would engender a substantially lower price.²¹⁷ Nevertheless, it came to the conclusion that the individual sale of rights is still possible due to ongoing developments in the broadcasting sector and because of the high number of potential channels which might be able to broadcast football matches.²¹⁸

9.3.3 *Discussion about uncertainty of outcome*

In relation to the financial viability of the league, the Ministry of Economic Affairs discussed the specific nature of uncertainty of outcome which characterises professional football. However, it held that the collective sale of television broadcasting rights is not a determinative issue in upholding the uncertainty of outcome.²¹⁹ It submitted the view that less successful clubs might be financed in a less restrictive way, than through the collective sale of broadcasting rights, by initiating a fund so that the financially stronger clubs might finance the weaker ones.²²⁰ In this respect, reference was made to Advocate General Lenz who, in his opinion on *Bosman* suggested that some of the revenues from player transfers might be divided up in order to support the struggling clubs, obviously in a less restrictive way than through the existing transfer system.

²¹⁴ Ibid. at 30.

²¹⁵ Ibid. at 31.

²¹⁶ Ibid. at 31.

²¹⁷ Ibid. at 32.

²¹⁸ Ibid. at 33.

²¹⁹ Ibid. at 34.

²²⁰ Ibid. at 34. Reference was made to the proposal of Advocate General Lenz in the *Bosman* case, C-315/93, *supra* note 35, which made this suggestion in relation to transfer regulations.

9.3.4 *Restriction on competition*

The Ministry of Economic Affairs found that the existing collective sales arrangements constituted a restriction on competition. Previous agreement had granted to the KNVB the right to sell transmission rights to the football leagues collectively, creating a joint sales agency on behalf of its members. Such collective sales means the horizontal price fixing of all matches, thus excluding the possibilities of the clubs individually setting prices. Competition between the clubs was therefore limited, because they are deprived of their freedom to set prices and to fix their conditions as the sellers of such rights.²²¹

9.3.5 *The relevant market*

The Ministry of Economic Affairs distinguished a separate relevant market for the rights to football broadcasts. It started by recognising that, within the market of television rights, there are different sub-markets. It was submitted that sport was not substitutable by other programmes which is proved by the existence of specific sports channels such as Eurosport and Sport7.²²² But, sports rights are also essential for more general channels in order to attract advertisers through viewing figures.²²³ The conclusion drawn was that television rights for the broadcast of Dutch professional football remains a separate product market.²²⁴ The relevant geographic market was held to be limited to the sovereign territory of the Netherlands.²²⁵

9.4 *Exemption refused*

The Ministry of Economic Affairs examined whether this agreement might be granted an exemption from the prohibition referred to in the competition act.²²⁶ It came to the conclusion, however, that the criteria for granting an exemption were not fulfilled.²²⁷ Nevertheless, in order to allow for a transition period, so that the actors in the market could prepare themselves for a situation under which the collective sale of television rights will no longer be admissible the prohibited agreement was allowed to remain in force until 1 July 1998.²²⁸ The Ministry of Economic Affairs added, for the sake of completeness, that the temporary exemption was only given under national competition law, and that it would also expire in the meantime if the European Commission found the agreement to be contrary to the E.C. Treaty.²²⁹

²²¹ See Ministerie van Economische Zaken, 22 December 1997, *KNVB*, supra note 65, at 39.

²²² *Ibid.* at 46.

²²³ *Ibid.* at 49.

²²⁴ *Ibid.* at 53.

²²⁵ *Ibid.* at 54.

²²⁶ *Ibid.* at 67-92.

²²⁷ *Ibid.* at 93.

²²⁸ *Ibid.* at 93.

²²⁹ *Ibid.* at 113.

9.5 Comments - a comparison between the DFB and the KNVB cases

The Dutch judgment goes further than the German one, simply because it prohibits the collective sale of, not only some matches in the European club competitions but all the matches played in the two professional Dutch leagues. At the same time, however, it is also less restrictive, since its decision does not take immediate effect as the parties were given a temporary exemption of up to six months. The following discussion regarding the restriction on competition in these two cases and the reasons for not justifying the collective sale demonstrates that the outcomes for Germany and the Netherlands are basically the same in both cases.

9.5.1 Market assessment

The point that differs most between the two cases is their respective definitions of the relevant market. The Bundeskartellamt defined the product market as the rights to transmit *sports events*, while at the same time considering that football matches have an important position with regard to these rights due to the specific interest which exists for this sport amongst both spectators and advertisers. The Dutch Ministry of Economic Affairs came up with a narrower definition, by limiting the product market to the rights for *football matches*. The narrower the definition of the market of course, the more likely that the agreement in question will then have an appreciable effect upon competition in that market. Any definition of the relevant market therefore has an integral importance in both cases. The limitation of the relevant market in the Dutch case to broadcasting rights to professional football matches in the Netherlands automatically gives an appreciable effect to any agreement; indeed it even creates a monopoly situation for the KNVB. In the German *DFB* case, the Bundeskartellamt defined a broader market, that is the broadcasting rights to sports events in Germany. The impact of agreements on televising of UEFA Cup and European Cup Winners' Cup matches might then be questioned when considering the amounts of sports events broadcast each year. However, their definition is not as broad as it might sound at first, because the Bundeskartellamt stressed the importance of broadcasting football and declared the UEFA matches to "the" event amongst sports broadcasting in Germany. With this additional remark the Bundeskartellamt indicates that the broadcasting of football is more important than it first might appear and that the effect of DFB's collective sale thereby results in an important effect on the market. The reason why the Bundeskartellamt did not define the product market as football broadcasting must be questioned. Whether these definitions become even narrower in future cases - for example, how a market is defined for the rights to televise the matches of a the most famous and appealing club in the league - is yet not evident.

9.5.2 *The matches as separate products*

In accordance with the German courts, the Dutch Ministry of Economic Affairs also considered the matches as separate products. This distinction goes further, however, because the games are more likely to be considered as one product when they form part of a national league. Nevertheless, this is still more reasonable than the situation in the *DFB* case, where the DFB argued that the home matches of the German teams taking part of the European club competitions should be considered as one market. Even so, this does not necessarily mean that such an interpretation has to be made. Although there are specific characteristics regarding the products produced by football clubs, the actual market situation demonstrates that there is a demand for such products and that they may be marketed separately. As the Dutch Ministry of Economic Affairs pointed out: why should the clubs not compete when selling their television rights, especially when they have to compete in ticket sales, the buying and selling of players, merchandising, *et cetera*? As long as there exists a demand for matches to be sold as separate products, it argued that they constitute separate products and thus they may be marketed as such. Therefore, it is not necessary to make any distinction between the collective sale of European matches and the matches that takes place in the national league. However, as in any competition law assessment, there are no general solutions. A hypothetical situation might arise in which, for example, there is not enough interest between the broadcasters to buy the football rights individually, thus risking the financial viability of the league; however, this might be because probably football is a relatively minor sport in that particular country and, therefore there is no risk necessarily of any appreciable effect on the larger sports rights market. If football is a sport that does not attract much attention the market should not be defined as the football rights market but sports rights market or television entertainment

9.5.3 *The less restrictive solution*

The German and the Dutch competition authorities came to the same basic conclusions. They both found that the clubs are holders of the rights and, indeed that they should be competitors in the sale of those rights in the same way as they are competitors in every other sense, with regard to ticket sales, attracting sponsors *et cetera*. In both cases the prohibition of collective sale originated from the fact that, although there has to be a degree of uncertainty in outcome, this may not be upheld by the collective sale of television transmission rights, a practice which sets prices and thus restricts competition between the teams. The determining factor appears to have been that there are less restrictive ways of upholding the uncertainty of outcome; for example, by initiating the suggested loyalty fund. Wealth distribution as such is not prohibited but a wealth distribution on the cost of free competition between the clubs.

Chapter 10 - Application of U.S. antitrust law to the sale of broadcasting rights agreements

10.1 Introduction

Due to the long tradition of antitrust enforcement in the U.S. - the Sherman Act was established in 1890 - there is often good reason to refer to U.S. antitrust jurisprudence when assessing areas of European competition law, mainly because interesting parallels may occasionally be drawn from its application. However, it should still be recognised that, although both competition law systems have as their overriding consideration the protection of competition in favour of consumer welfare, there are some great distinctions. Parallel to the protection of competition, there is, within the European Community the additional aim of enforcing market-integration between the Member States; this leads to different solutions being reached in the two systems, for example, in the area of vertical restraints. Moreover, there are obviously different policy aspects which influence the respective antitrust enforcing bodies and which then leads to diversity in assessment.

Section 1 of the Sherman Act provides that: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."²³⁰ However, not every restraint of trade is illegal under Section 1 of the Sherman Act, only those which are unreasonable. The U.S. Supreme Court has developed a practice wherein certain restraints are found to be so unlawful that they are considered as *per se* illegal, that is without the court having to go into any justifying reasons.²³¹ Among the agreements that are considered *per se* illegal are horizontal cartels, group boycotts, resale price maintenance and horizontal price fixing. The agreements which do not fall within the category of being *per se* illegal or do not need to be examined because they are considered as *per se* legal agreements, are analysed under a *rule of reason* analysis.²³² The courts then analyse whether the agreement threatens to raise prices or to reduce output; it also estimates the market power of the parties, assesses whether the agreement is ancillary, and then sees whether there are any proportional efficiencies. All of these factors are weighed together in order to establish whether the agreement must then be held to be unlawful or not.

Antitrust has been applied to the sports sector since the 1920's. There was really no debate regarding the applicability of antitrust laws to sport. What is paradoxical, however, is the fact that baseball was granted an exemption from

²³⁰ Sherman Act [15. U.S.C. §1].

²³¹ *Standard Oil Co. v United States*, 221 U.S. 1, 60 (1911).

²³² See *Board of Trade of City of Chicago v United States*, 246 U.S. 231, 231 (1918).

antitrust laws in 1922 in *Federal Baseball*,²³³ principally because Justice Holmes declared that professional baseball was not a federal business that involved intrastate commerce. Although there has been a lot of criticism regarding the illogicality of treating baseball differently to any other form of sport no court has since overruled the *Federal Baseball* judgment.²³⁴ That this general immunity would not be extended to any other sport was clearly held in relation to American football in *Radiovich v National Football League* in 1957.²³⁵

This section examines whether the application of U.S. antitrust towards the collective sale of sports broadcasting agreements might cast any light upon the approach taken by the courts in Europe. Although it is not possible to do an outright comparative study between the decisions in the U.S. and the ones given in Germany and the Netherlands, primarily due to U.S. legislative intervention in this area, it is nevertheless interesting to look at the main precedents and to examine the legislative exemption in the U.S.

10.2 The antitrust exemption for broadcasting agreements regarding professional sports leagues

The application of antitrust to television contracts of the National Football League (NFL) began with an antitrust action brought by the Department of Justice against the NFL in 1953, when the compatibility of Article X of the NFL's by-laws with Section 1 of the Sherman Act was questioned.²³⁶ The provisions, which were subject to the proceeding concerned were analysed under the rule of reason. The federal district court found that several of the provisions regarding blackout of games when a team played away from home constituted unreasonable restraints of trade, because they could not protect the levels of live attendance at the arena, the justifying argument which was put forward by the defendant.²³⁷

The NFL's collective sale of broadcasting rights to American football matches in the NFL were condemned by the same district court in 1961. In April 1961, the NFL entered into a contract with CBS which required that each "club will pool its television rights with those of all of the other clubs, and that only the resulting package of pooled television rights will be sold to a purchaser."²³⁸ This agreement was thus prohibited as an unreasonable restraint of trade.²³⁹ This judgment met with a lot of protest because other professional sports leagues were engaging in

²³³ *Federal Baseball Club of Baltimore, Inc. v National League of Professional Base Ball Clubs*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922), 39, 57.

²³⁴ Cf. *Toolson v New York Yankees*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953) 57 and *Flood v Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972), 56, 57.

²³⁵ *Radiovich v National Football League (NFL)*, 353 U.S. 931 (1957).

²³⁶ *United States v NFL*, 116 F.Supp 319 (E.D.) Pa. 1953.

²³⁷ *Ibid.* at 326-27.

²³⁸ *United States v NFL* 196 F. Supp. 445 (E.D. Pa. 1961).

²³⁹ *United States v NFL* 196 F. Supp. 445 (E.D. Pa. 1961).

substantially similar agreements to the prohibited practice of the NFL.²⁴⁰ Instead of letting the relevant bodies take antitrust action against these other leagues, the U.S. Congress enacted legislation to provide for an exemption from the antitrust laws in order to permit a professional league to sell package deals to broadcasting companies for the exclusive transmission of games, the Sports Broadcasting Act of 1961.²⁴¹ The legislative history of the Sports Broadcasting Act appears to indicate that a main concern, when the Act was enacted, was the financial viability of the NFL.²⁴² The NFL argued that they had to make package sales "to assure the weaker clubs of the league continuing television income ... on a basis of substantial equality with the stronger clubs."²⁴³ Television revenue was held to be "such a significant part of the overall financial success of a professional football team", that it was "necessary to prevent too great disparity in the television income of the various clubs."²⁴⁴ Moreover, it was stated that "should the weaker teams be allowed to flounder, there is danger that structure of the league would become impaired and [the NFL's] continued operation imperiled."²⁴⁵

10.3 Television plan regulating college football found illegal under the rule of reason - the NCAA judgment

While the Sports Broadcasting Act exempts the joint promotion of sports rights for professional football leagues from antitrust rules, similar kinds of agreements have been held to be illegal under the rule of reason, for example when enacted by the National Collegiate Athletic Association (NCAA). This was established by the U.S. Supreme Court in *NCAA v Board of Regents* in 1984, when television rights were subjected to a collective plan which restricted both price and output, as well as the commercial freedom of the participating teams.²⁴⁶

10.3.1 Facts of the case

The NCAA was established in 1905 and is a non-profit self-regulatory organisation, which runs amateur collegiate sports.²⁴⁷ In 1981, it had approximately 850 member-schools, of which less than 200 played American

²⁴⁰ S Rep. No. 1087, 87th Cong., 1st. Sess. 3 (1961) reprinted in 1961 U.S.C.C.A.N. 3043, (hereafter *Senate Report*) referred to by Anderson, David L., *The Sports Broadcasting Act: Calling It What It Is - Special Interest Legislation*, Hastings Comm/Ent L.J., Vol. 17, Summer, 1995, p. 945 - 959.

²⁴¹ The Sports Broadcasting Act, Pub. L. No. 87-331 (15 U.S.C §§1291-95) Section 1291 provides an exemption from antitrust laws for agreements covering the telecasting of sport contests: "The antitrust laws... shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball or hockey, by which a league of clubs ... sells or otherwise transfers all or any part of the rights of such leagues' members clubs in the sponsored telecasting of the games ... engaged in or conducted by such clubs."

²⁴² See *Senate Report*, supra note 239, at 3043.

²⁴³ *Ibid.* at 3043.

²⁴⁴ *Ibid.* at 3043.

²⁴⁵ *Ibid.* at 3043.

²⁴⁶ *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma et al.*, 468 U.S. 85 (1984), supra note 195 (hereafter *NCAA v. Board of Regents*).

²⁴⁷ *Ibid.* at 88.

football in Division 1. In 1971, the NCAA had established a 'Television Plan' stating that its Football Television Committee would be responsible for regulating the NCAA's programming of American collegiate football and television policy. A new television plan was adopted in 1981 and it is that plan that later became subject for judicial proceedings. This plan regulated the televising of NCAA football games for the 1982-1985 seasons. This plan recapitulated that like its predecessors, it aimed to "reduce, insofar as possible, the adverse effects of live television upon football game attendance".²⁴⁸ This plan also granted the television committee the rights to negotiate and to contract NCAA games to two U.S. television networks. Accordingly, the NCAA entered into a four-year contract with the American Broadcasting Company (ABC) and the CBS.²⁴⁹ Additionally, it entered into a contract with Turner Broadcasting System, Inc., for the exclusive rights to broadcast matches on cable television.²⁵⁰

The television plan limited the total number of games to be televised, as well as the maximum number of games to be televised involving any one school. Moreover, each network agreed to pay a minimum aggregate compensation. No members of the NCAA were permitted to make any other sales of television rights except in accordance with this television plan.²⁵¹ However, the networks negotiated with the schools as to which game to televise. Some of the members schools, which together formed the College Football Association wished to sell the rights according to their own conditions, and thus established a separate plan and initiated an agreement with a television network outside of the original television plan. The NCAA thus threatened them with disciplinary sanctions.²⁵² Then, however, two of the universities involved, Oklahoma and Georgia, initiated an antitrust proceeding in a U.S. Federal District Court.

10.3.2 *The lower courts' judgments*

This District Court found that the television plan violated Section 1 of the Sherman Act.²⁵³ It held that the market competition for live college football television rights was restricted in three ways: (i) by price fixing; (ii) as a group-boycott against all other potential broadcasters; and (iii) through a restriction on output.

The U.S. Court of Appeals held that the television plan constituted *per se* illegal price fixing.²⁵⁴ It rejected the NCAA's justifying arguments that the plan actually promoted live attendances, that it balanced athletic competition, and that the plan

²⁴⁸ Ibid. at 85.

²⁴⁹ Ibid. at 92.

²⁵⁰ Ibid. at 93.

²⁵¹ Ibid. at 92-93.

²⁵² Ibid. at 94.

²⁵³ 546 F.Supp. 1276.

²⁵⁴ 707 F.2d. at 1152.

was needed in order to compete effectively with other forms of television programming.²⁵⁵ Finally, it held that, even if the plan was not *per se* illegal, the anti-competitive effects on price and output were not met by any justifications promoting competition.²⁵⁶

10.3.3 The assessment of the Supreme Court

The U.S. Supreme Court analysed the agreements in two steps. Firstly, it determined whether the NCAA's action were illegal under Section 1 of the Sherman Act. The majority verdict found that the plan between horizontal competitors enacted horizontal restrictions.²⁵⁷ It also held that the NCAA's arrangement had limited the freedom of the member schools to sell their own television rights.²⁵⁸ Moreover, the Court found a restriction on output, holding that more games might have been televised on the open market rather than under the NCAA plan.²⁵⁹ It also found that the plan constituted horizontal price fixing.²⁶⁰ It held that the price was higher and the output lower than they would otherwise have been; therefore it stated that "both are unresponsive to consumer preference" and added such an effect "is not consistent with [the] fundamental goals of anti-trust law."²⁶¹

The Supreme Court confirmed the District Court's definition of the relevant market as the market for the televising of live college football. The Court based its findings on the fact that there are no specific substitutes for televised collegiate football television programming simply because it generates an audience which is uniquely attractive to advertisers.²⁶² These findings were thus held to support the fact that the NCAA alone possessed this specific market power.²⁶³

By tradition, horizontal cartels are considered *per se* illegal, that is, without the court having to look for possible justifications. The Supreme Court decided, however, to assess the plan according to a rule of reason analysis,²⁶⁴ because the case involved an industry in which horizontal restraints on competition are essential if the product is to be available at all.²⁶⁵ It recognised that the NCAA plays a vital role in enabling college football to preserve its character and, "as a result [enabling] a product to be marketed which might otherwise be unavailable."²⁶⁶

²⁵⁵ See 707 F.2d. at 1153-1154.

²⁵⁶ See 707 F.2d. at 1157-60.

²⁵⁷ See NCAA 468 U.S. 85 (1984), *supra* note 195, at 98.

²⁵⁸ *Ibid.* at 99.

²⁵⁹ *Ibid.* at 99.

²⁶⁰ *Ibid.* at 99.

²⁶¹ *Ibid.* at 106.

²⁶² *Ibid.* at 110-112.

²⁶³ *Ibid.* at 110-112.

²⁶⁴ *Ibid.* at 100.

²⁶⁵ *Ibid.* at 100.

²⁶⁶ *Ibid.* at 102.

The Supreme Court denied the applicability of the joint selling arrangement that was permitted in *Broadcast Music, Inc.*, since the NCAA did not function as a selling agent that promote competition because it limited prices and output.²⁶⁷ The Supreme Court held that most of the NCAA's regulatory controls are justifiable means of fostering sporting competition. However, it did not recognise the television plan as having the same effect. The Supreme Court thus held that the NCAA imposes a number of other restrictions which are better suited to amateurism than the television plan.²⁶⁸ In addition, it noted that no other NCAA sport was subject to a similar television plan.²⁶⁹ The Court also emphasised the District Court's finding that more games would be televised in a free market than were being shown under the television plan. The Supreme Court's final holding determined that as this plan was "curtailing output and blunting the ability of member institutions to respond to consumer preferences, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."²⁷⁰

10.3.4 Comments on the NCAA case

A strong dissenting opinion to the majority opinion in the Supreme Court was written by Justice White, an opinion which Justice Rehnquist shared.²⁷¹ The dissenting opinion held that the majority opinion erred in finding that the NCAA arrangement fixed prices and limited output.²⁷² Justice White took great account of the inherent and constituent nature of the NCAA, holding that its arrangement was justified because it maintained interaction between college athletics and academics. This dissident view criticised the majority opinion for using an improper measure of output and for not demonstrating that there was an anti-competitive increase in price.²⁷³ Finally, he held that the arrangement was sufficiently competitive under the rule of reason and that the non-economic goals underlying the arrangement - the integration of academics and athletes, the maintenance of a competitive equality between the teams, and the continued viability of academic programme through the income engendered by football broadcasting rights - were the results that should have lead the majority view to find that such restraints were reasonable.²⁷⁴ Despite the criticism put forward by the dissidents, it is argued here in this thesis that the NCAA arrangement was anti-competitive, just as the majority opinion held it to be. As H. Hovenkamp puts it, the Court of Appeals rightly rejected the NCAA's argument that the arrangement promoted competition in a different market, that is the market for

²⁶⁷ Ibid. at 113.

²⁶⁸ Ibid. at 119.

²⁶⁹ Ibid. at 119.

²⁷⁰ Ibid. at 120.

²⁷¹ *NCAA, 468 U.S. 85*, supra note 195, dissenting opinion by Justice White joined by Justice Rehnquist at 121 - 136.

²⁷² Ibid. at 128 - 129.

²⁷³ Ibid. at 129.

²⁷⁴ Ibid. at 134 - 136.

live attendance of football games. He is of the opinion that any restriction of output in one market tends to increase the demand in markets for substitute products.²⁷⁵ Nevertheless, he also states that “[s]trong arguments have been made that the Supreme Court defined the market too narrowly, and that televised professional football, or televised sports, should have been considered the appropriate market for antitrust analysis.”²⁷⁶ The role and aims of the NCAA can be fulfilled without its television plan. This is, *inter alia*, proven by the fact that American college football is the only sport for which the NCAA used to sell the rights collectively; in other sports, these rights were sold on an individual basis by the schools. The Court did not find that the NCAA’s arrangement promoted competition enough to justify the restraints on prices and output. The important factor is that, although the NCAA has an important role as the promoter of U.S. academic sports, it may not restrict competition with regard to the broadcasting rights market of such sports because there are less restrictive ways of supporting the weaker teams than by fixing prices and limiting output. This is the same argument which underlies the German and Dutch DFB and KNVB judgments.

10.4 Concluding remarks on the U.S. antitrust approach towards sports broadcasting agreements

To finish this look at the U.S. experience, perhaps it is necessary to make some concluding remarks.

10.4.1 There is a discrepancy in the antitrust treatment of collegiate and professional sports

Due to the Sports Broadcasting Act U.S. antitrust law does not apply to the collective sale of broadcasting rights agreements for professional sports. Although the sports sector not exclusively has a commercial profile, it seems odd that the broadcasting agreements, undoubtedly one of the most economic of activities which the clubs pursue be exempted from the application of antitrust legislation, especially in the case of professional sports. Although this legislation was enacted in order to uphold the financial viability of the leagues, it is peculiar that this could not be ensured by means which are less anti-competitive and which do not require an antitrust exemption. This Act has created monopolies within the different markets for sports broadcasting rights to the detriment of consumers; after all, they are the ones who have to pay the costs incurred by resulting profits. This view is supported by many, including a legal writer who holds that the time to change the subsidy granted to the NFL, due to the antitrust exemption, has come. He argues that this subsidy has enabled the league to enjoy the huge profits which accrue from television at the expense of the advertisers -

²⁷⁵ Hovenkamp, H., *Federal Antitrust Policy - the law of competition and its practise*, Hornbook Series, West Publishing Co., St. Paul, Minn., 1994, p 238.

²⁷⁶ Ibid. p 238, referring to Areeda, P., H. Hovenkamp & J. Solow, *Antitrust Law*, Ch. 5 (rev.ed 1994).

and, therefore the consumers too who pay for the broadcasts²⁷⁷; therefore the exemption should be amended and limited to negotiating pooled television rights for playoff games as regular season games would then be negotiable by individual franchises. The same writer further argues that the benefit of this amendment would be immediate as the price paid for the NFL's television rights would almost certainly fall.²⁷⁸ Reference is also made to the decrease in fees paid for the television rights to the NCAA games due to the U.S. Supreme Court's prohibition on collective sales agreements; the fees paid by the networks for the rights to their games dropped from \$74.2 million in 1983 - the year before the Supreme Court's decision - to \$52.7 million by 1986.²⁷⁹ The Sports Broadcasting Acts appears to be even inappropriate considering the outcome of the *NCAA* judgment. Indeed, it may be disputed as to why the application of antitrust laws should be harder on collegiate sports than they are on professional ones. This seems to be an unjustified discrepancy. Nevertheless, despite this discrepancy between the antitrust treatment of collegiate and professional sports, and the fact that the economic environment for football clubs has changed since 1961, a legislative change in the U.S. appears unlikely.

10.4.2 The Single Entity Theory is not applicable to sports leagues

Finally, it should also be mentioned that some scholars argue that a sports league must be treated as a single entity, referring to a doctrine according to which Section 1 of the Sherman Act is not applicable to cooperation between a parent company and its wholly owned subsidiary. The single entity doctrine was established by the U.S. Supreme Court in *Copperweld*,²⁸⁰ when it held that a parent company and its wholly owned subsidiary are not legally capable of conspiring with each other in violation of Section 1 of the Sherman Act. Some scholars try to argue that *Copperweld* should be extended to encompass "unique" joint ventures,²⁸¹ such as professional sports leagues, since the member teams cannot produce their product without the "integration and cooperation of each and every member of the league".²⁸² Although each team is independently owned, the league shares a "unity of interest",²⁸³ which is to promote league competition and to maintain the economic well being of every club.²⁸⁴ Within the realms of this

²⁷⁷ See Brown, Charles S., *Professional football and the antitrust laws: impact of United States Football League v. National Football and a proposal for change*, Saint Louis University Law Journal, Vol. 31, 1987, p. 1079.

²⁷⁸ *Ibid.* p. 1080.

²⁷⁹ *Ibid.* p. 1080, note 143, citing Lancaster, *Colleges Scrambling to Avoid Loss In a Glutted TV Football Market*, Wall Street Journal, 23 September, 1986 at 37, col. 50.

²⁸⁰ *Copperweld Corp. v Independence Tube Corp.* 467 U.S. 752 (1984).

²⁸¹ Michael S. Jacobs, *Professional Sports Leagues, Antitrust and the Single Entity Theory, A Defense of the Status Quo*, 66 Indiana Law Journal, 25, 30 (1991), at 120.

²⁸² Gary R. Roberts, *The Single Entity Status of Sport Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 Tulane Law Review, 562 (1986).

²⁸³ Jacobs, *supra* note 280, at 33.

²⁸⁴ *NASL v NFL*, 670 F.2d. 1249, 1253 (2d. Cir. 1982) "Damage to or losses by any league member can adversely affect the stability, success and operation of other members", *United States v NFL*, 116 F. Supp. 319, 323, "If all the teams should compete as hard as they can in a business way, the stronger teams would be likely

logic, the Sports Broadcasting Act is not needed, because a professional sports league is a single entity and, therefore, cannot violate Section 1 of the Sherman Act. However, it appears that this theory is misapplied when used in conjunction with professional sports leagues, an argument which is supported both by U.S. scholars and U.S. courts.²⁸⁵ There is probably no support for this theory in Europe either.

to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league ... would fail".

²⁸⁵ *Wood v. NBA*, 809 F.2d. 954 (2d. Cir. 1987) antitrust action based on league collective bargaining policy; *Kapp v NFL*, 586 F.2d. 644 (9th Cir. 1978) cert. denied. 441 U.S. 907 (1979) where the U.S. Supreme Court held that the NFL is an unincorporated association consisting of member clubs.

PART IV

THE FUTURE APPLICATION OF COMPETITION LAW TO THE SPORTS SECTOR

Chapter 11 - Concluding remarks

11.1 To set the limits - a balancing act

Although the sports sector has long tried to ward off outside interference in its internal rules, judicial scrutiny has changed the situation. As was illustrated in Part I of this thesis, the application of Community law to sport is justified when there is an economic activity involved. The sale of broadcasting rights to sport events is quite definitely an economic activity; moreover, it constitutes a sector where the prices for those rights constantly seems to rise. It was very probably unthinkable originally that the provisions on competition law would deal with the sale of broadcasting rights to football matches when the Treaty of Rome was first established, and, the broadcast of sport events was in its infancy and without the possibility of much financial remuneration ever being involved. Although no one at that time could foresee the current problems, it is argued here that the rules on competition are the right forum to deal with any distortion in competition regarding the sale and purchase of sports broadcasting rights. This is valid both on a Community level, by the application of Articles 85 and 86 and on a national level by application of the corresponding provision in the various national competition acts.

The attribution of ownership to a sports event is a complex question, as was illustrated in Part II of this thesis. That situation is normally regulated by contract with the broadcaster, in accordance with the rules set up by the sports association. There is little national legislation in this area. However, the legality of the attribution of broadcasting rights have, for several sporting events, been disputed. In the case of a judicial analysis, a number of factors have to be taken into account. The determining criteria tend to be who holds the actual organisational responsibility and who takes the economic risk for the event. It is the determination of ownership that lies behind any competition law assessment of the legality of a collective sale of broadcasting rights. It is argued that broadcasting rights usually belong to the home club which organises the game or event at hand. However, if a national association takes upon it the economic risk and the organisational tasks involved in organising the games, then it may consequently be entitled to sell the rights as those rights may then belong to it; thus, there is no longer question of a collective sale of rights because the rights already belong to it.

A sports league is, in its very nature, a cartel, a point which was seen in both Parts I and III. Since this form of cartel is necessary for the very existence of the league, it is argued that the question is not whether competition law should fully apply to sports because this is a contradiction in terms, as there would not necessarily be any professional sports organisations then. The problem lies in the fact that, on one hand, it is now well established that Community law and

competition law is applicable to sports bodies and, on the other hand, it has also been found that sports bodies are different to other undertakings since they need to combine in order to produce their product. But, where should the line be drawn between restrictions that are promoting competition and those that are anti-competitive? It is clear that the behaviour of the football clubs selling television rights collectively would not be acceptable in any other market. However, the specific characteristics of sports must be taken into consideration when assessing such agreements. The question then becomes: to what extent is the anti-competitive behaviour necessary for the viability of a league, and when should it be established that such cooperation goes too far and then constitutes anti-competitive behaviour external to the functioning of the league and thus cannot be justified? There must be a distinction between restrictions on competition that are necessary for the viability of a league, and those which are merely concerned with a league's internal functioning, that is the size of that league, the allocation of production, and the distribution of playing resources. Collective sales of television transmission agreements are, in most cases, not necessary for the continued viability of a league. It is admitted in this LL.M. thesis that they do have an important economic impact, but since they are sold to television companies which are dependent on these rights in order to offer them to consumers and advertisers, it is logical to let a league act as a monopolistic seller. In the long run, it is the consumers who have to pay for these monopolistic prices. Free competition between the clubs would, on the contrary, allow the clubs contractual freedom and would then leave the price to be determined by market forces.

Brinckman and Vollebregt is of the opinion that "regulating bodies in sport may need an objective justification for cumulating regulatory activities and marketing of broadcasting rights."²⁸⁶ These authors submit as objective justification the possibility that the regulatory bodies possesses the broadcasting rights under national law. Moreover, they also submit that it is possible to draw an analogy with the Court of Justice's and the Commission's policy on agricultural cooperatives and collecting societies for authors of artistic works.²⁸⁷ It is in this thesis argued that these arguments regarding objective justifications are not very well founded. It is rare that the regulatory bodies possess the broadcasting rights under national law; indeed this is a case which is only regulated in France.²⁸⁸ The analogy solution cannot be accepted either. The examples given constitutes restrictive application of E.C. competition law and should not be applied by analogy to the marketing of sports broadcasting rights.

²⁸⁶ Brinckman, & Vollebregt, *The Marketing of Sports and its Relation to E.C. Competition Law*, supra note 42, p. 285.

²⁸⁷ Ibid.

²⁸⁸ Cf. supra, section 6.5.1.

At the time when there were no private TV channels, sports events were broadcast by public service broadcasters; there was no competition between them because they were assured access to events held in other countries due to the reciprocal *Eurovision* system enshrined by the European Broadcasting Union. But, along with the deregulation and development of different modes of broadcasting, there exists today a large number of buyers operating on the sports rights market. Therefore, competition on the providers side, that is, between the clubs has suddenly come to be seen as an essential issue.

The *Bosman* case was the first occasion on which the fundamental patterns operating within a particular sport have been conclusively ruled by the European Court of Justice to be incompatible with Community law. Although the transfer rules in *Bosman* were likely to be found contrary to the competition rules there is a difference between transfer rules, which are purely internal regulations which operate amongst football clubs, and the sale of broadcasting rights, which create a monopoly of supply in the sports rights market and thus affect the relationship with external purchasers, broadcasters and/or sports rights agencies. It is therefore argued in this thesis that collective sales are an even more anti-competitive practice and that action is necessary in this area too. If financial support is needed by the clubs situated at the bottom end of a league, this should not be enacted by a collective sale of rights, but in a way which does not distort competition on the broadcasting rights market. Indeed, as Sloane argues: "[a]lthough sports leagues could usefully devote more attention to revenue-sharing arrangements to ensure sporting equality, they will more effectively promote the welfare of member clubs by encouraging enterprise and innovation in the marketing so as to enlarge total revenue."²⁹⁰

11.2 Future assessment of football cartels - the Premier League

Due to the *DFB* and the *KNVB* cases, the collective sales of broadcasting agreements are likely to be disputed in other countries as well, something which concerns football, but which may also be applicable to other team sports which are an important part of sports broadcasting. An agreement which shares features with the *KNVB* experience is a case pending in the UK's Restrictive Trade Practices Court against the Premier League Football operating in England, which has been brought by the Office of Fair Trading.²⁹¹ The agreement of the Premier League which has been challenged under the Restrictive Trade Practices Act 1976, relates to the rules and regulation of the Football Associations's (FA) Premier League which prevents the clubs from selling their television rights without prior permission from the Premier League. Consequently, the Premier

²⁸⁹ See Commission decision of 19 February 1999, case IV/32.524 - *Screensport/ EBU Members*, O.J. 1991, L/63/32.

²⁹⁰ See Sloane, P., *Sport in the Market? The Economic Causes and Consequences of the 'Packer revolution'*, supra note 12, p. 37.

²⁹¹ Communication from the Office of Fair Trading, No 6/96, 6 February 1996.

League has negotiated the sale of all the clubs' broadcasting rights collectively. The Office of Fair Trading regards this as significantly anti-competitive, since it prevents member clubs from competing with each other in the supply of broadcasting rights. Thus, higher rates extracted from the broadcasters by this monopolistic situation might be passed on to consumers.²⁹²

Another issue regards the Premier League's sale of exclusive rights to British Sky Broadcasting (BSkyB) and to the British Broadcasting Corporation (BBC) for a period of five years up to and including the 1996-97 football season. The rights concerned both live transmissions and the highlights of recorded matches; indeed, with this agreement the broadcasters were also given a prioritised right to another term of five years. The Office of Fair Trading argues that the Premier League, by selling the rights collectively and exclusively to the highest bidder on behalf of its members, is effectively acting as a cartel, with the net effect being to inflate costs and prices. The oral procedure in this particular case will not take place until the beginning of 1999. However, if the Restrictive Trade Practices Court follows the same line of argument as the Office of Fair Trading, the German Federal Supreme Court and the Dutch Ministry of Economic Affairs, this will presumably be the last time that the Premier League will have been able to sell broadcasting rights collectively.

11.3 An exemption for sport in European competition law seems unlikely

This national approach to sports is intimately linked to the Community's policy in this area, wherefore the Member States may not totally chose their own direction because the Commission surveys and prohibits any attempts which may be contrary to Community law. The Community recognises the social importance of sport and sees it as an important measure of European integration and as a means in the process of building up a European identity.²⁹³ However, a general exemption for sport from the scope of European antitrust legislation seems to be out of the question, nor does it appear that a European equivalent to the U.S. Sports Broadcasting Act is likely. The Commission has also pointed out that it does not except any general sports exemptions in the competition acts of any Member States. When the German Federal Supreme Court had confirmed a decision prohibiting the Deutscher Fußball-Bund from selling television rights collectively, the German Chancellor expressed the intention of exempting football from the scope of German competition law, an initiative which met with by heavy disapproval from the Commission.²⁹⁴ This leads to the question: what action might be taken at the Community level in relation to a country such as France where there are no explicit exemptions for sport from competition laws but, a

²⁹² See XXVIIth Report on Competition Policy 1996, at p. 334.

²⁹³ See Protocol to the Amsterdam Treaty, *supra* note 24.

²⁹⁴ See Financial Times, Tucker, Emma & Patrick Harverson, *E.U. warning on soccer 'cartel' plans*, 22 January 1998, p. 2.

collective sale of the rights is approved by law because the rights to the matches are assured the national association?

11.4 What about countries where the broadcasting rights have been granted to the national football league/federation by statute?

There is no risk that the collective sale of broadcasting rights in France to *any* sport might be held to be contrary to the French Competition Act²⁹⁵ since the national associations in every sport have been granted the position as organiser by statute. Still, such behaviour might be condemned under E.C. competition rules, since the legislation, which denies the French clubs the right to ownership of their matches, establishes a sales cartel through the national football federation and thereby fixes prices. This legislation could be assessed under Article 85 E.C., read in conjunction with Articles 5 and 2(g), and then condemned because this legislation distorts *l'effet utile* of the competition rules.²⁹⁶ This question is an interesting one; however there is not enough space here to develop it much further. What may be noted, nevertheless, is that although the sport bodies are at present granted the monopoly as organiser, they cannot just behave in any way they wish. If they are considered to have overwhelming market power within a specific market, they may not abuse such power. Behaviour such as that is condemned under Article 86 E.C., as well as by subsequent provisions in the French Competition Act. Consequently, the French courts, the Commission or the Court of First Instance can examine the behaviour of the French Football Association under these provisions.

11.5 Is the economic particularity of sports accepted by the courts?

Despite various courts' discussions about the financial viability of leagues, it must be questioned whether they have actually taken into consideration the differences which exist between sports and other businesses. It is doubtful whether the argument can be sustained that the national courts have actually accepted the economic specifics of sports when they assessed their cases. Contrary to Advocate General Lenz's opinion on the *Bosman* case, there is no other specific recognition of the uncertainty of outcome hypothesis or of the specifics of professional team sports. However, the German courts did discuss the financial viability of the German leagues. Without considering why a division of the league's income between the teams might be necessary, that is to protect the uncertainty of outcome, they came to the conclusion that there were less restrictive means of protecting the financially weaker clubs.

The conclusion that competition law is applicable to sports bodies, and the factual situation that several courts have condemned the collective sales of television broadcasting rights for football matches, does not mean that there is a *per se*

²⁹⁵ Ordonnance of 1 December 1986.

²⁹⁶ See e.g. Case C-276/86, *Van Eycke v ASPA NV*, [1988] ECR 4769.

prohibition on their collective sales in every Member State of the European Community. As in every competition law analysis, the precedents have to be applied to the facts in any given case, which means that, where football rights are not an important part of the sports rights market, an appreciable restraint on competition does not then exist. In cases where it is impossible for the clubs to sell their rights individually, perhaps because there is not much competition between the broadcasters or even not enough interest in acquiring football rights, it might not be considered that the collective sale of those particular sport broadcasting rights is anticompetitive.

The sports sector must face the reality of a situation that it has itself created, that is the increased commercialisation of their sector and the subsequently tightened relations that now exists with other sectors of the economy. It may not be denied that there are reasons to apply competition law to sports. Of course, the specific economy of sports must be respected as far as possible in any legal analysis; however, these characteristics do not justify a total exemption for the sports sector from the scope of competition law in Europe.

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