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ROUNDTABLE ON COMPETITION AND SPORTS

Note by the European Union

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

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ROUNDTABLE ON COMPETITION AND SPORTS

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1. Introduction

1. It has long been established by the European Commission and the Court of the European Union that **economic activities** in the context of sport fall within the scope of EU law, including Articles 101 (prohibition of anti-competitive agreements or practices) and 102 (prohibition of the abuse of dominance) TFEU[1] and internal market freedoms.

2. Already in the 1970s, the Court of Justice (CJ) (formerly the European Court of Justice - ECJ) ruled in *Walrave*[2] and *Donà*[3] that sport itself was subject to Community law where it constituted an economic activity. This has been confirmed by the Court on several occasions later on, in particular in the *Bosman*[4] ruling which played a significant role in guiding the Commission in its development of competition policy in the sport sector.

3. The fact that EU competition law is applied to sport as far as it constitutes an economic activity was recently confirmed by the CJ in the *MOTOE* judgement;[5] as well as in rulings by the General Court (GC) (formerly the Court of First Instance) and the CJ in the *Meca Medina* case.[6] Although sport fulfils important educational, public health, social, cultural and recreational functions that must be preserved, there exists a wide ranging field of activities in sport that clearly constitute economic activities. Examples include the sale of tickets for sport events, advertising activities, and the sale of media rights for sport events and the transfer of athletes in return for transfer fees.

4. This paper will give a brief overview of Court of Justice judgements and decisions of the European Commission dealing with two aspects of the sports cases: (i) certain revenue generating activities related to sports, specifically the sale of media rights and (ii) the regulatory aspects of sport.

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1 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are in substance identical. In this note references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate.

2 Case 36/74 *Walrave and Koch v. Union Cycliste Internationale* ECR 1974, 1405, para. 4.

3 Case 13/76 *Donà v. Mantero* ECR 1976 1333, para. 12.

4 Case C-415/93 *URBSFA v. Bosman* ECR 1995 I-4921.

5 Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. EllinikoDimosio.*

6 Case T-313/02 *David Meca-Medina and Igor Majcen v. Commission* ECR 2004 II-3291, para. 44 and Case C-519/04 P *David Meca-Medina and Igor Majcen v. Commission* ECR 2006 I-6991, para. 22.

2. Application of EU Competition Rules to Revenue-Generating Activities

2.1 Sports Media Rights

2.1.1 Market Definitions

5. Market definitions are particularly complex in the fast changing world of media rights. In the media sector, products and services are not always (or no longer) clearly separable and are, also due to technological or economic "convergence", often marketed in a bundle.

6. In previous Commission decisions, **upstream product markets** for the acquisition of sports media rights have been identified for certain audiovisual content on the basis of specific criteria, such as brand image, the ability to attract a particular audience, the configuration of that audience and advertising/sponsoring revenues. With regard to sport events, the Commission identified separate markets for the rights to broadcast sport events for the first time in 1996.[7] Subsequently, the Commission has defined narrower markets, *e.g.* for (i) the broadcasting rights for certain major sport events,[8] (ii) the broadcasting (and new media[9]) rights for football events played regularly throughout every year where national teams participate[10] and (iii) the broadcasting rights for football events that do not take place regularly where national teams participate.[11]

2.1.2 The Commission's Decision Making Practice

7. As regards the sale and acquisition of sport media rights, the Commission's decision making practice focussed on antitrust issues connected with the joint selling agreements.

8. Joint selling describes, for example, the situation where sport clubs entrust the selling of their media rights to their sports association which then sells the rights collectively on their behalf. A joint selling arrangement is a horizontal agreement which prevents the individual clubs each having a relatively small market share from individually competing in the sale of sports media rights. In its three Decisions[12] so far, the Commission consistently took the view that joint selling constitutes a horizontal restriction of competition contrary to Article 101(1) TFEU, as it may hinder competition between clubs in terms of prices, innovation, services and products offered to fans, and usually leads to the league selling the rights in a single bundle or very few packages on an exclusive basis.

9. The Commission has recognised that joint selling may create **efficiencies** and it could therefore be accepted - with certain case-by-case remedies - under Article 101(3) TFEU. A joint selling arrangement has the potential of improving the media product and its distribution to the advantage of football clubs,

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7 Commission decision of 7 October 1996, Case M.779 *Bertelsmann/CLT*, OJ 1996 C 364/3, para. 19. Also see Commission decision of 3 March 1999, Case 36237 *TPS+7,* OJ 1999 L 90/6, para. 34.

8 See Commission decision of 10 May 2000, Case 32150 *Eurovision (*OJ 2000 L 151/18) where the Commission considered that there was a strong likelihood that distinct markets existed for the acquisition of broadcasting rights for some major sporting events such as the Olympic Games. This decision was annulled by the GC, but the GC accepted the market definition.

9 Case 37398, *UEFA Champions league* of 23 July 2003, OJ 2003 L 291/25.

10 UEFA Champions League Decision.

11 Case M.2876 *Newscorp/Telepiu*, OJ 2004 L 110/73.

12 UEFA Champions League decision; Case 37214, *Bundesliga* of 19 January 2005, OJ 2005 L 134/46; Case 38173, *FA Premier League* of 22 March 2006, OJ 2008 C 7/18.

broadcasters and viewers. The Commission in its decisions has in particular identified three types of benefits:

- The creation of a **single point of sale** provides efficiencies by reducing transaction costs for football clubs and media operators;

- **Branding** of the output creates efficiencies as it helps the media products getting a wider recognition and hence distribution;

- **The creation of a league product**: This is a product that is focused on the competition as a whole rather than the individual football clubs participating in the competition. This is attractive to many viewers.

10. To ensure that the positive effects of joint selling outweigh the negative effects on competition, the Commission has sought in past decisions to remedy the competition concerns resulting from the collective sale of exclusive sports media rights by attaching conditions or making commitments binding on undertakings. The accepted solution in each case depended on the facts of the individual case including the degree of market power and the restrictive practices found.

11. At the same time, joint selling may also create efficiencies as it reduces transaction costs due to a one-stop-shop for media operators and clubs and may bring about advantages for the branding of a uniform league product. In its three Decisions, the Commission required certain modifications and commitments involving e.g. a short duration and a limited scope of jointly sold rights, a transparent bidding procedure, selling of some of the rights by the clubs, and reverting unsold rights to the clubs.

12. In the ***UEFA Champions League*** decision the Commission for the first time accepted joint selling of football media rights and laid out the principles for a pro-competitive rights structure. The original arrangements provided for the sale of UEFA Champions League free and pay-TV rights on an exclusive basis in a single bundle to a single broadcaster per territory for several years in a row. Buyers had only one source of supply and a single large broadcaster per territory would acquire all free and pay-TV rights, to the exclusion of all others, resulting in a number of rights being left unexploited and output restrictions. Following Commission intervention, UEFA amended its joint selling arrangements. The available rights were unbundled into several packages (in total 14) enabling more than one broadcaster to acquire rights to the UEFA Champions League. The packages were sold on the basis of an objective and non-discriminatory tender procedure. Although UEFA had the exclusive right to sell the packages of live rights, individual clubs could sell certain live rights relating to their matches, in case UEFA would fail to sell.

13. Certain restrictions however remained. Indeed, the exclusive sale of live rights by UEFA still prevented individual clubs from competing in the sale of those rights, a single price was fixed, broadcasters only had one point of supply in respect of most live rights and the exploitation of deferred rights was subject to limitations.

14. On the other hand, the Commission considered that joint selling also led to a number of positive effects and the Commission concluded that the amended joint selling agreement met the conditions for a justification under Article 101(3) TFEU.

15. In the sales process of the German and English top national football leagues, the **Bundesliga** and the **FA Premier League** ("FAPL") respectively, similar competition concerns arose as those found in *UEFA Champions League.* In order to address these concerns, in both cases commitments were made to amend the original joint selling arrangements by the respective leagues on behalf of their individual club

members. The commitments offered by both the *Deutscher Liga-Fußballverband* (the German League Association (GLA), the rights-holder for the Bundesliga matches) and the FAPL (the rights holder for the Premiership matches) were made legally binding under Article 9(1) of Regulation 1/2003. The commitments from both the GLA and the FAPL included the unbundling of rights into separate rights packages for TV broadcasting and mobile platforms, the possibility for individual clubs to exploit certain unsold rights and rights unused by the initial purchaser, as well as the exploitation of deferred rights and rights for the new internet broadcasting and telephony broadcasting markets. Rights were to be disposed of using a public tender procedure and exclusive rights contracts were not to exceed three football seasons.

16. In addition, as regards the **FAPL**, the open and competitive bidding process for the rights packages was made subject to scrutiny by an independent Monitoring Trustee. Furthermore, no single purchaser was allowed to acquire all the live rights packages, as first applied from the sale of rights to the 2007/2008 season (**no single buyer rule**). This commitment was negotiated by the Commission in order to end the monopoly of British Sky Broadcasting Group plc ("BSkyB") over the rights to the FAPL in the United Kingdom. Following the acquisition in May 2006 of two of the six FAPL live rights packages by Setanta, an Irish pay-TV sports channel, BSkyB ceased to be the exclusive holder of live Premier League matches. In 2009, following Setanta's bankruptcy, a new auction took place and ESPN picked up both packages previously held by Setanta.

2.2 Ticketing Arrangements

2.2.1 Exclusive Distribution Rights

17. The Commission decision relating to ticketing arrangements for the 1990 Football World Cup[13] concerned the exclusive worldwide distribution of package tours combined with tickets for the 1990 World Cup without the possibility of alternative sources of supply. The World Cup Organising Committee, set up jointly by the Italian football association and FIFA for the technical and logistical organisation of the World Cup, had undertaken to confer on a single travel agency (90 Tour Italia SpA) worldwide exclusive rights for the supply of stadium entrance tickets for the purpose of putting together package tours. Other travel agencies or tour operators could therefore not obtain tickets from any other source than 90 Tour Italia SpA.

18. The Commission took the view that this exclusive distribution system infringed Article 101 TFEU because it restricted competition between tour operators and between travel agencies in the EU on the market for the sale of package tours to the 1990 World Cup. The restrictions could not be justified under Article 101(3) TFEU on stadium safety grounds as a number of tour operators fulfilling the same criteria as 90 Tour Italia could have competed on the market without jeopardising spectator safety. The Commission therefore found an infringement of Article 101 TFEU but did not impose fines, *inter alia*, because it was the first time it had taken action on the distribution of tickets for a sporting event. Following the 1990 World Cup decision, the organising committees of the Barcelona and Albertville Olympic Games amended their contractual agreements to allow nationals of the EU Member States also to buy tickets directly from the organising committees or from travel agents distributing them in other EU Member States.

[13] Commission decision of 27 October 1992, Case 33384 and 33378, *Distribution of package tours during the 1990 World Cup*, OJ 1992 L 326/31.

2.2.2 Discriminatory Ticketing Practices (Territorial Restrictions)

19. The Commission decision relating to ticketing arrangements for the 1998 World Cup[14] found an abuse by the French organising committee under Article 102 TFEU as it had imposed unfair trading conditions which discriminated against non-French residents and resulted in a limitation of the market for those consumers. In particular, the general public throughout the EEA could only purchase certain match tickets on condition that they provided an address in France to which the tickets could be delivered. The practical effect of such a requirement was to deprive the overwhelming majority of citizens outside France of the possibility of purchasing any of the tickets in question. In addition, non-French residents were restricted to reserving tickets by means of written application while French residents could avail themselves of other, quicker means including reservation by telephone or by accessing the electronic French Minitel system. The Commission only imposed a symbolic fine of €1000 because of the legal uncertainty concerning ticket arrangements under EU law at the time and steps undertaken by the organising committee to ensure access of EU consumers to more tickets.

2.2.3 Restrictions in Payment Methods (Credit Card Exclusivity)

20. The Commission has also examined credit card exclusivity arrangements for sport events in two cases: the VISA exclusivity for ticket sales via the internet for the Athens Olympic Games in 2004, and the MasterCard exclusivity for direct sales of tickets for the FIFA Football World Cup 2006.

21. 2004 Athens Olympic Games. In the Athens Olympic Games, tickets ordered via the internet directly from the organising committee ('ATHOC') could only be paid for with VISA cards. The Commission took the view (Case 38703) that this exclusivity did not constitute an infringement of Articles 101 or 102 if consumers in the EEA had **reasonable access to tickets** via alternative sales channels that did not require payment with VISA cards. Such an alternative supply channel for the general public was available in that tickets could be bought from any National Olympic Committee in the EEA as the latter accepted other payment methods. ATHOC also agreed to improve the information to consumers regarding all options for the purchase of tickets and by intervening with the National Olympic Committees in the EEA. The case was subsequently closed without a decision.

22. 2006 Germany World Cup. The 2006 World Cup case was triggered by a complaint from a UK consumer organisation 'Which?' against FIFA and the German Football Association under Article 102 TFEU (Case 39177) concerning the MasterCard exclusivity arrangements for tickets intended for the general public. The Commission followed the same guiding principle as in the Athens Olympic Games case, *i.e.* there should be **reasonable access to tickets** for all consumers in the EEA. Tickets from the World Cup Organising Committee ('OC') could be paid for with MasterCard credit card, direct debit from a German bank account or international (cross-border) bank transfer. However, in the latter case, significant costs could arise for consumers in EEA countries outside the Eurozone, such as the United Kingdom. In light of the enormous demand for tickets and the importance of direct sales by the OC, the Commission was of the opinion that there needed to be a viable alternative to the direct sales by the OC to ensure reasonable access to tickets for the World Cup 2006 for those consumers who did not possess a MasterCard product. This alternative could take the form of (i) other payment forms for direct sales by the OC (*i.e.* more than one credit card and/or bank transfers without dissuasive additional costs for the consumers), or (ii) other sales channels for which there is no credit card exclusivity. As a result, the OC set up local currency accounts enabling fans based in non-Eurozone countries in the EEA to pay for tickets by making domestic bank transfers. The complaint was subsequently withdrawn and the case was closed without a decision.

14 Commission decision of 20 July 1999, Case 36888 *1998 Football World Cup,* OJ 2000 L 5/55.

3. The Application of EU Competition Law to the Organisation of Sport

3.1 Meca Medina Judgment – General Principles

23. In the *Meca Medina* judgment of 18 July 2006, the CJ rejected the notion that a "purely sporting" rule might fall outside the scope of EU competition law. The case concerned anti-doping rules adopted by the International Olympic Committee and implemented by the swimming governing body, Fédération Internationale de Natation Amateur. Two athletes challenged the compatibility of the anti doping rules with the EU rules on competition and freedom to provide services.

24. The CJ held that the mere fact that a rule is purely sporting in nature, does not have the effect of removing from the scope of the EU competition rules the person who is engaged in that activity. Sports rules, irrespective of their nature, should be investigated on a case-by-case basis in order to assess whether they are compatible with the EU competition rules, taking account of the overall context and more specifically, the rule's objectives. The CJ held that it has to be assessed whether the rules pursue a **legitimate objective**, and whether the restrictive effects resulting from such rule are **inherent to the pursuit of that objective** and are **proportionate** to its achievement.

25. After carrying out such assessment, the CJ concluded that the rules in question did not infringe Art. 101(1) TFEU. The overall objective of the rules was to combat doping in order to ensure fair competition for all athletes, as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. The limitations of actions imposed on athletes were inherent in the organisation and proper conduct of competitive sport and it was not established that the rules at issue were disproportionate.

3.2 The MOTOE Judgment – Exercise in Parallel Organisation of Sporting Event and Economic Activities

26. The CJ provided further clarification concerning the application of EU competition law to sporting rules in the MOTOE ruling in 2008. The Court held that a non-profit-making motorcycling association could be considered as an undertaking if it organised motorcycling events itself and entered into sponsorship, advertising and insurance contracts. This conclusion was not affected by the fact that the entity had the power to give its consent to applications for authorisation to organise competitions submitted to the public authorities.

27. Also, the CJ concluded that such an association that also takes part in administrative decisions authorising the organisation of motorcycling events, had the power to prevent other competitors to enter the market of motorcycling events and therefore could distort competition. The CJ held that Articles 102 and 106 TFEU precluded a national rule which conferred on such association the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.

28. The CJ explained that to entrust such an association the task of giving the competent administration its consent to applications for authorisation to organise motorcycling events, was *de facto* tantamount to conferring upon it the power to designate the persons authorised to organise those competitions and to set the conditions in which those events are organised, thereby placing the association at an obvious advantage over its competitors. The CJ was of the view that such a right may lead such association to deny other operators' access to the relevant market.

3.3 The Lehtonen Case – Rules Concerning Transfer Deadlines

29. The *Lehtonen* judgment[15] of April 2000, concerned organisational rules and transfer rules of the International Basketball Federation [Is it called FIBA? Yes, it is called FIBA.]. These rules, implemented by the national basketball associations, prohibited clubs in Europe fielding foreign players in national championships who had played in another country in Europe, if they had been transferred after 28 February. After that date it was still possible, however, for players from non-European clubs to be transferred and to play. Mr Lehtonen, a Finnish player, had been transferred to his Belgian club after that date and thus was not allowed to participate in the championship.

30. The national court made a reference to the CJ, asking whether these transfer rules were contrary to EU law (in particular to the freedom of movement for workers and competition law) in the case of a professional player who is a national of a Member State of the EU. The CJ found a restriction of the free movement of workers but considered that the restriction could, in principle, be justified. The CJ explicitly acknowledged the important role of transfer deadlines in ensuring the regularity of competition and observed that transfers late in the season might upset the competitive balance and damage the effective functioning of a championship. In the case at hand, the CJ found that the rules must be regarded as going beyond what was necessary to achieve the legitimate aim pursued. However, the CJ added that it is for the national court to ascertain whether there are objective reasons, concerning only sport as such or relating to differences between the position of players from a federation in the European zone and that of players from a federation not in that zone, which justify such different treatment.

3.4 The Piau Case - Organisation of Ancillary Activities (Agent Licensing)

31. The *Piau* judgment[16] concerned FIFA rules governing the profession of football agents through whom professional football players may conclude contracts with the clubs.

32. Under the FIFA rules, a contract in such case was valid only if the agent involved had a licence for his/her practice issued by the national football association. Licensed agents had to pass an interview, have an impeccable reputation, and deposit a bank guarantee. The complainant claimed that the rules had infringed competition rules. As a result of the Commission's investigation, FIFA removed the most restrictive limitations (for example, the deposit was substituted by liability insurance; the interview was replaced with a multiple-choice test*, etc*.). Following these amendments, the Commission rejected the complaint and this decision was appealed by Mr Piau.

33. The GC considered that the football agent's activity (to introduce a player for a fee to a club or clubs to each other with a view of employment) clearly does not pursue a purely sporting interest. The GC questioned the legitimacy of FIFA's right to regulate the profession of football agents (not specific to sport and of unequivocally economic nature) which would normally be the prerogative of public authorities. However, the GC acknowledged that the players' agent profession needed to be supervised by some entity, which, due to the quasi total absence of national laws in this respect and the lack of internal self-regulation among the agents does not otherwise exist. The GC upheld the Commission's conclusion that the rules in question did not produce anti-competitive effects under Article 101(1) TFEU, as the most restrictive rules had been modified by FIFA. The CFI also agreed with the Commission that, even if such anti-competitive effects existed, they could benefit from the exemption under Article 101(3) of the EC Treaty.

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15 Case C-176/96, *Lehtonen et al v. FRSB,* ECR 2000 I-2681.

16 Case T-193/02, *Piau v. Commission*, ECR 2005 II-209; the appeal was rejected as being partly manifestly inadmissible and partly manifestly unfounded by order of the CJ of 23 January 2006, Case C-171/05P, ECR 2006 I-37.

34. As regards Article 102 TFEU, the GC considered that FIFA, as the emanation of the national associations and the clubs - the actual buyers of the services of players' agents - was active in the market for players' agents through its members, and that it held a dominant position in this market. The GC stated, however, that an abuse could not be established, relying essentially on the same arguments as those used in relation to Article 101 TFEU. The GC thus agreed with the conclusion in the Commission's decision that there was no infringement of Article 102 TFEU.

3.5 The Commission's Decision Making Practice Concerning Organisational Rules

35. In 2009, the Commission rejected a complaint concerning **anti-doping rules**. In this case a professional tennis player lodged a complaint against the World Anti-Doping Agency, the ATP Tour Inc. and Court of Arbitration for Sport. The complainant claimed that the rules of the World Anti-doping Code, adopted/applied by the above organisations, were excessive and disproportionate and therefore they had a harmful effect on competition between professional tennis players. The Commission took the view that there was no Community interest to open an investigation in this case. The Commission also pointed out that it was very improbable that the anti-doping rules would restrict competition under Article 101(1) on the basis of the *Meca Medina* test. Concerning Article 102 TFEU the Commission stated that the complainant did not provide evidence of any abusive behaviour and there was no indication that the practices at issue would affect the functioning of the internal market. The complainant lodged an appeal against the Commission decision, the case is currently pending before the GC.[17]

36. In 2002 in the ***ENIC case*** the Commission took the view that UEFA's rule on the independence of clubs does not violate Art 101 and 102 of the TFEU. *ENIC*, a company that owned stakes in six professional football clubs in various Member States had lodged a complaint against a rule adopted by UEFA in 1998, which stated that no two clubs or more participating in a UEFA club competition may be directly or indirectly controlled by the same entity or managed by the same person. The Commission rejected the complaint concluding that there was no restriction of Article 101(1) TFEU. Although the UEFA rule is a decision taken by an association of undertakings and, therefore, theoretically caught by the prohibition principle set in Article 101(1) TFEU, it can be justified by the need to guarantee the integrity of the competitions. The Commission concluded that the rule "*aims to ensure the uncertainty of the outcome and to guarantee that the consumer has the perception that the games played represent honest sporting competitions*…" The Commission also found that the rule did not go beyond what was necessary to ensure its legitimate aim: *i.e.* to protect the uncertainty of the results in the interest of the public. The test applied by the Commission is similar to the one applied by the CJ in *Meca Medina*, therefore it would appear likely that the rule would not infringe Article 101(1) TFEU on the basis of *Meca Medina*.

37. In the **FIA case** the Commission dealt with a conflict of interest situation arising from the fact that a sport association was not only the regulator but also the commercial exploiter of a sport. The Fédération Internationale d'Automobile (FIA) is the international association for motor sport whose members, *inter alia*, organise and regulate motor sport in their respective countries. FIA itself also acted as organiser and promoter of motor sport championships, in particular Formula One. In 1999, the Commission issued a Statement of Objections (SO) concerning rules by FIA which prohibited drivers and race teams that held a FIA licence from participating in non-FIA authorised events. Circuit owners were prohibited from using the circuits for races which could compete with Formula One. The Commission came to the preliminary conclusion that these rules violated Articles 101(1) and 102 TFEU as they gave FIA the control to block the organisation of races which competed with the events FIA promoted or organised (*i.e.* those events from which FIA derived a commercial benefit, in particular Formula One).

17 Case T-508/09 *Cañas v Commission.*

38. The Commission also objected to certain terms of the contracts between the Formula One Administration Ltd (FOA, subsequently Formula One Management Ltd), the company that administered the TV rights to Formula One races, and broadcasters because they made it possible to block the organisation of motor sport events that would compete with Formula One races. For example, the agreement with broadcasters imposed a severe financial penalty on them if they showed anything that would be deemed by FOA a competitive threat to Formula One. Finally, the Commission objected to FIA rules according to which FIA automatically acquired TV rights to all the motor sport events it authorised even if these were promoted by a different promoter.

39. The Commission closed the case after having reached a settlement in 2001. The settlement provided in particular that FIA would:

- Limit its role to that of a sport regulator without influence over the commercial exploitation of the sport and thus removing any conflict of interest (through the appointment by FIA of a "commercial rights holder" for 100 years in exchange for a one-off fee);

- Guarantee access to motor sport to any racing organisation and to no longer prevent teams to participate in and circuit owners to organise other races provided the requisite safety standards are met;

- Waive its TV rights or transfer them to the promoters concerned; and

- Remove the anticompetitive clauses from the agreements between FOA and broadcasters.