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ROUNDTABLE ON COMPETITION AND SPORTS

Note by the delegation of Germany

This note is submitted by the delegation of Germany to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 - 17 June 2010

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-- Note by Germany --

1. Introduction

1. The issue of applying competition law to professional sports has gained notable significance in Germany since the 1990s. The attention paid to professional sports by competition law enforcement and the wider competition law community has developed along with the increase in economic significance of professional sports teams, the relevant sports events, and other business activities linked to sports. In Germany, the competition law debate with regard to sports has focused, not surprisingly, on the sport that attracts the greatest attention from stadium audiences and TV viewers, namely football. The particular popularity of this sport has led, among other things, to the considerable economic significance of TV broadcasting rights.

2. Consequently, this contribution focuses on competition issues raised by TV broadcasting rights for football events, more specifically the central marketing of broadcasting rights.

2. Competition Law Enforcement in the Football Sector – the European Cup Case

3. A key issue in the debate on competition enforcement in the sports sector, in Germany, has been the question of whether the commercial marketing of TV rights for sports events is actually subject to competition law in the first place. The issue was raised in the early 1990s, when the *Bundeskartellamt* examined a practice whereby the TV broadcasting rights to the home matches of German clubs competing in the European Cup were centrally marketed by the German Football Association, DFB (*Deutscher Fussball-Bund*).¹ The *Bundeskartellamt* maintained that each individual club, since it bore the principal economic risk of the matches held on its own football ground, was the relevant host of these home matches and the owner of the TV broadcasting rights. The *Bundeskartellamt* found, in its decision of September 1994, that the practice of having the TV rights centrally marketed by the DFB infringed competition in the market for TV broadcasting rights to sports events and therefore violated the ban on cartels. The *Bundeskartellamt* found further that there was no basis in German competition law for exempting the practice from the ban.² This was confirmed³ by the Berlin Higher Regional Court (*Kammergericht*) in November 1995, as well as by the Federal Court of Justice (*Bundesgerichtshof*) in December 1997 in a final ruling on the matter.⁴ It should be noted that the *Bundeskartellamt*'s proceedings related strictly to the European Cup events, and not to other football competitions.

¹ *Bundeskartellamt, Tätigkeitsbericht (Activity Report) 1993/94*, p. 125.

² *Bundeskartellamt, Decisions of 2 September 1994*, B6-105/02, B6-60/94.

³ *Kammergericht, Decision of 8 November 1995 (Kart 21/94)*, see also: *Bundeskartellamt, Activity Report, 1995/1996*, p. 154.

⁴ *Bundesgerichtshof, Decision of 11 December 1997 (KVR 7/96 (KG))*, see also: *Bundeskartellamt, Activity Report, 1997/1998*, p. 165.

3. Legislative Measures

4. In the wake of this case, the German Parliament debated and finally introduced, with the 6th Amendment to the Act against Restraints of Competition (ARC), a special provision exempting the central marketing of TV broadcasting rights for sports events from the ban on cartel agreements under certain conditions.⁵ A key aspect in this respect was the argument that central marketing by the football association was necessary to ensure a re-distributive mechanism among football clubs which served to set aside the financial means to promote youth and amateur sports activities. The special provision introduced into German competition law did not, however, preclude the application of European law.

5. The special provision in the ARC was eliminated with the 7th Amendment to the Act against Restraints of Competition in 2005.⁶ The reason given in the legislative intent of the amendment was that with the introduction of Regulation 1/2003 into European law, the application of European competition law was mandatory for cases that had an effect on trade between Member States.⁷ This was to be assumed for issues concerning TV broadcasting rights, and therefore there was no scope for a provision in national law that diverged from European law.

4. Central Marketing of TV Rights in the Present Legal Framework

6. Given the competition law framework in place, professional sports and related functions, as far as they are business activities, are within the realm of competition law. Non-business activities, which are sport-related, pursued by sports associations and which may be regarded as social policy, e.g. the establishment of revenue re-distribution mechanisms for the purpose of financing amateur and youth sports activities, do not justify a sweeping exemption of this sector from competition law.

7. Thus, in the practice of the *Bundeskartellamt*, the marketing of TV broadcasting rights for sports events is generally subject to the relevant provisions of the ARC as well as European competition law. However, this does not mean that central marketing is generally prohibited. Depending on the modalities of the specific central marketing scheme implemented, a system that fulfils the conditions of Art. 101 Sect. 1 TFEU [ex Art. 81 EU Treaty] – i.e. that constitutes an agreement or concerted practice which may affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition within the internal market – as well as the conditions of Section 1 ARC, may still be exempted from the ban on cartels by the provisions of Art. 101 Sect. 3 TFEU or Section 3 ARC, respectively, if the conditions stated there are fulfilled.

5. Joint Selling of *Bundesliga* Media Rights

8. In the run-up to deciding on the marketing of TV broadcasting rights for the matches of the *Bundesliga* (the top league/ division of football clubs in Germany) for the period of 2009-2015, the German Football League DFL (*DFL Deutsche Fussball Liga GmbH*)⁸ presented to the *Bundeskartellamt* the model that it intended to implement. The *Bundeskartellamt* gave a preliminary non-formal assessment which led the DFL to abandon the specific marketing model it had favoured. However, the DFL turned to

⁵ Section 31 of the ARC in the version promulgated 26 August 1998, *Bundesgesetzblatt* (Federal Gazette) BGBl. I 2546.

⁶ ARC in the version promulgated 15 July 2005, *Bundesgesetzblatt* (Federal Gazette) BGBl. I 2114.

⁷ *Deutscher Bundestag, Drucks. 15/3640, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, 12 August 2004, pp. 32-33.

⁸ The DFL is a daughter company of the League Association (*Ligaverband*), which is the association of all professional football clubs in Germany. The DFL conducts the operative business for the League Association.

the Düsseldorf Higher Regional Court for a review of the *Bundeskartellamt*'s material assessment and its mode of proceeding in this matter.

9. The case received considerable attention in the media and in the political sphere in Germany. In the summer of 2008, the Federal Ministry of Economics and Technology and the Federal Ministry of the Interior – being in charge of the sports portfolio – were requested by the Federal Government to examine the issue of legal certainty in the complex matter of applying antitrust law to sports, and how the interests of the sports sector could be adequately considered. Germany suggested to the European Commission and the EU Member States to have a discussion on this issue at the level of the sports ministers. The questions raised were whether there were any specific points of discussion in other Member States regarding the application of competition law to sports and whether a need was perceived for creating more clarity in this area throughout the EU (for example by issuing guidelines). The discussion is ongoing and is being led in the context of the application of the new Article 165 TFEU and the sports agenda of the European Commission.

5.1 *The Central Marketing Model Presented To the Bundeskartellamt*

10. The system proposed by the DFL for marketing TV rights was a central marketing model. Broadcasting rights were to be awarded not by the individual club for its individual home matches, but as a package of matches exclusively marketed by DFL.

11. The actual marketing would have been conducted by the TV marketing agency Sirius SportMedia GmbH (a company of the Kirch group) on behalf of the DFL with a guaranteed revenue to DFL of 500 million Euros per season. This amount considerably exceeded the revenue per season which the DFL achieved during the previous football seasons.

12. A key element of the marketing model presented was that Sirius was to produce the reports for pay TV itself. For this purpose DFL and Sirius intended to set up a joint venture company producing television footage of the football games. Pay TV providers and operators of technical infrastructure such as cable, DSL or mobile telephony were supposed to submit bids on the right to feed in the DFL/Sirius broadcast. Under the model presented, pay TV providers had no scope for their own editorial processing of live coverage. Only free TV broadcasting channels would continue to submit bids for the right to process coverage from the stadium (the so-called basic signal). Furthermore, under the marketing model the broadcasting rights packages were to be put out to tender separately for each transmission path (the most important ones being satellite and cable).

13. In general, *Bundesliga* matches take place on three days: Friday evening, Saturday afternoon, and Sunday afternoon, the core match day with the majority of games being Saturday. Under the marketing model, each of these days was to be put out to tender as a separate package, separately for each of the different transmission channels. Almost all packages for live coverage were to be offered alternatively to pay TV or free TV operators. However, the packages were only to be awarded once, *i.e.* either to the free TV or the pay TV sector.

14. Each package included live coverage of the matches. However, there were no provisions in place that would have ruled out the bundling of all live broadcasts of matches in the hands of one bidder.

5.2 *Central Marketing: Restriction of Competition vs. Benefits to Consumers*

15. The *Bundeskartellamt* concluded that the central marketing scheme fell under the provisions on anti-competitive agreements in German (Section 1 ARC) and European competition law (Art. 101 Sect. 1 TFEU). However, the scheme could conceivably qualify for an exemption (Section 3 ARC and Art. 101 Sect. 3 TFEU), in particular if the key criterion that consumers would be given “a fair share of the resulting benefit” was satisfied.

16. The *Bundeskartellamt* assessed the central marketing model as being a cartel agreement. Each football club is to be seen at least as a co-owner of the TV rights to its home matches along with the League Association (*Ligaverband*) which is also a co-owner.⁹ If each club transfers its broadcasting rights to the League Association which decides on how the broadcasting rights of all clubs are to be marketed collectively, the clubs give up their scope for making independent business decisions.

17. The *Bundeskartellamt* concluded that the cartel would lead to a reduction in the supply of marketing rights. The central marketing model would lead to a situation where it was impossible to purchase the rights to broadcast individual matches or matches of one single club. Instead, rights were to be offered as packages whose content was not predictable. However, it was to be expected that the packages would likely include matches which, under market conditions, the TV stations – as purchasers – would not be able to market economically because of a lack of viewer interest.

18. As important countervailing factors the *Bundeskartellamt* took into account the following possible advantages of central marketing, as compared with the individual marketing of TV rights by each club:

- Less bilateral negotiations for acquiring broadcasting rights to a broad range of matches would be required (“one-stop shop”), which would reduce transaction costs.
- It would be significantly easier to have highlights coverage of all matches, because, again, the number of bilateral negotiations and thus transaction costs would be significantly reduced.

5.3 *The Scope for an Exemption from the Ban on Cartel Agreements*

19. In its examination the *Bundeskartellamt* identified several points in the proposed marketing model which gave rise to concerns. In the *Bundeskartellamt*'s view the most important reason for a critical evaluation of the proposed marketing model was the fact that the consumers' share of the benefit resulting from central marketing was inadequate.

20. A possible and even probable outcome of the central marketing model presented by the DFL would be one bidder acquiring all rights to live TV broadcasting of the matches. It was conceivable that a TV station would spend a considerable sum of money on buying the exclusive rights for all match days while many competitors would lose out. There would be a strong incentive to do this as overall exclusivity would lead to the substantial added value of being the only channel offering *Bundesliga* coverage. Ultimately, the channel's high expenses for exclusive rights would have to be borne by pay TV subscribers via high subscription fees.

21. On the other hand, of course, there was the possibility of different channels buying the rights for individual days. In this case it would not be ensured that the pay TV viewer, via his pay TV subscription, would be able to enjoy live coverage of all top matches or all matches of his club. In an extreme case, due to a fragmentation of the packages, a TV viewer would be forced to enter into subscription contracts with several pay TV providers, with considerable costs and other disadvantages.

22. The *Bundeskartellamt* saw several options for limiting the pay TV providers' scope for setting prices and for mitigating the negative effects of these two possible outcomes. One option would be the guarantee of prompt free-to-air highlights coverage. This would provide consumers with an opportunity, though not optimal, to switch to alternative providers if pay TV became too expensive. Another option would be to put the pay TV packages, or at least some of them, out to tender on a non-exclusive basis only. Also, precautions could be taken to ensure that on each of the distribution channels a different bidder would be successful. In these cases consumers would have options for switching.

⁹ See: *Bundesgerichtshof*, Decision of 8 November 2005 (KZR 37/03 „Hörfunkrechte“).

23. The marketing model presented to the *Bundeskartellamt* failed to include such binding precautions which could limit the pay TV channels' scope for setting prices in the interest of consumers.

24. Highlights coverage of as many matches as possible is a key advantage of central marketing. The *Bundeskartellamt* therefore considered highlights coverage (if it is broadcast free-to-air) to be a particularly suitable measure for limiting the scope for setting prices. Only then can the large group of free TV viewers benefit as well.

25. In the *Bundeskartellamt's* view, taking into account the market conditions at the time, a fair share of the benefit of central marketing would only be guaranteed for consumers if highlights coverage included an essential part of the match day and was broadcast shortly following the games and at a time when a wide section of the population could have access. This required that the core match day, *i.e.* the Saturday matches, could be broadcast in a free-to-air TV round-up in a broadcasting slot before 8.00 p.m. The model presented by the DFL, however, envisaged highlights coverage on Saturdays starting only at 10.00 p.m. which, given typical consumer preferences in the German market, was not adequate.

5.4 Assessment

26. The *Bundeskartellamt* concluded that the marketing model presented was not suited to adequately balance the interests of the DFL and those of consumers. The DFL model was designed to maximize revenue on the broadcasting rights that were monopolized in the hands of the DFL by limiting alternative options for consumers. Bidders would have to pay correspondingly high prices, and the design of the broadcasting scheme made sure that consumers – especially football fans intent on watching their game – had to pay accordingly to have access to the broadcasts. Therefore it was virtually ruled out that “a fair share of the resulting benefit” would be passed on to consumers. The *Bundeskartellamt* gave its assessment of the marketing model as non-formal guidance to the parties and did not take a formal decision.

5.5 Further steps by the DFL

27. Following the – informal – assessment by the *Bundeskartellamt*, the DFL sold the broadcasting rights for the seasons 2009/2010 to 2012/13 in a bidding process on its own, without the cooperation of Sirius. In this process it was ensured that there was close-to-the-match highlights coverage. This took due account of the *Bundeskartellamt's* key objection to the original model presented, since highlights coverage which is attractive for viewers limits the pricing leverage of TV rights sellers and TV stations.

28. Furthermore, in April 2009, the DFL brought proceedings against the *Bundeskartellamt* before the Düsseldorf Higher Regional Court (*Oberlandesgericht*). The DFL sought preliminary relief in the case of a potential prohibition decision by the *Bundeskartellamt* in a future round of central marketing. Additionally, the DFL requested clarification from the court regarding the *Bundeskartellamt's* proceedings in the matter, namely the fact that the *Bundeskartellamt* had not issued a formal decision, but only a non-formal recommendation.

29. The court, implying that it could not rule on the legality of a future marketing model the content of which was yet to be determined, dismissed the DFL's claims as inadmissible.¹⁰ It held that the DFL could not request a precautionary measure against future *Bundeskartellamt* decisions since the DFL had no qualified interest which would be necessary to justify such a claim. According to the Court it was possible for the DFL to obtain effective legal protection by an ex post court review of a future *Bundeskartellamt* decision.

¹⁰ *Oberlandesgericht Düsseldorf*, Decision of 16 September 2009 (VI-Kart 1/09 (V)).