

FOOTBALL TELEVISION RIGHTS

Decision of the German Federal Supreme Court of 11 December 1997

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Introduction

Collective marketing of television rights to football matches by national 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 the last few years. On 27 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 the German clubs participating in the European Championships 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 Championship only. The decision of the Federal Antitrust Authority (*Bundeskartellamt*) was affirmed by the Court of Chamber in Berlin on 8 November 1995. The Federal Supreme Court ruled in favour of the Federal Antitrust Authority in its decision of 11 December 1997, likewise finding the collective marketing practice of the DFB a violation of German competition law.

Facts

Until the end of the 1988–89 season, television rights to home games of the German clubs participating in the competitions of the European Championship were marketed by the clubs individually. Since the beginning of the 1989–90 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 1992–93 until 1997–98, the DFB has granted exclusive worldwide (except in Italy and Monaco) TV broadcasting transmission rights for the European Championships (excepting the Champions League and the final of the Cup Winner's Cup) in a package to two sports rights agencies which sell the rights on a yearly basis. UFA, which belongs to the Bertelsmann Group and ISPR, which is owned equally by the Kirch Group and the Axel Springer Company, bought the rights for DM360m (annual charge of DM60m per season).

After a 10 per cent contribution to UEFA and a payment of DM1m to the football federations of Austria and Switzerland,

revenues are distributed by the DFB to the German clubs on a 70:30 basis.

Thirty per cent of the remaining amount is paid into a 'live pool', which is again divided on a 80:20 basis between the clubs of the First and Second Bundesliga. In the 1995–96 season, the clubs of the First Bundesliga not participating in the European competitions received an average amount of DM1.6m from the live pool, while all 20 clubs of the Second Bundesliga received DM165,000.

Seventy per cent of the remaining amount is paid to those clubs that qualify for the European competitions. Each participating club is paid a guaranteed amount of DM2m for the first round and DM1m for each additional round that they qualify for. An eventual surplus due to early elimination of the clubs does not remain with the DFB or the qualified clubs but 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 of the home games of the European Championships is likely to affect the condition of the German market for television rights of sporting events and, thus, violates the prohibition of cartels imposed by § 1 of the German Act Against Restraints of Competition. The court reasoned that competition among the clubs as rights owners for the marketing of the independent single games is restrained through the DFB regulations without reasonable justification.

Original ownership of 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 rights owner. The DFB asserted that it was the co-organiser of the European competitions along with the UEFA owing to their organisational tasks. The Federal Supreme Court ruled that the DFB was not the organiser of an individual match and, thus, denied them ownership of the TV broadcasting rights. The court reasoned that simply because the DFB takes charge of organisational tasks which are related to individual games this 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 sales, marketing, food provision within the stadium, and co-ordinating 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 a 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 art 1 of the UEFA Implementing Regulations which also expressly designates the clubs as rights owners.

Further, the court did not have to decide whether the DFB becomes the rights 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 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 specifically 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 DFB, owns television broadcasting rights. The court merely stated that it might be possible to derive ownership of UEFA from their main organisational function and the fact that they had founded the European competitions. Accordingly, the central issue of 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

By means of central marketing through the DFB, the competition among clubs regarding prices and conditions for television broadcasting rights is eliminated. There is restraint of competition in the TV broadcasting sports market because of the importance of the transmitted football matches and their high ranking within the different sports competitions. The restraint of the competition among the clubs leads to price increases which are ultimately financed by the consumers through higher product prices.

The relation among professional clubs is as competitive as in any other sector because of the need to attract spectators, sponsors and players and increase the sale of merchandising goods. In fact, clubs which qualify for one of the three European Championships are competing against each other for TV broadcasting rights to their home matches.

The need to maintain a league 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' of German competition law. Apart 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 do not necessarily need 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 participants' expense. In other words, the need to maintain competitive balance cannot justify a restraint of competition because it is obtained at the consumers' expense.

Moreover, the court determined that central licensing of the TV broadcasting rights to the European Championship 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 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 Championships. In comparison to the total income of the clubs, the revenues from the live pool (DM165,000 for clubs of the Second *Bundesliga* and about DM1.6m for 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 them 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 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 of the accuracy of this conclusion the Federal Supreme Court once more cites the practice of individual licensing in Germany until 1989 and the licensing system in operation 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.

Summary

The German Federal Supreme Court ruled that the collective marketing of television rights for the home matches of the German clubs participating in the European Championships constitutes a cartel and, thus, violates German competition law. It concluded that competition among the clubs as original rights owners and economic competitors for the marketing of 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 of the

European Championships individually from the beginning of the 1998–99 season.

What now for the rights of the *Bundesliga*?

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 also is highly questionable whether the requirement of collective licensing for competitive balance within the *Bundesliga* has to be answered equally regarding the earnings derived from sale of the *Bundesliga* TV rights (DM4m for the clubs of the Second *Bundesliga* and DM10m for the clubs of the First *Bundesliga*). Up to this point, it has only been decided with regard to the rights of the European Championships. As the representative of the DFB said after the Federal Supreme Court's decision: 'They have taken away the garage, but the house is still standing'.