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A Dutch solution to Premier League TV issues: part 2

The 'exclusive' broadcast model favoured by the English Premier League is currently facing a number of challenges from regulators, who are concerned about the restrictions it places on competition. In this second instalment of a two-part article, Tom Evens, Daniel Geey, Katrien Lefever and Ben Van Rompuy explain how court cases involving the use of decoders to view foreign broadcasts of English Premier League football could open the football broadcasting market to Europe-wide competition. They explain how this could ruin the territory-based sport broadcast sales model, and explain how the Dutch Eredivisie's approach could offer a viable alternative.

Introduction

Exclusivity for premium broadcasting rights has long been considered a mutually beneficial strategy for rights holders and broadcasters. Guaranteeing that the broadcasters have sole access to popular content in turn differentiates their programming from competitor offerings. In this second instalment of our two-part analysis, we aim to demonstrate that there appear to be new ways to sell premium content on a non-exclusive basis. As described in the first part¹ of this article, the Dutch Eredivisie football league has introduced a new model offering non-exclusive supply to broadcasters and platforms. Below is an in-depth analysis of the advantages and drawbacks of the Eredivisie channel.

Rights holders like the Dutch Eredivisie have been confronted with declining rights values because few competitors are willing to afford the large sums needed to purchase exclusive content. Faced

with the prospect of settling for what they considered to be a below market price offer for their exclusive rights, the Dutch Eredivisie (through a joint club corporation called the ECV²) decided to go down another path³. The ECV rejected the traditional exclusivity model and has found a more affordable market entry based tool for broadcasters, which also has the added appeal of fostering downstream retail-based price competition for consumers. It remains to be seen, however, whether the new ECV model will maximize revenues for its member clubs.

Eredivisie Live analysis

As previously discussed, the ECV agreed distribution deals with a host of platforms and offered non-exclusive access to all distributors. This model of shared access goes against the English Premier League (PL) grain of exclusive rights distribution. With Dutch football content being fed to multiple operators, the traditional exclusivity model is being tested by rights holders keen to expose their sport to a wider pay-TV audience.

Rights holders and broadcast platforms share similar aims, but do also have divergent interests. Whereas rights holders benefit from the maximum exposure of their product, platforms acquire exclusive content specifically to drive subscriptions to their platform and raise cross platform barriers to entry for exclusive content. For the length of the exclusive contract, the identifiable market can be effectively foreclosed. This has been justified by the European competition authorities - usually so long as the exclusive contract is not for more than three years - on the basis that broadcasters need time to invest in the product, advertise and innovate in order to attract consumers to

subscribe.

Rights holders are therefore caught between maximising exposure to fuel long-term interest and mass participation in the sport, or commercialising their product on a pay-TV station which in turn can limit viewer numbers. A halfway house solution may be a lower priced, multi-platform, non-exclusive product that would reach more subscribers.

Now that some rights holders fear a decline in rights fees, it may be that pushing non-exclusive content onto multiple platforms may drive wider exposure for the sport, whilst also generating more subscribers through cheaper subscriptions.

Targeting a wider audience

Being distributed by several platforms, the ECV can target a substantially larger pool of domestic viewers than they previously could when tied to their exclusive broadcaster. With digital television markets growing in most European countries, this should enhance market penetration. Consequently, rights holders who are no longer dependent on a single exclusive buyer should have the enhanced ability to negotiate distribution fees and conditions with cable, satellite and digital platforms. This is especially important if, like the ECV, a rights holder is entering into revenue sharing deals with each platform that will carry the channel.

The flipside for rights holders is that rather than selling their packages outright to the highest bidders, leagues and clubs would be taking on the full commercial risk for commercialising the product. The larger the current exclusive sum paid, the greater the risk of not reaching the heights of previously negotiated exclusive deals. The PL now has its own overseas channel⁴ which demonstrates that they are clearly

making inroads into the broadcasting market rather than just selling its rights at auction. A natural next step may be to market the rights themselves.

Rights holders would be gambling that self-exploitation and the non-exclusive provision of rights would generate more money than the exclusive deals. This has not yet happened for the ECV, however. Although the ECV had promised the clubs a yearly dividend of €60 million, this target has recently been downgraded to €50 million. Leagues would also have to consider the increasing transactional costs of entering into a raft of new agreements as they would have to establish relationships and negotiations with all interested platform operators. In Holland, it is believed the ECV has entered into commercial agreements with 12 platforms to screen the Eredivisie Live channel.

Non-exclusive selling would also have major consequences for broadcasters and platform operators as well. The removal of exclusivity as an accepted barrier to entry could generate incentives for technological innovation, the development of alternative broadcasting platforms and the arrival of new entrants. Consequently, consumers would purchase the product based on retail considerations such as pricing, quality of service, programming variety and innovative platform features. In the Dutch instance, multiple platforms can now compete on price as most football offerings are (more or less) alike. That was not previously the case in the UK when watching live PL matches⁵.

Consumer benefits

Currently, as a result of the exclusive offerings, consumers are forced to choose a particular platform that may not be their

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preferred option. Consumer choice should increase as new platforms who wish to carry the channel become available. In Holland, the Eredivisie Live channel is accessible on a variety of platforms so viewers do not have to choose between their favourite content and their preferred platform. Increased competition and non-exclusive distribution in downstream markets should then have the ultimate effect of driving down subscription prices.

The overall message is that consumers may be better served with the non-exclusive provision of services where they chose the product that best meets their budget, platform use and entertainment needs⁶. This should be preferable to the current PL scenario, where consumers have to subscribe to more than one channel to view all matches being televised live. As will be described below, Ofcom - through its 'must offer' remedy - is trying to force through new retail alternatives to BSkyB's PL Sky Sports offering in the UK.

Wider access, but still not free

The Eredivisie analysis highlights the long-term trend of premium live sports rights being locked behind pay-television platforms. One reason for this is because it has become impossible for free-to-air channels to match the rights fees paid by pay-TV operators. Although ECV's Managing Director, Mr Tielbeke, stated that the launch of the channel would guarantee that the league matches would be available to as many people as possible⁷, he meant this in the context of as many people who are willing to pay for the privilege.

Non-exclusivity does not, however, automatically imply that major sports events will be freely accessible for the public. A positive

side effect may be lower prices if platforms are able to compete with each other for the same product.

To ensure that all sports events do not disappear behind a decoder, both the European and national legislators have adopted listing of major events as an approach to solving this problem. This mechanism allows Member States to draw up a list of events of major importance for society that can only be broadcast on free-to-air.

A PL assessment of the Dutch arrangements

The ECV arrangements may be of interest to the PL, because they alleviate a number of the competition concerns that have become apparent in the Ofcom investigation into the pay-TV market in the UK and the decoder cases currently being heard in the European Court of Justice (ECJ)⁸.

Ofcom

Ofcom's main concern is that fair and effective competition is not occurring in the pay-TV market in the UK because BSkyB, after winning the majority of the live PL auction packages, either broadcasts the live games on its own retail platform or charges prices that other platforms argue make it unprofitable to buy wholesale from Sky. Ofcom argue that Sky has an incentive not to sell its Sky Sports channels (which includes live PL football) to other retail competitors because they could make more profit from selling Sky Sports to customers on their own retail platform.

Ofcom has now imposed a 'must offer' obligation on Sky to sell its Sky Sports 1 and 2 channels at regulated prices to the other current UK platforms; Virgin, BT Vision and Top Up TV. There are various appeals presently ongoing at the Competition Appeal Tribunal.

The significance of this is that should the PL change the way it sells its rights (i.e. non-exclusive, self-distribution through a PL channel), the whole structure of how live PL rights are sold would alter irrevocably. On face value, it would appear competition would be enhanced at broadcaster and consumer level. A whole host of new broadcasters/platforms would be able to screen the PL channel which would have the immediate effect of engaging with a new set of fans that previously may not have been able to afford an exclusive broadcaster's subscriptions. This would have the consequence of effectively deregulating the downstream retail market for live PL matches.

Just as in the Dutch example, greater retail competition on a non-exclusive basis could confer greater consumer benefits with potentially lower subscription prices. Sky has invested billions of pounds into the PL, but has been insulated to a degree from full blown downstream retail competition because of the limited number of broadcasters showing live PL matches in the UK. There is little doubt that the PL 'going it alone' would be an extremely risky course of action, but it may be that a new model may satisfy the regulators and courts alike.

Decoders

Should the PL win the decoder cases (as detailed in the first part of this two part article), the *status quo* prevails and territorial restrictions will presumably be permissible. This would then provide protection for rights holders to be able to cater for different demand values in various Member States (i.e. demand for PL football being higher in the UK than in Greece, thus UK subscriptions being higher than Greek subscriptions). This demand variance is at the

heart of the decoder case issue, with UK citizens purchasing legitimate Greek subscriptions at the lower Greek price. Sky (and presumably ESPN) view this as circumventing their exclusive territorial licenses and that UK customers should only buy from an authorised UK broadcaster.

Should such arguments not find favour with the ECJ, Sky, ESPN and the PL may find that European consumers are legally entitled to purchase the live PL rights from any authorised PL broadcaster within the EU. In such a scenario, a new rights selling procedure would have to be adopted. One way of alleviating this problem could be an enhanced version of the Dutch example. The PL could start its own channel, distributing it on a non-exclusive, pan-European wide basis, whilst entering into revenue sharing agreements with a whole raft of domestic and European wide platforms. This way the PL could tackle the problem of territorial restrictions by allowing, for example, a UK resident to buy live PL rights from an authorised non-exclusive German platform who is cheaper than any of the non-exclusive UK equivalents. This would provide the consumer with even greater choice between domestic and European wide platforms to promote price competition.

Conclusions

The ECV's novel distribution arrangements should provide food for thought for rights holders who are concerned about reaching wide audiences, yet still commercialising their product. It may be that the PL, whose broadcasting revenues remain steadily astronomical, have no need to consider risky auction strategies like gambling that three or four non-exclusive domestic broadcasters would bring in more revenue than the two present

incumbents. But bearing in mind the regulatory challenges facing Sky and the PL, the PL will no doubt have contingency plans in place, especially if the ECJ rules against them in the decoder cases. It is fair to say that the ECJ decision in interpreting EU law may be an industry defining moment. It has the potential to be the Bosman of the European broadcasting market.

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1. 'A Dutch solution to Premier League TV issues', World Sports Law Report Volume 8 Issue 9, September 2010.
2. In 1997, the clubs formed Eredivisie CV (ECV), which sold exclusive live rights to pay-TV operator Canal Plus.
3. Ibid., footnote 1.
4. <http://fourfourtwo.com/news/england/48927/default.aspx>
5. There was little retail price competition for PL rights until the Ofcom must offer remedy was introduced. It remains to be seen whether such intervention will remedy the situation.
6. Some may point out that this already occurs in the UK at present, with ESPN and Sky as the current PL auction winners. The important distinction, however, is that consumers have to subscribe to two channels; either Sky Sports/Virgin/BT Vision and ESPN, to view all PL matches screened on television. Therefore the PL sells exclusive packages rather than the whole package to any one platform. The authors believe the PL should sell a number of complete non-exclusive packages for all live televised matches and have various platforms compete for consumers based on price.
7. Endemol (2008). Gary Lineker joins Dutch football channel, 10 July 2008, <http://www.endemol.com/news/article/endemol-creating-content-for-eredivisie-live.html>.
8. See part 1 of this article for a review of the Ofcom investigation; Ibid. footnote 1.



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