

time

for the rights to televise certain NBA regular season games and all playoff games, including the NBA Finals.

The scorecard below compares the new deals with the existing deal:

The amounts networks are willing to pay for the rights to televise the NFL illustrates the extent to which professional football is regarded as the centrepiece of a network's programming, and the importance to the networks of reaching the

largest segment of the NFL viewing audience – young males. Although a 30-second advertisement typically costs approximately \$175,000 during the season and more than \$1,000,000 during the Super Bowl, even with expected increases, the networks will generally be unable to recover their costs on advertising revenue alone.

Indeed, some marketplace experts are predicting, for example, that CBS will have an advertising shortfall of more than \$150 million a year for the first several years of its agreement. However, the networks appear to have made the judgment that in-game promotions for other network programming, as well as other indirect or tangible benefits that may result

from viewers' identification with a particular network, will enable them to recoup on their investment.

Conclusion

Among the groups that stand to benefit the most from the new agreement is NFL players. Under the NFL's agreement with its players' association (the "NFLPA"), each of the league's 30 teams share equally in television revenue, and 63% of the league's revenue (except that attributable to items such as stadium luxury boxes) must go toward player salaries. According to Gene Upshaw, the NFLPA's Executive Director, the new television contracts may result in an increase in the salary cap – the maximum amount teams are permitted to pay players – from nearly \$41.5million in 1998. Some speculate that the salary cap may double within five years.

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NFL PACKAGE	NEW NET	LENGTH '98-2005	PER YEAR	PREVIOUS DEAL '94-'97 NET	% +/- PER YEAR
NFC	FOX	\$ 4.40B	\$ 550M	\$1.58B FOX	39.00
AFC	CBS	\$ 4.00B	\$ 500M	\$868M NBC	130.00
MONDAY	ABC	\$ 4.40B	\$ 550M	\$920M ABC	139.00
SUNDAY	ESPN	\$ 4.80B	\$ 600M	\$1.02B ESPN/TNT	135.00
TOTAL:		\$ 17.60B	\$ 2.2B	\$ 4.38B	

Collective marketing of football television rights

Decision of the German Federal Supreme Court of 11 December 1997

Introduction

The collective marketing of television rights to football matches by football federations is currently one of the most controversial issues for nearly all professional football leagues in Europe. Due to the significant economic impact of revenues from the sale of television rights, the issue has been strongly debated in Germany during recent years. On 2 September 1994, the German Federal Antitrust Authority issued a prohibition order against the German Soccer Federation (DFB) prohibiting the collective sale of television rights to the home matches of German clubs participating in the European competitions. The prohibition order did not have any legal impact on the collective sale of the television rights to the matches of the German Bundesliga because

it was limited to the sale of rights to the European competitions only. The decision of the Federal Antitrust Authority (Bundeskartellamt) was affirmed by the Court of Chamber, Berlin, on 8 November 1995. The Federal Supreme Court ruled in favour of the Federal Antitrust Authority in its decision on 11 December 1997, likewise finding the collective marketing practice of the DFB a violation of German competition law.

Facts

Until the end of the 1988-1989 season, television rights to home games of the German clubs participating in the European competitions were marketed by the clubs individually. Since the beginning of the 1989/1990 season, however, the DFB has marketed these rights centrally. During the two

subsequent seasons, the DFB granted rights either for individual games or in blocks for multiple games to different TV stations. For the seasons 1992-1993 until 1997-1998, the DFB has granted exclusive, worldwide (except Italy and Monaco) TV broadcasting transmission rights for the European games (except the Champions League and the final of the Cup Winner's Cup) in a package to two sports rights agencies which sell the rights in a yearly change. UFA, which belongs to the Bertelsmann Group and ISPR, which is equally owned by the Kirch Group and the Axel Springer Company, bought the rights for a total DM360 million (annual charge of DM60 million per season).

After a deduction for a contribution of 10% to UEFA and payment of DM1 million to the football federations of Austria

and Switzerland is made, revenues are distributed entirely by the DFB to the German clubs in a proportion of 70:30.

Thirty per cent of the remaining amount is paid into a "Live-Pool", which is again to be divided in a proportion of 80:20 between the clubs of the First and Second Bundesliga. In the 1995/1996 season, the clubs of the First Bundesliga not participating in the European competitions received an average amount of DM1.6 million from the Live-Pool, while all 20 clubs of the Second Bundesliga received an amount of DM165,000.

Seventy per cent of the remaining amount is paid to those clubs that are qualified for the European competitions. Each participating club is paid a guaranteed amount of DM2 million for the first round and DM1 million for each additional round that the club qualifies for. An eventual surplus due to early elimination of the clubs does not remain with the DFB or the qualified clubs. It is paid back into the Live-Pool, and is then distributed among the clubs pursuant to the terms of the Live-Pool. The Federal Supreme Court held that the collective sale of the television rights to the home games of the European competitions is likely to affect the conditions of the German market for television rights of sporting events and, thus, violates the prohibition of cartels imposed by §1 *German Act Against Restraints of Competition*. The Court reasoned that competition among the clubs as right owners for the marketing of the independent, single games are restrained through the DFB regulations without reasonable justification.

Original ownership of the TV rights

Under German law, television broadcasting transmission rights for an event are generally owned by an event organiser. The crucial question for the Federal Supreme Court, therefore, was to decide whether the DFB or the hosting club is the organiser of a match and, thus, the original right owner. The DFB asserted that it was the co-organiser of the European competitions along with UEFA owing to their organisational tasks. The Federal Supreme Court found, however, the DFB not being the organiser of an individual match, should be denied ownership of the TV broadcasting rights. Simply because the DFB takes charge of organisational tasks which are related to individual

games, the Court reasoned, does not change the fact that the main economic achievements for the individual games are created by the hosting clubs. A football match first becomes a marketable, commercial product due to the combined efforts of the clubs creating these economic achievements. This would include, along with the visiting club, the employment of the participating players, the obligation to make a stadium available for a home game, and the local organisational tasks such as ticket sale, marketing, food service within the stadium, and coordinating safety precautions with the local police. The Court took these economic achievements and the general organisational and financial responsibility of the hosting clubs into account, finding them to be the natural participant in the market and, thus, the organiser of the football match.

Article 14 of the UEFA regulations have no effect on the ownership of the rights because the provision only defines jurisdiction among the member federations and does not create ownership. This is also indicated by Article 1 of the *UEFA Implementing Regulations* which also expressly designates the clubs as rights owners. Further, the Courts did not have to decide whether the DFB becomes the right owner by means of an assignment of the rights by the clubs. In Germany, competition law considerations are adjudicated upon original ownership only.

Finally, the Federal Supreme Court rejected the plaintiff's argument that the TV rights are originally owned by a non-trading partnership whose members include both the DFB and the participating clubs. The DFB and the clubs do not constitute such a non-trading partnership with the purpose of holding international football matches because their relationship is conclusively regulated by the law of associations.

No decision about UEFA's role

The Federal Supreme Court did not decide whether the clubs own the rights exclusively in conjunction with UEFA as the main organiser of the European competitions. Since UEFA does not market the TV rights to the disputed competitions and, thus, was not a party to the proceedings, the Court could leave undecided the issue of whether UEFA, in contrast to the DFB, owns television broadcasting rights. The

Court merely stated that it might be possible to derive "ownership" from their main organisational function and the fact that they had founded the European competitions. Accordingly, the central issue whether the federation which has the main and decisive responsibility for a competition (which is UEFA for the European competitions, and the DFB for the Bundesliga) also has co-ownership of the TV rights along with the clubs owing to their organisational function, was left undecided.

Clubs as economic competitors

Arguments submitted against DFB included the following:

1. By means of the central marketing through the DFB, the competition among the clubs regarding prices and conditions for the television broadcasting rights is eliminated. The considerable influence of the restraint of competition to the market of TV broadcasting of sports arises from the paramount importance of the transmitted football matches and their high ranking within the different sports competitions which is evidenced by their high prices. The restraint of the competition among the clubs leads to price increases which are ultimately financed by the consumers through higher product prices.
2. The relationship between the professional clubs resembles usual, economic competitors because of their competition in the economic market for spectators, sponsors, players and sale of merchandising goods. In fact, clubs which qualify for one of the three European competitions are, in that certain season, actual competitors concerning the sale of TV broadcasting rights to their home matches.
3. The need to maintain a league structure and other clubs in order to foster competition at all is not in conflict with the idea of economic competition and its objective to eliminate competitors from the market. As long as there are enough clubs to substitute for those clubs that are successfully eliminated from the market, treating professional clubs as regular economic competitors in an economic market is in accordance with the notion of competition as the desire to displace one's competitors.

The match as an independent event

Central marketing of TV broadcasting rights to football matches is not justified by the "joint venture idea"

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of German competition law. According to this exception from the prohibition of cartels, anti-competitive conduct can be lawful if the collective sale and centralisation of interests appear necessary due to the impossibility and inefficiency to market a product solely and independently. Yet, the Federal Supreme Court held that a football match is an independent event whose rights are not necessarily to be sold collectively.

The fact that a match is played within the framework of a competition and derives its economic value from the whole competition does not necessarily require that the rights to a single game be sold collectively in a package. Every game does have an independent economic value and, therefore, can still be the subject matter of individual marketing. Therefore, a distinction has to be made between the organisation of the whole competition and the marketing of an individual game.

The economic independence of a single game and the possibility of marketing the rights to it individually are indicated by the fact that in Germany, clubs had marketed their rights individually until 1989. And, as the Federal Supreme Court expressly remarked, it is indicated by the fact that the television broadcasting rights to the home matches of European competitions are being marketed individually in several other European States such as England, Italy or Sweden.

It was further argued by the DFB that clubs avoid transaction costs by means of the collective marketing of rights. This argument is flawed however, because avoiding costs is the typical aim of a cartel and, therefore, cannot reasonably justify the "joint venture idea".

Maintaining competitive balance

The DFB and a majority of the clubs argued that central marketing and its "watering can principle" by which all clubs financially participate in the profits from the sale is essential to maintain the competitive balance within the league and to preserve the existence of the smaller clubs. Although the Federal Supreme Court affirmed the necessity to maintain competitive balance within a professional sports league, it came to the conclusion that it merely is an indirect political aim which may not justify a restraint of competition. The violation of the

direct aims of the competition law, free competition and protection of market participants, cannot be justified by mere indirect aims if the indirect aims are reached at the market participants' expenses. In other words, the need to maintain competitive balance cannot justify a restraint of competition because it is obtained at the consumer's expense.

Moreover, the Court determined that central licensing of the TV broadcasting rights to the European games is not necessary to maintain the competitive balance among the Bundesliga clubs and to preserve the existence of the smaller clubs. Even though the Federal Supreme Court conceded that the revenues from the Live-Pool are important for the clubs, it is nevertheless concluded that they are not essential for the competitive balance within the league and the existence of the clubs which do not participate in the European competitions. In comparison to the total income of the clubs, the revenues from the Live-Pool (DM165,000 for the clubs of the Second League and about DM1.6 million for the clubs of the First Bundesliga) are not nearly as essential for the financial condition of the clubs.

A falling out of the revenues from the Live-Pool would not imperil the existence of the clubs since the financial disparity among the clubs is additionally based upon several other factors. These would include size of the stadium, catchment area, tradition, interest of the local population and revenues from the merchandising activities. Furthermore, the fact that every year different teams may qualify for the European competitions has a balancing effect on the financial disparity of the clubs. As an indication for the accuracy of this conclusion the Federal Supreme Court once more cites the practice of individual licensing in Germany until 1989 and the functioning system of individual licensing in other European States. As an alternative concept, it has been suggested by the courts that a solidarity fund among the clubs be established. Such a fund could be based upon voluntary payments from the clubs and would not violate competition law.

Conclusion

The German Federal Supreme Court ruled that the collective marketing of the television rights

for the home matches of the German clubs participating in the European competitions constitutes a cartel and, thus, violates German competition law. It concluded that competition among the clubs as original rights owners and actual, economic competitors for the marketing of the independent, single games is restrained without reasonable justification. The restraint of competition is not justified by political reasons underlying the business of sports such as the maintenance of competitive balance within the league or the preservation of the existence of the smaller clubs. In general, the Federal Supreme Court refused to apply economic law differently to sports enterprises. As a consequence, German clubs will be required to market television rights for their home games in Europe individually from the beginning of the 1998-1999 season.

Prospects of the situation regarding the Bundesliga rights

Presently, it seems uncertain whether the Federal Antitrust Authority will issue a prohibition order regarding the central marketing of the rights to the Bundesliga games. Before the Federal Supreme Court's decision, it had been commonly expected that such a prohibition order would be issued. The Federal Supreme Court left the decision concerning the main federation's role open and did not conclude that clubs generally are exclusive owners of television rights to their games. This led to new speculation and was interpreted by commentators to possibly indicate that a court's decision did not necessarily have to be equal regarding the rights of the Bundesliga. It is also highly questionable whether the essentiality of collective licensing for the competitive balance within the league has to be answered equally regarding the earnings derived from sale of Bundesliga TV rights (DM4 million for the clubs of the Second League, DM10 million for the clubs of the First Bundesliga). Up to this point, it has only been decided with regard to the rights of the European games. As the representative of the DFB said after the Federal Supreme Court's decision: "We were taken away the garage, but the house is still standing".

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