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The EBU's Eurovision System Governing the Joint Buying of Sports Broadcasting Rights: Unfinished Competition Business

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On 4 October 2011, the Court of Justice delivered its judgment in two joined cases, *FA Premier League* v *QC Leisure and others* (Case C-403/08) and *Murphy* v *Media Protection Services* (Case C-429/08). The court found that the sale of broadcasting rights to Premier League matches on a country-by-country basis, backed up with prohibitions to prevent the licensed content from being accessed outside the country in question, is against EU law. This challenges the business model of rights holders that currently license their content on an exclusive territorial basis in the EU. Given the court's emphasis on the cross-border provision of broadcasting services, the joint acquisition of (EU-wide) sports broadcasting rights will likely regain importance. Interestingly, this would revivify 'old' conflicts between public and private broadcasters over the EBU's Eurovision system for the joint buying of sports rights. Anticipating these developments, this article revisits the unresolved EBU/Eurovison case - one of the European Commission's most significant antitrust cases regarding the audiovisual sector. It analyzes: (1) the incredible rise in the economic importance of sports broadcasting rights since the late 1980s and 1990s, and the competition between public broadcasters (represented by the EBU) and private broadcasters for these rights; (2) the European Commission's first and second exemption decision for the Eurovision system; and (3) the lessons to be learned from the Commission's handling of the EBU/Eurovision case and the competition problems that still linger.

1. INTRODUCTION

The sale of sports broadcasting rights is big business. Since the late 1980s, increased competition for attractive sports content led to an incredible rise in the prices paid for sports broadcasting rights. Popular sporting events, such as the UEFA Champions League or the FIFA World Cup, have a distinct high profile among desirable viewers. Because sports broadcasting rights are licensed on an exclusive basis they are highly valuable in terms of building a broadcaster's or a distributor's brand, attracting advertising revenue, and building a customer basis. The last aspect is of particular importance for pay-television, which emerged in Europe in the 1980s and has taken premium content like sports as its key selling proposition.[1]

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[1] T Evens and K Lefever, 'Watching the Football Game: Broadcasting Rights for the European Digital Television Market' (2011) 35(1) Journal of Sport and Social Issues 33-49; B Van Rompuy and C Pauwels, 'The Recognition of the Specificity of Sport in the European Commission's Article 81 EC Decisional

Confronted with the rise of pay-television in the 1980s, public broadcasters joined forces in the acquisition of sports broadcasting rights. To secure free access to events of major societal importance and high reach of viewers, the European Broadcasting Union ('EBU') became an active buyer of highly atractive sports broadcasting rights. Through the Eurovision system, members of the EBU can decide collectively to negotiate and acquire such rights on their behalf. Both free-to-air private broadcasters and pay-television operators questioned the Eurovision system, alleging it was in breach of the EU competition rules.[2] The European Commission adopted two formal decisions exempting the Eurovision system from the general prohibition of anti-competitive agreements. The General Court ('GC') (*ex* Court of First Instance) overruled both decisions. A third decision was never issued. Instead, the case remarkably sunk into a silent death. After over 15 years of public attention for and fierce sectoral discussions on the Eurovision system, the European Commission closed the case. It observed that the EBU had lost significant buying power as a consequence of increased competition for premium international sports rights.[3]

A recent judgment of the Court of Justice ('CJ'), however, might revivify the controversial Eurovision case. On October 4, 2011, the CJ delivered its long-awaited preliminary ruling in two joined cases, *FA Premier League* v *QC Leisure and others* and *Murphy* v *Media Protection Services* ('*Murphy*').[4] The court held that the sale of the broadcasting rights to Premier League matches on a country-by-country basis, backed up with prohibitions to prevent the licensed content from being accessed outside the country in question, violates EU law. This challenges the business model of media rights holders that currently license their content on an exclusive territorial basis in the EU. It is generally expected that this will make a stronger case for the joint acquisition of (EU-wide) sports broadcasting rights. In such a scenario, the Eurovision system might regain importance and unfinished competition business might resurrect when private content operators file complaints against the EBU's joint acquisition scheme once again.

In this article, the authors revisit the EBU/Eurovision case, one of the European Commission's most significant antitrust cases regarding the audiovisual sector in general and the acquisition of sports broadcasting rights in particular. The authors do so with an eye on the recent *Murphy* judgment of the CJ. Section 2 addresses the incredible rise in the commercial importance of sports broadcasting rights since the late 1980s and 1990s. It focuses on the competition between public broadcasters

Practice Related to Sports Media Rights' in S Gardiner, R Parrish, and RCR Siekmann (eds), *Professional Sport in the European Union. Regulation, Re-regulation and Representation*, T.M.C. Asser Press, Cambridge, 2009, 282-283.

[2] K Donders, *Public Service Media and Policy in Europe*, Palgrave Macmillan, London 2012, 81; M Arino, 'Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps' (2004) 54 Communications & Strategies 97, 108.

[3] Commission, Report on Competition Policy 2007 (2008) 114, 'the investigation revealed that the markets for the acquisition of top international sports rights have changed considerably in recent years. Contrary to the previous situation, EBU is no longer the sole buyer of premium international sports rights, as rights owners tend to diversify the sale pattern of their media rights'.

[4] Cases C-403 & 429/08, [2011] ECR I-0000.

(represented by the EBU through the Eurovision system) and private broadcasters for these rights. The trends of late the 1980s and the 1990s are compared with current developments in the sports rights markets. Section 3 critically evaluates the European Commission's first and second decisions granting an exemption to the Eurovision system. Section 4 provides for a brief analysis of the CJ's *Murphy* judgment, focusing on issues of importance for the joint acquisition of sports broadcasting rights. Section 5 elaborates on the lessons to be learned from EBU/Eurovision saga. They make clear that the interface between competition law and sports broadcasting rights is a never-ending story, raising fundamental questions, such as: What is the proper role of competition policy versus sector-specific regulation for safeguarding broad access to sports content? Was the Eurovision case an example of regulatory capture? Has competition policy made the European market for sports rights more competitive? Is this possible at all? Etc. This article cannot conclusively answer all of the above questions. Yet it aspires to reevaluate the 'old' EBU/Eurovision case in light of current and anticipated future developments regarding the joint acquisition of sports broadcasting rights in Europe.

2. THE SKY IS THE LIMIT: SPORTS BROADCASTING RIGHTS AND THEIR VALUE IN MEDIA MARKETS

To some extent, the issue of sports broadcasting rights and its importance in light of EU competition law has evolved in two phases. The first phase runs parallel with the European-wide liberalisation of broadcasting markets, the entrance of private broadcasters, and the beginning of pay-television in Europe (1980s-beginning of 2000). The second phase is far more recent and is characterised by more and larger uncertainties. Digital technologies have resulted in an increase of windows for sports broadcasting rights and new entrants are coming into the broadcasting market, deploying strategies similar to those used by pay-television operators in the 1980s and 1990s.

2.1 The rise of pay-television: the Eurovision system as defence against the 'dark arts'

Before the 1980s, there were few 'real' broadcasting markets in Europe. Public broadcasters held a monopoly over the provision of broadcasting services. They were the main, and in most countries the sole, buyers of sports broadcasting rights. In the 1980s, most EU Member States abolished their broadcasting monopolies (albeit some later than others). Private broadcasters entered the market. While most of these operated on a free-to-air basis, several pay-television operators – some of which were also active in the market of television distribution through satellite, cable or terrestrial – also emerged. Pay-television operators presented a fundamentally different business model in the European broadcasting sector. Their development, and the take-up of new, related services, was welcomed at the European level, referring to a discourse of consumer sovereignty prominently defended also in some Member States, like the United Kingdom.[5] Indeed, it was acknowledged that 'fewer viewers may watch an event

[5] See M Tracey, *The Decline and Fall of Public Service Broadcasting*, Oxford University Press, Oxford, 1998, 48.

on pay-television than on in-the-clear TV'; yet, 'the revenues can be significantly higher'.[6] However, diverging voices did utter concerns about the rise of pay-television. In comparing free-to-air private television companies and pay-television operators, the former were perceived as the lesser of two evils. Pay-television was seen as a commercial 'battering ram', providing additional services (more live sports on television), but at a price:

> There is pressure to accelerate the uptake of new forms of marketized television delivery 'bundled' with other services produced by the convergence of computing, broadcasting and telecommunications in order to 'add value' to existing media and information services. Customers, therefore, are 'encouraged' to take up these new services (for which they will have to pay) by a 'carrot-and-stick' combination of inducement and compulsion. The inducement is the availability of new content and uses. In the case of sport, this includes more 'live' television sports contests, with viewer choice of camera angles and the instantaneous ability to 'call up' sports data, opportunities to purchase tickets and merchandising, order fast-food without interrupting the viewing experience, networked computer communication with sports fans, and so on.[7]

The concerns about restriction of access to live sports events were transposed into regulation, first at the national level. Several Member States, including Germany, the United Kingdom and Ireland, introduced regulations restricting the possibility of pay-television operators to acquire sports rights. They received support from the European Parliament, which insisted on the introduction of the listed events mechanism in the Television without Frontiers Directive. This mechanism enables Member States to draw up a list of sports events of major societal importance that can only be broadcasted on free-to-air television.[8]

Against this background, the EBU's joint acquisition system was rather convenient. It made sure that public broadcasters, all free-to-air broadcasters benefiting from must-carry status, were powerful enough to compete with pay-television operators for the acqusition of rights to numerous sports events. Even though free-to-air private television companies often complained against anti-competitive behavior of public broadcasters,[9] they preferred the acquisition of sports rights by public broadcasters over pay-television competitors. Also at the political level, the Eurovision system was tolerated. After all, which national politician would publicly argue for a pay-per-view or subscription model to watch sports?

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[6] European Commission quoted in CA Jones, 'Transfrontier Media: Law and Cultural Policy in the European Union' in M Semati (ed) *New Frontiers in International Communication Theory*, Rowman & Littlefield, Lanham 2004, 168-169.

[7] D McArdle and R Giulianotti, *Sport, Civil Liberties and Human Rights*, Routledge, New York, 2006, 103. For a similar view, see e.g. G Jarvie, *Sport, Culture and Society: An Introduction*, Routledge, New York, 2006, 135.

[8] See below section 5.

[9] See Donders, n 2 above.

2.2 The rise of the electronic communications sector: no defence at all

Today's circumstances are markedly different: the boundaries between pay- and free-to-air television have faded; the level of competition has increased substantially (with hundreds of channels competing for viewers' attention); and public broadcasters have had to accept that someone can outbid them. Public broadcasters now see themselves confronted with electronic communications players (often carriers of their signals) whose large(r) capital allows them to invest strategically in sports rights – either to foreclose a market for competing firms or to enter a market.[10] For instance, the purchase of the broadcasting rights to the Belgian premier football league in 2005 and 2008 by telecommunications incumbent Belgacom was part of a strategy to counter the dominance of cable network operator Telenet in the market for the transmission of broadcasting signals. Belgacom succeeded in building up its market share to 15% of digital television viewers. In 2011, however, Telenet was successful in outbidding Belgacom for the same rights, allowing it to consolidate its dominance, transmitting television signals to over 85% of all Flemish (i.e. Northern part of Belgium) households.

Whereas the broadcasting market of the 1980s and 1990s was in many ways still a market of profound scarcity, youngsters today can hardly imagine the limited choice of channels in the beginning of the 1990s. Today's consumers are a generation of abundance.[11]

Keeping the above observation in mind, the strategic importance for sports broadcasting rights has not only increased in parallel with increased competition in the market. In spite of a slow start-up in most European countries, pay-per-view, on-demand, and subcription services are becoming more popular.[12] Whereas initially consumers refrained from engaging in active consumption behavior, they are now evolving along the lines of media companies' corporate strategies. This, reinforced by technological evolutions, provides massive opportunities in terms of diversification around sports broadcasting rights. Today, sports broadcasting rights are divided in bundles to enable different companies to acquire a subset of rights to a particular sports event. Furthermore, the rights are sliced and diced depending on the platform of provision: simultaneous broadcast, Internet streaming, mobile streaming, etc. Moreover, consumers' 'willingness to pay' partly remedies longstanding concerns about the necessity of free access to sports content. Notwithstanding scholarly opposition to a further commercialisation of sports,[13] there is less political fuss about free-to-air television and sports.

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[10] See K Donders and T Evens, *Broadcasting and its Distribution in Flanders, Denmark and the United States: An Explorative and Future-oriented Analysis*, IBBT-SMIT, Brussels, 2010.

[11] D Elstein, D Cox, B Donoghue, D Graham, and G Metzger, *Beyond the Charter: the BBC after 2006,* Broadcasting Policy Group, London, 2004.

[12] P Kern, *The Impact of Digital Distribution - A Contribution,* KEA, Brussels, 2009.

[13] See e.g. K Lefever and R Kerremans, 'Football on (Must-)Offer' (2011) 32(12) European Competition Law Review 621-628.

Hence, one can witness a number of resemblances and differences between the status of sports broadcasting rights in the 1980s-1990s and today. Obviously, the rationale for acquiring sports broadcasting rights has remained the same: companies try forcefully to enter a neighbouring market or to establish more firmly their (dominant) position. Given their strategic importance, the prices paid for sports broadcasting (and by extension media) rights are still exponentially increasing. There are however a number of differences. First, the position of public broadcasters is more than ever contested in the media market. Not only private television companies, but also publishers and Internet players contest whether extensive government intervention is necessary in times of declining market failure and unlimited choice.[14] As stated by Mulgan, referring to the multiplication of broadcasting services, 'the regulatory edifice that was built up to govern public broadcasting is being slowly demolished'.[15] In that sense, the contested nature of the joint acquisition of sports rights by public broadcasters would only intensify and trigger a European Commission investigation. Second, the number of players in the market, but also the diversification of services (going beyond simultaneous broadcasting), provides evidence of a sector that has matured. Even though technological evolutions still put things on shaky grounds, the market increasingly allows for the deployment of traditional competition law principles. Third, and related to the former, the European Commission's experience in applying the competition rules to sports-related activities, particularly in the field of sports broadcasting rights, has grown. However balancing the economic and socio-cultural dimensions of sports remains a difficult exercise.

3 LOOKING BACK: THE EBU / EUROVISION SAGA

3.1 The first episode: balancing public interest concerns against competition concerns

1) The EBU / Eurovision decision (1993)

The European Commission adopted its first exemption decision on June 11, 1993.[16] Following a complaint from the private broadcaster Screensport (later TESN) concerning the refusal of the EBU and its members to grant sublicenses for Eurovision rights,[17] the Commission initiated an infringement procedure in December 1988. The Commission indicated that the rules governing the acquisition and use of sports broadcasting rights within the framework of the Eurovision system could be exempted

[14] K Donders, C Pauwels and J Loisen, 'All or Nothing? From Public Service Broadcasting to Public Service Media, to Public Service "Anything"?' (2012) 8(1) International Journal of Media and Cultural Politics 3-12.

[15] G Mulgan, 'Freedom and the Licence: The Political history of the Funding of the BBC' in S Barnett (ed) *Funding the BBC's Future,* London, British Film Institute, 1993, 3.

[16] The following section is based on the overview given in B Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations Under Article 101 TFEU*, Kluwer Law International, Alphen aan den Rijn, 2012, 373-387.

[17] A second complaint concerning the joint venture between a consortium of EBU members (Eurosport) and News International/Sky Channel establishing the television sports channel Eurosport was subject of separate proceedings, see *Screensport/EBU members* (Case IV/32.524) Commission Decision 91/130/EEC OJ 1991, L63/32.

under Article 101(3) TFEU (ex Article 85(3) EEC). However, this would require the EBU and its members to grant non-members sublicenses for a substantial part of the Eurovision rights on reasonable terms. In April 1990, the Commission received a second complaint that equally concerned a refusal of the EBU to grant sublicenses for Eurovision rights.[18] Following discussions with the Commission, the EBU adopted a sublicensing scheme. The Commission indicated its intention to grant an exemption.[19] The critical observations received from third parties, however, prompted the Commission to conclude that the sublicensing scheme was unsatisfactory. The EBU submitted the final version of the sublicensing scheme to the Commission on February 26, 1993.[20]

In the 1993 *EBU/Eurovision system* decision, the Commission observed that the EBU rules governing the joint negotiation, buying, and sharing of sports broadcasting rights, as well as the related case-by-case agreements, have an anti-competitive object and appreciable anti-competitive effects on the relevant markets.[21] Without the Eurovision system, the EBU members would to some extent compete with each other for the acquisition of sports broadcasting rights.[22] Hence, competition between the EBU members 'is greatly restricted if not, in many cases, eliminated'.[23] Moreover, as it is a disadvantage that non-EBU members cannot participate in the rationalization and cost-savings achieved by the Eurovision system, competition *vis-à-vis* non-members 'is to some extent distorted'.[24] The Commission, however, concluded that the Eurovision system provides for various benefits that outweigh these anti-competitive effects:

- The Eurovision system leads to cost and distribution efficiencies. The joint negotiation and acquisition of sports broadcasting rights guarantees that the most competent representative negotiates the contracts. This reduces transaction costs and complexities in comparison to individual negotiations. EBU members from smaller countries particularly benefit from this.[25] The program exchange at the heart of the Eurovision system also results in considerable cost-savings. Moreover, the administrative and technical coordination carried out by the EBU and the host broadcaster ensures a high-quality signal and optimal adaptation to the needs of the different members.[26]

- The Eurovision system promotes the development of a single European broadcasting market.[27] Without the reciprocity mechanism, each member engaged

[18] *EBU/Eurovision System* (Case IV/32.150) Commission Decision 93/403/EEC OJ 1993, L179/23, para 42.

[19] Idem, para 43.

[20] Idem, para 44.

[21] Idem, para 54.

[22] Idem, paras 47-52, 54-57.

[23] Idem, para 49.

[24] Idem, paras 50-52.

[25] Idem, para 59.

[26] Idem, para 64.

[27] Idem, paras 61-62, 67.

in transnational broadcasting would need to acquire the broadcasting rights for all countries covered by its service. Because this would be expensive and difficult to achieve, the sharing of the Eurovision rights facilitates cross-border activities of the participating members.

- The Eurovision system increases the number of sports programs being produced and shown on television and leads to a more varied offer, including the coverage of minority sports. Firstly, the joint acquisition and the related sharing of the rights enables program coordination at the national level: 'In the case of events of major interest like the Olympic Games this sharing means that a quasi-permanent coverage can be guaranteed by the alternating members, whereby one of the members transmits the event while the other provides attractive alternatives'.[28] If one of the members would individually acquire exclusive rights, it would show much less of the sports event. Secondly, the reciprocity and solidarity mechanism stimulates EBU members to produce the signal for events taking place in its country, even if it is not itself interested in those particular events.[29] Thirdly, the participation of EBU members in consortia operating a transnational (pan-European) dedicated sports channel enables the members 'to provide a broader range of sports programs, including minority sports and sports programs with educational, cultural or humanitarian content that they cannot show on generalist channels'.[30]

Even though the Eurovision system greatly restricts or even eliminates competition between EBU members, the Commission concluded that these restrictions are indispensable. The success of joint negotiations would be put in jeopardy if individual members would simultaneously engage in separate negotiations. It is essential that the members refrain from separate negotiations once joint negotiations have commenced.[31] The restrictions of competition *vis-à-vis* non-members are also considered to be indispensable. Regarding the contractual access of non-members to Eurovision rights, the Commission stressed that, at its request, the EBU substantially relaxed earlier, more restrictive conditions (relating to the embargos and the restrictions on time, number, and volume of non-member transmissions). The remaining exclusivity for EBU members is necessary in order to allow them a fair return on their investments.[32] Regarding the EBU membership rules, the Commission contended that the limitation of membership to public broadcasters, *i.e.* broadcasters 'which have to fulfill a particular mission to which they are committed by national law, and practice, irrespective of the form of organization of the method of financing',[33] is equally indispensable. According to the Commission, only public broadcasters can be expected to respect the principles of reciprocity and solidarity, without taking into account the actual input and output of

[28] Idem, para 60.

[29] Idem, para 63.

[30] Idem, para 62, 76.

[31] Idem, para 70.

[32] Idem, para 71.

[33] Idem, para 5.

the individual members, on which the Eurovision system is based.[34] Furthermore, only public broadcasters have to provide varied programming in the public interest regardless of considerations of profitability. Lastly, only public broadcasters are obliged to cover the entire national population. This obligation guarantees that the common network covers the whole Eurovision area and that all members bear a proportional share thereof.

The Commission not only referred to the public mission concept in defining the circle of beneficiaries of the Eurovision system. A closer analysis of the *EBU/Eurovision system* decision reveals that the Commission showed great sensitivity for the concern that a substantial proportion of the public would be deprived of the opportunity to view major international sports events for free. The Commission observed that 'the television rights to certain major international events traditionally broadcast by the established public broadcasters have moved into the hands of new commercial channels'.[35] Also at the national level, 'EBU members are increasingly outbid for widely popular national events'.[36] According to the Commission, the migration of valuable sports rights to private competitors is attributable to the constraints arising from the EBU members' public mission, namely the limitations on sponsorship and advertising to which they are subject. These constraints often hamper their ability to buy and exploit programs in a commercially viable way, which means that they 'compete at a growing disadvantage *vis-à-vis* commercial channels'.[37] While acknowledging that new commercial channels provide for a broader choice for television viewers,[38] the Commission at the same time echoed concerns about this development. If part of the national audiences were prevented from watching major sports events, this would 'incur the displeasure of the television viewers and of public opinion'.[39]

The Commission essentially reasoned that public and commercial broadcasters take a different approach to sports broadcasting. First, generalist private broadcasters are more interested in mass-appeal sports events that allow them to attract advertisers and/or subscribers. Public broadcasters, on the contrary, 'also have to cover minority sports or less attractive events, as by virtue of their public mission they also have to cater for minority interests'.[40] Second, commercial channels are less interested in events that require enormous production efforts compared to the broadcasting time devoted to these events. Consequently, some new commercial channels 'often prefer to seek sub-licenses for ready-made sports programs produced by other broadcasters rather

[34] Idem, paras 72, 76.

[35] Idem, para 25.

[36] Idem. The Commission notes, however, that some sport organisers have sought to maintain their relationship with public broadcasters, as they 'consider a high-quality television coverage which reaches the entire national population to be a valuable service which not only contributes to the standing of the event and to the popularity of the sport concerned but also increases the value of advertising space in the stadium for advertisers'.

[37] Idem, paras 11, 25.

[38] Idem, para 11.

[39] Idem, para 74.

[40] Idem, para 19.

than to acquire full rights and produce the coverage themselves'.[41] Public broadcasters, on the contrary, 'are often prepared to cover an event in full … even if it can be broadcast only in short extracts, irrespective of cost/revenue considerations, *because they consider the provision of extracts to be part of their public mission*' (emphasis added).[42] As a result, they show a broader range of sports than purely commercial channels.

2) The GC's *Métropole Télévision (I)* judgment (1996)

Different commercial television stations, which were unable to gain the access to the Eurovision rights they were looking for, challenged the *EBU/Eurovision System* decision before the GC.[43] In *Métropole télévision SA and others* v *Commission* ('*Métropole télévision (I)*') (1996) the court annulled the decision on two grounds.

First, the court found that the Commission based itself on a misinterpretation of Article 101(3) TFEU (ex Article 81(3) EC) in concluding that the restrictions of competition resulting from the EBU's membership rules were indispensable. The court essentially held that the Commission, in order to assess correctly the indispensability of the EBU membership conditions, was obliged to examine whether the rules were 'objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner'.[44] Since it found that the Commission omitted to carry out such an assessment,[45] the court concluded that the Commission was not entitled to exempt these rules on that ground. In more practical terms, this criticism followed from the observation that the French pay-television operator Canal Plus was an active EBU member.[46] The Commission asserted that it was dispensed from having to examine the implementation of the membership conditions by the EBU.[47] The GC clearly disagreed. Before granting an exemption under Article 101(3) TFEU, the Commission should have examined whether the membership conditions were applied in an appropriate, reasonable, and non-discriminatory way.

Second, the GC addressed the question whether the concept of a public mission (as employed in the decision) may be taken into consideration in the application of Article 101(3) TFEU. In the proceedings before the court, the Commission argued that its decision is based 'only in the alternative' on the public mission characteristic of the members of the EBU. The use of the concept in the decision is 'merely a way of summarizing the conditions laid down by Article 3(3) of the EBU Statutes'.[48] The GC

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[41] Idem, paras 20, 73.

[42] Idem.

[43] Joined Cases T-528, 542, 543 & 546/93 *Métropole télévision SA and others* v *Commission* [1996] ECR II-649.

[44] Idem, para 95.

[45] Idem, para 96-99.

[46] A Herold, 'Rules Governing the Acquisition by Third Parties of Television Rights for Sporting Events under *Eurovision* in Breach of the European Competition Law' (2002) 7 International Journal of Communications Law and Policy 1-3; Commission, 'Commission approves the EBU-Eurovision system' (Press Release) IP/00/472, 12 May 2000 (stressing that the GC annulled its decision 'due in particular to the fact that the French pay television company Canal Plus was a member').

[47] See, n 43 above, para 90.

[48] Idem, paras 88, 110.

rightly observed that, contrary to this assertion, the public mission concept is a fundamental component of the statement of reasons of the decision. The GC stressed that 'in the context of an overall analysis, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant an exemption under Article [101(3) TFEU]'.[49] The court, however, criticised the Commission for using the mere fulfillment of a particular public mission, defined by reference to the mission of operating services of general economic interest (contained in Article 106(2) TFEU), as a criterion for exemption. As the decision itself indicated that Article 106(2) TFEU (ex Article 90(2) EC) was not applicable,[50] the court reasoned that 'factors coming essentially within the ambit of that article cannot in this case constitute a criterion for the application of Article [101(3) TFEU] in the absence of other justification'.[51] The Commission should have examined, carefully and impartially (i.e. in financial and qualitative terms), whether the burdens and obligations arising from the EBU members' public mission necessitate the restrictions *vis-à-vis* non-members. According to the court, the Commission 'did not base itself upon a minimum amount of actual economic data' to support its assertion that the restrictions inherent in the Eurovision system are indispensable.[52] The Commission in particular failed to consider the system of financial compensation for those burdens and obligations and relate this to the economic effects of the agreement.[53] Hence, 'the Commission concluded on the basis of a misinterpretation of Article [101(3) TFEU] that the restrictions of competition for which it granted exemption … were indispensable within the meaning of that provision'.[54]

3.2 The second episode: another bite of the cherry

1) The Eurovision decision (2000)

The European Commission adopted a second exemption decision on May 10, 2000. In order to obtain the new exemption, the EBU adopted a new set of sub-licensing rules relating to the exploitation of Eurovision rights on competing pay-television channels.[55] The EBU further amended the EBU membership rules. These rules, based on quantitative criteria of the population coverage condition and the program and

[49] See, n 43 above, para 118.

[50] *EBU/Eurovision System* (Case IV/32.150) Commission Decision 93/403/EEC OJ 1993, L179/23, para 78. The Commission acknowledged that, without the benefits of the Eurovision system, the acquisition of sports broadcasting rights would be more difficult and costly, particularly for members from smaller countries. Yet this is not sufficient for the EBU to benefit from the antitrust exception for undertakings entrusted with the operation of services of general economic interest contained in Article 106(2) TFEU: 'there is no risk that the application of the competition rules could obstruct the performance of their particular task, i.e. the provision of varied and balanced programming for all sections of the public, including a certain amount of sport, and the acquisition of the relevant television rights'.

[51] See, n 43 above, para 117.

[52] Idem, paras 120-121.

[53] Idem.

[54] Idem, para 125.

[55] *Eurovision* (Case IV/32.150) Commission Decision 2000/400/EC OJ 2000, L151/18, paras 35-36.

production obligations, led to the exclusion of Canal Plus from EBU membership.[56] The EBU presented the new membership rules to the Commission and made various modifications at the Commission's request.[57]

For the purpose of this article, it is sufficient to make two general observations about the 2000 *Eurovision* decision. First, the Commission carefully omitted explicit references to the public mission of the EBU members or their different approach to sports broadcasting**.** The Commission now presented the pro-competitive benefits of the Eurovision system exclusively in terms of efficiency benefits. First, the joint buying of sports media rights reduces transaction costs, which leads to better purchasing conditions. Without the benefits of the Eurovision system, smaller members would have more difficulty in accessing the relevant sports rights. The Eurovision system therefore improves the distribution of television services. This results in better coverage of sports events and more sports events being broadcast by a larger amount of broadcasters.[58] Second, the sharing of Eurovision rights improves distribution because it enables an alternation of the transmission of an event by the members.[59] Third, the reciprocity and solidarity principles of the Eurovision system obliges members to produce, free of charge, the television signals for events taking place in their country, even if they are themselves not interested in that event. This equally improves distribution and leads to more sports programs being produced and shown on television.[60] The anticipated benefits for consumers, in terms of increased access to diversified sports content, remain the same: 'the participants in the Eurovision system can show more and higher quality sports programs, both popular sports and minority sports, to European television viewers'. In particular, members from smaller countries 'can provide their chair viewers with a broad range of international sporting events with a commentary in their own language and tailored to their specific national interests'.[61]

Second, and subsequently, the Commission essentially applied the same reasoning. Albeit less explicit, the Commission is still concerned with the migration of sports events from free-to-air TV to pay-television. Discussing the market structure, the Commission observed that the EBU has lost significant market share in the relevant markets for the last ten years: 'the EBU's position has been effectively attacked by the big European media groups'. As a result, "[t]he EBU was unsuccessful in the bidding for the 2002 and 2006 Football World Cups" and 'has also not acquired or has lost a very significant number of important sporting events in the last few years because of higher competitive offers'.[62] Furthermore, the Commission noted that the EBU members are only recently starting to enter the pay-television market, but still through a

[56] Idem, at n 8.

[57] Idem, paras 59-62. Third parties addressed critical opinions concerning the EBU sub-licensing rules, finding them too restrictive. They observed that the new EBU membership rules were not sufficiently objective and transparent.

[58] Idem, paras 84-87.

[59] Idem, paras 88-89.

[60] Idem, para 90.

[61] Idem, para 91.

[62] See, n 55 above, para 57.

very limited number of thematic channels. The position of the EBU members in the free-to-air market has 'undoubtedly declined as a result of the sharp increase in new broadcasting companies entering the market … established pay television operators such as Canal+, BSkyB, and Kirch hold very strong market positions in some European countries with very valuable sports rights'.[63]

2) The GC's *Métropole télévision (II)* judgment (2002)

Different commercial broadcasters once again successfully challenged the Commission's exemption decision. In *Métropole télévision SA (M6) and others* v *Commission* ('*Métropole télévision (II)*') (2002) the GC focused exclusively on the Commission's application of the fourth condition of Article 101(3) TFEU, namely that competition is not eliminated in respect of a substantial part of the market.[64]

The GC disagreed with the Commission that the sublicensing scheme sufficiently guaranteed third parties access to live broadcasting rights not used by the EBU members. The sublicensing scheme applicable to free-to-air channels provides that sublicenses for live transmission rights may be granted only for residual transmissions, i.e. transmissions of those (parts of) competitions that are not reserved for live transmission by the EBU members. The court observed, however, that an event is considered to be transmitted live if the majority of the principal competitions constituting it are transmitted live. If EBU members reserve the live transmission of the majority of the competitions of an event, non-members cannot obtain sublicenses to the other competitions. According to the court, this is unacceptable:

> even if it proves necessary, for reasons linked to exclusive transmission rights for sporting events and the guarantee of their economic value … for EBU members to reserve for themselves live transmission of the programs acquired by the EBU, none of these reasons justifies there being able to extend that right to all the competitions which are part of the same event, even when they do not intend to broadcast all those competitions live.[65]

In light of this observation, the GC found that the sublicensing scheme does not guarantee access for competitors of EBU members. In concluding that the Eurovision system does not eliminate competition in the market, the Commission made a manifest error of assessment in the application of Article 101(3) TFEU (ex Article 81(3) EC).[66] Consequently, the court annulled the decision.

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[63] Idem, para 58.

[64] Joined Cases T-185, 216, 299 & 300/00) *Métropole télévision SA (M6) and others* v *Commission* [2002] ECR II-3805. The EBU appealed the judgment before the CJ. The EBU argued that the GC based its reasoning on arguments that were not raised by the applications and therefore infringed the rights of the defense of the EBU and the European Commission. The CJ dismissed the appeal as being manifestly unfounded. Case C-470/02 P *Union européenne de radio-télévision (UER)* v *Commission and others* (unpublished) OJ 2004, C314/2.

[65] Joined Cases T-185, 216, 299 & 300/00 *Métropole télévision SA (M6) and others* v *Commission* [2002] ECR II-3805, para 73.

[66] Idem, para 85.

3.3 The saga continues; no it does not.

The European Commission never adopted a new decision to remedy the concerns of the GC. In 2007, five years after the GC's annulment of the 2000 Eurovision decision, the Commission closed the case. It did so by merely pointing out that, as a result of new market entrants and the increased capacity devoted to sports broadcasts, the buying power of the EBU had further declined.[67] This is certainly true. The spiraling costs of sports broadcasting rights have forced many public broadcasters to reduce their involvement in sports broadcasting.[68] This has at times split the solidarity within the EBU.[69] In 2009, the EBU for the first time failed to obtain the European broadcasting rights for the Olympic Games.[70] Nonetheless, this does not justify the Commission's willingness to allow the Eurovision system to operate in illegality over all these years.

The Commission's silent escape from the EBU/Eurovision case stands in sharp contrast with its actions within the framework of European State aid control. Checking Member States' compliance with State aid rules, applying Article 106(2) TFEU (providing for a more lenient State aid regime for services of general economic interest) and more precise principles of compliance listed in the Broadcasting Communication, the European Commission has criticised public broadcasters for abusing public subsidies or licence fee income to outbid private competitors in the market for sports broadcasting rights on several occasions. In all these cases Commission intervention was provoked by private broadcasters. Filing complaints against the funding of public broadcasters, the latter basically shifted focus from antitrust to State aid law. In 2007, the European Commission accused German public broadcasters ARD and ZDF of going beyond their public service remit, aggressively pursuing sports broadcasting rights through its subsidiary SportA. Consequently, the German Länder decided to alter regulations to some extent. They asked the concerned public broadcasters to move more carefully in the market for sports broadcasting rights, capping maximum expenditure of sports rights to approximately 10% of overall budgets.[71] Concerns were also raised on the use of public money to acquire sports rights in the Netherlands,[72] Ireland,[73] Spain,[74] Belgium[75] and Austria.[76] Most investigations have not resulted in

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[67] Commission, Report on Competition Policy (2008) 114.

[68] HA Solberg, "Sports Broadcasting: Is it a Job for Public Service Broadcasters? – A Welfare Economic Perspective" (2007) 20(4) Journal of Media Economics 289.

[69] Idem, para 292. For instance, the Italian PSB (RAI) refused to participate in the joint acquisition of the rights to the 2010 and 2012 Olympic Games. RAI also disagreed with the EBU over the valuation for Euro 2008 (it was only willing to pay one half of the € 67 million it paid for Euro 2004).

[70] K Lefever and B Van Rompuy 'Ensuring Acces to Sports Content: 10 Years of Intervention. Time to Celebrate?' (2009) 1(2) Journal of Media Law 243-268, 257. Since 1956, the broadcasting rights to the Olympic Games have always been sold to the EBU. In 2009, however, the IOC rejected the EBU's offer and sold the rights to the 2014 Olympic Winter Games and the 2016 Olympic Games to SPORTFIVE.

[71] M Sherlock, 'Case Study 3.1: EC says German TV Misuses Licence Fee on Sports Rights' in C Gratton and HA Solberg (eds) *The Economics of Sports Broadcasting*, Routledge, London, 2007, 63-66.

[72] European Commission, 22 June 2006, *Ad hoc Financing of Dutch Public Service Broadcasters,* NN170/2003.

[73] European Commission, 22 February 2008, *Decision: State Financing of RTE and TG4*, E4/2005.

[74] European Commission, 20 April 2005, *Espana: Ayuda estatal en favor del RTVE*, E8/2005.

formal adaptations of the concerned public broadcasters' behavior in the market for sports broadcasting rights. Nevertheless, the Commission devoted significant attention to the issue during investigations and negotiations, which among others has forced public broadcasters in Ireland and Austria to act more vigilantly when acquiring rights.

4 THE *MURPHY* CASE: PAVING THE WAY FOR THE EBU'S COMEBACK

On October 4, 2011, the CJ delivered its long-awaited *Murphy* judgment.[77] The High Court of Justice of England and Wales had asked the CJ to give guidance on several questions concerning the marketing and use in the UK of foreign decoder cards to access Premier League matches.

The Premier League licensed the live broadcasting rights for PL matches on an exclusive territorial basis, corresponding to a single Member State within the EU. This licensing regime based on national exclusivity was upheld by a combination of private and public measures. The Premier League imposed a contractual condition preventing broadcasters, which acquire the rights, from offering services to subscribers outside the Member State for which they hold the licence. Moreover, national legislation prohibited foreign decoding equipment – giving access to satellite broadcasting services from another Member State – from being imported, sold, and used in the UK. Several pubs in the UK bypassed this territorial exclusivity by screening Premier League matches via a Greek decoder card and subscription package. The Premier League brought a civil action against these pubs and the suppliers of foreign decoder cards. Criminal action was also taken against Karen Murphy, a landlady who used a Greek subscription to show Premier League football in her Portsmouth pub, for avoiding to subscribe to the (more expensive) commercial subscription from Sky (i.e. the official UK licensee). It also allowed her to circumvent the blackout rule that prevents UK broadcasters from showing live football matches on Saturday afternoon.[78] The appeal against her conviction as well as the appeal from the foreign decoder suppliers form the background to the cases that reached the CJ for a preliminary ruling.

In its judgment, the CJ addressed *inter alia* questions about the compatibility of the public and private measures, designed to ensure compliance with the territorial allocation of the Premier League broadcasting rights, with different EU law provisions. First, the court found that the UK legislation prohibiting the import, sale, and use of foreign decoding devices is a restriction on the freedom to provide services prohibited by Article 56 TFEU.[79] The CJ rejected the arguments that were put forward to justify that restriction. Second, the court found that the contractual obligations on broadcasters not to supply decoding equipment, enabling access to broadcasts outside

[75] European Commission, 22 February 2008, *Decision: annual funding of Flemish public broadcaster VRT*, E8/2006.

[76] European Commission, 28 Octobter 2009, *Financing of the Austrian Public Service Broadcaster ORF*, E2/2008.

[77] Joined Cases C-403 & 429/08 *Football Association Premier League Ltd and others* v *QC Leisure and others* and *Karen Murphy* v *Media Protection Services Ltd* [2011] ECR I-0000.

[78] On the implications of the judgment for blackout rules, see B Van Rompuy, 'Analysis of the Murphy Case' (2011) 3(2) Sport & EU Review 13.

[79] See n 77 above, para 89.

the licensed territory, infringes EU competition law. Those contractual provisions 'prohibit the broadcasters from effecting any cross-border provision of services that relates to those matches' and thus enable 'all competition between broadcasters in the field of those services to be eliminated'.[80] Importantly, the judgment only addressed the anti-competitive object of the contractual territorial protection clauses. The CJ did not call into question the principle of granting exclusive licenses.[81]

At the time, the judgment was deemed a radical game-changer for the way media rights are sold in the EU. So far, however, the Premier League is sticking to the old recipe. Instead of outright prohibitions in the licence agreements, creative tactics are now used to protect the territorial exclusivity granted to broadcasters. For example, several European broadcasters – that previously received an optional English language feed in addition to the language of the country – have had English commentary taken away. Moreover, new contractual provisions reduced the number of live Premier League matches that non-UK, European broadcasters can show on Saturday afternoon (3-5 pm). While such tactical switches might reduce incentives for (UK) consumers to shop overseas, they essentially create concerns similar to the Premier League's license agreements before *Murphy*. It is therefore still too early to gauge the precise impact of the judgment in the longer run. The application of the CJ's judgment by the High Court of Justice of England and Wales is certainly not the last word on the matter.[82]

Other rights owners might be encouraged to develop alternative, and perhaps more lasting, strategies to safeguard compliance with EU law. The prospect of tendering pan-European broadcasting rights for sports with wide European appeal is frequently mooted as an alternative licensing model. In such a scenario, the EBU's joint acquisition system is likely to regain importance. Competition for broadcasting rights to international sports events has increased significantly, with powerful players such Al-Jazeera and ESPN entering the European market. Yet the EBU still offers an attractive one-stop shop for rights holders. In 2010, the EBU revised its sports rights acquisition strategy, allowing the acquisition of ancillary rights (that EBU members may not need) if this facilitates the acquisition of the core rights.[83] The assurance of reaching the widest possible viewing audience in Europe is another trump card the EBU will continue to play. The IOC's policy to give preference to the fullest coverage of the Olympic Games is explicitly enshrined in the Olympic Charter.[84] For sport events that rely on sponsorship as the main source of income, such as Formula One, attracting large viewing figures is also crucial. In this regard, it should be noted that sponsorship deals are the fastest growing component of the professional sports market.[85]

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[80] Idem, para 142.

[81] Idem, para 141.

[82] *Murphy* v *Media Protection Services Ltd* [2012] EWHC 466 (Admin), [2012] 3 CMLR 2; *Football Association Premier League Ltd & Others* v *QC Leisure & Others* [2012] EWHC 108 (Ch), [2012] 2 CMLR 16.

[83] EBU, Annual Report 2011, 18.

[84] Para 49(1) of the Olympic Charter provides that 'The IOC takes all necessary steps in order to ensure the fullest coverage by the different media and the widest possible audience in the world for the Olympic Games'.

[85] PricewaterhouseCoopers, 'Back on track? The outlook of the global sports market (2010).

5 THE COMEBACK OF JOINT ACQUISITION SCHEMES FOR SPORTS BROADCASTING RIGHTS

If the EBU's Eurovision system regains importance in light of the CJ's *Murphy* judgment, new complaints from private media operators against the joint acquisition of sports broadcasting rights by the EBU are bound to arise. Anticipating a resurrection of the EBU/Eurovision case, this section (1) elaborates on the lessons that can be learned from the Commission's handling of the case and (2) identifies the key competition issues that would require resolution.

5.1 Lessons learned

First, and not to be underestimated in a legal context, the attention for competition issues related to the acquisition of sports broadcasting rights very much depends on the status of the market and the political context. When pay-television was on the rise, a concern existed that companies engaging with pay-television would be hampered in deploying their activities by public broadcasters. Hence, the acquisition of sports broadcasting rights by public broadcasters attracted more attention. When pay-television operators got more successful and fears on universal access to events of major societal importance emerged, these policy concerns were put forward by several Member States, the European Parliament, and, eventually, endorsed by the European Commission to offset possible competition concerns. In a similar way, and especially at the national level, the political context is a determining factor in terms of more or less attention for competition issues. Conservative governments tend to focus more on competition issues, especially if they arise from State intervention like is the case with public service broadcasting. The adoption of public value tests across Europe to evaluate *ex ante* the admissibility of public broadcasters' new services in terms of their public value and likely market impact is a case in point. Most governments adopting this *ex ante* instrument (enforced by the European Commission in many instances) are to be situated at the centre or right of the political spectrum.[86]

Second, the appraisal of the joint acquisition of sports rights by the EBU will always be tied to deliberations about broad and free access to the broadcasting of major international sports events. This necessarily involves a balancing exercise between economic considerations and broader public interest considerations.

Until recently, and since EU antitrust enforcement became effective in 1962, the European Commission had the exclusive competence to apply Article 101(3) TFEU. The centralization of the enforcement and policy-making prerogatives gave the Commission a broad margin of discretion in applying the conditions of that provision. While the Commission generally used its discretion cautiously, it was at times willing to reconcile competition concerns with broader public interest considerations.[87] In the broadcasting sector, where the EU competences to regulate remain weak, competition law notably served as a 'laboratory for regulation', anticipating and pre-empting certain

[86] Donders, n 2 above.

[87] For a detailed discussion of the role of non-efficiency considerations in the enforcement of Article 101 TFEU, see B Van Rompuy, n 16 above.

regulatory options.[88] The Commission's handling of the *EBU/Eurovision* case is a clear illustration of this practice.

When the Commission issued its *EBU/Eurovision* decision in 1993, concerns about the migration of sports events from free-to-air TV to pay-television were high on the EU policy agenda. As illustrated in the previous part, the Commission showed great sensitivity for these concerns. Considerations about the burdens and obligations arising from the EBU members' public mission were an essential component of the Commission's statement of reasons. In 1997, the European Parliament succeeded in introducing the listed events mechanism in the Television Without Frontiers Directive ('TWF Directive').[89] Article 3(a) of the TWF Directive (renumbered as Article 3(j) of the new Audiovisual Media Service Directive)[90] permits EU Member States to take measures to guarantee universal access by the public to television coverage of a list of national and international events of 'major importance for society'.[91] In light of this regulatory development, the Commission declared that:

> concern has arisen, with the growth and development of pay television, that viewers are being denied free-access to important national events because large subscription broadcasters have been buying up those rights to develop their own services. It is said that some sporting events are of such national or heritage importance, that they reflect common identity and value, so that broad free access should be given to them. The complaints are from 'public interest' or 'national heritage' concern, rather than competition grounds, and a regulatory approach would be necessary to achieve the desired result.
>
> *Competition law is not the right instrument for achieving cultural or regulatory aims.* As confirmed by the Eurovision judgment, *competition rules* are neutral with respect to different types of broadcasting and in principle, *do not provide a legal base for favoring one category of broadcasters over others* (emphasis added).[92]

In the 2000 *Eurovision* decision, the second exemption decision, the Commission carefully omitted explicit references to the public mission task of the EBU members and their different approach to sports broadcasting. The Commission translated the pro-competitive benefits of the Eurovision system in efficiency terms. As discussed, however, the Commission essentially applied the same reasoning it followed in the first

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[88] See e.g. Arino, n 2 above.

[89] The original TWF Directive (Council (EC) Directive 89/552/EEC of October 3, 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, L298/23 was amended in 1997 by European Parliament and Council (EC) Directive 97/36/EC of June 30, 1997 OJ 1997, L202/60.

[90] European Parliament and Council (EC) Directive 2007/65/EC of December 11, 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities OJ 2007, L332/27.

[91] For a detailed discussion of the listed events mechanism, see e.g. K Lefever, *New Media and Sport: International Legal Aspects*, T.M.C. Asser Press, The Hague, 2012.

[92] Commission, 'Broadcasting of Sports Events and Competition Law: An Orientation Document from the Commission's services' (1998) Competition Policy Newsletter (2) 18.

exemption decision. This is problematic. It compromises the Commission's obligation to present, in a clear and unequivocal fashion, the facts and legal considerations that had a decisive impact on its decision-making.[93]

Third, contrary to the Commission's interpretation, *Métropole télévision (I)* confirmed, rather than denied, the legitimacy of taking non-efficiency considerations into account in the application of Article 101(3) TFEU.[94] Several commentators have concluded from the *Métropole télévision (I)* judgment that public service obligations, unless Article 106(2) TFEU applies, are irrelevant under Article 101(3) TFEU.[95] The Commission seems to subscribe to this view.[96] This reading of the *Métropole télévision (I)* judgment is contentious, however.[97] The criticism of the GC was directed at the manner in which the Commission evaluated the proportionality of the restrictions aimed at guaranteeing the fulfillment of public service tasks. Regardless of whether this analysis is made in the context of Article 106(2) TFEU or 101(3) TFEU, the Commission must undertake a detailed economic analysis before being able to reach this conclusion.[98] As the court stressed:

> in the present case (the Commission) should have shown that such considerations required exclusivity of rights to transmit sport events, which the Decision

[93] It is settled case law that the statement of reasons required by Article 296 TFEU (ex Article 253 EC) depends on the circumstances of the case. It is not necessary for the reasoning to go into all the relevant facts and points of law. However, in its competition decisions, the Commission must set out the facts and the legal considerations that had a decisive importance in the context of the decision (in such a way to enable the parties concerned to ascertain the reasons for it and to enable the competent EU courts to exercise their power of review). See e.g. Case C-367/95 P *Commission* v *Sytraval and Brink's France SARL* [1998] ECR I-01719, paras 63-64; Case T-185/06 *L'Air liquide* v *Commission* (16 June 2011/unpublished), paras 63-64; Case T-349/03 *Corsica Ferries France SAS* v *Commission* [2005] ECR II-2197, 62-64; Case T-7/92 *Asia Motor France SA and others* v *Commission* [1993] ECR II-660, paras 30-31.

[94] See B Van Rompuy n 16 above, 382-384.

[95] See e.g. D Bailey, 'Scope of Judicial Review under Article 81 EC' (2004) 41(5) Common Market Law Review 1327-1360, 1350-1351; A Bartosch, 'The Application of Both the EC Merger Regulation and Regulation No. 17 in the Markets for Audiovisual Media, Telecommunications and Internet-related Services' in C Koenig, A Bartosch, and J-D Braun (eds) *EC Competition and Telecommunications Law*, Kluwer Law International, The Hague, 2002, 288-289.

[96] See n 92, ('The Court of First Instance (in the *EBU Eurovision* judgment) has stated that, unless Article [106(2) TFEU] applies, the Commission would not be justified in giving a preference to television stations merely because they have a public service role, or to publicly owned stations, or to those financed from officially-collected license fees').

[97] For a similar interpretation, see e.g. C Townley, *Article 81 EC and Public Policy*, Hart Publishing, Oxford, 2009, 67, 141; G Monti, 'Article 81 EC and Public Policy' (2002) 39(5) Common Market Law Review 1057-1099, 1058; R Wesseling, *The Modernisation of EC Antitrust Law,* Hart Publishing, Oxford, 2000, 111. More recently, the European Commission advocates a narrow interpretation of Article 101(3) TFEU that only accepts quantifiable, economic efficiency benefits under that provision. Accordingly, the Commission appears to banish considerations, which cannot be construed as having an economic efficiency value, from the application of Article 101(3) TFEU. Commission, 'Guidelines on the application of Article 81(3) of the EC Treaty' OJ 2004, C 101, para 42. On the inconsistency between this position and the case law, see B Van Rompuy, n 16 above. For a contrasting view, see O Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81 EC*, Oxford University Press, Oxford, 2006.

[98] JL Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law*, Oxford University Press, Oxford, 1999, 325-326.

> authorizes for the benefit of the members of the EBU, and that exclusivity was indispensable in order to allow them a fair return on their investments.[99]

In other words, the Commission was allowed to consider the burden and obligations arising from the EBU members' public mission, but it should have carefully examined the indispensability of the restrictions *vis-à-vis* non-members. The court's demand for such an assessment is logical. For instance, one might argue that PSBs are simply extremely adept at invoking the rhetorical power of its public mission tasks when it suits their interests.[100] The Commission did not scrutinise the different nature of sports programming on public broadcasters, but did accept it as one of the central justifications for an exemption.

5.2 Lingering competition problems

There is no automatic objection to joint buying agreements under Article 101 TFEU. It is generally accepted that joint buying agreements, usually aimed at the creation of buying power, can give rise to significant efficiency gains. They can lead to lower prices, reduced transaction costs, and/or group together smaller market players that lack the economic power to secure contracts on an individual basis. Moreover, joint buying agreements may give rise to qualitative efficiency gains by leading suppliers to innovate and introduce new or improved products on the markets.[101] Accordingly, neither the Commission nor the GC challenged the joint acquisition of sports rights by the EBU as such. Nevertheless, it is clear that the Eurovision system does raise significant competition concerns. The acquisition of exclusive broadcasting rights to a certain major sporting event (such as the Olympic Games or the FIFA World Cup) strongly impacts the downstream markets in sponsorship and advertising, which is the main source of income for free-to-air TV. Because of the widespread appeal and the economic importance of the international sporting events addressed by the Eurovision system, the Commission made clear that any restriction on the acquisition, sharing or exchange of the Eurovision rights among the European broadcasters will *de facto* be appreciable under the purposes of Article 101(1) TFEU.[102]

To address effectively the GC's criticisms, the Commission will need to demonstrate that the EBU's sublicensing rules guarantee sufficient access for third parties. The EBU sublicensing rules in their current format no longer provide that an event is considered to be transmitted live when the majority of the principal competitions constituting it are transmitted live. This provision enabled EBU members to extend their exclusivity beyond the parts of an event that they intended to broadcast live. The GC rightly found this to be disproportionate. The current EBU sublicensing scheme stipulates:

> Any unused rights for Live transmission of an Event or Part of an Event shall be Offered to non-Members. Rights for Live transmission are considered unused if

[99] See n 43 above, para 118.

[100] D Fraser and K McMahon, 'When Too Much Sport is Barely Enough: Broadcasting Regulation and National Identity' (2002) 1(3) Entertainment Law 1-52, 31.

[101] Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ 2011, C11/1, paras 194, 217.

[102] See n 55 above, paras 82.

> the Member does not intend to make a Live transmission of an Event or Part of an Event.[103]

The commitment to sublicense all unused rights, in principle, reduces the scope for output foreclosure. However, the devil lies in the details:

> The Member shall decide to engage in a Live transmission as early as possible, and at the latest three months prior to the commencement of an Event, except where this decision depends on programming priorities outlined below.
>
> Where Part of an Event includes one or more qualification rounds, and where the decision as to whether a Member intends to make a Live transmission for that Part of an Event depends on programming priorities such as whether a national athlete will be taking part or the Event or Part of an Event is of national interest, the Member shall have the right to decide on a short-term basis, depending on the unfolding of the Event, whether or not it will engage in Live transmission of the Event or the Part of an Event. The Member shall take its decision within one hour after the basis on which it can make its choice as to its own coverage is known.[104]

The opportunity for third parties to obtain sublicenses can still be rendered inoperative if an EBU member argues that the intention to transmit part of an event depends on last-minute programming priorities. Admittedly, events like the Olympic Games cannot be split up into parts. Olympic broadcasting is characterised by short-term decisions by the director, who has to choose from different multilateral signals which moments of the event to broadcast depending on the performance of national athletes.[105] Yet for most other sporting events, this escape clause can easily be misused. The bottom line is that, while the idea of sublicensing might be appealing in theory, making it work in a highly competitive media environment turns out to be very difficult in practice. For example, sublicensing to some extent implies disclosing programming strategies to competitors. Public and private broadcasters, competing for limited audiences, are obviously not keen on doing that. Also, rights holders remain powerful in terms of 'conditionalising' the acquisition of sublicensing (e.g. keeping a right to claim the rights to broadcast up until 24 hours before broadcast). In that sense, corporate media reality is more 'messy' than anticipated in competition theory.

Hence, when the argument is that concerns about possible foreclosure are offset through the implementation of sublicensing systems, these have to be extremely transparent in order to ensure that there is indeed a balance being struck between the advantages of a joint acquisition by the EBU (in terms of public value and the efficiencies achieved) and the remedies proposed to offset the possibility of foreclosure. In addition, and related to the former, one needs to be crystal-clear about the public value being realised by the Eurovision system.

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[103] EBU, Sublicensing rules for Eurovision sports programmes (2009) available at http://www.ebu.ch/en/legal/department/leg_rules_sports_sublicensing_list.php.

[104] Idem.

[105] A Fikentscher, 'Joint Purchasing of Sports Rights: A Legal Viewpoint' in C Jeanrenaud and S Kesenne (eds) *The Economics of Sport and the Media*, Edward Elgar, Cheltenham, 2006, 90.

6 CONCLUSION

The European Commission twice granted an exemption to the Eurovision system operated by the EBU under Article 101 TFEU. Both decisions were annulled by the GC, referring mainly to flawed or inadequate arguments on an acceptable limitation of competition between public broadcasters and private media operators. The major weaknesses in the Commission's argumentation were twofold. First, in spite of manifold adaptations of the Eurovision system in order to limit restricted access (e.g. through extensive sublicensing provisions) the GC remained unconvinced of the necessity of certain restrictions towards non-members. Second, the arguments of the Commission to accept the Eurovision system because of public interest objectives were never adequately substantiated. The Commission refrained from issuing a third decision, allowing the Eurovision system to operate in illegality over all those years.

In light of the CJ's *Murphy* ruling, the unresolved EBU/Eurovision case will likely come back to bite the Commission's Competition DG. One difficulty will be to address carefully the (implicit) public interest value of the Eurovision system. As fewer Member States make use of the listed events mechanism provided by the AVMS Directive, the public interest argument clinging to the Eurovision system has lost much of its persuasive force. Furthermore, the Commission should evaluate its approach – developed mainly in response to concerns of the GC – to impose ever more detailed sublicensing conditions. There is a tendency of regulatory capture that, instead of creating more rivalry in the market, has merely passed on the EBU's traditional buyer power to new private broadcasting monopolies. That in itself is, certainly with an eye on the *Murphy* ruling, a painful conclusion 15 years after the start of the EBU/Eurovison saga.