

Culture vs. Commerce: A Dual Regulatory Approach to Television Sports Rights

Tom Evens (iMinds-MICT, Ghent University – Ghent, Belgium) – Tom.Evens@UGent.be

Petros Iosifidis (City University – London, UK) – P.Iosifidis@city.ac.uk

Paul Smith (De Montfort University – Leicester, UK) – PAsmith@dmu.ac.uk

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INTRODUCTION

Essential reading in media sports portrays how sports has developed as a global, multibillion dollar industry that constitutes significant economic activity (Boyle and Haynes, 2004; Horne, 2006; Rowe, 1999; Whannel, 1992). Simultaneously, sports represents a social and cultural activity loved and practiced by millions of people across the globe (Coalter, 2007; Maguire, 1999). Scholars have widely discussed the role of the media, and television broadcasting in particular, in the development of sports as a cultural sphere and commercial enterprise. On the one hand, sports and television have built a synergetic relationship, one that allows both institutions to reap the fruits from the complementariness of their economic interests. Along with the expanding footprint of modern capitalism, the transformation of sports into a media spectacle has been highly instrumental for commercial players to take a share of this lucrative sports market (Andrews, 2003; Gaustad, 2000; Law et al, 2002; Miller et al., 2001). On the other hand, free-to-air television coverage of sports events, most notably by public service broadcasters and terrestrial commercial networks, has helped in creating a public sphere and contributed to the formation of national identity and cultural citizenship in many countries. Coverage of major sporting events was traditionally seen as a major argument to legitimise a national broadcasting service, and was of high symbolic value to its explicit cultural mission (Rowe, 2004; Scherer and Whitson, 2009).

In the paper, we will examine how these contrasting perspectives on television and sports are reflected in the regulation of sports broadcasting. The contrasting perspectives on television and sports are each embodied in an extensive policy framework that regulates the economic and societal impact of sports broadcasting. First, competition policy aims at facilitating free and fair competition in the upstream broadcast market, and ensures that media companies and consumers have equal access to sports rights (Iosifidis, 2011; Papadopoulos, 2010). Secondly, sector-specific media regulation, *in casu* the listed events regulation, intends to guarantee the public's right to information and preserve free access to sports events of major importance to society (Evens and Lefever, 2011; Lefever, 2012). However, there is an enduring,

but until now relatively unsuccessful, pressure on policy makers to relax both of these strands of regulation in order to favour private interests in sports broadcasting (Scherer and Sam, 2012). Hence, concerns arise about the reach and effectiveness of government intervention to preserve the highly-valued public as well as private interests of sports broadcasting, and keep the balance between the cultural and commercial dimension of sport.

Based on the findings from eight countries, with a global angle comprising sports broadcasting markets in Australia, Brazil, India, Italy, South Africa, Spain, United Kingdom and the United States (for a full discussion, see Evens et al., 2013), it can be concluded that the balance is indeed shifting in favour of the commercial interests of sport multinationals, depriving citizens access to free-to-air sports coverage and therefore saddling sports fans with rising bills from pay-TV and pay-per-view services. The economic agenda of market regulation and the prominence of market-based arguments raises the concern that the citizen's interest is becoming marginalised as the consumer discourse becomes more widespread. In assessing the need for policy intervention, we will make a strong argument for a 'dual regulatory approach' that seeks to balance the commercial priorities of sports organisations and private media firms with the wider social and cultural benefits citizens gain from free-to-air sports broadcasting. Hence, we urge national governments as well as supranational regulatory bodies, first, to resist pressure from pay-TV consortia and sporting associations to relax or abolish existing legislation designed to preserve free-to-air coverage of major events of national importance; and secondly, to apply the existing competition rules more vigorously and with more emphasis on the economic and cultural specificities of the sports broadcasting markets.

ASSESSING REGULATORY APPROACHES

The implementation of the kind of dual regulatory approach described above requires policy makers and regulators to constantly weigh up the commercial and socio-cultural implications of their decisions (and non-decisions). Taking a global viewpoint, the regulation of sports broadcasting takes on various forms, with far-reaching implications for the balance between the cultural and commercial interests of sports. Obviously, to a large degree, these different approaches reflect the particular historical, political and cultural traditions of each country concerned and echo a tradition of policy intervention in correcting market shortcomings. The type and degree of regulatory intervention within sports broadcasting can usefully be seen as a continuum with the 'free market' at one end and the 'excessive regulation' at the

other side of the policy spectre. In the free market case, sports broadcasting is totally left to the market with no role for public service broadcasting and a ‘light touch’ regulatory framework, which does little to tackle the market power of dominant commercial interests or ensure free-to-air television coverage of major sports events. In the excessive regulation case, public service (or commercial free-to-air) broadcasters are granted a leading role in sports broadcasting, supported by a regulatory approach that savoury preserves the citizens’ interests by means of major events regulation and the vigorous appliance of competition law principles, possibly at the detriment of commercial interests in society.

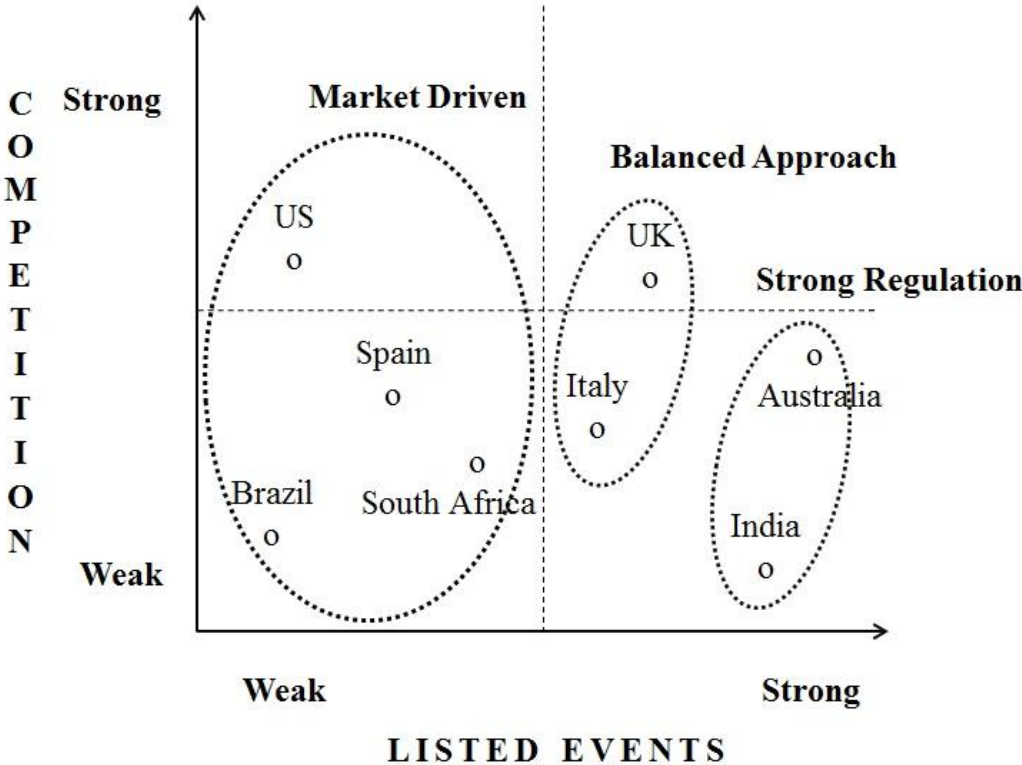


Figure 1: Free market versus excessive regulation

In reality, of course, most countries fall somewhere between these two extremes and some combine an interventionist approach to major events legislation with a less interventionist approach to the application of competition law (or vice versa). Hence, the regulation of sports broadcasting all over the world often relies on both approaches of policy intervention, and echoes a mixture of safeguarding public and private interests. Nevertheless, analysing sports broadcasting in different countries in terms of ‘free market’ versus ‘excessive regulation’ provides a good starting point for comparative analysis. In that context, Figure 1 provides an overview of the policy model in each of the eight countries considered in the study, and shows the different regulatory approaches to sports broadcasting. Based on that, we have identified

three policy models in global sports broadcasting. The consequence of each policy model is that it may produce structural imbalances between the cultural and commercial interests of sports broadcasting, and tends to favour one of these forces over the other.

Let the market rule

Broadly speaking, sports broadcasting in the US, Brazil, Spain and South Africa can be characterised as predominantly market-driven. In each of these countries, there is no (or only, in the case of Spain and South Africa, fairly weak) major events legislation and the regulatory impact of competition law has been minimal (although this could be debated in the US case). Whereas in Brazil the commercial media system was first highly controlled and used as a propaganda instrument by political elites, deregulation has been key in the US broadcast model since its inception in the 1930s (Sinclair, 1999). Today, the relaxation of media regulation in the US has produced a concentrated system that is controlled by a few conglomerates that have spread their wings over the networked media industry. First, public service broadcasting PBS became soon overpowered by commercial networks in the bidding process for popular sports rights. Secondly, multichannel operators and sports leagues have contested the anti-siphoning law, which was breaching the US Constitution according to a ruling of the Court of Appeals (Wolohan, 2009). Despite these developments, free-to-air broadcasting continues to play a leading role in the production and consumption of sports broadcasting in the US. Third, the Sherman Antitrust Act has hardly been applied in the case of sports broadcasting, but the regulatory agency FCC successfully serves as a 'big stick' to limit anti-competitive behaviour by broadcasters and pay-TV operators, especially with regard to regional sports networks (Moss, 2008). This became most prominent in the case of premium offering MLB Network whose access was severely restricted as a result of an exclusive agreement with DirecTV. After the FCC threatened with regulatory intervention, MLB lessened its exclusive reliance on DirecTV and allowed access to alternative distributors. However, the migration of live sports to league-owned premium packages, enabled by the introduction of digital television, could serve as the prime trigger for future policy intervention in the US broadcast market.

The US competition approach starkly contrasts with the one applied in Brazil, which has a relatively weak tradition of competition law. Economic arguments rather than socio-cultural goals drive the process of media policymaking in Brazil. The (late) availability of a competition law framework has failed to restrict economic power of the reigning media empires and

has not prevented TV Globo from retaining its dominant position in media and broadcasting (Fox and Waisbord, 2002). Despite Globo's high market share and considerable degree of corporate integration, competition agency CADE only recently accused TV Globo of abusing dominant position and ruled that the broadcaster needs to share top domestic and international soccer rights with alternative broadcasters. The absence of anti-siphoning law has, however, not resulted into a migration of live sports to pay-TV channels so far, partly because of the high costs associated with subscription services. But since a prosperous middleclass is likely to emerge soon following the booming economy in the country, the penetration of pay-TV is likely to rise in the next years. The conclusion that large parts of the Brazil population, especially lower classes and people residing in rural areas, will be deprived access from live sports could urge the need for media-specific regulation to guarantee free-to-air sports coverage. In this context, the new progressive government has taken some modest steps in the democratisation of the media landscape (Matos, 2011). Government enhanced the establishment of a national public service broadcaster, which is to promote cultural citizenship and guarantee diversity in the market. Following pressure from civil society, government has also debated the introduction of a media regulatory framework to better serve public interests in the Brazilian media market. Despite good intentions, however, installing such regulatory framework remains the biggest challenge for the Brazilian media landscape.

Australian 'Schemes'

By contrast, Australia, and to a lesser extent India, could be well seen to provide examples of 'excessive regulation', due to the particular forms of major events legislation adopted in each country. The 'Schemes' in Australia may harm private interests in the sports, and possibly favour free-to-air broadcasting in a disproportionate manner. The anti-siphoning approach in Australia and India is fundamentally different to that operated in Europe (cf. *infra*). The Australian and Indian schemes are based on a 'first choice' approach, which prioritises free-to-air broadcasters in the purchase of broadcast rights, and possibly creates a competitive imbalance between free-to-air broadcasters and pay-TV operators. Since public broadcasters and commercial free-to-air channels are entitled the first right to bid, the regulation is said to limit rivalry in the sports rights market and, hence, reduce the economic value of sports rights (Healey, 2009). Hence, the conclusion that the sports rights market in Australia is severely underdeveloped (in economic value) in comparison with similar countries all over the world comes as no surprise.

Although it attempts to preserve the public interests, however, the anti-siphoning regulation in Australia has not automatically served the citizen's interests and safeguarded cultural citizenship (Perrine, 2001). In some cases, free-to-air networks have resold sports rights to pay-TV operators with profit. In other cases, free-to-air networks bargain cheap deals and warehouse the rights, so as to prevent pay-TV operators from obtaining the rights. The question thus arises whether a more equitable and effective means of guaranteeing free-to-air sports coverage is to preclude free-to-air broadcasters and pay-TV operators from negotiating rights contracts that exclude the other form of broadcasting. Another remedy could be to limit the extensive amount of listed sporting events and transfer more 'major' sporting events to subscription services. This would possibly benefit the amount of live sports effectively offered to the Australian viewer. Whether this would also imply a significant increase in the fees paid for acquiring sports rights still needs to be seen. The relatively low prices for rugby league and rugby union deals as well as the outcome of the Super League and C7 cases might be symptomatic of the highly concentrated pay-TV market and *in casu* Foxtel's quasi-monopoly, and may therefore require a more vigorous implementation of the existing competition policy framework to induce competitive bidding for sports rights (Papandrea, 2006).

European 'dual rights' approach

The EU anti-siphoning regulation, based on a 'dual rights' system, offers a more balanced approach, as it allows broadcast rights to listed events to be purchased by either free-to-air or pay-TV broadcasters, but not broadcast exclusively on pay-TV, unless there is no interest in providing coverage of an event by a free-to-air broadcaster. In recent years, sporting associations such as UEFA and FIFA have unsuccessfully contested anti-siphoning regulations because they fear the listed events mechanism prevents them from maximising broadcasting revenues. The fact that only nine European member states have agreed to draw up a list of 'protected' events, implies that the regulation is not applied in large parts of Europe (Lefever, 2012). So far, Spain has not adopted this kind of listed events regulation and has indeed witnessed a move of live sports from public service broadcaster TVE to pay-TV operators Gol T and Canal+. But as Spanish media law requires that at least one match per week of the Primera División must be shown live on free-to-air networks, Spanish viewers are not automatically deprived from free live sports. In fact, Spanish football clubs benefit from the scarcity that is created in the market (in terms of higher rights fees) and free-to-air broadcasters draw huge ratings for these matches.

In those countries that have adopted the major events scheme, however, the regulation is therefore not automatically strictly applied. Across Europe, the digitisation of television has enabled a shift of sports coverage from free-to-air television to the ‘basic’ packages (as opposed to premium packages) of cable and satellite operators. More often than not, viewers need to pay subscription fees for accessing such digital-only sports channels (Evens and Lefever, 2013). As a result, opponents have repeatedly questioned the further value of such regulation and consider it ‘old-fashioned’ in a digital media environment that is characterised by disruptive technological change and plenty of new opportunities for viewers to watch (and pay for) sports programming. According to the critics, the underlying principles of media-specific regulation, i.e. spectrum scarcity and the one-way broadcast model, can no longer be upheld (e.g. Levy, 2001). However, we will argue in the remaining sections that in a digital television industry, where direct payment for popular programming is likely to become common practice, watering down existing regulation is not the right answer. Although the UK and Italy could be well seen to occupy positions somewhere close to equally between the free market and excessive regulation extremes, the vigorous application of competition law, complementing a media-specific regulatory framework, is required to achieve a truly balanced approach to the regulation of sports broadcasting.

A BALANCED APPROACH TO SPORTS BROADCASTING REGULATION

We believe such a balance between public and private interests in the regulation of sports broadcasting would increase both the economic value and the cultural significance of sports, and thus maximise total value in society. Critics might argue that the preservation of cultural and commercial interests of sports broadcasting are two separate, mutually exclusive policy goals, we tend to see them as highly complementary though. The public and private interests of sports constantly interact, and have a dialectic relationship, even in the case of the free-market approach and excess regulation. A change in the conditions of selling, buying and exploiting sports rights due to technological or regulatory developments directly affects sports viewers in terms of lower (higher) subscription prices, or in a more restricted (wider) availability of sports programming. Similarly, the implementation of listed events regulation could under particular conditions have an effect on whether pay-TV broadcasters are allowed to enter the bidding process and hence immediately affect the economic value of the sports rights. Put simply: changes related to the cultural sphere of sports imply changes for the commercial interests of sports, and vice versa. Indeed, the sports media system should be seen as a complex web of interdependencies between the various stakeholders of the game. Be-

cause the economic and cultural dimensions of sports broadcasting are highly interrelated, policymakers cannot but consider the implications of the competition policy framework on the availability of sports programming to the viewers, and simultaneously investigate the consequences of media-specific regulation for sports organisations and broadcasters. Therefore, we would like to make a plea for a balanced approach towards sports broadcasting regulation.

There is considerable evidence to suggest that a balanced regulatory approach can be successfully applied in practice. For example, regulatory intervention by the European Commission to limit the scope and duration of exclusive licensing has not prevented European football clubs to see a spectacular increase in their earnings from broadcasting rights. Ever since the Bundesliga (2003) and Premier League (2006) cases, imposing the unbundling of rights packages and limiting the duration of exclusive dealing to three years, the respective football associations, helped by the entrance of new delivery platforms and technology, have witnessed a steep increase in rights revenue. In 2012, Sky Deutschland renewed its rights deal for the Bundesliga, paying an average of €485.7 million per season from the 2013/14 onwards, compared to the average €249 million under the previous contract. Despite Ofcom's attempt to regulate Sky's excessive market power in the UK, in 2012, the Premier League sold domestic TV rights to Sky and BT for £3 billion, an overall £1.3 billion price increase on the previous deal. Fears that policy intervention reducing the impact of exclusive dealing would negatively affect the value of sports rights auctions – transferring less money to sports associations to invest in the quality of the game – have thus proved unfounded. Similarly, opponents of anti-siphoning regulation claim that it enables free-to-air, and especially public service, broadcasters to purchase the rights to key sporting events and competitions at artificially low prices and thus deprives sports organisations of vital funds. Furthermore, it is claimed that free-to-air and especially public service broadcasters are granted relatively cheap access to events of major importance to society, and entitled to play a leading role in sports broadcasting. To some extent at least, this may well be the case, but major events legislation has certainly not prevented an escalation in the value of the television rights to many major events, such as the Olympic Games and the FIFA World Cup, that have been safeguarded for free-to-air coverage.

One could criticise the market-driven approach of US broadcasting for its lack of anti-siphoning law, but the US model also provides some interesting findings for sports organisations all over the world. It shows that increased exposure and higher viewership via free-to-air television adds to the popularity of sports which maximises the interests of teams, leagues,

broadcasters, advertisers, sponsors and viewers alike. For sporting organisations, the free-to-air model allows to diversify their income and lessen reliance on income from pay-TV services. The Super League saga, the memorable fight between Foxtel and Optus to control the Australian pay-TV market, learned that sports rights owners may not be too greedy and that leaving the free-to-air television model could have tremendous impact on the economic value of sports rights despite the quick financial gain in the short term. After Sky Sports obtained the UK rugby league contract in 1996, audiences fell drastically as a result of which the record deal of £87 million had to be renegotiated to £45 million. Hence, the unbridled migration from free-to-air television to pay-TV services might, in first instance, add value for sports rights owners, but could turn out to be counterproductive in the longer term. In Europe, the high levels of TV income – up to 60 per cent in Italy – may impose managerial risks for contemporary sports organisations. In Spain, hit by a severe financial crisis, several broadcasters have announced they can no longer afford to pay the expensive rights fees demanded by Spanish football clubs. This could have dire ramifications for the competitive balance, possibly increasing the financial chaos Spanish football clubs are in for the moment.

Increasingly, sports associations, both in the US and Europe, tend to abandon exclusive rights deals and shift toward non-exclusive licensing models. In the past, exclusive rights agreements were seen as the most effective instrument to protect the economic value of broadcasting rights for sports leagues, and to maximise the profitability of the broadcasters. Now, concerns have arisen about the negative effects such exclusive contracts produce for the viewers and alternative pay-TV operators. Consequently, competition authorities have intervened in order to reduce artificial entry barriers in pay-TV markets, and have limited – or in some cases banned – exclusive dealing. Apart from regulatory concerns, the advent of broadband platforms is completely revolutionising the landscape for access to content and, hence, forms an additional challenge for sports associations that are selling media rights. As a result of these developments, sports rights owners have started exploring innovative, non-exclusive models for selling and exploiting rights. In the US, the major leagues have established their own sports channels like NFL Network and NBA TV, and closed carriage agreements with multiple distributors. More and more, these initiatives are copied by European sports associations that want to lessen their reliance on pay-TV operators. Such non-exclusive distribution strategies might create opportunities for alternative operators that now have access to sports programming. Viewers are no longer forced to choose a particular platform and are free to pick the pay-TV operator of their choice. Since all pay-TV operators would have equal access

to sports programming, increased competition in the market might lower subscription fees and spur total penetration of pay-TV services.

A DUAL REGULATORY APPROACH TO SPORTS BROADCASTING

A dual regulatory approach to sports broadcasting combines the application of competition law, with media-specific regulation, namely major events legislation. Competition law has been widely applied in the context of sports broadcasting, and has had a significant impact on market conditions for the buying, selling and exploiting of sports media rights. Most notably, in both the US and Europe, regulatory authorities have allowed sports organisations to sell their broadcast rights collectively (e.g. as leagues, rather than as individual teams). At least partly as a result, the sports rights market has become a ‘seller’s market’ characterised by an escalation in the price paid by broadcasters for key rights. With the exception of the US, free-to-air broadcasters have been generally outbid by pay-TV operators in the contest for sports rights, who, in turn, have used exclusive rights deals to establish dominant positions within national broadcasting markets. To a greater or lesser degree, the sports rights market has evolved into a two-tier system, whereby subscription services secure the most valuable rights and free-to-air broadcasters are left with the rights to less popular sports and/or sporting events, with the exception of rights protected for free-to-air coverage via major events legislation. Against the backdrop of the rising costs of sports rights, competition policy should be used to stimulate free and fair competition in the sports rights market and ensure that broadcasters have equal access to key rights. Most importantly, regulatory intervention should be used to lessen the common practice of agreeing exclusive rights deals, which tend to restrict competition.

Furthermore, competition law should be used to ensure a reasonable balance between promoting investment and enhancing competition within the sports broadcasting market. To date, policy makers and regulators have placed too much emphasis on preserving the investments of pay-TV operators in both infrastructure and programming, and have failed to effectively tackle the market power of dominant pay-TV operators in many countries. Economies of scale and prevailing rights agreements have effectively prevented the emergence of rival operators into the pay-TV market and as a result competition has stalled. In response, regulators should act to limit the power of leading pay-TV operators, reduce entry barriers and create incentives for alternative operators. The combination of collective selling cartels at the supply side and a monopolised pay-TV market concentrates significant market power in the hands of leading

sports organisations and dominant pay-TV broadcasters. Monopolies at various stages of the sports broadcasting supply chain can produce double marginalisation problems and considerable mark-up pricing; sports organisations as well as pay-TV operators have pricing power and hence keep prices artificially high. As a result, the stricter application of existing behavioural regulation and the increased involvement of competition authorities are required to reduce the market power of incumbent pay-TV broadcasters (and powerful sports organisations). Ultimately, the reward for regulatory intervention along these lines could prove to be lower retail prices for consumers.

Competition policy – based on extensive economic analysis and the assessment of significant market power – has, following the US model, emerged as key feature of broadcasting regulation in Europe and beyond. However, there is a danger that the increased focus on the economic analysis of broadcasting markets, accompanied by the related more general shift towards so-called ‘evidence-based policy making’, can lead to a neglect of the wider social and cultural significance of broadcasting. For example, despite the best efforts of some economists (and policy makers), economic concepts cannot fully capture the democratic and cultural role played by public service broadcasting in many European countries. At least partly as a result, even the more rigorous application of competition law is unlikely to guarantee the achievement of key social and/or cultural policy objectives related to sports broadcasting. Specifically, the application of competition law to the sports broadcasting market cannot guarantee that major national and international sporting events are provided on free-to-air television. To achieve this policy objective, and to enhance cultural citizenship, requires a clearly defined and coherent form of major events legislation. In this regard, the EU’s approach based on the application of clear and transparent criteria for the listing of events offers a model approach. At the same time, however, in countries where major events legislation is already in place, policy makers should resist calls from pay-TV broadcasters and some sports organisations to reduce its scope and effectiveness. For other countries, if live television coverage of major sports events is predominately the preserve of pay-TV, major events legislation offers an effective means to remedy the situation.

In a digital media environment that is gradually characterised by audience fragmentation, live sports on free-to-air television can be effectively protected by adequate sector-specific regulation. It should be stressed that, despite the much hyped new media revolution, including the development of Internet television, social media, mobile communication devices and so on, television continues to provide an unrivalled capacity to bring viewers together for a

shared viewing experience. Both in terms of audience preference and (as a result) as a source of revenue for sports organisations, television continues to be by far the most significant medium for the coverage of sports events, and it is likely to remain so for the foreseeable future. By complementing the appropriate application of competition law to the sports broadcasting market with a clear and coherent approach to major events legislation policy makers can serve the interests of broadcasters, sports organisations and citizens.

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