

Media coverage of sport from the perspective of antimonopoly law

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Lapšanský, L. Media coverage of sport from the perspective of antimonopoly law. *Právny obzor*, 104, 2021, special edition, pp. 22-43 <https://doi.org/10.31577/pravnyobzor.specialissue.2021.02>

Media coverage of sport from the perspective of antimonopoly law. Sport constitutes a very attractive content of TV broadcasting. The interest of viewers/listeners/readers in following sports events is one of the main motives of media monitoring, which brings about fierce competition among the media for procurement of the highest quality content possible and subsequently for gaining the largest possible number of viewers/readers. The competing media also resort to practices restricting competition: they conclude agreements restricting competition of their parties, abuse their dominant position or merge with each other, at the risk of creating or strengthening their dominant position. The competition authorities have successfully addressed the competition concerns brought by the strong wave of concentrations and agreements restricting competition in the TV sector since the turn of the millennium, without getting in the way of the application of new technological and commercial procedures.

Key words: competition, media, sport

Introduction

Sport and the media are closely linked. Those wishing to watch a sporting event and not being able to physically attend often resort to a means that allows them to follow it live or at least to gain *ex post* the fastest and/or best available information or analysis of the event. And precisely this role is played by the media.

In order to be able to perform this task the media need to create conditions for the production of a sports communication¹, i.e. content that they will offer to viewers/listeners/readers in the area of sport. Whereas the activity offering a sports communication to viewers/listeners/readers is mostly implemented in the free competition regime and the interest of viewers/listeners/readers in following sports events is one of their main motives for media monitoring, fierce competition for the procurement of the highest quality content possible and subsequently for gaining the largest possible number of viewers/readers naturally takes place among the media. In order to succeed in this competition, the media also resort to practices that are problematic from the perspective of antimonopoly law: they conclude agreements restricting competition between the

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** This paper was prepared as part of the VEGA project “*Sports market between the legal ideals and the economic reality*”.

¹ The term “communication” is used in a number of laws as a general designation for an output of media activity (e.g. Act No. 308/2000 Coll. on broadcasting and retransmission and on amendment of the Act No. 195/2000 Coll. on telecommunications, Act No. 220/2007 Coll. on digital broadcasting or the Act No. 343/2015 Coll. on public procurement and on amendments to certain laws).

parties, abuse their dominant position or merge with each other despite the risk that they will create or strengthen their dominant position.

The relevance of this topic is determined by the growing symbiotic relationships between sports and the media. Sports are a source of very attractive media content that has a unique potential to attract new viewers/listeners/readers and media coverage becomes the most important source of income for sports organisations, clubs and athletes.² The growth of income from the media coverage of sport (especially from the sale of broadcasting rights) over the last two decades has been enormous in terms of both volume and share in overall funding of sport (with revenues from professional sport accounting for 40 to 60% of this income)³. The share of costs of acquisition of broadcasting rights to sports events on total costs of TV stations of the acquisition of rights to broadcasting content is also very large (up to 40%)⁴.

These anticompetitive practices of undertakings (agreements restricting competition, abuse of a dominant position, concentrations) are regulated by the Slovak Act on the Protection of Competition (Act No. 187/2021 Coll. is currently in force) (hereinafter “APC”), in the Treaty on the Functioning of the European Union (hereinafter “TFEU”) and in the Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings. However, because of the general nature of these norms, the decisive source of positive law is the decision-making practice of the competition authorities, i.e. the Antimonopoly Office of SR (hereinafter “Office”) and the European Commission (hereinafter “European Commission” or “Commission”).

The structure of this paper corresponds to the chronology of individual phases of standard competition analysis that assumes the definition of a relevant market, determination of the position of undertakings – participants of an anticompetitive conduct on a relevant market, and finally the evaluation of admissibility of the conduct of the undertakings. Therefore, we will gradually address the issues of the place that sport has in the phase of definition of relevant markets in the media sector; (2.) the weight of broadcasting rights to sports events in the assessment of a dominant position of an undertaking on a relevant media market (co-)created by sport; and (3.) the assessment of business practices on relevant media markets (co-)created by sport (4.).⁵

² Report of the United Nations – UN Conference on Trade and Development – Council for Trade and Development – Trade and Development Commission – Intergovernmental Group of Experts on Competition Law and Policy: Questions de concurrence relatives à la vente des droits audiovisuels des grandes manifestations sportives. Geneva : 17th meeting, 11-13 July 2018, paragraph 6 (available at: https://unctad.org/system/packages/official-document/ciclpd50_fr.pdf).

³ United Nations Report – Intergovernmental Group of Experts on Competition Law and Policy, paragraphs 10 to 13.

⁴ MENSCHING, J.: Sport et télévision : Exclusivité et concurrence. Rendez-Vous International du Sport et de la Télévision, 14ème Symposium international, Monaco, 17 September 2003, p. 3 (available at: https://ec.europa.eu/competition/speeches/text/sp2003_025_fr.pdf).

⁵ LAPŠANSKÝ, L.: Protection of competition from anticompetitive interventions of public authorities [electronic publication]. First edition. Bratislava : The Institute of State and Law of SAS, 2020. 162 p.

1. The place of sport in defining the relevant media markets

The competition authorities had the opportunity to provide their opinions of the issue of boundaries of the relevant markets in the phase of creating preconditions for the production of a communication, in which sport played the role of a decisive or co-decisive element. Sport played this role in defining the relevant markets both in the phase of creating preconditions for the production of a communication (1.1.), and in the phase of offering a communication (1.2.).

1.1. The place of sport in defining the relevant markets in the phase of creating conditions for the production of a communication

1.1.1. Market for provision of sports news

In its decision *SITA/TASR*⁶ concerning a suspicion of an abuse of a dominant position TASR, the President of the Office established the definition of relevant markets in the area of agency news provision by saying that there were **relevant markets for provision of:**

- a) home news in Slovak language, comprising information about domestic political events (information about the work of the parliament, ministries and other central authorities of the state administration, government and the President), cultural and social events, information from science, medicine, information about weather etc. and regional news;
- b) international news in the Slovak language, comprising reports prepared by editors sent abroad, translations of reports issued by foreign agencies and translations of selected articles from the foreign press;
- c) economic news in the Slovak language covering economic events both in Slovakia and worldwide;
- d) **sports news in the Slovak language** bringing results, interviews and commentaries on foreign and domestic sports events;
- e) visual news offering a visual service relating to events and persons from the policy, economy, culture, sport and social life in Slovakia and worldwide;
- f) the relevant market for TOP news in the Slovak language providing the most interesting information and curiosities from areas such as policy, culture, sport, social life in Slovakia and worldwide (paragraphs 23 to 30).

In relation to the provision of all partial news services (except for visual news), the provision of news in the Slovak language as a criterion in defining the geographic boundaries of a relevant market reflects the fact that the customers of these services prefer them in the Slovak language.

⁶ Decision No. 2003/DZ/P/2/052 of 24 March 2003.

1.1.2. *Markets for granting the rights to broadcast sports events*

In order to fill up their broadcasting structure, broadcasters are forced to buy a considerable amount of television or radio programmes produced by independent producers. Although broadcasters can produce the programmes themselves, the relevant market will only be a market for programmes produced by independent producers, because programmes produced by broadcasters are mostly used by themselves and not sold to the operators of other competing stations.⁷

Since a large majority of programmes produced by independent producers can be regarded as copyright work⁸, the relevant market will be a market for granting the rights to broadcast these programmes to broadcasters.

The European Commission in its decisions regularly publishes the list of its previous decisions relating to the boundaries of relevant product and service markets for granting the rights to broadcast or transmit the individual types of TV programmes⁹. The content, the rights to which constitute a number of separate relevant markets, is sport, and in particular football. According to the European Commission there are **relevant markets for granting the rights to broadcast**:

- a) feature cinematographic films,
- b) **football events that are played regularly throughout every year¹⁰ and in which teams from a certain State participate** (especially the national league, the national cup, the Champions League and the UEFA Cup),
- c) **football events with longer periodicity and with participation of national representation teams** (European Championship, World Championship);
- d) **other sports events;**
- e) TV programmes and
- f) TV channels.

The market for granting the rights to broadcast football events that are played regularly throughout every year and in which teams from a certain State participate, can be distinctly separated from the market for granting the rights to broadcast football events with longer periodicity and with participation of national representation teams (European Championship, World Championship), among others because these rights are granted by different organisations.

The rights to broadcast football events that are played regularly throughout every year and in which teams from a certain State participate, cannot be substituted by the

⁷ European Commission Decision of 20 September 1995 *RTL/Veronica/Endemol*, OJEC L 134 of 5 June 1996.

⁸ Audio-visual work (§ 82 paragraph 1 of the Copyright Act No. 185/2015 Coll.) is regarded as a copyright work [§ 3 paragraph 2 of the Copyright Act No. 185/2015 Coll.].

⁹ For example, Decision of 2 April 2003 *Newscorp/Telepiu*, OJEU L 110 of 16 April 2004, paragraphs 49 to 76; Decision of 6 October 2020 *PPF GROUP/CENTRAL EUROPEAN MEDIA ENTERPRISES*, OJEU C 3 of 6 January 2021, paragraph 18.

¹⁰ Commission Decision of 23 July 2003 *Joint selling of the commercial rights of UEFA Champions League*, OJEU L 291 of 8 November 2003, paragraphs 57 et seq.

rights to broadcast other (non-football) sporting events (that are played regularly and in which teams from a certain State participate), because of the higher attractiveness of football and hence incomparably higher price of the rights to broadcast them.

As regards to the geographic delimitation of the market for granting the rights to broadcast football events that are played regularly throughout every year and in which teams from a certain State participate, this market basically remains national. As regards to the national league and the national cup, due to the specific nature of these events, determined by cultural factors and requirements of national viewers, the spatial reach of these events is limited to the territory of the State, where they are played. Finally, the rights to broadcast national league and national cup matches are in reality acquired by television operators from the respective State. But also, as regards the Champions League and the UEFA Cup, according to the valid UEFA rules relating to the granting of broadcasting rights, these rights are mostly sold at the national level. Only relevant markets for the sale of rights to broadcast football events with longer periodicity and with participation of national representation teams (European Championship, World Championship)¹¹ could have a multinational scope.

Markets for granting the rights to broadcast other sports events are defined, because although broadcasting of non-football sports events are not a determinative factor in the decision-making of television viewers about subscription of programmes offered by a particular TV broadcaster, it nevertheless remains an important factor of the attractiveness of their offer. This group of sports events comprises, among others, the Olympic games, large tennis tournaments, boxing matches or motor races. In terms of the characteristics of these events as well as in terms of price conditions, the granting of rights to broadcast these sports events can be distinguished from the granting of rights to broadcast other programmes.

From the perspective of television viewers, these sports events are events of pan-European importance. Moreover, the rights to broadcast some of these sports events are acquired for the whole of Europe and some broadcasters, such as Eurosport, always acquire the rights to broadcast these sports events for the whole of Europe or at least for several countries and to broadcast them in several countries. But even these circumstances do not justify the territorial delimitation of a relevant market as a pan-European market. The reason is that although the rights to broadcast some sports events are granted for the whole of Europe, later they are sold, irrespective of the TV signal transmission technology, for the territories of individual States or language zones. Therefore, the market for granting the rights to broadcast sports events other than football matches and also remains spatially delimited by the territories of the individual States or language zones.

The common reason for defining these markets as separate relevant markets was the incapacity of the grantors of rights to these types of TV programmes to quickly switch to the granting of rights to broadcast other types of TV programmes¹², i.e. the negative result of the test of substitutability of goods or services, on the supply side.

¹¹ European Commission Decision of 13 November 2001 *Canal+/RTL/GJCD/JV*, OJEU C 130 of 27 May 2005, paragraph 22.

¹² For example, the European Commission Decision *Newscorp/Telepiu*, paragraph 52.

The Commission specified that in the market for granting broadcasting rights to TV channels, the granting of rights to pay sports TV channels did not form a separate relevant market – it was only a segment of the market for granting broadcasting rights to TV channels¹³. Nevertheless, the Commission assesses the impact of the business practices also separately for this market segment¹⁴.

1.2. The place of sport in defining the relevant markets in the phase of offering a communication

1.2.1. Markets for publishing opinion-forming dailies, weeklies and monthlies

The Office concluded that dailies published in Slovakia differed in terms of the depth, volume, standard of processing and coverage of topics, as well as in terms of the socio-economic groups of readers to which they are intended. In the light of these criteria, we can distinguish dailies specializing in the provision of general, objective and robust information about political, economic and social events in society, i.e. so-called “opinion-forming dailies”, and dailies bringing prevalingly information from the life of personalities of the political and social life and fascinating facts, i.e. so-called tabloids¹⁵.

As regards the market for publishing opinion-forming dailies, the Office announced the potential further narrowing of the definition of the relevant product and service market – to markets for **publishing opinion-forming dailies focused on the provision of:**

- a) general information,
- b) **information – exclusively or predominantly – from sports events** and
- c) information about the economic life¹⁶.

As a crushing majority of the opinion-forming dailies sold in the Slovak Republic brings essentially information about events in Slovakia and is published in the Slovak language, the market for publishing opinion-forming dailies remains geographically delimited by the territory of the Slovak Republic.

On the basis of the criteria “topic” and “target group” the Office distinguished, in the segment of publishing weeklies and monthlies, **relevant markets for publishing weeklies or monthlies** with the following focus:

- a) society or family, bringing information from many areas,
- b) women’s
- c) religious
- d) cultural

¹³ For example, the European Commission Decision *PPF GROUP/CENTRAL EUROPEAN MEDIA ENTERPRISES*, paragraph 34.

¹⁴ For example, the European Commission Decision *PPF GROUP/CENTRAL EUROPEAN MEDIA ENTERPRISES*, paragraphs 157, 158, 180, 188, 189, 194, 197, 198, 200, 202, 222 and 224.

¹⁵ Decision of the Office No. 2004/FH/3/1/021 of 10 February 2004 *Ringier/VČN*, paragraph 32.

¹⁶ Decision of the Office *Ringier/VČN*, paragraph 34.

- e) sports
- f) economic
- g) advertising
- h) television
- i) specialised, such as periodicals for modellers or gardeners.¹⁷

1.2.2. Pay-to-view television market

Beside the free-to-air terrestrial broadcasting of TV stations, where a direct contractual relationship only exists between the broadcaster and the advertisers (not between the broadcaster and the television viewer), there is a large group of entities that provide television viewers with the TV programme retransmission service for a consideration on the basis of a direct contractual relationship.

The use of terminology by the Office and the European Commission for this relevant market is inconsistent. The Office had designated this market as a “market for retail distribution of TV programmes to final consumers”¹⁸ or as a “market for retransmission of TV programmes”¹⁹, before the Council of the Office established its designation as a “market for provision of TV programme retransmission service”²⁰ or a “market for retransmission of complete and unchanged original TV programmes”²¹. The European Commission mostly refers to a “pay television distribution market”²² or simply a “pay-to-view television market”²³. For the purposes of this paper we will use for this relevant market the terms “**market for retransmission of TV programmes**” or “**pay-to-view television market**”.²⁴

The European Commission consistently believes that retransmission of TV programmes is a product different from free-to-air television and reflects the demand for specific TV programmes that supplement those transmitted by free-to-air TV stations. In the said decision *NewsCorp/Telepiu* concerning the relationship between free-to-air television and retransmission of TV programmes in Italy, the European Commission based this conclusion on the statement that only subscribers of the TV programme retransmission service could watch the most attractive TV programmes, such as the latest

¹⁷ Decision of the Office *Ringier/VČN*, paragraphs 39 and 40; Decision of the Office No. 2002/FH/3/028 of 22 February 2002 *Ringier/Gruner + Jahr/VČN*, paragraph 22.

¹⁸ Decision of the Office No. 2003/FV/3/1/278 of 26 November 2003 *Liberty Media Corporation/UnitedGlobalCom*, paragraph 32 et seq.

¹⁹ Decision of the Office No. 2003/DZ/2/1/122 of 20 June 2003 *SBD Šal'a*, paragraph 12.

²⁰ Decision of the Council of the Office No. 2004/DZ/R/2/012 of 23 January 2004 *SBD Šal'a*, paragraph 11.

²¹ Decision of the Council of the Office No. 2004/DZ/R/2/090 of 23 April 2004 *UPC Slovakia*, paragraph 14.

²² European Commission Decision of 4 March 2005 *CINVEN/France TELECOM CABLE - NC NUMERICABLE*, OJEU C 140 of 9 June 2005, paragraph 24.

²³ European Commission Decision of 15 September 1999 *British Interactive Broadcasting/Open*, OJEC L 312 of 6 December 1999, paragraph 25.

²⁴ To the overall evaluation of the decision-making practice of the competition authorities in relation to pay television until 2006 – see for example AMIEL, F.: *Télévision payante et droit de la concurrence, une histoire récente mouvementée*. In *REVUE LAMY DE LA CONCURRENCE*, 2011, October-December, No. 29, pp. 94 – 107.

feature films or football events with the participation of Italian teams. Moreover, subscribers of the TV programme retransmission service are willing to pay for the possibility to watch these programmes a much higher amount than the annual fee determined by the public free-to-air TV operator RAI²⁵ (paragraphs 112 and 113).

The success of channel packages offered by the operators of retransmission depends on the selection of attractive programmes and the amount of the subscription fee. Therefore, the relevant product and service market depth will depend on the answer to the question whether television viewers regard the packages offered by individual operators of the TV programme retransmission service as mutually substitutable in terms of the width, quality and price of the offered programmes.

Beside of the criteria “depth” and “price” of offered programmes, their quality may appear to be a decisive criterion in some cases.

This is because on the relevant market for the retransmission of pay-to-view TV programmes, beside the retransmission service operators who offer different packages of TV channels produced by other entities, individual television broadcasters, especially operators of important TV stations such as CNN, Eurosport or Canal+²⁶, appear on the supply side.

Results of surveys conducted on the market for retransmission of pay-to-view TV programmes show that they should form separate relevant markets – market for the **retransmission of basic pay-to-view TV channels** and a market for **the retransmission of premium pay-to-view TV channels**, because premium pay-to-view TV channels bring a very specific content (in particular sports, films and other exclusive content), which have a special value for the viewers and are not available on the basic pay-to-view channel²⁷. As regards to the market for the retransmission of premium pay-to-view TV channels, the European Commission admitted the possibility of its further division into **relevant markets for retransmission of premium pay-to-view sports channels** and **the retransmission of premium pay-to-view film channels** because they cannot be replaced by other channels²⁸. However, the Commission refused a further division of the relevant market for retransmission of premium pay-to-view sports channels into markets that would include only separate premium pay-to-view sports channels bringing the most attractive content²⁹. The reason is the acquired knowledge that although premium pay-to-view sports channels bring the most attractive content that attracts viewers and generates income, providers of retransmission of premium pay-to-view sports channels still have the possibility to differentiate themselves by investing in an alternative content which

²⁵ The mentioned European Commission Decision *Newscorp/Telepiu*, paragraphs 112 and 113.

²⁶ Commission Decision of 13 October 1999 *Telia/Telenor*, OJEC L 40 of 9 February 2001, paragraph 266.

²⁷ European Commission Decision of 7 April 2017 *FOX/SKY*, OJEU C 238 of 22 July 2017, paragraphs 81 and 100.

²⁸ European Commission Decision of 30 May 2018 *LIBERTY GLOBAL/ZIGGO*, OJEU C 327 of 17 September 2018, paragraph 112.

²⁹ Such most attractive sport events on the Dutch market were the Formula One World Championship, English Premier League, Spanish La Liga and Dutch Eredivisie Football League (Decision *LIBERTY GLOBAL/ZIGGO* – paragraph 76).

can become over time equally or more attractive to viewers and subscribers, due to contingent circumstances (e.g. top athletic competitions with the participation of national athletes) or a change in viewers' preferences³⁰.

2. The weight of the rights to broadcast sports events in the assessment of a dominant position of an undertaking on a relevant media market (co)created by sport

A dominant position on the relevant market is held by an undertaking or several undertakings that are not subject to substantial competition and which can behave independently as a result of their economic power (§ 8 paragraph 1 of APC). The partial evaluation criteria of the existence of a dominant position in the market are the market share of the examined undertaking, its economic power and its potential competition in the market.

The conclusion regarding the **economic power of an undertaking** (or group of undertakings) is the result of the partial conclusions on the market position of the undertaking, to which the competition authority arrived at by applying different partial evaluation subcriteria. These sub-criteria are the financial power, **access to assets required for operation in the market**, the presence of several group members in one relevant market or on upstream/downstream relevant markets and other factors. The rights to broadcast sports events may be an important factor in terms of the criterion of access to assets required for operation in the market.

In the case of *Slovak Telekom/DIGI SLOVAKIA*³¹ the Office examined a concentration between two providers of the TV programme retransmission service; one of them also produces a sports channel (DIGI Sport) that is part of its TV programme offering. Therefore, the Office examined whether this sports channel was – thanks to its popularity among viewers – indispensable for the preparation of a competitive programme offering of any TV programme retransmission service provider, i.e. whether it is a so-called **“must have” TV channel**. The Office used data from the audience survey conducted among Slovak television viewers, which provided information about: (i) the awareness of individual channels, including the sports ones, expressed as a ratio of the number of television viewers being aware of the respective channel to the total number of television viewers, (ii) the ranking of all channels, including the sports ones, in terms of audience, (iii) the ranking of individual sports channels in terms of audience. The sports channel DIGI Sport with 35% of television viewers being aware of this channel ended in the survey as the 49th most watched TV channel and as the 6th most watched sports channel. In the said survey the television viewers answered among others the question which of all TV channels, including sports channels, that they do not receive at their homes, they would like to watch. The survey showed that the sports channel DIGI Sport would only be chosen by 8% of the viewers, who did not receive it at their homes, which places it

³⁰ Decision *LIBERTY GLOBAL/ZIGGO*, paragraphs 77 and 112.

³¹ Decision No. 2013/FH/3/1/016 of 31 July 2013.

27th in the ranking of all TV channels and 5th in the ranking of sports channels. The Office therefore concluded that the sports channel DIGI Sport is not a so-called “must have” channel for the TV programme retransmission service providers operating in the Slovak market, and thus it did not make it possible for the participants of concentration to prevent their competitors on the TV programme retransmission market from access to an asset required for the operation in this market³².

It was only during the administrative procedure that one of the participants of the concentration (Slovak Telekom) acquired an exclusivity in respect of the sports TV channel Slovak Sport 2, which shows both domestic and foreign sports events, among others the English top football competition Premier League. However, the Office reminded that the exclusive rights to some sports and non-sports channels had already been acquired before the examined concentration and in spite of the fact that the size of the acquirer had been comparable with its competitors. This is evidenced by the acquisition of exclusive rights to the English Premier League by the undertaking DIGI SLOVAKIA that took place before the concentration with Slovak Telekom in 2011 (with a market share accounting for 20 – 30% of the total number of customers of pay-to-view television services in SR). So, this acquisition of exclusivity could not constitute proof of an important negotiating power of the emerging group toward the grantors of the broadcasting rights to “audio-visual TV content” and consequently of a competitive advantage of the emerging group over the other providers of the TV programme retransmission service³³.

In the case of *NENT/Telenor/JV*³⁴ the European Commission examined a concentration creating a group of undertakings present in both the market for granting broadcasting rights to TV channels and that for TV programme retransmission in Scandinavian countries. The market for granting broadcasting rights to TV channels had been defined as the relevant product and service market without distinguishing the genres preferred by these channels. Nevertheless, the Commission assessed the position of NENT (as part of the emerging group) in the individual segments of this market, one of which was the segment of granting the broadcasting rights to premium pay-to-view sports TV channels in Norway. The Commission estimated the market share of NENT in this market segment at 20-30% (in terms of audiences) or 40-50% (in monetary terms), which represented an important market share. The analysis of opinions of the market participants showed that the premium pay-to-view sports TV channels of NENT were an **important precondition for entry into the TV programme retransmission market**, because these channels covered a unique sport content (such as football Champions League), which the TV programme retransmission service providers considered as highly relevant from the perspective of television viewers. The Commission concluded that NENT **would probably have the capacity to deny its competitors** in the market for retransmission of TV programmes in Norway, fully or partially, **access** to its premium pay-to-view sports

³² Decision *Slovak Telekom/DIGI SLOVAKIA*, paragraphs 123 and 127.

³³ Decision *Slovak Telekom/DIGI SLOVAKIA*, paragraphs 136 to 139.

³⁴ Decision of 30 April 2020, OJEU C 54 of 16 February 2021.

TV channels (and to reserve these channels for TV programme retransmission services provided by the company itself or by other undertakings of the emerging group).³⁵

On the other hand, the Commission concluded that NENT would probably not be **motivated to deny its competitors** in the market from the retransmission of TV programmes in Norway, fully or partially, **access** to its premium pay-to-view sports TV channels, among others for the following reasons:

- a) The loss of revenues caused by a denial of access to its channels for other TV programme retransmission service providers would be higher than the increase of revenues achieved by the potential extended sale and the potential higher prices of retransmission of these channels through their own services or services of related undertakings;³⁶
- b) NENT had been vertically integrated (it operated in both the market for granting broadcasting rights to TV channels and that for the provision of TV programme retransmission services in Norway) already before the concentration and yet it was also selling broadcasting rights to its TV channels to its competitors in the TV programme retransmission market;³⁷
- c) By denying RiksTV access to its channels NENT would risk the retaliatory denial of access to TV channels supplied by TV2 Norge, which is co-owner of RiksTV and the largest creator of TV channels in Norway with shares of over 50% of the market for granting broadcasting rights to TV channels (and in any of its segments).³⁸

3. Assessment of business practices on relevant media markets (co) created of sport

3.1. Assessment of agreements restricting competition

3.1.1. Agreements influencing the final price and the form of other conditions of their performance

In decision *Eurovision*³⁹ the European Commission assessed the Eurovision system that was based on the joint acquisition of rights to sports events by EBU members (the European Broadcasting Union – Union Européenne de Radio-Télévision) and later distribution of these rights.

The restriction of competition in the phase of joint acquisition of rights consisted in the fact that instead of competing with each other for the acquisition of rights to sports events EBU members agreed on collective negotiations with the right holders. It allowed them to formulate a unified offer of financial and non-financial conditions of the acquisition of these rights in relation to their holders. Competition was thus restricted, in

³⁵ Decision *NENT/Telenor/JV*, paragraphs 34, 231, 232, 234, 242 and 246.

³⁶ Decision *NENT/Telenor/JV*, paragraphs 249, 257 and 258.

³⁷ Decision *NENT/Telenor/JV*, paragraph 250.

³⁸ Decision *NENT/Telenor/JV*, paragraph 264.

³⁹ Decision of 10 May 2000, OJEC L 151 of 24 June 2000.

particular on territorial relevant markets, on which several EBU members operated, directly or through transmission of a signal from a territory that constituted another territorial relevant market.⁴⁰

Another element of the Eurovision system was the exchange of transmission signals between the EBU members. Whenever an EBU member covered a sports event, which took place on its national territory and was of potential interest to other EBU member/members, the local member offered its coverage free of charge to the other members on the understanding that, in turn, it would receive corresponding offers concerning similar interesting events from the other members. The Commission saw a restriction of competition in the case of this element of the Eurovision system in the fact that one member was obliged to offer the transmission signal to the other members free of charge.⁴¹

3.1.2. Agreements on division of a market

The Eurovision system, which was the reason for the issue of the Commission Decision *Eurovision*, also included the sharing of the jointly acquired rights (to sports events) among the members. Restriction of competition was evident on the geographic relevant markets, where several EBU members operated simultaneously, directly or through signal transmission from territories forming other geographic relevant markets, because they aimed their broadcast at the same audience. In this case the concerned members had to agree among themselves on the procedure for the sharing of these rights, e.g. transmission of the signal from the same event alternately by both members or the application of the rule of priority of the member, who transmitted the signal from a sports event taking place in its local territory in favour of the other members.⁴²

3.1.3. Agreements on the granting of exclusivity

In decision *Joint selling of the commercial rights of the UEFA Champions League* the Commission was confronted with the UEFA (Union of European Football Associations) system in respect of the sale of rights to matches played within the Champions League. The applicability of the prohibition of any agreements restricting competition to this system was determined partly by the exclusive right of UEFA to sell some rights to Champions League matches and partly by some restrictions on the procedure, according to which the clubs [that are exclusive holders, and in some cases co-holders (together with UEFA) of the rights to matches played within the Champions League] would sell rights not ceded by UEFA.

The exclusive right of UEFA to sell some rights to Champions League matches prevents the individual clubs from individually marketing the rights to these matches and thus eliminates – in the market for acquisition of transmission rights to football events that are played regularly throughout every year – competition among clubs and between

⁴⁰ Decision *Eurovision*, paragraphs 73 and 74.

⁴¹ Decision *Eurovision*, paragraphs 78 and 90.

⁴² Decision *Eurovision*, paragraphs 76 to 78.

clubs and UEFA. Applicants for these rights can thus acquire the rights to these matches from a single source.⁴³

3.1.4. Possibility of the exemption of agreements restricting competition from prohibition

The option to exempt agreements otherwise restricting competition from prohibition was introduced because in the case of some of these agreements the damage in the form of a decrease in competition intensity, caused by the agreement, could be outweighed by the benefits in the form of a potential contribution of the agreement to improving the production or distribution of goods or to promoting technical or economic development. The provisions of Article 6 (3) of APC and Article 101 (3) of TFEU lay down the same four conditions of exemption of an agreement from prohibition.

3.1.4.1. Contribution of an agreement to improving the production or distribution of goods or to promoting the technical or economic development

In the decision *Joint selling of the commercial rights of the UEFA Champions League* the European Commission concedes that the exclusive right of UEFA to sell some rights to Champions League matches contributed to improving the production, distribution of goods or to promoting the technical or economic development, because:

- a) it allows the applicants for these rights to avoid communication problems and to decrease transaction costs, to which they were exposed when they needed to negotiate the acquisition of rights to individual matches with clubs, that will be protagonists of these matches. This is especially important in the case of European competitions such as the Champions League, which involves clubs from different States with different regulation rights to matches;
- b) it allows the selling of rights to UEFA matches in packages, which enables the TV broadcasting and retransmission operators to better plan their programmes of broadcasting the Champions League matches, often till the finals. It also allows them to cover not only one or several matches, but all events played in the Champions League; this is manifested by the possibility to weekly broadcast a programme covering the most important moments of all matches of the playing day or week;
- c) the sale of rights in a package decreased the financial risk for the TV broadcaster and retransmission operators, to which they would expose themselves if they acquired the rights to matches involving a particular club and this club were eliminated in the first stages of the competition⁴⁴;
- d) the uniform approach to the development and sale of products made up by the rights to Champions League matches contributes to the uniformity and consistency of the product “UEFA Champions League” which, associated with a uniform and high-

⁴³ Decision *Joint selling of the commercial rights of the UEFA Champions League*, paragraph 114.

⁴⁴ Decision *Joint selling of the commercial rights of the UEFA Champions League*, paragraphs 144 to 150.

quality media coverage, increases the attractiveness of the competition for both television viewers and the clubs⁴⁵.

One of restrictions imposed on the clubs selling the rights conferred upon UEFA was the impossibility for the clubs to sell the rights in package 4, that UEFA failed to sell within a defined period (and that were returned to the clubs), to free-TV stations. The Commission concluded that this restriction did not contribute to improving the production or distribution of goods, because in the case of the application of this restriction some matches could stay without television coverage, especially when only free-TV broadcasters operate in the respective territory, or when pay-to-view-TV broadcasters have already satisfied their demand with the Gold or Silver rights packages.⁴⁶

The restrictions imposed on clubs developing products from the rights to their matches in the Champions League, that had not been conferred upon UEFA, were justified by the necessity to safeguard the reputation and identity of the “UEFA Champions League” brand and to find an optimal model of the coexistence of the “UEFA Champions League” branded products and club branded products. These club products had to be developed so that their content could not be confused with the “UEFA Champions League” branded products, as defined in relation to each type of rights.⁴⁷

Finally, the exclusive right of UEFA to sell some rights to Champions League matches was justified by the principle of solidarity of stronger clubs with weaker clubs, which however allows it to maintain a certain balance between them. This balance contributes to the comparability of the Champions League matches and thus makes the rights to them more desirable. The solidarity system also has a positive impact in relation to the players who are the basic element of the system. However, the Commission surprisingly did not consider the argument based on the principle of solidarity as sufficient. Instead, it justified the exemption of the joint selling scheme in respect of the rights to UEFA Champions League matches from prohibition by the positive effects mentioned above.⁴⁸

In the decision *Eurovision* the European Commission sees the contribution of the joint acquisition of rights to sports events by the EBU members in the fact that it guarantees access of the EBU members, in particular of the small ones, to interesting sports events, decreases the transaction costs and guarantees that the negotiation will be carried out by the most competent negotiator, i.e. the local member who is familiar with the local conditions or the EBU itself, which has specialised staff experienced in negotiations at an international level. The joint acquisition of rights also enables access of a larger number of entities to a larger number of events.⁴⁹

If two members, who operate on the same territorial market, agree that they will use the jointly acquired rights for alternate transmission of the same sports event by both

⁴⁵ Decision *Joint selling of the commercial rights of the UEFA Champions League*, paragraph 154.

⁴⁶ Decision *Joint selling of commercial rights to the Champions League UEFA*, paragraph 159.

⁴⁷ Decision *Joint selling of the commercial rights of the Champions League UEFA*, paragraphs 162 and 163.

⁴⁸ Decision *Joint selling of the commercial rights of the Champions League UEFA*, paragraphs 165 to 167.

⁴⁹ Decision *Eurovision*, paragraphs 85 to 87.

members, the contribution will consist in quasi-permanent coverage of the sports event, especially in the case of events spread over a longer period, such as the Olympic games⁵⁰.

The exchange of the transmission signal between the members in turn enables the coverage of a larger number of events⁵¹.

3.1.4.2. *Fair share of the benefit to consumers*

In the decision *Joint selling of the commercial rights of the UEFA Champions League* the European Commission identified the advantages of the joint selling scheme in respect of rights to Champions League matches for two types of consumers: consumers as acquirors of the rights to matches and final consumers, i.e. television viewers.

Thanks to the joint selling arrangement, the applicants for the rights to matches get more efficient and easier access to this unique content, which is in addition carrying the UEFA Champions League quality brand label. The increased effectiveness allows the applicants to invest more in new production and transmission technologies or in quality television coverage, quality production and presentation. Moreover, this unique product is accessible to a larger number of applicants, including small and medium enterprises, as well as to applicants operating so-called “new” media.⁵²

Thanks to better media coverage of the competition, television viewers can watch all premium matches of every match day over the course of the entire season which are of particular interest to them. Viewers also benefit from a facilitation of access to deferred media content and archive material, which may be of special interest to them⁵³.

In the case of *Eurovision* the Commission recognised that the joint acquisition of rights to sports events allowed the EBU members to improve their offer of transmitted sports events, in terms of both quantity and quality, by transmitting not only the most popular, but also minority audience sports events⁵⁴.

The advantage of the exchange of transmission signal between EBU members consists in the certainty that essentially all sports events, that are of potential interest beyond national boundaries, will be covered and offered to all EBU members⁵⁵.

3.1.4.3. *Indispensability of restrictions on competition for the achievement of aims of the agreement*

In the decision *Joint selling of the commercial rights of the UEFA Champions League* the European Commission based its decision on the indispensability of the introduction of the joint selling arrangement in respect of rights to the Champions League matches on:

- a) the fact that sold rights to sports events were most frequently aggregated in some form;

⁵⁰ Decision *Eurovision*, paragraph 88.

⁵¹ Decision *Eurovision*, paragraph 90.

⁵² Decision *Joint selling of the commercial rights of the Champions League UEFA*, paragraphs 170 and 171.

⁵³ Decision *Joint selling of the commercial rights of the Champions League UEFA*, paragraph 172.

⁵⁴ Decision *Eurovision*, paragraph 91.

⁵⁵ Decision *Eurovision*, paragraph 93.

- b) the legitimate right of UEFA to create its own product that would – unlike potential products made up of excerpts from Champions League matches by other entities with their own interests – be focused exclusively on the Champions League and represents it in an objective and independent manner, and
- c) the indispensability of the intervention of UEFA for the achievement of this aim. Moreover, the sale of the same rights by two sellers (clubs that are protagonists of the match) would bring smaller revenues than their sale by a single seller (UEFA).⁵⁶

3.1.4.4. No elimination of competition in relation to a substantial part of the concerned goods in the relevant market

In the decision *Joint selling of the commercial rights of the UEFA Champions League* this condition was fulfilled, because the rights to Champions League matches represent on average only 20% of the rights in the relevant market. Moreover, the joint selling scheme in respect of rights to Champions League matches assumed the presence of a single entity on the supply side, but not on the demand side; these rights were offered for sale in a competitive bidding procedure open to all applicants. This allowed acquisition of these rights by several media operators.⁵⁷

In the decision *Eurovision* the Commission made sure that the joint acquisition of rights to sports events by the EBU members would not exclude competition in the respective relevant market, on the basis of several facts. Firstly, the joint acquisition of rights by the EBU members only concerned international sports events, not the national ones, which are the majority of the sports events shown on television. At the acquisition of rights to international sports events EBU faces increasing competition from large multimedia groups and specialised brokers and its market share has been declining. Moreover, under the 1999 EBU rules, a non-member EBU, which was a pay-to-view TV channel, had the right to acquire the rights to a sports event, that have already been acquired jointly by the EBU members, and to transmit this sports event at the same time, at which it was transmitted by a EBU member on its pay-to-view TV station. This places the operators of pay-to-view TV stations – the EBU members and the non-EBU members – on an equal footing. Finally, the EBU members could always sell, on their national market, the jointly acquired rights to an applicant – EBU non-member on more favourable terms.⁵⁸

3.2. Prohibition of an abuse of a dominant position

A dominant position can be abused among others by making the conclusion of a contract by the undertaking in a dominant position subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such a contract.

⁵⁶ Decision *Joint selling of the commercial rights of the UEFA Champions League*, paragraphs 174 to 176.

⁵⁷ Decision *Joint selling of the commercial rights of the UEFA Champions League*, paragraphs 193 and 194.

⁵⁸ Decision *Eurovision*, paragraphs 101 to 103, 109 and 110.

In decision *SITA/TASR* the President of the Office examined whether a dominant undertaking had committed this abuse of a dominant position. Specifically, TASR subjected subscription of the home, visual and TOP news by customers to the condition that the customers would also subscribe to international, economic and sports news.

The President of the Office reminds that in this type of conduct the undertaking uses its dominant position in the market for provision of certain goods or service (the tying subjecting product) to force the customers to purchase from it also other goods or service (the tied product) in order to eliminate competition in the market for provision of the tied product, with the intention to significantly increase the prices of the tied products after elimination of competition and acquisition, or even strengthening of its dominant position in this market. The conduct of TASR fully fitted this scheme, because two out of three tied products (economic and sports news) had been provided not only by TASR, but also by SITA, while TASR was the exclusive provider of two from three tying products (visual news and TOP news) and had a strongly dominant position in the market of provision of the third one (home news).⁵⁹

The assessment whether the conduct of the dominant undertaking satisfies the tying criteria depends among others on whether the tied products by their nature or according to commercial usage are in no connection with the tying products. Although according to TASR the visual service inevitably has a connection with the verbal news, an investigation of the Office showed that these two services could be supplied individually, also by different suppliers. The possibility to only subscribe certain services was confirmed for the other news services as well, because some customers actually had only subscribed to some of them (paragraph 60).⁶⁰

3.3. *Examination of concentrations*

3.3.1. *Horizontal concentrations*

In the mentioned decision *NewsCorp/Telepiu*⁶¹ the European Commission examined a concentration consisting in a merger of two (until then the only) operators of retransmission of TV programmes via a satellite in Italy (Telepiu and Stream), which led to:

- a) a **dominant position of the newly established group in the market for retransmission of TV programmes in Italy** and
- b) a **dominant position of the newly established group in individual markets for acquisition of broadcasting rights to the individual types of programmes in Italy** (premium feature films; regular football competitions involving national teams; other sports events; TV channels), allowing the newly established group to eliminate competition on the demand side, to dictate the grantors of these rights the terms of

⁵⁹ Decision *SITA/TASR*, paragraphs 59 and 61.

⁶⁰ Decision *SITA/TASR*, paragraph 60.

⁶¹ Comment to the case – see for example GÁBRIŠ, T. Sport law. First edition. Bratislava: EUKÓDEX, 2011, pp. 339 and 340.

their granting and to adjust these terms so as to prevent new operators of TV programme retransmission via satellite from entry into the market.⁶²

With regard to the fact that the concentration would create to a strongly dominant position of the newly established group in the relevant markets mentioned above, the Commission made the approval to the concentration subject to important **concessions on the part of the newly established group**. These concessions included:

- a) – in relation to the ongoing exclusive contracts with grantors of broadcasting rights to matches of regular football competitions, in which national teams participate, and to premium feature films – **the right of the grantors of these rights to unilaterally terminate these contracts** (in case of football clubs as grantors of broadcasting rights to football matches, starting from the season 2003/2004) and **the obligation to waive exclusivity and other protection rights in relation to the methods of retransmission other than signal transmission via a satellite** (cable, Internet, UMTS, ...). The limitation of exclusivity to satellite TV would significantly improve the chances to enter the TV programme retransmission market for the operators who use for signal transmission other means than satellite. The right to unilaterally terminate the ongoing contracts would significantly increase the availability of football matches and premium feature films also for potential new operators who provide the TV programme retransmission service via satellite,⁶³
- b) – in relation to the future exclusive contracts with grantors of broadcasting rights to matches of regular football competitions, in which national teams participate – **the limitation of the duration of future exclusive contracts and the unilateral termination right granted to football right owners** are effective undertakings, in that they will make broadcasting rights to football matches contestable in the market at regular intervals and available also for entities other than Telepiu and Stream,⁶⁴ and
- c) **The wholesale offer addressed to operators of TV programme retransmission by other means than satellite, for acquisition, on a non-exclusive and unbundled basis, of rights to broadcast all the most attractive programmes of the newly established group**, for as long as the newly established group offers these programmes to its own subscribers.

This wholesale offer was **supplemented by a “best endeavours clause”**. In the event that the newly established group, having used such reasonable endeavours, has been unable to acquire the rights to broadcast by means of retransmission other than satellite certain content, which it is entitled to broadcast via satellite, it shall take all reasonable steps to provide a full package of content, including the provision of suitable alternative content⁶⁵.

⁶² Decision *Newscorp/Telepiu*, paragraphs 162 and 168.

⁶³ Decision *Newscorp/Telepiu*, paragraphs 230 to 232.

⁶⁴ Decision *Newscorp/Telepiu*, paragraph 233.

⁶⁵ Decision *Newscorp/Telepiu*, paragraph 249.

The principles of determination of the price of this wholesale offer are laid down satisfactorily, but they leave a sufficient margin of discretion to the Italian Office for Regulation of Communications, which will be an arbiter in disputes arising from the performance of obligations of the newly established group, including disputes relating to an wholesale offer.

Finally, the newly established group undertook **not to discriminate between its own retail operation and retail operations of the customers of this wholesale offer**, and in particular not to design a discount structure such as to only allow its own retail operation to benefit from the highest discount rate made available by its wholesale operation, to the detriment of third-party retailers.⁶⁶

3.3.2. Concentrations consisting of the presence of group members on the neighbouring markets

In decision *Bertelsmann/Kirch/Premiere*⁶⁷ the European Commission examines a concentration leading to the establishment of a group of undertakings that would have a **very strong dominant position in the market for broadcasting of free-TV stations in Germany (60%) and practically a monopoly in the market for retransmission of premium stations** (through the station *Premiere*) and **later also packages of TV channels in Germany**. The Commission stated that one of the foreseeable consequences of such a concentration would be the effort of the concentrated undertakings to perform coordinated purchases of broadcasting rights. It seemed likely that the **concentrated undertakings would acquire the broadcasting rights in a coordinated manner** in order to make optimal use of them with regard to the group strategy, for example by reserving transmission of the most popular sports events (e.g. finals of football competitions) for a pay-to-view-TV station, while the other sports events would be transmitted by free-TV stations.⁶⁸

With regard to the foreseeable coordination of purchases of broadcasting rights and the programme policy of the concentrated undertakings, the Commission identified among others **a risk of strengthening the dominant position of *Premiere* in the market for retransmission of premium stations or packages of TV channels**⁶⁹ and declared the planned concentration incompatible with the common market.

Conclusion

The development of new television signal transmission technologies made the watching of sports events accessible to an even larger group of television viewers, who can watch them in even higher quality. This fast development of transmission technologies, combined with the long-term position of sport as one of the two most important elements

⁶⁶ Decision *NewsCorp/Telepiu*, paragraph 249 to 252.

⁶⁷ Decision of 27 May 1998, OJEC L 053 of 27 February 1999.

⁶⁸ Decision *Bertelsmann/Kirch/Premiere*, paragraph 91.

⁶⁹ Decision *Bertelsmann/Kirch/Premiere*, paragraph 99.

of attractiveness of the TV programme offer for television viewers (beside of the latest feature films), triggered a wave of interest among TV broadcasters in the acquisition of rights to sports events (especially the most popular ones) and in their commercial or hybrid commercial participative use (e.g. as in the mentioned case of *Eurovision*). The competition authorities (both European and Slovak) have successfully addressed the competition concerns brought by the strong wave of concentrations and agreements restricting competition in the TV sector since the turn of the millennium, without getting in the way of the application of the new technological and commercial procedures, unless the degree of restriction of competition clearly exceeded the critical level or the overall competition-economic balance of the examined operation became negative. The standardised “arsenal” of principles, conditions, criteria, parameters and procedures that was gradually built up in the application practice of the competition authorities for the determination of compliance of the business practices with the requirement of the protection of competition, proved in principle sufficient for grasping the competition challenges linked to this wave.

The legislator nevertheless intervened into broadcasting rights of broadcasters of some types of events. When transposing the European Directive⁷⁰, the Slovak legislator imposed on a broadcaster that has the exclusive right to broadcast:

- a) an event attracting increased public attention, the obligation to tolerate broadcasting of recorded extracts from such an event by other broadcasters and to enable its recording in the extent and under the conditions laid down by law⁷¹ and
- b) an important political, social, cultural or sports event, the obligation to enable a substantial proportion of the public (more than 80% of the population) to watch these events free from special fees through a broadcaster, whose broadcasts are accessible for more than 80% of the population without the payment of special fees, under the conditions laid down by law and by the Council for Broadcasting and Retransmission⁷², if it is unable to ensure the watching of such an event by a substantial proportion of the public by its own means.

In connection with this normative intervention a peripety, that preceded the concentration examined in the case Slovak *Telekom/DIGI SLOVAKIA*, is worth mentioning. In 2010 DIGI SLOVAKIA acquired among others broadcasting rights to the Slovak Top Football League and to matches of the Slovak football representation team for its prepared sports channel DIGI Sport, which launched a debate on the admissibility of the sale of broadcasting rights to such important sports events to a broadcaster with

⁷⁰ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulations or administrative action in Member States concerning the provision of audiovisual media services (Directive on Audiovisual Media Services), OJEU L 95/1 of 15. April 2010

⁷¹ Article 30 of the Act No. 308/2000 Coll. on broadcasting and retransmission and on amendment of the Act No. 195/2000 Coll. on telecommunications.

⁷² Article 31 of the Act No. 308/2000 Coll. on broadcasting and retransmission and on amendment of the Act No. 195/2000 Coll. on telecommunications.

such limited coverage of the population (in 2010, its market share represented 20 – 30% of the total number of the customers of pay-to-view TV services in SR). This situation was made possible by the fact that the Slovak Top Football League matches and matches of the Slovak football representation team in the said period had not appeared on the list of important events⁷³, that would fall under the obligation of the holder of broadcasting rights to enable a substantial proportion of the public to watch these events.⁷⁴

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⁷³ Article 31 paragraph 2 of the Act No. 308/2000 Coll. on broadcasting and retransmission and on amendment of the Act No. 195/2000 Coll. on telecommunications.

⁷⁴ GÁBRIS, T. Sport law, pp. 328 and 329.

MEDIA COVERAGE OF SPORT FROM THE PERSPECTIVE OF ANTIMONOPOLY LAW

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Decision of the Office No. 2003/DZ/2/1/122 of 20 June 2003 *SBD Šaľa*

Decision of the Council of the Office No. 2004/DZ/R/2/012 of 23 January 2004 *SBD Šaľa*

Decision of the Office No. 2003/FV/3/1/278 of 26 November 2003 *Liberty Media Corporation/UnitedGlobalCom*

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