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**TITLE: "The Next Big Match: Convergence, Competition and Sports Media Rights"**

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## **Introduction**

Television remains by far the most popular way to follow live major sporting events and is at the heart of the ‘sports-media-business complex’ (Evens et. al, 2013). At the same time, however, as pointed out in a recent European Commission (DG Education and Culture) study on ‘sports organisers’ rights in the European Union’, the ‘traditional term sports broadcasting’ no longer reflects a ‘market reality’ where, as well as a traditional television set, consumers ‘increasingly use a range of internet-connected devices to watch sports: via PC, tablet, and smartphones’ (Asser Institute, 2014: 62). In this context, it makes more sense to refer to ‘sports media rights’, a term that ‘encompasses the rights to transmit audio-visual material across all transmission techniques’ (ibid). Or, put another way, the long heralded convergence of broadcasting, telecommunication and computing technologies is beginning to have a significant impact on the way that the rights to sporting events and competitions are sold and distributed. Over the last few years, this trend has been most clearly demonstrated by the growing prominence of leading traditional (often former state owned) telecommunications companies in the European sports media rights market, most notably British Telecom (BT) (UK), Deutsche Telekom (DT) (Germany), Orange/France Telecom (France) and Telefonica (Spain). Using these major European media markets as examples, the main object of this article is to examine the implications of spending on sports rights by telecommunications operators for both the sports media rights market and the wider European communications market.

The first part of the article focuses on the corporate strategies of traditional telecommunications operators and details how the acquisition of sports rights has been driven by a general desire to enhance their competitive position within an increasingly converged communications market. Just as importantly, however, it is also argued that the strategies adopted by individual telecommunications companies (and their successes or failures) have been shaped by the particular features of national markets, most notably the strength of pay-TV rivals. Taking these two points together, this section highlights the continued and, if anything, growing significance of premium sports rights as a 'site of struggle' within contemporary media markets (Evens and Lefever, 2013). The second part of the article moves on to consider the regulation of the sports media rights market. In Europe (and beyond), the regulation of the sports media rights market focuses on two main areas: first, major events legislation (also commonly referred to as listed events or anti-siphoning legislation), designed to preserve free access to television coverage of major national or international sporting events, such as the Olympic Games, or the FIFA World Cup; and, secondly, the application of general competition law to the buying and selling of rights in order to facilitate free, fair and effective competition, which ultimately, at least in theory, benefits consumers. Elsewhere, we have argued that there remains a clear case for major events legislation to preserve/enhance cultural citizenship (Smith et. al, 2015). Here, our main focus is on how the growing involvement of traditional telecommunications operators in the European sports media rights market has underlined shortcomings in attempts to apply competition law principles to the buying and selling of premium sports rights. Specifically, the second part of the article begins by setting out how, over the last decade or so, regulatory attention at both European Union (EU) and national level has focused mainly on competition issues related to the (upstream) sports rights market (i.e. the selling of television rights by

sporting organisations to broadcasters) and, in particular, the collective selling of rights by Europe's leading football leagues and competitions. Here, it is argued that regulatory intervention intended to promote competition in both (upstream) sports rights and (downstream) pay-TV markets has, at best, proved only partially successful. To date at least, the application of competition law has benefitted sports organisations and (at least some) pay-TV/telecoms operators, rather than consumers. Following on from this, the case is made for further regulatory intervention to facilitate increased competition in the (downstream) market for the distribution of sports channels/programming to consumers. In this way, regulators may be able to ensure that increased competition for sports rights between telecommunications operators and pay-TV broadcasters (as well as other possible market entrants) leads to improved services and lower prices for consumers, rather than merely escalating fees for sports rights that are then passed on to sports channel and/or broadband subscribers.

### **Telecommunications Operators and the Sports Media Rights Market**

The commercial and strategic importance of sports rights for pay-TV (as well as some free-to-air) broadcasters has been well documented (Boyle and Haynes, 2009). Over the last couple of decades or so, exclusive sports rights have been used, in Rupert Murdoch's often quoted phrase, as a 'battering ram' to open up national pay-TV markets for broadcasters, such as BSkyB (UK), Canal Plus (France), DirecTV (US), Foxtel (Australia), MultiChoice (South Africa) and StarTV (Asia) (Evens et. al, 2013). Furthermore, the continued reliance of pay-TV broadcasters on (live and exclusive) sports rights to retain/add subscribers and to increase average revenue per user (ARPU) has fuelled a global premium sports rights market estimated to be worth as much as \$28 billion per annum (Deloitte, 2014). In short, the use of sport by pay-TV broadcasters has been a significant part of a mutually reinforcing trend

toward the marketization of the television and sports industries (Murdock, 2000; Rowe, 2004). At least partly as a result, intense competition for premium sports rights in Europe has also resulted in monopolistic pay-TV market structures and major corporate failures (Leandros and Tsourvakas, 2005). During the early 2000s, in an attempt to establish and/or challenge a dominant market position, a whole host of European pay-TV broadcasters overpaid for sports rights and faced the ‘winners curse’ of heavy losses and/or bankruptcy, including ITV Digital and Setanta (UK), Premiere (Germany), Telepiù and Stream (Italy) (which merged to form Sky Italia), Alpha Digital Synthesis (Greece), Quiero TV (Spain) and Sport7 (Netherlands). By the early 2000s, Europe’s national pay-TV markets had become ‘winner-takes-all-markets’, largely dependent on the exclusive ownership of key sports rights (Cudd, 2007).

Over the last decade or so, developments in digital distribution technology, such as high speed broadband, have paved the way for many of Europe’s established telecommunications operators to play a growing part within the television industry, either as distributors, or as vertically integrated distributors/content providers that compete directly with established pay-TV broadcasters. Most significantly, telecommunications operators across Europe have attempted to use premium sports rights, commonly the rights to their respective national football championships, to promote new pay-TV services. For example, in 2005, Belgian telecom operator, Belgacom, became the first European telecommunications company to purchase live sports rights with a record €36 million per annum deal for the rights to the Belgian football championship designed to promote the take-up of its new IPTV service, Belgacom TV (Evens and Lefever, 2013). In a similar vein, a year later, having secured the IPTV rights for German Bundesliga matches, DT launched its T-Home Entertain service (Deutsche Telekom, 2015). And, in 2008, France Telecom, rebranded as Orange, launched

Orange Sport, which was made available via its own ADSL network following a deal for the exclusive live rights to some Ligue 1 matches (Kuhn, 2011: 48). More recently, telecommunications operators have also secured exclusive live rights to at least some matches from their respective national football championships in Greece (OTE), Portugal (Portugal Telecom/Sport TV), Spain (Telefonica), Switzerland (Swiscom) and the UK (the English Premier League and the Scottish Premier League) (BT).

To some extent, the growing involvement of telecommunications operators in the buying and distribution of premium sports rights is part of a wider change in the 'media sport content economy', whereby the growth of new media technology, chiefly the internet, mobile devices and social media, represent a shift from the long-established 'broadcast model' characterised by scarcity, with high barriers of access and costs restricting the number of media companies and sports organisations able to create, control and distribute popular sports content, to a 'networked model' defined by 'digital plenitude' with new technology significantly lowering entry barriers to commercialise sports content (Hutchins and Rowe, 2009). At the same time, however, the availability of premium sports rights remains tightly controlled by leading sports organisations, such as Europe's national football leagues, who are keen to preserve a major source of revenue and have made a concerted effort to ensure that any loss of value to their rights from breaches of copyright via illegal internet streams is relatively limited (Boyle, 2015). Consequently, in an increasingly converged media environment, premium sports rights remain as important, if not more important, than ever. In fact, the commercial strategies adopted by some of Europe's major telecommunications companies suggest that control of, or at the very least, guaranteed access to premium sports content has also become a key source of market power in the wider communications market beyond pay-TV.

For Europe's leading telecommunications operators the acquisition of premium sports rights is a vital part of a 'triple play' strategy, whereby they aim to preserve and/or expand their market position by bundling together over a single broadband connection multiple communication services, namely, internet access, digital television and fixed line telephony (possibly also integrated with a mobile phone service i.e. 'quad play'). Using sports rights to attract/retain subscribers, telecommunications operators aim to establish a strong position from which to cross-sell bundled services. More specifically, 'triple play' strategies are attractive for telecommunications operators for a number of interrelated reasons: first, they facilitate the 'locking in' of subscribers, by raising the cost (and inconvenience) of switching to other providers (i.e. a lower 'churn rate'); second, perhaps most importantly, 'triple play' strategies provide operators with the option to cross-subsidise one or more of their services depending on market conditions; and, third, in theory at least, additional revenues can be secured through improved customer service provision and service promotion (McGrail and Roberts, 2005). Furthermore, from a strategic perspective, the ability of telecommunications operators to offer a 'one-stop-shop' for bundled services provides them with a significant competitive advantage vis-à-vis pay-TV operators, who, in most, if not quite all, cases offer a standalone television subscription.

The European telecommunications operator to have entered the sports rights market in the most aggressive fashion has arguably been BT, in the UK. In 2012, BT took most industry observers by surprise when it agreed a £738 million deal for the exclusive live rights to 38 Premier League matches per season for three seasons (2013-14 – 2015-16). BT followed this up by acquiring the live rights to a number of other sports, including Premiership rugby and WTA tennis. By 2013, BT had spent over £2 billion on sports rights and had launched two dedicated sports channels, BT Sport 1 and 2 (Mance, 2013). In what was widely described as

a 'defensive strategy' designed to protect BT's core fixed line telecoms business, the new channels were then made available for no fee to new and existing BT broadband and/or BT TV subscribers (Budden and Thomas, 2012). According to some estimates, BT's sports channels have cost it in excess of £200m per year (Hewlett, 2013a), but the use of premium sports content to anchor its 'triple play' strategy has, to date at least, proved a worthwhile investment. In 2012, BT was the UK's leading fixed line broadband provider with just over 6 million household subscribers, 29.4 per cent of the market (Ofcom, 2012). However, Sky (then BSkyB), the UK's dominant pay-TV broadcaster, was already pursuing its own 'triple play' strategy having launched a broadband service six years earlier. By 2012, Sky had successfully converted around 40 per cent of its 10 million pay-TV subscribers to 'triple play' contracts and was set to increase this proportion, largely at the expense of BT, who, it was estimated, was likely to lose as much as £700 million of annual revenue (Hewlett, 2013b). Moreover, during 2011, Sky also accounted for more than half of net new broadband subscriber additions in the UK (Dunne, 2012). Faced with this situation, BT has used premium sports rights to stabilise its position in the UK broadband market. By the end of 2013, BT Sport was reported to have attracted over 2 million subscribers, mostly from existing BT customers, and, just as, if not more importantly, BT had also signed up more than nine out of ten (156,000) of the UK's net new broadband customers (Thomas, 2013a). By 2015, BT had actually increased its share of the UK's growing broadband market to 32 per cent, with around 7.7 million subscribers, and in doing so had retained its position as the UK's leading broadband provider (Ofcom, 2015: 292). Furthermore, since the launch of BT Sport, BT has continued to invest heavily in premium sports rights. In 2013, BT agreed a £900 million deal for the exclusive UK live rights to UEFA Champions League and Europa League football for three seasons (2015-16 – 2017-18), which were previously shared between Sky and ITV (free-to-air) (Thomas, 2013b). And, most recently, in 2015, BT agreed



to pay £960 million to offer exclusive live coverage of Premier League football (42 matches per season) for a further three seasons (2016-17 – 2018-19) (Gibson, 2015). Following the UEFA deal, ahead of the new 2015-16 football season, BT also launched a new sports channel, BT Sport Europe, available for free to BT TV subscribers, but not existing/new BT broadband customers, who are required to pay a relatively small (£5) monthly subscription fee. With this move, BT appears to have begun to shift away from a purely ‘defensive strategy’ and towards a more ambitious (and risky) approach designed to both increase BT TV’s relatively low share of the UK pay-TV market (around one million subscribers) and to increase the ARPU from existing BT broadband subscribers (Thomas, 2015; Mance and Thomas, 2015).

In Spain, broadband and pay-TV markets have become just as, if not more, interwoven than in the UK. Following a series of mergers over the last few years, the Spanish communications market has become dominated by three main players each offering ‘triple play’ and/or ‘quad play’ packages, namely Vodafone, Orange and Telefonica. Of these three, Telefonica is the clear leader in the broadband market, with, by 2015, 5.88 million subscribers, a 44.3 per cent market share, compared to Vodafone’s 21.4 per cent (2.8 million subscribers) and Orange’s 12 per cent (1.6 million subscribers) (Solana, 2015). Telefonica has also recently moved to extend its market leadership from broadband to pay-TV. In 2014, the telecoms operator agreed a €750 million deal with the Spanish media group, Prisa, and then a €350 million deal with the Italian media company, Mediaset, for 56 per cent and 22 per cent stakes respectively in Digital+, Spain’s leading pay-TV broadcaster (Del Valle, 2014a). Combined with its existing 22 per cent stake, these deals gave Telefonica full control of Digital+ and, when merged together with its existing pay-TV service, Movistar TV, meant that Telefonica became Spain’s leading pay-TV operator, with around 3 million subscribers, more than three

times the number of its closest rival, Vodafone-ONO (Del Valle, 2014b). Just as significantly, Telefonica has publicly pronounced its intention to rely on premium sports rights to strengthen its position in Spain and beyond (Del Valle, 2015a). By using exclusive premium sports rights as part of a ‘triple/quad play strategy’ (Movistar Fusion TV), Telefonica plans to both differentiate itself from its rivals and also to grow the take-up of pay-TV in Spain, which, at 22 per cent in 2014, was relatively low when compared to other major European markets, such as France (76 per cent) and the UK (53 per cent) (Ofcom, 2014a: 159). To this end, Telefonica has already secured the rights to a host of popular sports, such as Formula One and Moto GP, and has also agreed a landmark €600 million deal for the exclusive live rights to the top two divisions of Spanish league football, La Liga and the Segunda División, for the 2015/16 season, the first time that the rights to Spanish football have been sold collectively by the League, rather than by individual clubs (Nelson, 2015).

Other major European telecommunications companies, however, have been less successful in their attempts to base ‘triple play’ packages on exclusive premium sports rights. In France and Germany, telecoms operators have faced intense competition for rights from new and established pay-TV broadcasters respectively. Faced with such competition, and no doubt keen to avoid the corporate failures experienced by some pay-TV broadcasters during the early 2000s, telecoms operators have opted to recast themselves as purely distributors and thus at least retain access to premium sports programming for their subscribers. Specifically, in France, in 2011, when the Qatar based broadcaster, Al Jazeera (later rebranded as beIN Sports) entered the bidding for Ligue 1 matches, Orange opted not to bid to renew its deal with Ligue 1. Instead, in 2012, with cumulative losses estimated at around €1.2 billion, Orange announced the closure of Orange Sport and agreed a long term deal to distribute Al-Jazeera’s two beIN Sports channels, which subsequently also secured exclusive live rights to

the majority of UEFA Champions League football matches, as well as some Ligue 1 matches (Enders Analysis, 2012; Boxell and Thompson, 2011). Similarly, in Germany, in 2012, DT was outbid for live Bundesliga football rights by the satellite pay-TV broadcaster, Sky Deutschland, who, in a deal worth around €486 million per season, acquired the exclusive live rights for both IPTV and pay-TV, for four seasons from August 2013 (Wiesmann, 2012). Faced with the prospect of losing many of its T-Entertain subscribers to Sky, DT agreed a distribution deal for Sky's Bundesliga package, Liga Total, and subsequently withdrew from the premium sports rights market (Sheahan and Bryan, 2013).

Taken together, these examples serve to underline the importance attached to premium sports rights by both traditional telecommunications operators and pay-TV broadcasters. The ownership of premium sports rights has become a key source of market power in the increasingly converged European pay-TV and broadband communication markets. It is perhaps no surprise therefore that the buying, selling and distribution of sports rights has long attracted the attention of competition authorities across Europe, and continues to do so.

### **Competition Regulation and the Sports Media Rights Market**

The late 1990s and early 2000s witnessed a steady stream of competition cases at both EU and national level focused on the buying and selling of premium sports rights (Smith et al, 2015). Prompted by the 'battering ram' strategies of Europe's leading pay-TV broadcasters, competition authorities were principally concerned with the anti-competitive impact of the collective selling of live rights by Europe's top football leagues and competitions. Critics argued that collective selling enabled leagues to act like cartels so as to maximise the value of their rights, which, in turn, strengthened the market position of already dominant pay-TV broadcasters, as they were the only ones who could afford to purchase the rights. In theory, if

broadcast rights were sold by individual clubs, there would be more possibilities for other broadcasters to obtain rights, which, in turn, would foster competition in (downstream) pay-TV markets. Alternatively, supporters of collective selling claimed that the principles of competition law could/should not to be applied to sporting leagues, not least because the selling of rights (to home matches) by individual teams would lead to vast income discrepancies and undermine competitive balance within a league. Weighing up both sides of the argument, in a landmark case on the selling of media rights to the UEFA Champions League, the European Commission's Competition Directorate opted to allow collective selling, but only with the introduction of measures designed to ensure greater competition for rights, most notably the division of television rights into a number of smaller packages, three year limits on the lengths of exclusive contracts and the unbundling of new media rights (from live television rights) (EC, 2003). The European Commission then applied the same logic in its rulings on the selling of the rights to the Bundesliga and the Premier League, in Germany and the UK respectively (EC2005a; EC2005b). Furthermore, following the EU's lead, national competition authorities also subsequently widely permitted the collective selling of football rights by their national championships, as long as the practise is accompanied by similar conditions to those imposed by the Commission (Asser Institute, 2013: 78).

Since around the early 2000s, the modified approach to collective selling implemented by Europe's leading football competitions has certainly facilitated increased competition for rights. In France, the leading pay TV broadcaster, Canal Plus, has faced competition from a series of new entrants, each able to secure exclusive rights to some Ligue 1 matches, namely Télévision Par Satellite (TPS), Orange and beIN Sports. Similarly, in the UK, the regulated selling of Premier League rights enabled, first, the Irish based pay-TV broadcaster, Setanta,

and, more recently, BT, to acquire exclusive rights to packages of matches. And, in Germany, the unbundling of new media rights (from television rights), enabled DT to launch its IPTV service as a rival to satellite pay-TV broadcaster, Premiere/Sky Deutschland. Beyond this, however, there exists a ‘major discrepancy’ between the aspiration frequently proclaimed by the Commission in its rulings on collective selling to ensure ‘greater choice and better value’ for consumers and the market reality (Lefever and Van Rompuy, 2009). First, the increased competition provided by new entrants to pay-TV markets has often proved relatively short-lived. As already noted, over spending on premium football rights during the early 2000s led to a number of high profile corporate failures in European pay-TV markets, including, TPS, Orange Sport, Setanta and Premiere. Second, where competition has endured it has most often merely meant the replacement of a monopoly with a duopoly, namely: Sky and BT (UK); Canal Plus and beIN Sports (France); and, DT and Sky Deutschland (Germany). And thirdly, most significantly, the emergence of pay-TV duopolies has contributed to a rapid escalation in the cost of premium rights, which has then, to at least some extent, been passed on to consumers. Paradoxically, for consumers, increased competition in the sports media rights market has led to higher prices.

In France, during the early 2000s, competition between Canal Plus and TPS produced a 26.6 per cent CAGR increase in the value of the live rights to Ligue 1 matches, until the two rivals agreed a merger in 2005 (Ofcom, 2007a: 9). To the frustration of Canal Plus, the increased value of Ligue 1 rights was then sustained by the entry of Orange into the market and, more recently, competition from beIN Sports has led to a 20 per cent annual increase in the total amount paid for live rights, to €726.5m per year (between 2016 -2020) (Ligue 1, 2014). In Germany, competition for Bundesliga rights has been just as intense. In 2012, Sky Deutschland outbid DT and agreed to pay €486 million per season to secure both the

exclusive live pay-TV and IPTV Bundesliga rights for four seasons from August 2013, leading to a 52 per cent increase in the total value of the rights (Wiesmann, 2012). Even more starkly, in the UK, competition between Setanta and Sky directly facilitated by EU regulation, which prevented any single bidder from acquiring all available packages of live rights, led to an increase of over 60 per cent in the value of the exclusive live rights to Premier League matches (between 2007/8 2009/10) (Ofcom, 2007b: 19). The entry of BT into the market has further inflated the value of Premier League rights, with the value of live rights increasing by a staggering 70 per cent at each of the last two rights auctions, in 2012 and 2015, from £1.78 billion to around £3 billion and then to over £5.1 billion (Gibson, 2015).

The rapid escalation in the value of premium sports rights has obviously benefitted sports organisations, most notably Europe's leading football clubs (and players), but it has produced less favourable outcomes for consumers. Given the monumental rise in the value of UK sports rights, it is perhaps no surprise that subscribers to sports channels in the UK have faced some of the steepest price increases in Europe. Ofcom's (2014b) report on the 'cost and value of communications services in the UK' since 2004, declared that, over the last decade, increased competition had 'underpinned declines in real prices', particularly for broadband access. However, pay-TV was deemed to be an exceptional case. According to Ofcom, subscribers to Sky's sports channels had experienced 'real terms price increases' of 21.6 per cent and subscribers to Sky's sports channels via Virgin Media, the UK's leading cable broadcaster, had faced even steeper price rises (23.7 per cent) (Ofcom, 2014b: 12-13). Furthermore, BT's entry into the sports rights market has provided fresh impetus to the upwards trend in the cost of UK sports channels. According to research from Kantar Media, the average cost of watching top flight English football on television in the UK has soared

since 2009 (Mann, 2015). Most notably, in 2014 alone, Sky increased the price of Sky Sports by 10 per cent, and, at least partly as a result, around one third of sports channel viewers were estimated to be struggling to pay their subscription (ibid.). Just as significantly, consumers who do not subscribe to sports channels have also faced increased charges as a result of the spiralling fees paid for sports rights. In 2014, BT imposed a 6.49 per cent increase in the cost of home phone and broadband packages on all its customers, a move described by some industry observers as a ‘football tax’ (Brignall, 2014). Similarly, in 2015, Sky raised the cost of its sports channel package by £1 per month, but its main ‘family bundle’ was increased by £3 per month, leading to suspicions that ‘family bundle’ subscribers were helping to pay for the latest Premier League rights deal (Snoddy, 2015). And finally, sports channel subscribers have also faced the inconvenience (as well as extra cost) of subscriptions to multiple pay-TV providers in order to follow all of the matches within a particular competition. This has become a defining feature of numerous European pay-TV markets, including the UK, France and Spain. For instance, a recent survey found that the most expensive country in Europe for watching football on television was Spain, due to the ‘maze’ of different pay-TV and pay-per-view packages viewers are required to negotiate in order to watch certain matches, including those featuring the two most popular teams, Real Madrid and Barcelona (Clover, 2014). Against this background, it is perhaps no surprise that the viewing of live matches via illegal streams broadcast on the internet is an increasing common practice in many European countries. Indeed, according to recent research from the European Union Intellectual Property Office (EUIPO), illegal viewing was most common in Spain, with around 33 per cent of 15-24 year olds using illegal sources to access online content, including live football matches (Clancy, 2016). For consumers to benefit from the increased competition in the sports media rights market, policy makers and competition authorities need to turn their attention to the regulation of the (downstream) sports programming distribution market i.e. the retail market.

One way to address the use (and abuse) of exclusive sports programming as a source of market power within pay-TV and wider communications markets would be to treat premium sports rights in accordance with the ‘essential facilities doctrine’, which is an established feature of EU communications regulation (Smith, 2007). The ‘essential facilities doctrine’ effectively denotes that certain upstream (i.e. sports rights) inputs are essential/indispensable for downstream content providers/aggregators (e.g. pay-TV broadcasters or telecoms operators) to compete in the relevant market (i.e. sports programming) and cannot easily be replicated without significantly raising costs. Following on from this, to facilitate competition, access is provided to the ‘essential facility’ for all market players on ‘fair, reasonable and non-discriminatory’ terms, which are overseen by broadcasting and/or competition regulators.

To some extent, this approach has already been adopted as the basis for the regulation of the premium sports programming market in Europe. In the UK, following an exhaustive (2007-10) review of the UK pay-TV market, Ofcom has overseen a ‘wholesale-must-offer’ (WMO) regime, which compels Sky to offer its premium sports channels (Sky Sports 1 and Sky Sports 2) to other outlets on a wholesale basis at prices regulated by Ofcom (Ofcom, 2010). In France, in 2009, similar thinking underpinned a ruling from the Conseil de la concurrence, which prevented Orange from making access to Orange Sports exclusive to its own ADSL delivery platform (Ferla, 2009). And finally, since the early 2000s, a whole host of mergers between European pay-TV operators have been accompanied by regulations to guarantee the wholesale provision of premium sports channels to other broadcasters and/or delivery platforms, including in Spain (between Via Digital and Sogecable to form Digital+, as well as more recently between Telefonica and Digital+) and France (between TPS and Canal Satellite to form Canal+ France) (Ofcom, 2009). However, to varying degrees, these examples have



also highlighted the piecemeal and often limited application of the essential facilities doctrine. For example, despite its recent spending on premium sports rights, Ofcom's WMO regime has not been extended to BT, which has enabled the telecoms operator to opt to provide its sports channels to commercially attractive delivery platforms with large numbers of subscribers (i.e. Sky and Virgin Media), but not to smaller (and potential rival) platforms, such as Talk Talk/YouView (Ofcom, 2014c: 68-70). Just as importantly, one of the most controversial aspects of Telefonica's takeover of Digital+ has been the Spanish competition authority's ruling that Telefonica be obliged to give rival operators, Orange and Vodafone, access to only 50 per cent of its premium content (Del Valle, 2015b).

A more systematic application of the essential facilities doctrine could be implemented to apply to all premium content and all delivery platforms. No doubt major sports organisations, such as Europe's major football leagues (and at least some pay-TV/telecoms operators), would oppose any such move on the grounds that it would fatally undermine the commercial value of the sports media rights market, but this need not be the case. Curtailing the ability of pay-TV and/or telecoms operators (and/or other content aggregators) to offer premium sports programming on an exclusive basis may well dampen the inflation in the sports rights market, but, by definition, premium content is likely to remain popular with consumers. Pay-TV/telecoms operators would therefore still no doubt be able to raise considerable revenue from the sale of highly popular sports programming. Only with this approach the value of premium content would be decoupled from the delivery platform, allowing consumers to select more freely from competing service providers, who, in turn, would be forced to compete in areas other than offering exclusive access premium sports content, such as price, performance, technological innovation and customer service. As a result, the fully-fledged application of the essential facilities doctrine to premium sports content regulation could also

encourage a move away from a ‘winner takes all’ sports media rights market towards one based more on revenue sharing between content providers and sports organisations, which in the long term could benefit them both.

Finally, it is worth noting that ongoing interrelated technological, market and regulatory developments are likely to increase the salience of the essential facilities doctrine to the regulation of the premium sports media rights market. First, the growing trend towards convergence means that premium sports rights are increasingly being marketed and/or acquired on a technologically neutral basis, with rights distinguished on a temporal basis (e.g. live, near-live, highlights, clips etc.), rather than by means of delivery. This has long been the approach adopted by some rights owners, such as the Premier League, but recent rights auctions have also seen movement in this direction from other leading European football leagues. Second, the EU’s approach to the regulation of sports media rights could see a shift away from national markets and towards a pan-European market. In 2011, the ruling of the European Court of Justice in the ‘Murphy case’ made it clear that the way that rights are currently sold on a territory-by-territory basis is ‘irreconcilable’ with the single internal market (EC, 2012). A combination of ‘cultural reasons’ and the nationally focused strategies employed by rights holders may well mean that there is little immediate prospect of a pan-European rights market (Boyle, 2015), but the European Commission’s (2015) Digital Single Market Strategy signalled that movement in this direction remains a political priority (EC, 2015). Thirdly, major commercial players have also moved to enhance their ability to purchase and/or distribute sports rights on a pan-European level. Most significantly, in 2014, Sky, completed the £7 billion acquisition of Sky Italia and Sky Deutschland (Hammett, 2014) and, a year later, the US based Discovery Communication completed its takeover of the pan-European sports broadcaster, Eurosport, which just a few months earlier had agreed a £920

million deal for the exclusive TV and online rights to the Olympics and Winter Olympics across Europe from 2018 to 2024 (White, 2015). Furthermore, as well as pan-European broadcasters and telecommunications operators, global Over-The-Top (OTT) providers, such as Netflix and Amazon, may also look to enter a pan-European premium sports rights market. Indeed, following the 2015 Premier League rights auction, the League's chief executive, Richard Scudamore, noted that some bids had come from 'the digital space' and suggested that OTT providers could be significant contenders for rights in future (Farber, 2015) Taken together, these developments suggest that the European sports media rights market is likely to become increasingly dominated by major vertically-integrated transnational media corporations. In this context, the regulation of commercial power in the sports programming market to protect the interests of European consumers (and citizens) will be more important than ever.

## **Conclusion**

Using France, Germany, Spain and the UK as examples, this article has highlighted the commercial and regulatory significance of the increasingly prominent role played by traditional telecommunications operators in the European sports media rights market. More specifically, several key points should be emphasised. First, premium sports rights have become a key source of market power in both the pay-TV and wider communications market. For telecommunications operators (and some pay-TV broadcasters) premium sports rights have become a vital part of 'triple play' strategies employed to ensure a competitive position in the increasingly converged pay-TV and broadband markets. Second, the implementation of the 'triple play' strategies adopted by telecommunication operators has been shaped by the particular features of national markets, most significantly the level of competition from pay-TV rivals. For BT and Telefonica the acquisition of premium sports rights have been used to

defend an existing market position in the broadband market and/or translate a dominate position in broadband to pay-TV. By contrast, in France and Germany, new and/or existing pay-TV broadcasters have moved to prevent telecommunications operators from pursuing similar strategies. Faced with such competition, Orange and DT have opted to position themselves as distributors, rather than risk overpaying for sports rights. Third, to date at least regulatory attempts to promote competition in the sports media rights market and, in turn, (downstream) pay-TV markets, have been only a limited success. Pay-TV monopolies in some countries, such as the UK and France, have been ended, but reforms to the arrangements used by Europe's leading football leagues and competitions to sell their rights have also contributed to a rapid escalation in the value of rights, which has benefitted rights owners at the expense of consumers. Finally, to ensure that increased competition for sports rights translates into benefits for consumers, policy makers and regulators should turn their attention to the regulation of the (downstream) sports programming market. The more systematic application of the essential facilities doctrine to the sports programming market offers a possible means to end the 'winner takes all' approach to the auctioning of sports rights, while still enabling content providers and/or sports organisations to secure revenue based on the popularity of their programming/sport with consumers. Just as, if not more significantly, consumers would also be likely to benefit because pay-TV/telecoms providers would be forced to compete on the basis of price and quality of service, rather than merely the exclusive availability of premium sports content. In short, the application of the essential facilities doctrine to the sports programming market could serve the interests of pay-TV/telecoms operators, sports organisations and consumers.

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