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Rules Governing the Acquisition by Third Parties of Television Rights for Sporting Events under *Eurovision* in Breach of the European Competition Law

(Judgement of the Court of First Instance in Joined Cases T185/00, T299/00 and T-300/00, *M6 v Commission, Gestevisión Telecinco v Commission and SIC v Commission*, 8 October 2002)

Summary

The Commission was wrong to conclude that, even in a market limited to certain major international sporting events, the sub-licensing system set up by the European Broadcasting Union (EBU) guarantees access to Eurovision rights for third parties competing with EBU members.

According to the Court of First Instance, the sub-licensing system does not guarantee competitors of members of the EBU sufficient access to the transmission rights for sporting events which members hold due to their participation in that purchasing association. In the eyes of the Court, the condition on which the EBU exemption was based - the non-elimination of competition for non-members - has not been satisfied. As a result, the exemption the EBU enjoyed due to the Commission decision must be annulled.

I. Background

1. The *Eurovision* system

Eurovision is a television programme exchange system, created in 1954 and based on the understanding that member radio and television organisations will offer other members their coverage of national sporting and cultural events likely to be of interest to them. It is coordinated by a professional association, the European Broadcasting Union (EBU), a consortium of public mission-oriented broadcasters, who may participate in the joint acquisition and sharing of television rights to international sporting events, known as *Eurovision* rights.

Since the EBU is a non-profit making association, composed mainly of public service broadcasters,² its members are obligated to cover an entire national population and, in fact,

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² However, in the past the EBU was criticized for the fact that Canal Plus (a French channel) was previously its member even though, subsequent to entry into the EBU, it transformed into a pay-per-view commercial broadcaster

actually must cover a substantial part thereof, while using their best efforts to achieve full coverage. They must provide varied and balanced programming for all sections of the population, including a fair share of programs catering to minority/special interests, irrespective of the ratio of program cost to audience size.³ Presumably, this prevents members from focusing strictly on major sports events that may be the most popular, and thus, attract the most viewers.⁴

EBU members compete individually against each other and/or private broadcasters for national sports events. Eurovision system therefore applies only to international sports events.

The Eurovision scheme is based on reciprocity: whenever one member covers a sports event occurring in its own national territory, it offers coverage free of charge to all other members on the understanding that it will receive corresponding services from other members when events take place in their respective countries.

All interested EBU members jointly acquire television rights to an event, and then share the rights and the related fees among themselves. Whenever EBU members from two or more countries want to broadcast a given sports event, they request coordination from the EBU. A member in whose country the event occurs, or the EBU itself, then conducts negotiations (on behalf of the interested EBU member(s) with the event's organizer. EBU members may negotiate separately only after joint negotiations fail.⁵

Members who compete with each other for audiences have to agree among themselves on the procedure for attributing priority to one of them. For example, they could agree to alternate transmission of an event. If the parties do not reach agreement, they obtain non-exclusive rights to broadcast the event in their same national territory.⁶

The EBU statutes provide for contractual access to Eurovision for third party non-members. In general terms, according to the EBU rules, non-members (who are mainly private commercial broadcasters) may gain access for live transmission if no EBU member in the country concerned has reserved its own live transmission of a sports event. When an EBU member does opt to broadcast an event live in the country concerned, non-members may gain access for deferred transmission at least one hour after the conclusion of an event. The terms and conditions of access are freely negotiated between the EBU (for transnational channels), or the member(s) in the given country (for national channels), and the non-member. If a dispute develops over the access fee, the parties may request arbitration by an independent expert, or, if both parties agree, by three experts.⁷

2. The evolution of the conflict

The conflict over acquisition and sharing of sport television rights comes back to 1987, when, in response to a complaint by the company *Screensport*, the Commission had to examine the rules governing the Eurovision system. As a result of the Commission's investigation, the EBU was bound to revise its rules so as to make it possible to obtain sub-licenses for the broadcasts in question. Subsequently, the Commission adopted, on 11th June 1993, Decision 93/403/EEC relating to a proceeding pursuant to Article 81 of the EEC Treaty, under which it granted an exemption pursuant to Article 81(3) EC Treaty.

³ Cf. the EBU statute on membership conditions, http://www.ebu.ch/members/members_conditions.php.

⁴ Decision 93/403/EEC 'Eurovision' of 11th June 1993, 1993 O.J.L 179, 23, at 24.

⁵ *Supra*, n. 3, at 28.b

⁶ See Aaron N. Wise & Bruce S. Meyer, *International Sports Law and Business* 1790 (1997).

⁷ See *EBU Non-Members Access to Eurovision Sports Programmes*, http://www.ebu.ch/departments/legal/activities/leg_rules_tv_sublicensing.php.

According to Article 81(1), agreements between undertakings, which may affect trade between Member States and have as their object or effect the restriction of competition within the common market, are prohibited.

Article 81 is one of many EC Treaty tools which help us achieve the establishment of the common market. However, competition is not an end in itself within the EU context.⁸ Therefore, Article 81(3) provides an exemption to this prohibition, which may be granted by the Commission if an agreement:

- 1) increases efficiency;
- 2) provides that the efficiencies are passed to the consumers;
- 3) contains the restrictions which are indispensable to the attainment of the agreement's objectives;
- 4) and does not lead to the elimination of competition 'in a substantial part of the products in question'.

The 1993 Eurovision decision by the Commission is an example of such an exemption. It was based on the reasoning that Eurovision reduced transaction costs, benefited smaller members, enabled coordination by different channels within countries, and facilitated exchange of programs between countries.⁹

This exemption from the EU competition rules applying to companies for access to the rights held by the EBU was annulled by the Court of First Instance on 11 July 1996 on the ground that the EBU membership criteria were too vague to be indispensable as required by Article 81(3), and that the exemption had been based solely on fulfilment of a particular public mission.¹⁰ Public interest obligations, defined essentially by reference to the mission of operating services of general economic interest referred to in Article 86(2) EC Treaty, (which as such was deemed inapplicable) may be considered, the Court reasoned, but only by explaining precisely in financial and qualitative terms how exclusive purchasing is indispensable. In more practical terms, the annulment was due in particular to the fact that French pay-TV company Canal Plus was an EBU member. Subsequently, on the Commission's request, the EBU adopted new *Eurovision* provisions relating to sub-licensing, which subsequently led to exclusion of Canal Plus from the membership in the Eurovision system. Thus, the Commission granted a new exemption pursuant to Article 81(3)¹¹ declaring in Art. 1 of the decision that the provisions of Article 81(1) are inapplicable from 26 February 1993 to 31 December 2005 to the following notified agreements: the joint acquisition of sport television rights; the sharing of the jointly acquired sport television rights; the exchange of the signal for sporting events; the sub-licensing scheme; the sub-licensing rules.

In the eyes of the Commission, although Eurovision system can, indeed, restrict competition between the EBU member, it provides for a number of improvements - reduction of transaction and other costs - which benefit in particular small member channels from smaller countries, allowing them to show more sports programmes and of better quality than would otherwise be the case. In addition, the Commission has contended in its decision that

⁸ Opinion 1/91 *Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty* [1991] I-ECR 6079, paragraphs 17 and 18 and the opinion of Advocate-General Darmon, Case C-185/91 *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH & Co. KG* [1993] I-ECR 5801, paragraph 23.

⁹ *Supra*, n. 3.

¹⁰ See Joined Cases T-528/93, T-542/93, T-543/93, T-543/93 and T-546/93 *Métropole Télévision and Others v Commission*.

¹¹ Decision 2000/400/EC 'Eurovision' of 10th May 2000, 2000 OJ L 151, 18.

the cooperation of member channels within the Eurovision System facilitates cross-border broadcasting and contributes to the development of a single European broadcasting market.

The Commission also has taken into account in granting the second exemption that EBU has significantly lost market share during the last ten years as a result of new entrants into the market and the increased capacity devoted to sports broadcasts which caused a sharp rise in the prices of the TV rights for sports events.

Therefore, given the structure of and developments on the relevant market and the effect on it of the notified rules, the Commission has concluded in its decision that the notified arrangements, although falling within the scope of Article 81(1) of the EC Treaty and Article 53 (1) of the EEA, meet the criteria for an individual exemption pursuant to Article 81(3) of the Treaty.

However, access to the broadcasting rights for sporting events shall be granted on reasonable terms and conditions for deferred transmissions, extracts and news, but also live transmissions with regard to all events which the EBU members do not themselves broadcast live. As far as the use of such rights by EBU members on pay-TV channels is concerned, the sublicensing rules, give the non-EBU members, in the Commission's view, the right to broadcast on their pay-TV channels identical or comparable competitions to those presented on the EBU members' pay-TV channels.

3. The present case

Four companies operating free-to-air television channels with national coverage - the French channel Métropole télévision SA ("M6"), the Spanish companies Antena 3 de Televisión, SA and Gestevisión Telecinco, SA and the Portuguese company Sociedade Independente de Comunicação, SA ("SIC") have felt affected by the Commission's decision. They have contested the "new" Eurovision rules governing the joint acquisition of television rights for sporting events, the exchange of the signal for sports broadcasts, and contractual access for third parties to that system, which gives rise, according to them, to serious restrictions on competition. The four applications have focused in particular on the sublicensing system governing access to the Eurovision system for third parties broadcasting free-to-air. They have questioned the Commission exemption on the ground that the condition on which it is based - that is, the non-elimination of competition for non-members - has not been satisfied and it must therefore be annulled.

It has to be indicated that two of the claimants: M6 and Antena 3 lodged previous applications to join the EBU, which were rejected on the grounds that they did not fulfil the membership conditions.¹²

¹² "Since 1987, M6 has lodged an application to join the EBU six times. Each time, its application has been rejected on the ground that it does not fulfil the membership conditions laid down by the EBU Statutes. Following the last refusal of the EBU, M6 filed a complaint with the Commission on 5 December 1997, complaining of EBU's practices towards it, and in particular the refusal of its applications for admission. By decision of 29 June 1999, the Commission dismissed the applicant's complaint. The Court of First Instance, in its judgment in *Métropole télévision v Commission* (Case T-206/99 [2001]), annulled that decision to reject the complaint on the grounds that the Commission infringed its obligations to state reasons and the obligations it has when dealing with complaints.

Meanwhile, on 6 March 2000, M6 filed a new complaint with the Commission, asking it to declare the EBU's membership conditions as amended in 1998 anti-competitive and not qualifying for an exemption under Article 81(3) EC. By letter of 12 September 2000, the Commission dismissed that complaint. The applicant brought an action for annulment of that dismissal. That action was held inadmissible by order of the Court of First Instance in Case T-354/00 *M6 v Commission* [2001].

II. Judgement

In its judgement of 8 October 2002, the Court of First Instance confirms the position of the applicants and rules that the sub-licensing system does not guarantee competitors of members of the EBU sufficient access to the transmission rights for sporting events which members hold by virtue of their participation in that purchasing association. As a result, the exemption it enjoys must be annulled.

First, the Court considers the structure of the markets in question and the restrictions on competition resulting from the Eurovision system. As far as the definition of the relevant market is concerned, the Court upholds the Commission's view that it is not necessary to exactly define the product market. Nonetheless, there is a strong probability that there is a market consisting entirely of certain major international sport events, which assumption permitted the Commission to conduct its assessment of the market in question.

The Court's analysis reveals the existence of an upstream market, for the acquisition of rights, and a downstream market, for the televised transmission of sporting events, and makes clear that television rights to sporting events are granted for a given territory, normally on an exclusive basis. That exclusivity is considered necessary by broadcasters in order to guarantee the value of a given sports programme in terms of viewing figures and advertising revenues.

However, the Court's examination of the effects of the Eurovision system on competition shows that it leads, contrary to the Commission's view, to two sorts of restriction. First, the joint acquisition of television rights to sporting events, their sharing and the exchange of signal restricts or even eliminates competition among EBU members which are competitors on both the upstream and downstream markets. Second, the system, according to the CFI, gives rise to restrictions on competition for third parties, since those rights are generally sold on an exclusive basis, an "aggravating" circumstance for non-members which are refused access to them.

The Court goes on to conclude that, whereas it is true that the joint purchase of televised transmission rights for an event is not in itself a restriction on competition in breach of the provisions of the Treaty and may be justified by particular characteristics of the product and the market in question, it points out that the exercise of those rights in a specific legal and economic context may, though, lead to such a restriction. Barring access to programmes deprives non-EBU channels of potential revenue and demonstrates Eurovision's extreme exclusivity: if the same rights were bought by a media group, operators could negotiate to obtain them for their respective markets.

The Court of First Instance also considers whether the third-party access scheme to the Eurovision system guarantee competitors of the EBU members sufficient access to rights to transmit sporting events held by the latter. Two cases must be considered: live and deferred transmissions. Even if it were acceptable for EBU members to reserve the first category for themselves, nothing justifies their extending that right to all the competitions in a given event

Antena 3 de Televisión SA (hereinafter 'Antena 3') is a company governed by Spanish law set up on 7 June 1988, which has been granted by the competent Spanish authority a concession indirectly to operate the public television service.

On 27 March 1990. Antena 3 lodged an application to join the EBU. By letter of 3 June 1991, Antena 3 was notified of the decision by the EBU's administrative council to refuse that application" (see CFI's joined cases T-185/00; T-216/00; T-299/00; T-300/00, supra, n.).

even when they do not intend to broadcast those competitions live. The possibility of providing deferred coverage or roundups of events is subject to several restrictions, in particular as regards embargo times and the editing of programmes.

As a consequence, both the rules and the operation of that system fail, with a few exceptions, to allow competitors to EBU members to obtain sub-licences for the live broadcast of unused Eurovision rights. In reality, the system allows the transmission of competition roundups only under very restrictive conditions. The Commission has therefore made a manifest error of assessment in determining that the sub-licensing system could be granted an exemption.

In sum, since the EBU's sublicensing rules do not grant appropriate opportunities for non-Members for live coverage of events, or parts thereof, which the EBU Members choose not to broadcast live themselves, the Court of First Instance felt bound to annul the decision by which the European Commission had granted an exemption from European competition law to the system of joint acquisition of TV sports rights by the EBU's Members.

II. Comment

1. The acquisition of sport broadcasting rights in the EU context

The acquisition of exclusive sport broadcasting rights is one of the most salient broadcasting issues within the EU context. In this highly competitive industry, broadcasters attempt to attract maximum audiences, among others, by offering exclusive coverage of a given sports event. Obviously, sponsors and advertisers pay broadcasters more to advertise their products when they believe larger audiences will, in fact, watch an event. This belief, in turn, propels broadcasters to pay more for the right to be the exclusive broadcaster of a given event.¹³

The issue of exclusive broadcasting of sports events should be considered in the context of the ongoing struggle between public and private broadcasters. In the past, public broadcasters dominated the market and secured exclusive rights to events with the goal of encouraging interest in sports. In recent years, private broadcasters have entered the ring with the goal of profiting from the rising popularity of sports and the related popularity of sports on television.

Since its foundation in 1950, the EBU has emerged as one of the most important EU players in the broadcasting world. However, the situation within the European sport broadcasting rights has evolved since then. At the time of its formation, public sector organisations entrusted with the operation of a public service provided most radio and television broadcasting services in Europe and enjoyed a seeming monopoly over the broadcasting of all television programs, including sports events. This radically changed in the late 1980s, when purely commercial, private broadcasters emerged to capitalise on the rising popularity of sports and the related market for viewers and advertising revenue. As their audience share increases, these commercial broadcasters prove formidable competitors to the traditional public broadcasters in both the advertisement and program procurement markets. The public EBU members compete sometimes at a growing disadvantage against commercial channels, which are in some cases backed by powerful media conglomerates. The EBU members face various constraints arising from their public mission that the private

¹³ See Coopers, Lybrand, 'The Impact of European Union Activities on Sport', 17 Loyola L.A. International and Competition. Law Journal (1995) 245, 285.

broadcasters do not encounter. In particular, members face limitations on sponsorship and advertising that often hamper their ability to buy and exploit programs in a commercially viable way.

Public and private, commercial broadcasters take different approaches to the broadcasting of sports. Public broadcasters, by virtue of their public mission, cater to minority, or less popular, sports in addition to major sports events. They tend to cover a broader range of sports events and do so from an event's beginning to end, irrespective of costs and revenue considerations. Purely commercial broadcasters, with the exception of all-sports channels, are more interested in mass-appeal sports events that attract advertisers and persuade viewers to subscribe to their services. Furthermore, they care less about sports events that require expensive production efforts relative to the broadcasting time and advertisement revenue generated from such an event.

As a consequence, there is an ongoing tension between private and public broadcasters within the contemporary European market of broadcasting rights for sporting events, resulting from the attempts of both to gain exclusive rights to broadcast sports events and thus to attract larger audiences. Thus, there is no wonder that the existence of the Eurovision system of joint acquisition and sharing of television rights for international sport events is coming under growing pressure from the non-participants.

2. The Eurovision system: a restriction of competition?

It is definitely true that an analysis of the competition between public and private broadcasters leads to a conclusion that the Eurovision system restricts competition between some EBU members and between EBU members and private broadcasters. By allowing for the joint negotiation, acquisition, and sharing of broadcast rights and the exchange of programs, Eurovision's object and effect is greatly to restrict, if not eliminate, competition between EBU members. EBU members agree to joint acquisition and sharing of signals instead of competing against each other on an open market for the right to broadcast in a given area.

Eurovision also distorts competition between EBU members and private, commercial broadcasters, who do not share its rationalization and cost savings with an effect to exclude private broadcasters unaffiliated with the EBU from the reciprocal benefits of the joint acquisition and program exchange.

However, Eurovision enables EBU members, who are public service or public mission oriented broadcasters, to strengthen their individual market positions to the disadvantage of their competitors. Without Eurovision, EBU members would have less market power and, consequently, less ability to secure exclusive broadcast rights for major sports events.

Therefore, it has been argued that the Eurovision deserves an exemption from the European competition rules. Eurovision enables EBU members who otherwise would be unable to be players in the rising market for exclusive broadcast rights to compete with private broadcasters who have more resources and unlimited program discretion. The private broadcasters remain significant competitors, with each other and with EBU members, because they have extensive financial resources. In effect, it can be claimed that although Eurovision alters the conditions, it still ensures a minimum of a level playing field.

Whereas it remains true that the EBU and Eurovision technically restrains trade, an Article 81(3) individual exemption could still be considered to the Eurovision system. It seems that the factor of non-elimination of competition still can be fulfilled in this case.

The justification could be based on the premise that the ultimate effect of Eurovision is to help public broadcasters while conferring no identical benefit for non-EBU members. It

does not, however, specifically take from the private broadcasters. They still have more finances and are able to compete for exclusive rights. Instead of the practical effect of competing among themselves (since only they, individually, have the funds to bid highest), commercial broadcasters have to contend with one more bidder by way of the EBU consortium. The entry of one more bidder does not dramatically reduce their respective market shares.

In addition, Eurovision does not totally exclude non-members. In fact, the EBU rules have evolved to provide for a strengthened third party access. It would be sufficient for the non-members to obtain a live transmission if no EBU member broadcasts an event and to obtain a deferred transmission if an EBU member does broadcast an event live. In this way, non-members might gain some access even to those events that the EBU has exclusive rights and the competition would not be eliminated.

However, the recent CFI's judgement annulling the Commission's exemption and thus declaring the Eurovision system in breach of the Treaty competition provisions demonstrates clearly that the existing rules do not fully ensure such access and, thus, the Commission has committed serious errors in its exemption rationale. The existing rules seem to be constructed and, in particular, applied in a very restrictive and discriminatory way and do not provide genuine access opportunities for the third parties.

This Court's assessment of the present EBU sublicensing system as too restrictive, which exemplifies the CFI's rigorous approach to competition, is based on very strong arguments, therefore it can be expected that the EBU will be bound to relax its access rules.

In any case, it should not be forgotten, however, that the CFI's decision annulling the Eurovision system's exemption from European competition law did not question the fundamental principle that EBU Members may acquire sports rights together. The Court does not challenge the basic principle that the EBU may acquire sports rights on behalf of its Members.

As a result, the EBU is still entitled to acquire free-to-air rights, to the benefit of all European citizens, pending a new decision by the Commission. Nevertheless, it appears that a thorough analysis of the effects of the EBU's sublicensing rules will have to be undertaken within the organisation itself. Their reconsideration seems to be inevitable.

3. Sport and the EU policy

More generally, the CFI's judgement exemplifies the tension that exists between the Commission and the Court in the interpretation of non-competition concerns under Article 81(3) EC Treaty. In the absence of a specific provision in the Treaty, such as the so-called 'cross sectional clauses'¹⁴ that refer e.g. to employment (Article 127 EC), industrial policy (Article 157), consumer protection (Article 153 EC) and environmental policy (Article 6 EC), the Commission seems to endorse the view put forward in the declaration on the specificity of sport adopted by the European Council in Nice¹⁵ where the social, educational and cultural functions inherent in sport have been stressed. Accordingly, it appears that the EU, especially the European Commission endorses the view that sport is a sort of 'public good' and as such

¹⁴ This term is used mostly in the German literature, as indicated by G. Monti, 'Article 81 EC and Public Policy', (2002) Common Market Law Review 39, 105, at 1069.

¹⁵ Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies. Annex IV to the Presidency conclusions, Nice 7-9 December 2000.

access to main sport events has to be granted to the broad public.¹⁶ There is an increasing awareness on the European level that there is the way the competition works in sport broadcasting is different from other economic sectors, precisely because of its social function. The main argument is that the mere possibility of a sport event forming the content of a television broadcast does not transform that event into a purely commercial product. According to this view, the public should not be forced to pay more and more for viewing sport events which are part of their own cultural environment. On this view, the special role of public service broadcasting in this field seems obvious. It remains true, however, that, while there are clear references to some policies in the Treaty, the EU policy concerning sport or, more specifically, broadcasting of the major international sport events (which falls rather under media and cultural policy) has not been yet clearly articulated. This is one of the reasons that permit the European Court, however sensitive it might be on the sport issue, to apply very strict analysis criteria to the competition restrictions in the sector.

In conclusion, the lack of a firm Commission policy in the field makes very often the competition aspect prevail in some sensitive sectors, including broadcasting of major sport events, while the economic rationale of the European Court's logic appears difficult to challenge since it is based on very sound and convincing arguments. Therefore, although the Court's reasoning in the Eurovision case appears to be plausible, the controversy over the Eurovision rights suggests a need of reconsideration of the relationship between competition and non-economic concerns (exemplified here as access of the broad public to major sport events) within the EU legal order.

¹⁶ Cf. Article 3a of the Television without Frontiers Directive which refers to events 'of major importance to society', *Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities*, OJ 1989 L 298/23, as amended by the *European Parliament and Council Directive 97/36/EC of 30 June 1997*, OJ 1997 L 202/60.