

## **Necessary Restraints and Inefficient Monopoly Sports Leagues**

*Stephen F. Ross & Stefan Szymanski*

The collective sale of broadcast rights by sports leagues and associations has attracted considerable attention from European competition authorities, provoking interventions in Germany and the Netherlands, warnings from the European Commission, and most notably a full scale attack from the UK Office of Fair Trading. Brought under the now defunct Restrictive Trade Practices Act, the OFT challenged the Premier League (PL) Rule that requires any club wishing to broadcast a match to obtain permission from the PL Board, alleging that this rule caused the number of broadcast matches to be restricted to only 60 out of the 380 matches played in a season, contrary to the public interest.

In this note we deal with two issues. Firstly, we consider the reasons presented as to why the PL restricted the sale of broadcast rights to less than one sixth of the matches played; secondly, we consider the standard that competition authorities should apply to determine the consequences of striking down the restrictions.

*(a) Explaining the restrictions.*

The OFT alleged that the PL, like a conventional cartel, sought to maximise profits by sharply reducing output and thereby raising prices. In its defence, the PL argued that the purpose of the restriction was primarily to prevent the loss of live match attendance at PL

matches. Moreover, expert witnesses sympathetic to the PL position argued that a monopolist such as the Premier League would be unlikely to restrict the sale of broadcast rights to a collection of matches because the expedient of product bundling (selling different selections games at different prices) allows the league to charge monopoly prices while increasing output.

The Court rejected the OFT's view and accepted that PL's position that the challenged restriction reduced, rather than increased, the receipts from the sale of television rights. So why then did the PL restrict the number of matches shown? The court was silent on this particular issue. The court dwelled wholly on the damage that would be caused by moving from a regime of collective selling to a regime where all rights would be sold by individual clubs.<sup>1</sup> Significantly, the court rejected the view that loss of live gate would be a significant consideration even if a much larger number of games were broadcast. Thus both the OFT's explanation for the restrictions (efficient exploitation of monopoly power to raise income) and the PL's explanation (efficient co-ordination to preserve attendance) were rejected. As a result, another "suspect" must be found to account for the restriction of broadcast matches. We believe the "dog that did not bark" best explains the severe output restraints: the PL is not acting as an efficient "single entity" monopolist at all, but rather as a collection of individual businesses engaged in a monopoly joint venture, where each venturer votes on policy decisions of the joint enterprise.

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<sup>1</sup> In the court's view individual selling would:

- prevent the sale of an exclusive package to an individual broadcaster and thus reduce the overall value of the rights
- lead to an increase the inequality among teams, adversely affecting the competitive balance of the League (thus reducing interest in the League)
- limit the ability of the League to redistribute income to the grassroots of the game.

There are two principal aspects to the inefficiency of joint ventures organised on these lines. Joint venture members can regularly be expected to vote for decisions that do not maximise joint profits, but rather maximise profits per member. In economic jargon, this means expanding output (or sales) to the point where marginal profit equals average profit, rather than where marginal profit equals zero. The second aspect relates to interplay between the interest of the joint venturers for any particular decision.

Broadcasting one match might produce a marginal impact on attendance at another match, but calculating these effects is problematic. Both the absence of data and the imperfections of statistical methods mean that no precise compensation scheme can be easily devised. Moreover, even if the effect could be quantified, devising a compensation scheme to which all can agree is likely to prove impossible. In other words, joint ventures where decisions are made by majority or super-majority vote are likely to fail to make efficient decisions because of the transactions costs. Although these problems could be solved by appointment of a board of directors charged with responsibility for total joint venture profits, the character of the league would be substantially altered.

*(b) Necessary Restraints.*

Cases involving restrictions on competition require a balancing of benefits and detriments arising from a challenged restraint compared to a world where the restraint is withdrawn. The court took a firm view on the limits to its imagination under the old RTPA: “What the court has to compare is, on the one hand, a world in which the relevant restriction exists and is given effect to and, on the other hand, a world in which no restriction at all

is accepted.”<sup>2</sup> This represented a significant defeat for the OFT since it was agreed on all sides that some agreements, including some collectively sold exclusive packages of broadcast rights, were necessary and reasonable restraints required for effective marketing leading to substantial consumer benefits.<sup>3</sup>

It has been noted elsewhere that the standard applied under European Competition Law and under the Competition Act that has superseded the RTPA in the UK is that the restraints should be strictly necessary to provide the alleged benefits.<sup>4</sup> Applying this standard, it would have been accepted that some restriction would have been required to permit the collective sale of a particular package of matches (e.g. Monday Night Football), without requiring that the restriction go so far as to prevent matches being sold on any other night of the week. Similarly, a collective scheme to broadcast all or nearly all matches, with revenue shared to maintain competitive balance, might be necessary and hence lawful. In other words, it is conceivable that, due to the peculiar economics of sports leagues, an efficient monopolist might produce a better outcome than unfettered competition, once one accepts that the actual outcome of the PL monopoly was plainly inefficient.

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<sup>2</sup> *In re Football Ass'n Premier League Ltd.*, 1996 No. 1 (E&W) (Restrictive Practices Court, 28 July 1999), at p. 136.

<sup>3</sup> Szymanski, “Heart, minds and the Restrictive Practices Court case,” in *Football in the Digital Age: Whose Game Is It Anyway?* (Hamil et al (eds.), Edinburgh: Mainstream 2000).

<sup>4</sup> Robertson, in this issue.

## *Conclusion*

Given the unexplained conclusion that the PL arrangement to broadcast only 60 matches was an efficient collective decision and that the only alternative was the chaos of individual selling, the outcome of the *Premier League/BSkyB* case was inevitable. We have argued that a more reasonable explanation of the PL's behaviour is that it was acting inefficiently, due to transactions costs associated with negotiating a collective agreement.

The new statutory regime brings the UK into line with most other international competition law regimes. The requirement that restraints be demonstrably necessary to achieve efficient results will require tribunals to compare the effect on price, output, and responsiveness of output to consumer demand to "what would otherwise be"<sup>5</sup> based on a "pragmatic and commercial assessment of what is likely to occur in the absence of the proposed arrangement."<sup>6</sup> Were authorities to proscribe inefficient output restraints, we suggest that leagues will have a significantly increased incentive to overcome transaction costs and develop efficient collective schemes; otherwise, competition is likely to benefit consumers more than the *status quo*.

The potential for inefficiency among cartels and other collective institutions, above and beyond the usual inefficiencies created by the existence of pure monopoly has long been recognised both by economists and lawyers. Indeed, recent proposals to significantly expand the output of broadcast PL games suggest that the litigation may have focussed

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<sup>5</sup> *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 107 (1984).

the clubs' attention on this problem in a manner that will overcome transaction costs.

Closely monitoring inefficient conduct is surely appropriate for monopoly sports leagues.

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*Stephen F. Ross is Professor of Law at the University of Illinois. Stefan Szymanski is Senior Lecturer at the Imperial College School of Management, and currently Visiting Professor of Law at the University of Illinois.*

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<sup>6</sup> *Rugby Union Players' Ass'n v. Commerce Comm'n (No 2)*, [1997] 3 NZLR 301, 308 (H.C. (Commercial List)).