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SAVING THE MONOPSONY: EXCLUSIVITY, INNOVATION AND MARKET POWER IN THE MEDIA SECTOR

Pablo Ibáñez Colomo*

1. Introduction

The Media Sector has experienced a technological revolution in the last 15 years. Digital encoding of television signals made possible a more efficient use of the radiospectrum. Digital terrestrial television (hereinafter, “DTT”) allows now for the reception of a significant number of free-to-air channels.¹ Moreover, the use of new transmission platforms (hereinafter, “platforms”), namely cable and direct-to-home satellite (hereinafter, “DTH”) paved the way for the arrival in Europe of pay-TV operators, which finance their activities mainly via subscription fees. This changing technological landscape is subject to further evolution in the near future, as incumbent telecommunications operators become increasingly interested in making available broadcasting content² as part of their broadband offer and 3G mobile handsets can be used for the reception of TV signals.

The arrival of new operators and new technologies on the market has brought important benefits for consumers. For instance, Hollywood blockbusters are broadcast much earlier than before in pay-per-view format.³ As far as sports events are concerned, a more efficient use of available platforms enables pay-TV operators to broadcast simultaneously several football games, thereby broadening fans’ choice.

However, as a consequence of such an increase in the number of potential TV operators, competition in the sector has been fierce in recent years. The pay-TV segment has witnessed a vast consolidation trend, with mergers leading to temporary near-monopolies in the provision of such services in Italy and Spain.⁴ There have also been some resounding commercial failures, the most notable of which is that of DTT pay-TV operators in the UK and Spain.⁵ This is most commonly explained by problems encountered by the different operators regarding access to broadcasting rights of premium content. Premium content, which has now “migrated” to a large extent towards the pay-TV segment, is considered to be the “driver” for subscriptions to pay-TV services. According to the Commission, premium content encompasses

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¹ On DTT see “Public policy treatment of digital terrestrial television (DTT) in communications markets”, *Report prepared by Analysys for the European Commission*, 26 August 2005.

² For an overview of the possibilities of different platforms see Poel, “Competition and Innovation in Broadcasting Markets”, 50 *Communications & Strategies* (2003), p. 269.

³ For an early example, see Commission Decision of 15 September 1999, *British Interactive Broadcasting/Open*, Case IV/36.539, O.J. (1999) L 312/1.

⁴ Commission Decision of 4 April 2003, *NewsCorp./Telepiù*, O.J. (2004) L 110/73 and Tribunal de Defensa de la Competencia, decision of 13 November 2002, *Sogecable/Canal Satélite Digital/Vía Digital*, Case C74/02, available at <http://www.tdcompetencia.es/PDFs/concentraciones/7402.pdf> (in Spanish).

⁵ ITV Digital and Quiero TV provided pay-TV services that were very similar to those already offered by incumbent DTH operators. In the UK, a new DTT-based product, with an important offer of free channels (known as Freeview) has been more successful than its predecessor. On the failure of ITV and Quiero TV see for example Ariño, “Digital War and Peace”, 10 *European Public Law* (2004), p. 135.

first-run Hollywood blockbusters as well as mass sports, in particular football (but also Formula 1 and the Olympic Games).⁶ With a view to extracting the maximum value of their content, right holders (i.e. Hollywood majors and sports organisations) tend to sell their broadcasting rights on an exclusive basis to a single operator in a given territory. This practice, combined with the inherent scarcity of premium content, led to a process of cut-throat competition among pay-TV operators. Prices of broadcasting rights skyrocketed.⁷

In 1982 (long before the technological revolution referred to above), the ECJ considered that the grant of exclusive broadcasting licences by film producers is an acceptable exercise of copyright under Article 81(1) EC in the landmark *Coditel II* judgment.⁸ According to the ECJ, exclusive licences may only come within the scope of Article 81(1) EC “*where there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market*”.⁹ It is now well established that the *Coditel II* judgment applies by analogy to rights exploited by sports organisations, which derive their exclusive rights not from intellectual property but from physical property (i.e. stadiums or similar infrastructures).¹⁰

In spite of the principles derived from the *Coditel II* judgment, both the Commission and National Competition Authorities (“NCAs”) are imposing conditions on the grant of exclusive broadcasting licences of premium content that are increasingly stringent. However, such a “regulatory approach” towards exclusivity on the part of the Commission is not motivated by the risks of foreclosure of content suppliers (which, as seen above, was the concern of the ECJ in *Coditel II*). On the contrary, this progressive move on the part of the institution seems to be an attempt, on the one hand, to keep a competitive market structure on the pay-TV segment and, on the other hand, to ease the development of new technologies.¹¹

It is assumed by the Commission that incumbent pay-TV operators are able to foreclose entry in the pay-TV segment through exclusive agreements.¹² As a response to the situation, exclusive rights for sports events are, in some cases, plainly waived, so as to ensure direct access to premium content by undertakings operating via new platforms (such as the Internet or 3G, but sometimes also cable). This remedy was imposed in the *UEFA Champions League* decision and in the *NewsCorp./Telepiù*

⁶ For an early example of the distinction between premium and non-premium content see *British Interactive Broadcasting/Open*, supra note 3. A more elaborate analysis is to be found in *NewsCorp./Telepiù*, supra note 4, paras. 38 et seq.

⁷ See Gérardin, “Access to Content by New Media Platforms: A Review of Competition Law Problems”, 30 *European Law Review* (2005), p. 68 et seq.

⁸ Case 262/81, *Coditel SA and others v Ciné-Vog Films SA and others* [1982] ECR 3381.

⁹ *Ibid.*, para. 16.

¹⁰ Wachtmeister, “Broadcasting of sports events and Competition law”, 2 *Competition Policy Newsletter* (1998), p. 23.

¹¹ On this last issue, see Petit, “The Commission’s Contribution to the Emergence of 3G Mobile Communications – Analysis of Some Decisions in the Field of Competition law”, 25 *European Competition Law Review* (2004), p. 429.

¹² Ungerer, “Switchover or Catch-up? Applying the modernised EC Competition Regime in the New Media Sectors”, *Speech delivered before The Law Society’s European Group*, 5 April 2005.

merger.¹³ In other cases, exclusive rights are maintained, but are at the same time substantially limited in their scope (for instance, limited to a part of an event) as was the case in the recent *Bundesliga* and *Premier League* cases.¹⁴ As far as 3G platforms are concerned, the Commission, in a Sector Inquiry recently launched,¹⁵ has not excluded going further this way, and is even considering banning exclusive licences altogether.¹⁶

The present paper seeks to ascertain whether the Commission “regulatory approach” towards the exclusive sale of premium content is a sound one, in particular in view of the constant technological evolution outlined above. The assumptions underlying landmark Commission decisions will be compared with recent developments of the media sector in Italy. In the *NewsCorp./Telepiù* case, decided in 2003, the Commission imposed very strict conditions to allow the merger giving birth to Sky Italia, on the assumption that the operation created a lasting near-monopsony in the different upstream markets for the acquisition of premium content identified by the institution. In June 2006 (thus, only three years later), the Italian NCA intervened against the media conglomerate Mediaset (which controls, *inter alia*, the main three private free-to-air channels in Italy) for an alleged abuse of dominant position.¹⁷ In fact, and contrary to the forecasts made by the Commission, Mediaset was in a position to acquire the broadcasting rights of the main Italian football teams, thereby excluding the incumbent (and near-monopolist) pay-TV operator, Sky Italia. This may go to show that the reality of the sector is more complex and evolves faster than one may infer from the Commission practice, thus putting into question its stance regarding exclusivity. The experience of the evolution of the Italian media sector will be used as the starting point for the evaluation of alternative regulatory options.

2. Overview of the media sector in the European Union

There are three main production stages in the value chain of the media sector: (i) content provision by broadcasting right holders;¹⁸ (ii) content packaging, i.e. the bundling of content into different channels (this stage includes the wholesale

¹³ Commission Decision of 23 July 2003, *UEFA Champions League*, Case COMP/C.2-37.398, O.J. (2003) L 291/25.

¹⁴ Commission Decision of 19 January 2005, *Bundesliga*, Case COMP/C-2/37.214, O.J. (2005) L 134/46, and Case COMP/38.173, *Premier League*, commitments available at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38173/commitments.pdf>.

¹⁵ See the Issues Paper on the preliminary findings of the Sector Inquiry into New Media (3G), Brussels, May 2005 and the Concluding Report on the Sector Inquiry into the provision of sports content over third generation mobile networks, Brussels 21 September 2005.

¹⁶ See the Concluding Report on the Sector Inquiry, *supra* note 15, para. 54: “[...] the European Commission [...] will monitor the development of 3G markets and will advocate the application of appropriate remedies where exclusive access to premium content could give rise to anti-competitive effects”.

¹⁷ See Autorità Garante della Concorrenza e del Mercato, decision of 28 June 2006, *Italian Football Rights*, Case A 362, available at http://www.agcm.it/agcm_ita/DSAP/DSAP_287.NSF/218c8abc30b4e077c1256a470060e61b/b64a8f4bbf6fb16bc1256fe1003b3dbf?OpenDocument (in Italian). See also the Autorità Garante della Concorrenza e del Mercato, decision to open proceedings against Mediaset, decision of 22 March 2005, *Italian Football Rights*, Case A362, available at http://www.agcm.it/agcm_ita/DSAP/DSAP_287.NSF/218c8abc30b4e077c1256a470060e61b/0d228874833c5409c12571b0002a92e4?OpenDocument (in Italian).

¹⁸ Undertakings that are active at this level will be hereinafter referred to both as “right holders” and “content providers”.

provision of content to competitors); and (iii) the transmission of content through the platforms (DTH, cable, DTT). TV operators are most often active in the bundling of content and, at least, in its transmission. Vertical integration between stages (i) and (ii) is indeed relatively rare in Europe for pay-TV operators (at least regarding premium content) and more common in the case of free-to-air broadcasters (which in any case do not usually extend to the production of premium content). As a consequence, TV operators have to acquire premium content (which includes, as said above, Hollywood blockbusters and some sports events) from third parties.¹⁹ For the sake of simplicity, the first production stage will be hereinafter referred to as “the upstream level” and the third production stage will be referred to as “the downstream level”.

Premium content providers use different strategies to sell their rights. Whereas sports events only have premium value when they are broadcast live, Hollywood blockbusters have a much longer lifecycle.²⁰ After release in cinema theatres and in DVD format, they are first broadcast on pay-TV (first, in pay-per-view format, then on video-on-demand and near-video-on demand and then on the first and second window film channels). Eventually, the film is broadcast on free-to-air TV.²¹ Under such circumstances, the broadcasting of Hollywood blockbusters is shared between free-to-air and pay-TV operators. As will be shown in detail below, broadcasting of premium sports events is progressively “migrating” towards pay-TV.²²

As a result of this “migration” phenomenon, risks of foreclosure and other similar competition law issues currently concern almost exclusively pay-TV operators. Market characteristics in the different Member States very much differ. A brief overview of the reality of the pay-TV segment in the different Member States (degree of consolidation, development of the different platforms) will show the different approaches to exclusivity in these markets. A comprehensive review of the status of exclusive licences also requires, however, an outlook of the conditions under which popular sports content is marketed.

2.1 Structure of the pay-TV segment in the different Member States

¹⁹ There are however some exceptions. The two main pay-TV services providers in Europe, Canal Satellite and NewsCorp. are active in the production of film content (for instance, NewsCorp. controls the 20th Century Fox Studios). Moreover, there have been some attempts by BSkyB (the British pay-TV subsidiary of NewsCorp.) to vertically integrate with sports organisations. Its attempt to acquire a stake in the Manchester United has been widely commented, see for instance Harbord and Binmore, “Toeholds, Takeovers and Football”, 21 *European Competition Law Review* (2000), p. 142.

²⁰ Robertson, “The Application of European Competition Law to Sports Broadcasting”, 25 *World Competition* (2002), p. 423.

²¹ *NewsCorp./Telepiù*, supra note 4, para.

²² Several reasons may explain the “migration phenomenon”. It can be presumed that pay-TV operators value more premium content, as it is the main reason that may justify subscription by consumers to pay-TV services. Secondly, it must be borne in mind that pay-TV operators may extract higher value for the content, considering that they are able to broadcast several games simultaneously in pay-per-view format. For an overview of this phenomenon, see S. Szymanski, “Why have premium sports rights migrated to pay TV in Europe but not in the US?”, *The Business School – Imperial College London* (2003).

Increased efforts take place at Community level to push towards the integration of broadcasting activities.²³ However, the different markets related to the media sector are still national in scope, due mainly to the fact that licences and authorisations are still granted at national level. This situation mirrors the reality encountered in the telecommunications sector, where effective market integration is far from being achieved.²⁴ As a result, each national market shows distinctive features and a different stage of evolution.

The most mature market is the British one, where the dominant undertaking is BSkyB, a DTH operator. Cut-throat competition between the early operators, BSB and Sky, eventually led to the creation of a temporary near-monopoly in the pay-TV segment, a merger which took place as long ago as 1990.²⁵ The merged entity, known as BSkyB, has since then been able to recover financially and is currently a stable and profitable undertaking, with a very large subscriber base.²⁶ Several cable operators, which entered the market short thereafter and have rolled out well-developed networks, are also active in the provision of pay-TV services to consumers. At the upstream level, however, BSkyB has so far been the only undertaking active in the acquisition of premium content (which is obviously acquired on an exclusive basis).²⁷ Thus, cable operators, which also provide telecommunications services since the early 1990s, purchase premium content (both sports and cinema) at wholesale level from BSkyB. The latter charges them a per-subscriber fee for the content.²⁸ Some authors point out that BSkyB engaged in this behaviour following “induced regulation” from the British NCA aiming to ensure access by competitors to premium content.²⁹ Under the current system, right holders can protect the value of exclusivity and BSkyB is able to keep its monopoly profits at the downstream level.³⁰ As will be shown below, however, heavy intervention by the Commission is progressively changing the landscape.

²³ Directive 89/552/EEC of the Council 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. (1989) L 298/23 as modified by Directive 97/36/EC of the European Parliament and the Council, 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. (1997) L 202/60.

²⁴ On the partitioning of markets in the telecommunications sector, see Larouche, “What went wrong: the European perspective”, TILEC Discussion Paper 2003-001, available at <http://www.tilburguniversity.nl/tilec/publications/discussionpapers/2003-001.pdf>. Some authors, as well as the Commission, point out to cultural and linguistic diversities among Member States to explain the partitioning of markets in the media sector. See Gérardin, supra note 7, and Commission Decision of 10 May 2000, *Eurovision II*, Case IV/32.150, O.J. (2000) L 151/18, at paras. 46-49.

²⁵ An overview of the process leading to the creation of a monopoly in the provision of DTH services in the UK can be found in Williams, “Sky Wars: The OFT review of the Pay-TV”, 18 *European Competition Law Review* (1997), p. 214.

²⁶ BSkyB now boasts more than 8 million subscribers to pay-TV services. Recent financial information can be found at http://library.corporate-ir.net/library/10/104/104016/items/166570/PR_280706.pdf.

²⁷ See Armstrong, “Competition in the Pay-TV Market”, 13 *Journal of the Japanese and International Economies* (1999), p. 259 et seq.

²⁸ The conditions under which BSkyB supplies premium content to its downstream competitors have been constantly under review by the British NCA, see Office of Fair Trading, Decision of 17 December 2002, *BSkyB Investigation*, Case CA98/20/2002.

²⁹ Nicita, Galbiati and Nici, “Regulation and Competition in Media Markets: the Evolution of Pay-TV in UK, Australia and Italy”, *American Law & Economics Association Annual Meetings* (2004), p. 7.

³⁰ Harbord and Ottaviani, “Anti-Competitive Contracts in the UK Pay-TV Market”, 23 *European Competition Law Review* (2002), p. 122 et seq.

In some other Member States, such as Italy and Spain, the consolidation of the pay-TV segment took place much more recently (2003 and 2002). In the Spanish market, the pre-merger scenario showed two DTH pay-TV operators, Canal Satélite Digital and Vía Digital, which accounted roughly for 80% of pay-TV subscriptions, and incipient competition coming from regional cable operators, which accounted for 16.6% of subscriptions.³¹ Most problems related to access to premium content by cable operators were solved before the approval of the merger. Prior to the operation Canal Satélite Digital and Vía Digital already cooperated (together with the Catalan public broadcaster) in the acquisition of sports broadcasting rights (on an exclusive basis) through a joint venture company called Audiovisual Sport. As the Commission expressed serious concerns about this cooperation agreement, the parties agreed to sub-license to cable operators the content acquired through Audiovisual Sport on a fair, reasonable and non-discriminatory basis.³² This condition was extended after the approval of the merger. As regards Hollywood blockbusters, the parties agreed to waive exclusive rights for the broadcasting in pay-per-view format (at the time of the merger pay-per-view rights were not sold on an exclusive basis) and to sub-license a premium channel as a condition for the approval of the merger. Thus, the current reality in the Spanish pay-TV segment is not very different from the one that exists in the UK since the early 1990s.

In the *NewsCorp./Telepiù* case, the Commission went beyond the imposition of sub-licensing obligations upon the merged entity. If in Spain cable companies constituted a growing competition constraint on DTH pay-TV operators at the time of the merger (as their market share was rapidly growing and they provided also telecommunications services), the cable sector was almost non-existent in 2003 and the rolling out of cable networks showed some delay.³³ What is more, the perspectives for development of DTT pay-TV services seemed unclear after the abovementioned failure of such ventures in other Member States.³⁴ As a consequence, the Commission, besides the sub-licensing obligations that were imposed on the merging parties (which were, again, similar to the existing conditions in the UK), it waived exclusivity for transmission through platforms other than DTH.³⁵ New entrants on the market operating through cable and DTT gained the possibility of negotiating contracts directly with content providers.

Following the remedies imposed in *NewsCorp./Telepiù*, the media conglomerate Mediaset, owner of the main private free-to-air channels in Italy, decided to provide pay-per-view services through its own DTT platform. The product offered was however different from traditional pay-TV services. Instead of proposing a typical pay-TV offer, based on monthly subscription fees, Mediaset proposes an enhanced offer of free channels and a selection of premium channels. The main feature of this system comes from the fact that consumers only pay for what they actually want to

³¹ *Sogecable/Canal Satélite Digital/Vía Digital*, supra note 4, at section 6.1.2.

³² “Commission closes its probe of Audiovisual Sport after Sogecable/Vía Digital merger”, IP/03/655, Brussels, 8 May 2003.

³³ The only cable operator in Italy, e.Biscom, provided at the time of the merger pay-TV services to less than 20,000 subscribers. See *NewsCorp./Telepiù*, supra note 4, at paras. 101-104.

³⁴ *Ibid.*, at paras. 105-110. The Commission focused on technical uncertainties as well as on the inherent limitations of the DTT technology, which is often seen as inferior to DTH in terms of capacity and reliability.

³⁵ *Ibid.* at para. 225.

see. As for cable operators, its subscriber base in Italy is still very low³⁶ and in any case its premium content offer is sub-licensed by Sky Italia.

2.2 Dealing with content providers

As can be seen from the examples outlined above, when broadcasting rights for premium content are sold on an exclusive basis, national markets tend to monopsony at the upstream level, that of the acquisition of premium content. In all the three examples, intra-platform competition between DTH pay-TV operators is progressively replaced by inter-platform competition between cable and DTH, with DTH being a vertically integrated undertaking providing premium content at wholesale level to its downstream competitors. Until recently, France was the only Member State where there were still two vertically-integrated DTH operators, Canal Satellite and TPS, on the market. The French Minister for Economic Affairs has recently adopted a decision clearing the merger between the two operators, which followed the Opinion delivered by the French NCA.³⁷ The tendency towards such a market structure is explained by most authors by reference to the existence of strong networks effects.³⁸

As a response to this situation, the Commission has recently intervened in the German and British markets to broaden access to broadcasting rights of national football championships. Similar interventions took place in 2003 against the UEFA to broaden access to the Champions League competition. According to these recent decisions, acquisition of premium content at the upstream level by right holders can be divided into different markets, depending on product characteristics and the value attached to these by TV operators. More precisely, the Commission has made clear, at least since the *UEFA Champions League* decision, that there is a separate market “for the acquisition of TV broadcasting rights of football events played regularly throughout every year”.³⁹ This encompasses national football Championships as well as top European Championships. As far as other sports events of mass appeal (such as the Football World Cup or the Olympic Games) are concerned, the Commission took the view in *Eurovision II* that “there is a strong likelihood that there are separate markets for the acquisition of some major sporting events, most of them international”.⁴⁰

Since the *UEFA Champions League* decision the Commission has put in practice its new strategy. Even though the obvious aim of any such interventions is to protect the market structure at the downstream level, the Commission relies on the fact that joint selling arrangements by national sports organisations (i.e. the UEFA and national

³⁶ Autorità Garante della Concorrenza e del Mercato, Indagine conoscitiva sul settore televisivo: la raccolta pubblicitaria (IC 23), at p. 100 et seq., available in Italian at [http://www.agcm.it/agcm_ita/DSAP/DSAP_IC.NSF/bcf0799f25d242c6c12564ac004bf2a5/c481bad225c6a24ac1256f58003be066/\\$FILE/IC23.pdf](http://www.agcm.it/agcm_ita/DSAP/DSAP_IC.NSF/bcf0799f25d242c6c12564ac004bf2a5/c481bad225c6a24ac1256f58003be066/$FILE/IC23.pdf).

³⁷ See the Decision by the Minister for Economic Affairs, BOCCRF, n° 7 bis of 15 September 2006, available at http://www.finances.gouv.fr/DGCCRF/boccrf/06_07bis/page3.pdf (in French), and Conseil de la Concurrence, Avis du 13 juillet 2006 relatif à l’acquisition des sociétés TPS et CanalSatellite par Vivendi Universal et Groupe Canal Plus, Case 06-A-13, available at <http://www.conseil-concurrence.fr/pdf/avis/06a13.pdf> (in French).

³⁸ See for instance Nicita and Ramello, “Exclusivity and Antitrust in Media Markets: The Case of Pay-TV in Europe”, 12 *International Journal of the Economics of Business* (2005), p. 375.

³⁹ *UEFA Champions League*, supra note 13, paras. 57 et seq.

⁴⁰ *Eurovision II*, supra note 24, para. 43.

associations such as the Football Association Premier League in the UK) of the broadcasting rights of all football clubs involved in the championship entail a restriction of competition within the meaning of Article 81(1) EC. Indeed, in countries like France, Germany and the UK, football organisations negotiate broadcasting rights on behalf of football clubs.

As a remedy to these joint selling arrangements, the Commission has imposed the division of the event into several packages to be acquired by different operators.⁴¹ A similar response was put in practice in France by the Conseil de la Concurrence in 2002.⁴² In all these cases, the remedy has not proved to be particularly effective. In France, Canal Satellite has acquired in 2002 and 2004 the whole of the packages offered by the Ligue de Football Professionnel.⁴³ In the British case, BSkyB purchased all the packages offered by the Football Association Premier League (hereinafter, “FAPL”) in 2003.⁴⁴ As a result, the last commitments accepted by the FAPL explicitly provide that no single bidder is allowed to purchase all packages on offer.⁴⁵ The outcome of the auction organised by the FAPL in May 2006 under these rules will be commented below.

The use of this remedy cannot be used as a response to market foreclosure in Italy and Spain, as broadcasting rights are exploited individually by football clubs in these two countries. However, individually marketed rights end up, as much as in those countries where joint selling is practised, being purchased by a single pay-TV operator. As a result, the Commission was obliged to try different responses in those markets. As already mentioned above, the Commission was satisfied in the *Audiovisual Sport* case with the resale of the rights at wholesale level by the main Spanish pay-TV operators, a solution that was paradoxically not perceived as being fully satisfactory for the British market. As far as the Italian market is concerned, recent developments, which will be commented in detail below, may go to show that the sale of broadcasting rights of premium content may be closer than thought to a true “bidding market”.

3. Forecasts and reality in the Italian media sector

⁴¹ See for instance paras. 27 and 28 of the *Bundesliga* decision, supra note 14:

“27. *The league rights are offered in several packages in a transparent, non-discriminatory procedure. The duration of the agreements concluded with both the agents and the sublicense holders will not exceed three seasons.*

28. *Live broadcasts of the Bundesliga and the 2. Bundesliga are offered by the League in particular in two packages, both for free TV and for pay TV programme suppliers. A third package entitles the acquirer of the live broadcast to at least two Bundesliga matches and to deferred highlight first coverage on free TV. A fourth package covers live games of the 2. Bundesliga and the rights to deferred highlight first coverage on free TV. Second and third exploitation rights are offered in a fifth package. Packages 3 to 5 can each be sold to several exploiters”.*

⁴² Conseil de la Concurrence, decision of 23 January 2003, *Interim Measures requested by TPS*, Case 03-MC-01.

⁴³ “Canal + raffle tout”, *L'Equipe*, 10 December 2004.

⁴⁴ Harbord and Szymanski, “Football Trials”, 25 *European Competition Law Review* (2004), p. 119.

⁴⁵ *Premier League*, supra note 14, section 3.3: “*The FAPL shall ensure, and shall specify in the Invitation to Tender in respect of the Live Audio-Visual Packages, that no single Bidder (including a Bidder acting on its own for some Live Audio-Visual Packages and as part of a Consortium or Consortia for each of the others) shall be awarded all of the Live Audio-Visual Packages exclusively by the FAPL*”.

3.1 Forecasts made by the Commission in *NewsCorp./Telepiù*: a lasting near-monopsony

3.1.1 Pay-TV and free-to-air TV, two separate markets

The analysis undertaken by the Commission in *NewsCorp./Telepiù* followed its traditional assumptions. As regards broadcasting activities, the Commission held that pay-TV and free-to-air TV operators are in two different product markets. Thus, in spite of the “undeniable interaction between the two markets” acknowledged in the decision, the institution took account of the difference in the financing of the activities (subscription fees vs. advertising), the difference in the content provided (premium content was almost exclusively broadcast at the time of the merger on pay-TV). According to this market definition, the merger gave rise to a near-monopoly in the Italian pay-TV market.⁴⁶

3.1.2 Analysis of the upstream markets

At the upstream level (acquisition of premium content), the Commission identified two main “premium markets”: (i) acquisition of broadcasting rights on premium films; (ii) acquisition of TV broadcasting rights of football events played regularly throughout every year. Regarding both markets, the Commission considered that the operation gave rise to a near-monopsony. Against this market definition, NewsCorp. claimed that both markets for the acquisition of premium content were “bidding markets”, where both pay-TV and free-to-air operators compete “for” the market and not “in” it.⁴⁷ Regarding the first of these markets (premium cinema), the Commission based its analysis on the fact that broadcasting rights on Hollywood blockbusters up to the “second window rights” are tailor-made products that are specifically conceived for being broadcast on pay-TV.⁴⁸

The market for the acquisition of regular football events encompasses, in the case of Italy, the Serie A Championship, the Coppa Italia (both national championships) as well as the UEFA Cup and the Champions League (organised at European level). This market does not concern a product available only to pay-TV operators, as a consequence of which free-to-air operators would not be prevented, in principle, from entering the market. Moreover, broadcasting rights in Italy are sold individually by each football club, a measure which, in theory, should reduce the risks of downstream foreclosure. However, the Commission concluded that the merger gave rise, again, to a near-monopsony on that market and that there was not sufficient competitive pressure coming from free-to-air operators or from potential entrants on the alleged pay-TV market. The reasoning is worth being recalled. First of all, the Commission claimed that football clubs are reluctant to sell their broadcasting rights to free-to-air operators as such conduct might diminish attendance to stadiums. Secondly, the possibility to broadcast several games simultaneously, which was only open to pay-TV operators at the time of the merger, was also taken into consideration by the Commission. The institution however conceded that free-to-air operators were indeed active in this acquisition market, regarding in particular Coppa Italia, UEFA Cup and

⁴⁶ *NewsCorp./Telepiù*, supra note 4, paras. 99-114.

⁴⁷ Ibid. para. 174.

⁴⁸ Ibid. para. 176. See also a more developed reasoning at paras. 150-156.

Champions League games.⁴⁹ As for the chances of new pay-TV operators to successfully enter this market, the Commission excluded such possibility, taking into account the duration of the exclusive contracts concluded between the merging parties and premium content providers as well as the financial risk involved.⁵⁰

In the light of these concerns, NewsCorp. accepted remedies of a double nature. On the one hand, it accepted strict limits on the duration of the exclusive agreements related to premium content: for future exclusive agreements, the maximum duration of contracts concerning the acquisition of football broadcasting rights was limited to a maximum of two years. Moreover, exclusivity only concerned transmission through DTH platforms. As can be seen, NewsCorp. agreed to remove exclusive rights, not just to limit their scope or length. On the other hand, it accepted sub-licensing obligations on similar terms as those existent in the UK, as already mentioned above. According to the Commission, the logic underlying the imposition of a double remedy was to “*lower barriers to entry in the pay-TV market by allowing non-DTH pay-TV operators to access premium contents which would otherwise be too costly for them to purchase directly*”.⁵¹ The commitments were accepted until 31 December 2011.

3.1.3 A more convincing reasoning? The Spanish NCA in the *Sogecable/Canal Satélite Digital/Vía Digital* merger

In this regard, it is interesting to note that the Spanish NCA, in the *Sogecable/Canal Satélite Digital/Vía Digital* merger, followed a much more nuanced reasoning. Indeed, it did not follow the Commission argument whereby football clubs are reluctant to market broadcasting rights to free-to-air operators. This is probably due to the fact that Spanish free-to-air broadcasters have always been very active in the acquisition of sports content⁵² and broadcast weekly some games of the national championship and the European Championships (regional public service broadcasters offer at least one game per week of the Spanish Liga). Regarding in particular the acquisition of the broadcasting rights for the UEFA Cup and the Champions League, the Spanish NCA even pointed out that the effects of the merger were insignificant, as the parties to the operation faced strong competition from free-to-air broadcasters. Accordingly, the Spanish NCA focused on the risks of foreclosure deriving from the length of the agreements and the pre-emption rights enjoyed by the merging parties in some of the contracts concluded. Furthermore, the Authority was sufficiently satisfied with the sub-licensing scheme put in practice by the parties following the intervention of the Commission in the *Audiovisual Sport* case.⁵³

3.2 The *Italian Football Rights* case: saving the monopsony three years later

The prospects made by the Commission regarding the development of alternative pay-TV networks faced an important test with the arrival on the pay-TV segment of

⁴⁹ Ibid. footnote 65.

⁵⁰ Ibid. para. 196: “*The financial risk for a new entrant to subscribe contracts with football clubs would be much higher than for the combined platform*”.

⁵¹ Ibid., para. 246.

⁵² In this regard, the Spanish NCA referred to the “football war” that took place in 1996 between Canal Satélite Digital, the incumbent pay-TV operator and Antena 3, a private free-to-air broadcaster, for the acquisition of football broadcasting rights, see *Sogecable/Canal Satélite Digital/Vía Digital*, supra note 4, section 6.2.1.3.

⁵³ See supra.

Mediaset, which provides DTT-based pay-TV services. The Italian government made important efforts for the introduction of DTT in the country, subsidising the purchase of interactive set top boxes to end-consumers. In spite for the pessimism shown by the Commission in *NewsCorp./Telepiù*, there were some reasons to expect a warm welcome to DTT technology by consumers in this Member State. First of all, the main benefit of DTT is the substantial increase in the number of channels available free of charge, which was important for consumers in a country where cable infrastructures were clearly underdeveloped.⁵⁴ Secondly, penetration rates of pay-TV in Italy are relatively low, showing some reluctance of consumers in this country to subscribe to pay-TV services.⁵⁵

In May 2006, i.e. about two years after the introduction of the technology in the country, 4 million Italian households had already installed interactive set top boxes, which may be seen as a record figure, considering that Sky Italia boasted at the time as little as 3 million subscribers after 10 years of presence in that Member State.⁵⁶ As seen above, Mediaset provides content through this new platform with a hybrid product: on the one hand an enhanced offer of free channels and on the other hand an important premium content offer (involving no subscription fees), with football games available at a price of € 5 and films at € 2-4.⁵⁷ Under the conditions of the NewsCorp./Telepiù merger, this new product (similar to the provision of mobile telephony services with pre-paid cards) showed a great potential for development.

Following the conditions imposed in the *NewsCorp./Telepiù* merger, Mediaset was in a position to negotiate during the Summer of 2004 the acquisition of broadcasting rights for DTT transmission with top Italian football clubs, including Milan, Inter and Juventus, for seasons 2004-2005 until 2006-2007. In another set of agreements, Mediaset acquired pre-emption rights for the acquisition of exclusive broadcasting rights (for transmission via all platforms, including DTH) that extended the contractual relationship until 2016. As a consequence, Sky Italia was excluded from the acquisition of the said broadcasting rights from season 2007-2008 onwards (and for an extremely long period of time).

The NCA opened proceedings in March 2005 against Mediaset for an alleged abuse of dominant position.⁵⁸ It is worth mentioning that the proceedings opened by the Italian NCA against Mediaset present a particular feature, as they were based on Article 82 EC, a possibility that had not been explored so far by the Commission in this context.⁵⁹ The choice made by the NCA required a finding of dominance, a

⁵⁴ In countries like Belgium or the Netherlands, with well-developed cable networks, the benefits for consumers deriving from the introduction of DTT are less obvious, as the free offer through cable networks is very important, see Poel, supra note 2, p. 272.

⁵⁵ See *Indagine Conoscitiva*, supra note 36, p. 126. Another country where penetration rates of pay-TV services is low is Germany, a circumstance which is often explained by the important offer of free channels through cable networks and by the high prices consumers must support to finance public service broadcasting.

⁵⁶ Recent information on the evolution of the DTT sector in Italy can be found at http://www.dgtvi.it/stat/Allegati/Rapporto_GFK_Maggio_2006.pdf.

⁵⁷ Information on the services offered by Mediaset Premium can be checked at www.mediasetpremium.it.

⁵⁸ See Autorità Garante della Concorrenza e del Mercato, decision to open proceedings, supra note 17.

⁵⁹ As an example at national level, the French NCA adopted interim measures against the Ligue de Football Professionnelle and Canal Satellite for an alleged abuse of dominant position by both undertakings, see *Interim Measures requested by TPS*, supra note 42.

difficult task in auction markets. Interestingly, the NCA started its analysis by considering that pay-TV and free-to-air TV operators may belong to the same relevant downstream market, contrary to constant Commission practice. First of all, the NCA held that all TV operators seek audience, and thus their acts necessarily have an influence on other TV operators. Secondly, it was pointed out that the possibility for free-to-air operators to offer pay-per-view services acts as an actual/potential constraint on pay-TV companies.⁶⁰

According to the NCA, the relevant market in that case was not that of the acquisition of premium content (or football rights), but that of the sale of advertising slots for TV. On that market, Mediaset's advertising revenue accounted for 64.7% of the total sector, well above the public broadcaster (28.5%) and Sky Italia (2%). Even though the position of Mediaset on the said market may be uncontested, it seems difficult to understand the extent to which its dominance on that market has an influence on the upstream markets for the acquisition of premium content.⁶¹ The NCA decision provided little guidance in this regard. The decision stressed the importance of football for attracting audiences (and thus advertisers) and warned about the risks of foreclosure deriving from the “*notably long*” contracts concluded by Mediaset, without mentioning the links between dominance and abuse.

After such an enigmatic decision, proceedings were closed on 28 June 2006 following commitments made by Mediaset. In a long decision, the NCA confirmed the breach of Article 82 EC by Mediaset. The TV operator basically agreed to reduce the length of future contracts to three years (in accordance with constant Commission practice) from 2007 onwards. As regards exclusivity in future contracts, the NCA applies a similar remedy than the one applied by the Commission in *NewsCorp./Telepiù*. If broadcasting rights would be sold by football clubs in the future on a non-exclusive basis, Mediaset agreed not to acquire exclusive rights for broadcasting through platforms other than DTT. If, on the contrary, football clubs would sell their rights on an exclusive basis in future contracts, Mediaset agreed to sub-license the broadcasting rights to third parties operating through platforms other than DTT on a fair, transparent and non-discriminatory basis.

3.3 The government approach: the removal of exclusive rights for football events

The *Italian Football Rights* decision showed the risks faced by pay-TV operators if excluded from the acquisition of broadcasting rights of national football championships. Following the decision, the government intervened to propose a lasting regulatory framework to ensure access to content on a non-exclusive basis by all players on the market. The draft legislation⁶² presented by the government proposes, first of all, to move back to a joint selling regime and, secondly, perpetuates the temporary remedy accepted by the merging parties in *NewsCorp./Telepiù*.

⁶⁰ See Italian NCA, decision to open proceedings, *supra* note 17, para. 14.

⁶¹ It must not be forgotten that Sky, which performed a symbolic 2% on the market defined by the Italian NCA, was held to be a near-monopsony in the upstream market by the Commission in *NewsCorp./Telepiù*.

⁶² “Calcio, via libera ai diritti tv collettivi”, *Yahoo Finanza*, 26 July 2006 available at <http://it.biz.yahoo.com/060721/246/3vpa3.html>.

According to the proposal, the association in charge of the organisation of the Serie A championship would be responsible, from July 2007 onwards, for the joint selling of the rights to the different pay-TV operators. A different auction would take place for each platform. Moreover, a pay-TV operator would only be allowed to acquire broadcasting rights for those platforms where it operates at the time of the auction.

4. Some reflections on the implications of the *Italian Football Rights* case on the Commission practice

The new and potentially very successful product introduced by Mediaset allowed it to take the financial risks of acquiring broadcasting rights of the most successful Italian football clubs for transmission via all platforms (which excluded Sky Italia), a possibility that was ruled out by the Commission in *NewsCorp./Telepiù*. The relative surprise of the move made by Mediaset may have some relevant implications on present and future Commission practice, and more precisely:

- Market definition in the media sector, an issue where the Commission is often accused of being inconsistent and of proposing too narrow definitions.
- Market power. As shown in *Italian Football Rights*, incumbent pay-TV operators may not be able to face better offers from new entrants on the pay-TV segment, in particular well-established free-to-air broadcasters and, increasingly, incumbent telecommunications operators. Accordingly, market power in an alleged market for the provision of pay-TV services does not necessarily put pay-TV operators at an advantageous position at the upstream level.
- Treatment of exclusivity. The application of Articles 81 and 82 EC as tools of *ex ante* regulation reveals some incoherence in the Commission approach. Other regulatory approaches than those favoured by the Commission, such as the one proposed by the Italian government, may be envisaged.
- 3G Sector Inquiry and, more generally, new media.

4.1 Implications on market definition

4.1.1 Definition of upstream markets

As regards, market definition at the upstream level, both *NewsCorp./Telepiù* and *Italian Football Rights* show some inconsistencies. After the *UEFA Champions League* decision, it seems now clear that upstream markets are defined with regard to the substitutability of content from the broadcasters' (and not viewers') perspective.⁶³ Thus, the question is, according to the Commission, whether two or more TV programs serve broadcasters' needs equally well, that is to say, whether two TV programs can achieve "equally high audience numbers" or "provide a certain brand image".⁶⁴ Such a test may go to suggest that the market definition constantly proposed by the Commission is too narrow. For instance, the Commission suggested in that case that football achieves high audience ratings and is played throughout the year. If

⁶³ At some point, the Commission focused on consumers' preferences when defining upstream markets, as in *Eurovision II*, cited supra note 24. This inconsistency in the Commission practice has been identified by Subiotto and Graf, "Analysis of the Principles Applicable to the Review of Exclusive Licences", 26 *World Competition* (2003), p. 593.

⁶⁴ *UEFA Champions League*, supra note 13, paras. 57-58.

this reasoning was to be followed, it is difficult to see the extent to which football differs, from a broadcaster's standpoint, from successful American TV series or other premium content. Some authors have indeed pointed out that the Commission has never sufficiently justified the reason why it draws a distinction between the two premium categories it constantly identifies (blockbusters and football games).⁶⁵

However, even if the narrow definition proposed in *UEFA Champions League* were to be followed, it stems from the Commission practice that the institution does not draw the logical consequences that would derive from it. In particular, it is submitted that the Commission tends to treat each single sports event as a separate product market. In *NewsCorp./Telepiù*, for instance, the Commission held that Sky Italia would enjoy a near-monopsonistic position after the merger on the market for the acquisition of broadcasting rights for football events played regularly but conceded at the same time that free-to-air operators were already active on the broadcasting of at least three of these events: the Coppa Italia, the UEFA Cup and the Champions League.⁶⁶ In reality, pay-TV operators have excluded free-to-air broadcasters only from the main national championships (for instance, Italian Serie A, British Premier League or Spanish Liga). The conclusion that the *NewsCorp./Telepiù* operation gave rise to a near-monopsony would thus only hold true if such national championships were deemed to be separate product markets, a proposition that is rejected by the Commission itself.

A similar idea seems to be drawn from the *Italian Football Rights* decision, which lacks to define upstream markets but seems to treat the Serie A championship as a separate product market. In the decision to open proceedings, the Italian NCA pointed out that Mediaset concluded licensing agreements with football clubs that represented 70% of the revenue made within the whole Serie A.⁶⁷

Likewise, remedies chosen in the joint selling cases referred to above (*Premier League* and *Bundesliga*) would support the same conclusion. The division of the broadcasting rights for national championships into several packages seemingly suggests that there is no substitutability between such content and another one, thus contradicting the conclusions drawn in *UEFA Champions League*. Further clarification on this issue would be welcome.

4.1.2 Definition of downstream markets

The *Italian Football Rights* case may have an important impact on the definition of downstream markets, where the Commission systematically distinguishes between a pay-TV market, in which operators compete for subscribers, and a free-to-air market, in which operators compete for advertising revenue. The Mediaset DTT offer is indeed a hybrid one, presenting features of the two categories identified by the Commission. Had the *Italian Football Rights* case been dealt with by the

⁶⁵ See Subiotto and Graf, *supra* note 63, p. 592. In *UEFA Champions League*, the Commission based the existence of a separate market for the acquisition of football events played regularly every year on the fact that the UEFA Champions League is essential in building a branding strategy.

⁶⁶ See *supra*.

⁶⁷ Autorità Garante della Concorrenza e del Mercato, decision to open proceedings, *supra* note 17, para. 30: “[...] le squadre contrattualizzate da RTI rappresentano, infatti, più del 70% del ricavi complessivi della Serie A, nonché circa l’80% del totale di tifosi [...]”.

Commission, it would have undoubtedly been forced to shift its past approach.⁶⁸ It must not be forgotten that the Italian NCA, in the decision to open proceedings, started its reasoning by following the Commission practice but soon concluded that the strong interplay between pay-TV and free-TV justified a market definition that better reflected the reality of the sector.⁶⁹

There are some further reasons to reconsider the broad distinction between free-to-air TV and pay-TV chosen by the Commission. It must be recalled that, according to the Commission, the question whether a content serves the same purpose as another one from a broadcaster's standpoint strongly depends on viewers' preferences.⁷⁰ Accordingly, it is difficult to understand why, if at the upstream level content is deemed to constitute a separate product market, the TV operator holding exclusive rights over it is not deemed by the Commission to hold a dominant position at the downstream level. Again, there seems to be some contradiction between the pay-TV and free-to-air TV distinction at the downstream level and some of the remedies imposed in previous cases. For instance, in *Eurovision II*, a case concerning an agreement concluded by EBU members (mainly public service broadcasters) for the acquisition of major sports events (such as the Football World Cup and the Olympic Games), the Commission imposed sub-licensing obligations on the parties to the agreement, thus suggesting the existence of a dominant or monopolistic position also at the downstream level.⁷¹

4.2 Market power

The application of Article 82 EC to acquisition processes, explored by the Italian NCA in *Italian Football Rights* and ignored so far by the Commission, gives rise to several questions. First of all, the *Italian Football Rights* decision shows that the question whether content providers enjoy market power at the upstream level is largely ignored in the Commission practice. More importantly, the NCA left open the question whether dominant undertakings in downstream markets enjoy market power in the upstream markets.

4.2.1 Content providers and market power

It has already been submitted that the Commission tends to treat each football event taking place regularly as a separate product market. This seems at least to be a plausible explanation for the obligation imposed on content providers to sell their rights in several packages. It could also be argued that the said obligation is

⁶⁸ In *NewsCorp./Telepiù*, supra note 4, the Commission had already foreseen this situation and did not exclude revising this market definition in the future. See para. 39 of the decision: “*The current situation does not, however, exclude that the distinction between the two markets may not become increasingly blurred in the future, for reasons linked inter alia to the evolution of technology in general and the progress of digitisation in Italy. The future introduction of DTT in Italy will certainly bring about changes in the television landscape*”.

⁶⁹ See supra. There are however powerful reasons to consider that the market definition finally proposed by the Italian NCA is highly objectionable.

⁷⁰ *UEFA Champions League*, supra note 13, para. 57: “*Viewer preferences are decisive for all types of broadcasters in their content acquisition policy as they determine the value of programmes to broadcasters*”.

⁷¹ *Eurovision II*, supra note 24, annex I. Interestingly, the Commission supported, in paras. 41 et seq. of the decision a similar market definition to the one proposed in *NewsCorp./Telepiù*.

“mechanically” imposed as a regulatory choice regardless of the existence of market power. In the *UEFA Champions League* decision, the question of market power does not have an impact whatsoever in the assessment of the restrictive nature of the joint selling arrangement under Article 81(1) EC, nor in its assessment of the fulfilment of the conditions laid down in Article 81(3) EC.

In that case, the Commission focused its analysis under Article 81(1) EC on the fact that the joint selling arrangement set by the UEFA limited individual football clubs’ freedom to market their rights individually and thus amounted to price-fixing. As the arrangement entailed a supposed *per se* restriction, the Commission did not proceed to examine its effects on the relevant market.^{72 73} Under Article 81(3) EC, the decision took account of the fact that the UEFA joint selling arrangement involved important efficiencies. Moreover, the market share of the contents marketed by this organisation amounted to a mere 20% of the relevant market.⁷⁴ In these circumstances, there are strong reasons to believe that the joint selling arrangement deserved, at least, an exemption under Article 81(3) EC, without it being necessary to impose additional obligations (in particular, sale in several packages) that harmed the value of the content.⁷⁵

4.2.2 TV operators and market power

- Market power at the upstream level

The application of Article 82 CE against TV operators in auctions organised for the allocation of exclusive broadcasting rights requires a finding of dominance either at the upstream or the downstream level. The unconvincing analysis of the question undertaken by the Italian NCA in *Italian Football Rights* has nevertheless pointed at the crucial question, i.e. whether the existence of significant market power at the downstream level (provision of pay-TV services) allows such operators to abuse their market power in auctions organised for the allocation of broadcasting rights. The

⁷² Likewise, the institution takes the view in the Guidelines on horizontal cooperation agreements that “[joint selling] agreements that involve price fixing will always fall under Article 81(1) irrespective of the market power of the parties”, see the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, O.J. (2001) C 3/2, para. 148.

⁷³ The *per se* restrictive nature under Article 81(1) EC of the UEFA joint selling arrangement is in itself open to discussion, in particular in light of the most recent developments of EC law. First of all, the Commission decision is based on the idea that football clubs hold rights individually and decide to sell them jointly through the UEFA, which is doubtful if account is taken of the role taken by this association in the organisation of the event (there are some developments in the decision regarding the ownerships status of the broadcasting rights for sporting events in the different Member States, see paras. 118-124 of *UEFA Champions League*, supra note 13). Secondly, it could now convincingly be argued that the objectives of the UEFA joint selling arrangement are in line with the so-called specific nature of sport. It is now well established that competition between sports clubs differs from normal competition between undertakings, as a sporting competition “needs” competitors for the proper conduct of events. In this vein, the ECJ has accepted, in a recent case involving anti-doping rules (Case 519/04 P, *Meca Medina and Majcen v. Commission*, [2006] nyr.) that sporting rules having restrictive effects on competition may be justified if deemed proportionate to the objectives pursued and could accordingly escape Article 81(1) EC. The sharing of the revenues derived from joint selling of broadcasting rights may serve the same objectives as other measures such as salary caps.

⁷⁴ *UEFA Champions League*, supra note 13, para. 193. The Commission even acknowledged that the broadcasting rights at stake were just one possibility for media operators wishing to acquire content concerning football events

⁷⁵ See *infra*.

Commission approach to the question in *Premier League* and *UEFA Champions League* seems to be based on an affirmative answer to this question. For instance, it is worth reminding that in the final set of commitments adopted in *Premier League*, the FAPL agreed not to grant all packages to the same operator. Such a commitment is often explained by the fact that BSKyB, the dominant pay-TV operator in the UK, had been securing exclusive rights for the broadcasting of the Premier League championship since 1992.⁷⁶

However, the question seems to be less evident than what suggested by the Commission practice. In theory, incumbent pay-TV operators and new entrants are given the same opportunities in auction markets.⁷⁷ Moreover, new entrants may even be in a better financial position (through cross-subsidies from other activities) and thus offer a higher sum for the rights than incumbent pay-TV operators.

The possibility of applying Article 82 EC as a result of the links between the upstream and downstream markets was explored by the French NCA in 2003.⁷⁸ The facts behind the interim decision were mentioned above: as a response to the Commission concerns, the French NCA forced the sale of the rights for the French national football championship in several packages. Unsurprisingly, Canal Satellite, the dominant pay-TV operator, was able to outbid TPS and purchased the whole of the packages. TPS brought a complaint before the French NCA requesting for the adoption of interim measures. When defining the relevant markets, the Authority found that the Ligue de Football Professionnel was the dominant content provider in the market for the acquisition of football events played regularly every year. Then, it found that Canal Satellite was dominant in the downstream pay-TV market, but remained silent regarding the upstream market.

The way in which the French NCA linked dominance in the downstream market and abuses in the upstream market is less convincing. According to the Authority, it could not be excluded Canal Satellite's offer could be seen as a dominant undertaking's strategy to exclude its competitor. However, a closer look at the relevant facts in this case shows that both the alleged abuse and the effects of the abuse (exclusion of TPS from the allocation of broadcasting rights) took place on a market where the undertaking was not found to be dominant. This implies pushing the boundaries of Article 82 EC very far. Indeed, strong controversy arose in relation to the *Tetra Pak II* judgment, where the ECJ accepted for the first time that Article 82 EC may apply, in special circumstances, "*where conduct on a market distinct from the dominated market produces effects on that distinct market*".⁷⁹

⁷⁶ Geey and James, "The Premier League-European Commission Broadcasting Negotiations", 4 *Entertainment and Sports Law Journal* (2006), available at <http://go.warwick.ac.uk/eslj/issues/volume4/number1/geey>.

⁷⁷ Some prominent authors have put into question the idea that no market power exists in the so-called "bidding markets", see Klemperer, "Bidding Markets", *UK Competition Commission*, June 2005, available at www.ssrn.com.

⁷⁸ See reference supra note 42.

⁷⁹ Case C-333/94 P, *Tetra Pak v. Commission*, [1996] ECR I-5951. In *Tetra Pak II*, the ECJ accepted the application of Article 82 EC due to the existence of "*close associative links*" between the dominated market and the market where the behaviour took place as well as on the strong position (short to dominance) held by Tetra Pak on the latter market. In the media sector, it could also be argued that there are "close associative links" between the upstream and the downstream markets. However,

Another option for the Commission and NCAs would be to establish dominance at the upstream level instead of linking downstream dominance to the upstream behaviour. Klemperer considers that dominance by a previous bidder may exist in auction markets as a result of switching costs and lock-in effects.⁸⁰ It seems however that a finding of an abuse of dominance in the upstream market is a task that is, at least, as difficult and uncertain as transposing the *Tetra Pak II* case law to the context of broadcasting rights. An adequate *ex ante* design of the auction (dealing with conditions, length of exclusivity) that would mitigate upstream dominance could be seen as a better solution than the uncertain application of Article 82 EC.

In any case, *Italian Football Rights* provides now sufficient evidence that a dominant undertaking at the downstream level (and, according to the Commission, near-monopsonist at the upstream level) may very well be excluded from the upstream market by a new entrant in the media sector (or in the pay-TV segment, as was the case for Mediaset). The links between one stage of the value chain and the other seem to be more tenuous than assumed by the Commission. The evolution of the technological landscape will provide more and more examples of this same phenomenon, as telecommunications incumbents become interested in the provision of pay-TV services and technology evolves. In 2005, Belgacom, the Belgian telecommunications incumbent, acquired the exclusive broadcasting rights of the local football championship for a three-year period over BeTV, the leading pay-TV provider in the French-speaking part of the country, and Telenet, a cable operator active in the Dutch-speaking part.⁸¹ The Belgian NCA dismissed an action brought by competitors of Belgacom and considered that the allocation of the whole of the packages to Belgacom was done in accordance with current Commission practice.

As for the application of Article 81 EC to joint purchasing arrangements, the Commission practice disregards the issue of market power as much as in relation to joint selling agreements. The *Eurovision II* case provides for a prominent example in this respect. The Commission took the view that EBU members were facing increasingly strong competition at the upstream level from strong media groups such as Kirch as well as from other actors, such as international brokers.⁸² However, when analysing the restrictive effects on competition under Article 81(1) EC, the Commission followed an “old-fashioned” reasoning, focusing on the limitation of the parties’ freedom of action, without taking into consideration the presence of other European-wide bidders or the countervailing power coming from strong sports organisations such as the FIFA or the IOC.⁸³ This position seems to go against the *Gøttrup-Klim* case, in which the ECJ required to take account of these two factors before concluding that an agreement entails a restriction of competition within the

the specificity of the facts in *Tetra Pak II* as well as the criticism that followed such a unique solution calls for a prudent stance in this regard.

⁸⁰ Klemperer, *supra* note 77.

⁸¹ Conseil de la Concurrence, decision of 29 July 2005, Belgacom, Case 2005-I/O-40, 3 *Conseil de la Concurrence – Revue Trimestrielle de Jurisprudence* (2005), p. 27.

⁸² *Eurovision II*, *supra* note 24, para. 50-58.

⁸³ *Ibid.*, paras. 72-75. The Eurovision system gave rise to some concerns that were not mentioned by the Commission, such as the financing of public broadcasters and Article 3 of Directive 97/36 (reference *supra* note 23, which allowed Member States to impose that some events of major importance to society are broadcast by free-to-air operators.

meaning of Article 81(1) EC.⁸⁴ The criticism against the Commission approach in *Eurovision II* does not go to say that Article 81 EC could never apply to joint purchasing arrangements. The application of Article 81(1) EC could be envisaged if, for instance, the two bidders in an auction agree to present a common offer. The *Audiovisual Sport* decision (referred to above), in which the two main pay-TV operators (with one of them participated by the Spanish incumbent telecommunications operator) created a joint venture for the acquisition of premium sports content may be seen as an example in this regard.

In view of the above, it seems that the application of Articles 81 and 82 EC against TV operators in the context of the acquisition of broadcasting rights is not an easy task. This would explain why the Commission has so far disregarded the issue of market power in this context and has avoided the application of Article 82 EC. Undesirable outcomes, as in *Eurovision II*, call however for a more refined analysis of the question. Following the *Italian Football Rights* case, it seems that giving fair and equal chances to all bidders and organising auctions on a fairly regular basis would be satisfactory remedies. These were the two very concerns of the Commission in the first set of cases regarding broadcasting rights that were brought to its attention.⁸⁵

- Market power at the downstream level

The Commission has been repeatedly supporting the idea that the survival of pay-TV operators depends on the availability of premium content. Moreover, the remedies imposed in many cases by the Commission on TV operators, consisting on an obligation to sub-license premium content to competitors (as in *NewsCorp./Telepiù* and *Eurovision II*) seem to support the idea that some sports events (at the very least national football championships), are treated as “essential facilities”, even though this expression is obviously not used in the decisions. In this regard, the French NCA, in the interim measures decision mentioned above, was more explicit and considered that, by granting the rights exclusively to Canal Satellite, it could not be excluded that the Ligue de Football Professionnel deprived TPS of “*an essential element for its development and its survival*”.⁸⁶ The intervention of the Italian government to regulate access to broadcasting rights of national football events would support this same idea.

The “veiled” application of the refusal to supply line of case law against TV operators having acquired premium content in the upstream market has become more evident following the *Italian Football Rights* decision. Even though sub-licensing obligations were imposed on TV operators as a remedy in the past, these cases, unlike *Italian Football Rights*, were linked to joint purchasing agreements (as in *Eurovision II* and *Audiovisual Sport*) or to mergers (as in *Sogecable/Canal Satélite Digital/Vía Digital* and *NewsCorp./Telepiù*) and not to an Article 82 EC one. The most interesting feature of the remedy imposed by the Italian NCA on Mediaset, a new entrant in the upstream market, comes from the fact that it replicates the one imposed by the Commission to an alleged near-monopolist in the *NewsCorp./Telepiù* case.

⁸⁴ Case C-250/92, *Gøttrup-Klim e.a. Grovwareforeninger v. Dansk Landbrugs Grovareselskab AmbA*, [1994] ECR I-5641, paras. 34-35.

⁸⁵ The requirement that the procedures are conducted on fair terms has been included in some Commission decisions. See Subiotto and Graf, *supra* note 63, p. 600-601.

⁸⁶ See *Interim Measures requested by TPS*, *supra* note 42, para. 43.

For most commentators, the origins of the refusal to supply line of case law can be traced back to the *Commercial Solvents* case,⁸⁷ where the ECJ held that the decision by a vertically integrated undertaking to cut-off supplies to an existing downstream competitor amounts to an abuse contrary to Article 82 EC. The issue was brought before the ECJ again in the 1990s, in relation to the refusal opposed by Irish TV operators to license their program lists (protected by copyright) in the *Magill* case.⁸⁸ The cumulative conditions imposed in that case for a refusal to license intellectual property rights to give rise to abusive behaviour have been confirmed in 2004, in the *IMS Health* case, in the following terms: “*refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that (i) refusal is preventing the emergence of a new product for which there is a potential consumer demand, that (ii) it is unjustified and (iii) such as to exclude any competition on a secondary market*” (emphasis added).⁸⁹ The CFI took the view that the *Magill* case applies (though some confusion remained at the time regarding the application of the conditions laid down in that case)⁹⁰ to refusal to license broadcasting content in the *Tiercé Ladbroke* case,⁹¹ which presented the closest facts to those at stake in the broadcasting cases mentioned above. The case concerned a request by a Belgian owner of betting shops to access television images and sound of French horse races.

As from the 1990s, the Commission, in a series of cases, which sometimes referred explicitly to the expression “essential facilities”, applied Article 82 EC to grant access to physical inputs.⁹² Many of these cases concerned access to former State monopolies’ facilities. In a liberalisation context, the application of Article 82 EC can be seen as a regulatory tool in the absence of sector-specific regulation. The context of deregulation, along with the fact that the facilities at issue in some of these cases were built with the participation of public funds may explain that the conditions imposed by the Commission in these cases are less strict than those required by the ECJ in *Magill*. The possible application of the principles deriving from *Magill* to physical input-related cases has not been ruled out by the ECJ in an *obiter dictum* found in the *Bronner* case,⁹³ concerning access to a newspaper delivery network.

⁸⁷ Joined Cases 6/73 and 7/73, *Commercial Solvents*, [1974] ECR 109.

⁸⁸ Joined Cases C-241/91 P and C-242/91 P, *Radio Telefís Éireann e Independent Televisión Publications Ltd. v. Comission*, [1995] ECR I-743.

⁸⁹ Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, [2004] ECR I-5039.

⁹⁰ Korah, “The Interface between Intellectual Property and Antitrust: the European Experience”, 69 *Antitrust Law Journal*, p. 814.

⁹¹ Case T-504/93, *Tiercé Ladbroke SA v. Comission*, [1997] ECR II-923.

⁹² A summary of these cases can be found in the Opinion of A.G. Jacobs presented on 28 May 1998 in Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others*, [1998] ECR I-7791, para. 44.

⁹³ Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. and others*, [1998] ECR I-7791, para. 41: “*Therefore, even if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for the Magill judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article 86 of the Treaty in a situation such as that which forms the subject-matter of the first question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business,*

Some interesting points arise when comparing the conditions laid down in cases like *Bronner* and *IMS Health* with the remedies imposed in the broadcasting cases mentioned above. The most apparent difference probably comes from the origin of the essential input. From *Commercial Solvents* to *Microsoft*, the input was developed by the dominant undertaking. On the contrary, the supposedly essential input in the broadcasting cases is acquired from a third party. The first question is whether the refusal to supply line of case law could apply when the competitive advantage on the part of an undertaking comes as a result of such an investment in an upstream market. A negative answer would find support from the fact that the application of Article 82 EC in such circumstances may favour, in a very obvious manner, free-riding behaviour on the part of other TV operators and may even decrease the price paid for the rights in the upstream market, thus penalising right holders. Unfortunately, the amount of the investment made by the dominant undertaking does not seem to play a role in any of these cases.⁹⁴ Moreover, and even though the conditions laid down in *IMS Health* expressly refer to abuses coming from a “copyright owner” (not a licensee) the distinction seems artificial and nothing would exclude an application of the same principles by analogy.

A second interesting point is the one related to the difference between inputs protected by intellectual property rights and those that are not protected by such rights. According to some authors and,⁹⁵ to some extent, to the Commission practice,⁹⁶ the refusal to supply line of case law would be stricter regarding access to inputs protected by intellectual property rights. This would find support in the *obiter dictum* of the *Bronner* judgment, where the ECJ did not seem to require as a condition that the refusal to supply prevents the emergence of a new product (“the new product test”).⁹⁷

The inconvenience of setting two different tests in these two circumstances becomes apparent in the context of broadcasting rights. Indeed, Hollywood blockbusters are protected by copyright but football games are not (broadcasting rights derive from the right of the home team to allow access to its property), even though both inputs serve the same purposes for TV operators and are subject to identical investments. It would be illogical to treat them differently or to require the new product test only for

inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme” (emphasis added).

⁹⁴ Even though the substantial investment issue is not referred to by the ECJ in *Magill*, the fact that the program listings at stake in that case were a simple spin-off of its main activities, which did not require any additional investment seems to have played an important role in the decision taken to uphold the Commission decision. This issue has been widely commented, see for instance Opinion of A.G. Jacobs in the *Bronner* case, *supra* note 92, para. 63.

⁹⁵ See for example Derclaye, “Abuses of Dominant Position and Intellectual Property Rights: A Suggestion to Reconcile the Community Courts Case Law”, 26 *World Competition* (2003), p. 685.

⁹⁶ In the recent Discussion Paper on the application of Article 82 EC, the Commission indeed draws a distinction between refusal to supply physical inputs and refusal to license intellectual property rights. The obligation that the refusal to supply prevents the marketing of a new product is only referred to when dealing with refusal to license intellectual property rights. In the section devoted to the refusal to supply interoperability information, the Commission seems to exclude the new product requirement for interoperability information involving trade secrets, see paras. 241 and 242 of the DG Competition discussion paper on the application of Article 82 of the treaty to exclusionary abuses, Brussels, December 2005.

⁹⁷ See *supra* note 93.

Hollywood blockbusters. The same issue arose in relation to the *Microsoft* case,⁹⁸ as it has been suggested that the new product test should not apply if the interoperability information requested by Microsoft's competitors is not protected by patent or copyright law. As much as in the case involving TV operators, there is no reason to take account of such an element. Accordingly, the new product test, laid down in *IMS Health*, should in principle apply to both situations.⁹⁹

It is precisely regarding the new product requirement that the broadcasting cases may be of interest for the proponents of an "essential facilities" doctrine. If premium content were to be considered as truly "essential" in the sense that there was a risk of elimination of competition on the downstream market, it could be claimed that the refusal to sub-license rights over Hollywood blockbusters or football events amounts to an abuse even in the absence of the new product requirement. As the new product requirement was imposed in the framework of a very particular set of facts, it should not be excluded that the ECJ will broaden the *Magill-IMS Health* line of case law in the future.¹⁰⁰

There are also strong doubts regarding the "indispensability" of contents such as football rights to compete in the downstream market (which would be, in most cases and according to the Commission practice, the pay-TV market). First of all, it must be recalled that before the arrival of pay-TV services in Europe, free-to-air operators were able to compete effectively with those operators holding exclusive rights for the broadcasting of premium content (which often were public service broadcasters). Under the current circumstances, it is far from clear that without access to football broadcasting rights competition would be eliminated in the downstream market, however this is defined. The multiplication of the number of available platforms and the increased specialisation of TV channels, make it difficult to conclude that a certain product or service is "essential" to compete effectively.

As can be seen, the Commission approach in cases like *Audiovisual Sport* and *Eurovision II*, and, in particular, the Italian NCA approach in *Italian Football Rights*, are very intrusive concerning the exercise of broadcasting rights and seem to go beyond what the *Magill-Bronner-IMS Health* line of case law allows. The Commission is favouring the use of Articles 81 and 82 EC as regulatory tools devised to grant access to all operators on the market of premium content, in particular football (as will be seen below, interventions by the Commission against Hollywood majors are far less frequent and intrusive in the exercise of the rights). The follow-up of the *Italian Football Rights* goes to show that governments may be willing to regulate very closely access to premium content.

⁹⁸ Commission Decision of 24 March 2004, *Microsoft*, Case COMP/37.792.

⁹⁹ Vandecasteele et Waelbroeck, "Une nouvelle approche à l'égard des abus de monopolisation? Quelques commentaires à propos du document de travail de la Commission européenne relatifs à l'application 82 aux abus de monopolisation", 20 *Revue Internationale de Droit Economique* (2006), p. 87.

¹⁰⁰ The issue was raised in the appeal before the CFI of the *Microsoft* decision. It was indeed claimed that the ECJ held in *IMS Health* that the conditions set out in the latter case were "sufficient" for a refusal to license to amount to an abuse of dominant position. Thus, the application of Article 82 EC in the absence of one of these conditions would not have been ruled out by the ECJ. See Order of the President of the Court of First Instance in Case T-201/04 R, *Microsoft Corporation v. Commission*, [2004] ECR II-2977.

Examples of regulatory approaches towards supposedly essential inputs can be found elsewhere. For instance, the regulatory framework for electronic communications¹⁰¹ imposes access obligations on incumbent telecommunications operators that seem to be less stringent than the conditions laid down in the case law mentioned above.¹⁰² However, such an approach can be explained (like the less strict application by the Commission of Article 82 EC in the “essential facilities” cases mentioned above) by the fact that incumbents in that sector rolled out their networks under monopolistic conditions and benefited from public financing of the infrastructures. The question is precisely whether such a “regulatory” solution should prevail in a young sector where technology has radically changed its shape in the past 15 years, where competition has recently proved to be fierce and whose future evolution is difficult to predict, as shown in *Italian Football Rights*.¹⁰³

4.3 The Commission approach to exclusivity

As submitted in the previous section, the Commission is arguably using Articles 81 and 82 EC as a tool of *ex ante* regulation of those markets. The exclusivity of broadcasting licences, whose compatibility with Article 81(1) EC was upheld by the ECJ in *Coditel II*, has been subject to increased regulatory intervention to promote downstream competition. With regard to competition between DTH, cable and DTT platforms (leaving aside new platforms such as 3G and the Internet, subject to a more favourable treatment, as will be seen below), it appears from the latest developments that the Commission prefers to tackle the issue of exclusivity at the upstream level so as to ensure direct negotiation of TV operators with content providers.¹⁰⁴ In order to attain this objective, the Commission has chosen, as seen above, to limit the scope of exclusivity by dividing the content into packages and by preventing one operator from purchasing the whole of the packages. Obligations imposed on TV operators to sub-license content are seen as a second-best solution, and have applied either because the rights were sold individually by football clubs but were purchased by a single TV operator (as in *Audiovisual Sport*), or because there was no joint selling at all (as in *Eurovision II*, where the right holders were organisations such as the IOC and the FIFA). This approach to exclusivity is subject to criticism on several accounts. First of all, because by following this path the Commission is far from ensuring consistency of EC competition law in the different Member States. Secondly, because

¹⁰¹ See in particular Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, O.J. (2002) L 108/33.

¹⁰² See for instance Article 12 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, O.J. (2002) L 108/15: “A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user’s interest”.

¹⁰³ On the application of Article 82 EC to innovative industries, see Ahlborn, Denicolò, Gérardin and Padilla, “DG Comp’s Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries”, 31 March 2006, available at www.ssrn.com.

¹⁰⁴ In the British market, BSkyB sub-licensed premium content to cable operators. However, the Commission preferred that cable operators had direct access to premium content. Likewise, the merging parties committed in *NewsCorp./Telepiù* not only to sub-license premium content but also to waive exclusive rights, see *supra*.

the “regulatory approach” applies to some sports events but not to other premium content having the same features. Thirdly, the division of content into different packages is ineffective. It fails to ensure a downstream competitive structure but also to promote consumer welfare. Fourthly, it empties property rights of its substance. These different issues will be commented in turn.

4.3.1 The Commission approach to exclusivity: issues related to consistency

- Uniform application of EC competition law

What seems striking in the different decisions commented above is the disparity of remedies chosen (or imposed) in the different Member States (Italy and Spain vs. UK, France and Germany) and with regard to the different events (sub-licensing in *Eurovision II* vs. sale in packages in *Premier League*).

As antitrust intervention is fairly intrusive in the media sector, a unique and coherent “regulatory approach” to ensure access to premium content for all the Member States should be given priority in order to avoid disparities within the Community. Thus, either sale in packages or sub-licensing obligations should be uniformly imposed across the Community through the application of Articles 81 and 82 EC. Even though football broadcasting rights are sold individually by football clubs in some Member States (Spain and, so far, Italy), the risks for competition (i.e. a TV operator acquiring the whole of the rights) are exactly the same as in other Member States where football clubs proceed to joint selling arrangements. For instance, the Commission intervened on the Spanish market in *Audiovisual Sport* as a result of an agreement between the two DTH pay-TV operators. After the merger between these two undertakings, the application of Article 81 EC in this context in Spain is no longer possible. As a consequence, a paradoxical situation could arise if the Commission made efforts to open access to content in Member States where joint selling by sports organisations is the norm, such as the UK or Germany, and was satisfied with a single pay-TV operator acquiring the whole of the football broadcasting rights in Spain. Conversely, in Member States like the UK and Germany TV operators could be excluded for all or most of the content following an auction whereas, if sub-licensing obligations are imposed in Spain or Italy, premium content would be accessible from any platform.

In joint selling Member States the sub-licensing remedy could be easily imposed as a regulatory solution (as is currently the case in the UK). Conversely, in Member States like Italy and Spain, a remedy similar to the obligation to sale in packages could be imposed. Prior to the *NewsCorp./Telepiù* merger, an Italian decree provided that a single pay-TV operator was not allowed to own more than 60% of the total available football broadcasting rights.¹⁰⁵

It must also be pointed out that the Commission should also play a major coordination rule in the application of EC competition law in the post-modernisation era. In some Member States, the granting of broadcasting rights is only examined by the NCA (this is the case for instance of France, Belgium and Italy). Therefore, disparities in the application of Articles 81 and 82 EC may arise. For instance, the Italian NCA has decided to apply Article 82 EC as a regulatory tool to ensure access to premium

¹⁰⁵ *NewsCorp./Telepiù*, supra note 4, para. 159.

content by all players on the market whereas the Belgian NCA, in the *Belgacom* case, was satisfied with Belgacom acquiring the whole of the packages offered by the Belgian Ligue Professionnelle de Football. Moreover, as the Commission approach is also rapidly evolving (the conditions for the granting of broadcasting rights are becoming more and more stringent), a centralised application of remedies would be preferred.

- Uniform application of the remedies

It must also be pointed out that sub-licensing obligations and/or sale in packages are remedies are imposed mainly on football organisations. Surprisingly enough, Hollywood blockbusters have so far remained largely unaffected from these interventions.¹⁰⁶ The crucial issue is thus whether it is justified not to include premium films from this *ex ante* regulatory approach. Premium films and football are equally perceived by the Commission as major drivers for subscriptions to pay-TV services. If the Commission analysis were to be followed, a pay-TV operator offering only football content would not have many chances to survive on the market, since premium films would also be necessary to compete effectively.¹⁰⁷

As the logic underlying the Commission intervention in acquisition markets is to ensure that downstream competition is maintained, a coherent attitude on the part of the institution would call for an intervention on the market for the acquisition of premium films. Even though content is marketed by eight Hollywood majors,¹⁰⁸ all content tends to be acquired by a single pay-TV operator. Some remedies mirroring those explored in the marketing of football broadcasting rights could be used to achieve a uniform regulatory approach for all premium content. As seen above, Hollywood blockbusters follow a well-defined lifecycle, which could ease the limitation of the scope of the broadcasting licences. For instance, Hollywood majors could be obliged to market their content in different packages: more precisely, first and second window rights could be split in negotiations with TV operators. The imposition of sub-licensing obligations could also be seen as a valid remedy regarding premium films.

The *ARD* decision,¹⁰⁹ decided in the late 1980s, is a valid precedent for both remedies. This case concerned a license agreement concluded between the German public service broadcasters and the Hollywood major MGM for an exceptionally long period (15 years). The agreements were cleared under Article 81(3) EC following modification in their terms, which allowed access by third parties to the broadcasting rights over certain windows through sub-licensing agreements.

4.3.2 The Commission approach to exclusivity: effectiveness and consequences

¹⁰⁶ Obligations to sub-license premium films are to be found in mergers, such as *NewsCorp./Telepiù* and *Sogecable/Canal Satélite Digital/Vía Digital*. In the UK, BSkyB provides premium films to cable operators as part of its offer.

¹⁰⁷ A prominent example is that of the pre-merger scenario in Spain, where both DTH platforms, *Vía Digital* and *Canal Satélite Digital* had access to the same football rights but the latter was the only licensee in Spain of the broadcasting rights of most Hollywood blockbusters, see *Sogecable/Canal Satélite Digital/Vía Digital*, supra note 4, section 6.2.2.

¹⁰⁸ These are Universal, Paramount, Columbia, Disney, Dreamworks, 20th Century Fox, Metro Goldwyn Mayer and Warner Bros.

¹⁰⁹ Commission Decision of 15 September 1989, *ARD*, Case IV/31.734, O.J. (1989) L 284/36.

- Market structure and effectiveness of the remedy

The sale of broadcasting content in several packages has been favoured by the Commission over sub-licensing agreements. There are however serious doubts regarding the effectiveness of this remedy in keeping a competitive market structure in the downstream pay-TV market and in facilitating direct access to right holders.

It is now clear from the experiences in the different Member States that the trend of the pay-TV segment towards monopoly remains unaffected by the application of this remedy. In France, the merger between Canal Satellite and TPS was announced even though the French NCA insisted on promoting the sale of broadcasting rights of the French national football championship in several packages. Indeed, in spite of the intervention of the authority, Canal Satellite, the dominant pay-TV operator, secured the whole of the rights in the auctions organised in 2002 and 2004. Evidence from this case (as well as from the permanent intervention by the Commission on the British market) goes to show that this remedy fails to take account of the differences in the willingness to pay for the rights by the different operators. For instance, DTH pay-TV operators (such as BSkyB and Canal Satellite) may value their rights more than cable pay-TV operators (as the former do not provide broadband and basic telephony services). Conversely, the latter may be satisfied if they can access the rights to the whole event (and not to a part of it) at wholesale level.

Sale in packages allows in principle an undertaking to secure the whole of the packages offered (as has been the case in Belgium, France and the UK), thus excluding downstream competitors from the auction. As a consequence, sub-licensing obligations may have to be imposed at a later stage anyway. The outcome of the auction organised in 2003 by the FAPL (where BSkyB secured the whole of the rights on sale) is an example of such an undesirable duplication of remedies. Under pressure by the Commission, and following the outcome of the auction, BSkyB had to agree to sub-license eight games per season to a free-to-air operator.¹¹⁰

The only visible effect on the market may then be a reduction in the value of the rights at the upstream level. Indeed, experience in the UK shows that when rights were marketed in several packages (and purchased by a single operator), the perspective of losing exclusivity over the whole event slightly decreased the value of the rights and this without promoting effective upstream competition.¹¹¹

In order to prevent a single-buyer scenario from arising, the conditions for the auction may provide that it is prohibited for a single TV operator to acquire the whole of the rights on sale (as shown supra note 45). In that case, evidence from the last auction organised in May 2006 by the FAPL shows that such condition may lead to a spiralling of prices paid for the broadcasting rights. In 2003, BSkyB paid £ 1.02 billion for the whole of the packages on offer. In May 2006, the same undertaking could only secure 4 out of the 6 live broadcasting rights packages on offer, but paid for them as much as £ 1.3 billion. Setanta, the purchaser of the two remaining

¹¹⁰ “Last-ditch deal avoids TV crisis”, *Guardian*, 17 December 2003.

¹¹¹ See Geey and James, supra note 76. In the bid organised by the Premier League for seasons 2004-2007, the amount paid for this season decreased as compared with the previous one, whereas the number of licensed games doubled.

packages, paid £ 392. The content provider's revenue rose by 65%.¹¹² This goes, once again, against the Commission forecasts. The institution expected that following the introduction of this rule the price for the rights would decrease in the absence of the "exclusivity premium" supposedly paid by BSkyB in previous auctions.¹¹³

- Sale in packages and benefits for consumers

Some Commission officials have put forward the idea that commitment decisions such as *Premier League* aim to promote consumers' benefit by broadening the range of available platforms.¹¹⁴ It is however doubtful whether these remedies are in the interest of consumers. Suppose the rights are sold to two pay-TV operators (which has so far been the most common scenario). In the absence of a cross-licensing agreement between the two operators, it would be necessary for viewers to subscribe to two pay-TV services in order to have access to the entire event.

If content is cross-licensed between the two pay-TV platforms (so as to allow their subscribers to access the whole of the event) the scenario is not necessarily superior to a situation where content is sub-licensed by a single operator. Under the system in place in the UK, BSkyB sub-licenses premium content to its downstream competitors on a per-subscriber basis. As the fee perceived by BSkyB depends on the number of subscribers of its competitors, it is able to control the costs of the latter and, more importantly, to keep monopolistic prices at retail level.¹¹⁵ If on the contrary two undertakings earned half of the broadcasting rights of a football event and decided to cross-license, they may have a strong incentive to set high prices for the cross-licences,¹¹⁶ thus also affecting consumer welfare. In reality, both TV operators would enjoy a monopoly over their rights and would charge monopolistic prices for their content. If the benefits for consumers deriving from the sale in packages remain uncertain, it is doubtful that this remedy should be preferred over sub-licensing by a single operator.

Following the last auction organised by the FAPL, some of these questions are being experienced in the UK. As said above, live broadcasting rights of the Premier League championship will be shared from 2007 onwards by BSkyB (92 games per season) and Setanta (46 games), which operates sports channels that are broadcast by DTH and cable pay-TV operators in the UK. Even though Setanta's services channels are currently available for BSkyB subscribers (as well as cable subscribers), these will have to subscribe to Setanta's services in order to have access to the whole event. Moreover, it must not be forgotten that BSkyB has purchased more and better packages (games taking place on Saturday and Sunday afternoon). As a consequence, it is doubtful whether consumers face a real choice between pay-TV offers from Setanta and BSkyB. It can be presumed that most of them will remain with the incumbent operator.

¹¹² "Setanta joins Premiership Action", *BBC News*, 5 May 2006, available at <http://news.bbc.co.uk/1/hi/business/4975632.stm>.

¹¹³ Geey and James, supra note 76.

¹¹⁴ Toft, "Football: joint selling of media rights", 3 *Competition Policy Newsletter* (2003), p. 47.

¹¹⁵ See Harbord and Ottaviani, supra note 30 and Harbord and Szymanski, supra note 44.

¹¹⁶ Armstrong, supra note 27. There are some analogies between cross-licensing of sports content and mobile interconnection fees. On the latter see de Bijl, Brunekreeft, van Damme, Larouche, Shelkopyas and Sorana, "Interconnected networks", TILEC Discussion Paper 2005-007, available at <http://www.tilburguniversity.nl/tilec/publications/discussionpapers/2005-007.pdf>.

As seen above, in the May 2006 auction organised by the FAPL (which provided for the first time that no single bidder was allowed to win all packages) may be even more harmful for consumers. Contrary to the Commission expectations, the price paid by TV operators for the rights rose by 65%. Accordingly, an increase in the prices paid by consumers for the services cannot be ruled out. In any event, one of the benefits for consumers announced by the Commission (lower final prices for consumers as a result of the lower prices paid for the rights by TV operators) did not resist its first test.

- A ban on exclusive rights

As an alternative of the remedies explored by the Commission, some authors have proposed the possibility of banning exclusive rights altogether.¹¹⁷ This has been the option favoured by the Italian government following the *Italian Football rights* decision, as it has proposed a different auction for each of the platforms. It must be acknowledged that a ban on exclusive rights, as pointed out by some authors would have immediate positive short-term effects in the downstream market, as content would be available through all platforms, broadening consumers' choice and probably decreasing the price paid for pay-TV services. In this regard, the remedy seems superior to sale in packages. However, serious doubts remain as to the desirability of this regulatory option.

First and foremost, a ban on exclusivity would be the most intrusive option on intellectual property rights (and more generally on property rights). This option would go far beyond the "exceptional circumstances" laid down in *Magill-IMS Health* under which the exercise of intellectual property rights may be abusive. If exclusivity was permanently waived for all content, right holders would be entitled to a simple right to remuneration. Secondly, setting a fair compensation on content providers may prove to be a difficult task. Following the remedies imposed in *NewsCorp./Telepiù*, Mediaset acquired the broadcasting rights from the main football clubs for DTT transmission but paid significantly less than Sky Italia. The latter even envisaged asking football clubs for some money back.¹¹⁸ Similar problems could arise at the downstream level if the dominant pay-TV operator engaged in aggressive pricing strategies in the downstream market. As can be seen, it is probably difficult to apply this remedy without introducing some form of price regulation at some level. Again, it is doubtful whether such a far-reaching intervention is desirable.

Finally, and more generally, one may wonder why right holders that in most cases do not even enjoy significant market power (UEFA, IOC, FIFA...) should bear the consequences of a supposedly anti-competitive market structure in the downstream market.

4.4 *Italian Football Rights*: some lessons for new media

¹¹⁷ See, in particular, Nicita and Ramello, supra note 38 and Gérardin, "Competition law problems raised by the entry of telecommunications incumbents in the media content delivery content delivery market", *Paper Presented at the University of Zurich*, 7 September 2005.

¹¹⁸ "Sky e diritti tv: Inter, Juve e Milan ci ridiano i soldi", *Corriere della Sera*, 16 July 2004.

New Media platforms have drawn particular attention in the Commission decisions commented above. With a view to facilitating rapid development of platforms such as webcasting and 3G, the institution has introduced more favourable conditions concerning access by operators transmitting via these platforms. In *Premier League*, for instance, the Commission provided for a specific regime for licensing of rights for 3G operators.¹¹⁹ Besides the licensing of broadcasting rights to TV operators, the FAPL required that at least a package with clips of all Premier League games is made available for 3G operators. A similar remedy was imposed in the *Bundesliga* case, in which the German football association committed to offer two different packages for 3G operators.¹²⁰

Simultaneously, the Commission opened a Sector Inquiry regarding in particular access to sports content by these operators.¹²¹ The principles and concerns outlined in *Premier League* and *Bundesliga* are dealt with in more detail. The Concluding Report on the Sector Inquiry expresses the following concerns:

- Cross-platform bundling: the Commission prefers an unbundled sale of rights, i.e. a situation where rights are not sold to a TV operator for broadcasting via 3G platforms.
- Overly restrictive conditions: the Commission is concerned about limitations imposed by right holders in the exercise of the rights justified by the need to protect live transmission rights or the branding of content.
- Joint selling: the Commission considers that joint selling of rights may not be justified regarding 3G operators.
- Exclusivity: according to the Concluding Report, the Commission will be ready to ban exclusive rights regarding 3G operators.

It must be noted at the outset that the Commission's stance in the Concluding Report advocates for the adoption of measures in the 3G sector that are more intrusive than those currently imposed to other TV operators. For instance, the Commission is ready to ban exclusive rights or joint selling agreements, which have so far been accepted with some limitations.

Moreover, the Commission express concerns about issues that had not given rise to any objection in previous decisions, such as cross-platform bundling (i.e. a single TV operator acquiring rights for transmission via different platforms). In most cases, rights have so far been granted irrespective of the platforms concerned. Indeed, remedies limiting exclusivity to a single platform are rather exceptional: for instance, they have been imposed in *NewsCorp./Telepiù*, so as to accelerate competition against Sky Italia on the pay-TV market. However, in the context of the 3G Sector Inquiry, the Commission stance is arguably not so much motivated by the need to enhance competition in the pay-TV market,¹²² but by the risk that broadcasting rights are not licensed at all to 3G operators. As rightly pointed out by some authors, a ban on cross-platform licensing seems to be motivated more by industrial policy considerations

¹¹⁹ *Premier League*, supra note 14, section 5.

¹²⁰ *Bundesliga*, supra note 14, para. 29.

¹²¹ See references supra, note 15.

¹²² According to the Concluding Report, supra note 15, broadcasting through 3G is not a valid substitute of broadcasting through regular TVs.

than by competition law concerns.¹²³ There are reasons to consider that right holders should remain free to exploit their content in the way that is most convenient for them and, of course, free not to license for broadcasting in a platform that may diminish the value of the rights.¹²⁴ The same can be said of TV operators having acquired 3G rights. Moreover, the Commission fails to explain why direct access to content by 3G operators must be privileged over access to content via sub-licensing agreements with TV operators. This second option may be even more convenient for 3G operators, which do not value sports rights as much as pay-TV operators and may be satisfied with edited content sub-licensed by a TV operator.¹²⁵ This is precisely what happened in the framework of the auction organised by the FAPL. In May 2006, BSkyB, together with the newspapers owned by NewsCorp. (BSkyB's main shareholder) acquired the rights for 3G transmission over mobile operators and has already announced that it will make content available for 3G users.¹²⁶

It seems that sports content are not “major drivers” for subscription to 3G services. For mobile telephony operators, the availability of sports content may not be more than a way of making their core services (voice telephony and possibly Internet) more visible or attractive to customers. It cannot be excluded that it is possible for 3G operators competing with the one owning the exclusive rights to “counter-attack” with many different strategies.¹²⁷ Accordingly, the Commission approach to joint selling or exclusivity could in principle be even less stringent than for the rest of platforms: if, as shown above, it is doubtful that sports rights are “indispensable” within the meaning of the *Magill-IMS Health* line of case law even for TV operators, there is no valid reason to ban exclusivity in the mobile telephony sector, as the Commission proposes to do. Moreover, the *Italian Football Rights* decision has shown that acquisition markets are more subject to change than previously thought.

It must again be stressed that the Concluding Report does not take account of the differences between joint selling Member States and Italy and Spain. In the case of the former Member States (in the case of Italy, at least until the draft legislation referred to above is passed), access to content by 3G operators can be ensured through specific provisions in the decisions. A similar remedy can be imposed in joint purchasing cases, like *Eurovision II*. It remains to be seen how the Commission will ensure that 3G operators access, for instance, the Italian Serie A and the Spanish Liga.

To sum up, the 3G Sector Inquiry seems to be motivated by industrial policy considerations aiming to facilitate rapid penetration of 3G mobile handsets. It is however submitted that the Commission should not depart from well established principles to achieve these objectives.

5. Conclusions

¹²³ Subiotto and Graf, *supra* note 63, p. 605.

¹²⁴ In particular if, as will be seen *infra*, sports rights are far from being indispensable for 3G operators.

¹²⁵ This was alleged by TV operators, which also mentioned that sub-licensing by a TV operator would avoid an inefficient duplication of the costs of producing content. See the Concluding report, *supra* note 5, at para. 34.

¹²⁶ “BSkyB teams with tabloids for mobile soccer rights”, Yahoo News, July 12 2006, available at <http://uk.news.yahoo.com/12072006/80-91/bskyb-teams-tabloids-mobile-soccer-rights.html>.

¹²⁷ This assertion contradicts the market definition suggested by the Commission in the Concluding Report, *supra* note 15. This text suggests (at para. 24) that sports rights may not find substitutes with other services provided through mobile telephones.

There is little doubt that the application of competition law provisions in the media sector is a difficult task. Efforts to open access to premium content, which have dominated the Commission practice in the field in the last years, have proved particularly ineffective, as the trend towards concentration remained unaffected by any such interventions. As a response to this situation, the Commission is imposing remedies that are increasingly stringent.

In cases like *Premier League*, the Commission favours market structures that harm consumers, a stance that constitutes a clear departure from its traditional practice. In this case, as well as others concerning joint selling and joint purchasing (as, for instance, the sub-licensing obligations imposed in the *Eurovision II* case) the Commission has disregarded the issue of market power, which is now central in the application of Article 81(1) EC. It is indeed submitted that the Commission is adopting a structural approach to media markets. In this regard, it cannot be excluded that the institution is influenced in the application of Articles 81 and 82 EC by sector-specific concerns, such as media pluralism.¹²⁸

The *Italian Football Rights* case commented above has brought interesting elements to this ongoing debate. First of all, it has shown that new entrants are able to outbid strong pay-TV incumbents at the upstream level. Secondly, the case has confirmed that the media sector and, in particular, the pay-TV segment, is subject to further evolution, making it difficult to predict what the media landscape will look like in the years to come. Traditional pay-TV services have so far relied on monthly subscriptions and long term contracts. In some Member States where penetration of pay-TV services is low, consumers may prefer a more flexible product, with a less extensive and better focused offer. Thirdly, it has become apparent in the aftermath of *Italian Football Rights* that both the Commission and the Member States are ready to take a very active role in the regulation of a sector that is perceived as being particularly sensitive. Therefore, there is a high risk of disparities in the application of Articles 81 and 82 EC in the different Member States, as shown in some of the decisions commented above.

In the light of the Commission practice, an “explicit” regulatory approach that would take account of all issues at stake in the media sector seems *prima facie* preferable. Such an approach should take account of the failed experiences of the last years. Pluralism concerns might be seen as legitimate in the media sector. However, it is unclear why the sound application of competition law principles should suffer from such concerns, in particular at a time where the Commission seems to have reached a clear stance on the aims of competition policy.

¹²⁸ Commission officials have accepted that pluralism concerns influence the application of competition law in the media sector. See Ungerer, *supra* note 12: “*The main goal must be to avoid market foreclosure. Avoiding market foreclosure in this sector goes beyond traditional competition law concepts. Application of competition law cannot be seen in abstract. It must be seen inevitably against the basic goals of the Union in this sector – particularly the guarantee of plurality*” (emphasis added).