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# A Dutch solution to Premier League TV issues: part 1

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 first instalment of a two-part article, Tom Evens, Daniel Geey, Katrien Lefever and Ben Van Rompuy explain the current challenges facing the Premier League and how the Dutch Eredivisie's decision to wholesale its own channel to could offer an alternative that placates regulators.

Since the formation of the English Premier League (PL), the revenue PL clubs have derived from broadcasting rights has been nothing short of astronomical. Much of the value attached to the rights recently stems from the PL exclusively auctioning the live rights to two bidders for three years at a time. BSkyB (Sky), as one of the exclusive incumbents, has and continues to pay hefty exclusivity premiums for screening live PL matches. At a time when the PL is entangled in regulatory disputes with Ofcom[1] and in the European Court of Justice (ECJ) over various decoder cases, there may be a new non-exclusive avenue which may alleviate the PL's ongoing broadcasting issues.

This two-part article firstly delves briefly into the current decoder and Ofcom broadcasting issues affecting the PL. These issues are pertinent because a new model for selling live football rights has emerged in the Dutch Eredivisie which could alleviate a number of legal issues that have arisen in the Ofcom and decoder matters. The Dutch Eredivise has set up its own channel and is wholesaling it to a number of broadcasting retailers via various platforms. The article explains the background to these new Dutch arrangements and how they have been implemented. The article concedes that whilst some have argued that the Eredivisie had no choice but to set up its own channel after not receiving enough satisfactory bids, the upshot is that consumers can subscribe to the Eredivise channel from an array of broadcasting platforms offering different prices for the same Eredivise product. Such arrangements are absent from the current PL deal.

## Ofcom and decoder case summary and update

Both topics have been considered at length in various articles[2]. It is important to briefly summarise both cases, because negative outcomes for the PL in either or both instances could lead to a reassessment of how the PL's rights (at auction or wholesale) are sold.

### Decoder cases

The PL is involved in two cases relating to Karen Murphy and QC Leisure. Mrs Murphy is a pub owner and QC Leisure is a stockist and supplier of foreign decoders to pubs and the general public in the UK. References have been made to the ECJ by the English courts because various European broadcasting issues require clarification[3].

Mrs Murphy and QC Leisure have argued that the way in which the PL enters into its contracts with various broadcasters throughout the EU infringes, among other things, competition law. They argue that the PL's contractual provisions restrict the ability of PL rights holding broadcasters to screen live pictures outside their own designated territory. They also contend that this restricts the capacity of Mrs Murphy or QC Leisure to either view, or purchase decoders to view, live PL matches from any source other than the exclusive national PL rights holding broadcaster (i.e. only Sky and ESPN have the rights to broadcast the exclusive pictures in their allotted UK territory).

The PL argues that the system of national Member State territorial restrictions is required to protect the value that is attached to their product. The oral hearing - which is the next procedural step in allowing the parties and various interested parties to put forward their case - is scheduled for October 2010, which means a court ruling is unlikely before mid-2011.

### Ofcom decision

It was announced in March of this year that Ofcom will require Sky to offer at a wholesale level its Sky Sports 1 and 2 channels at a price determined by Ofcom. This will provide a mechanism for other platform providers to gain access to Sky Sports 1 and 2 on fair and reasonable terms. The decision will mean, subject to various appeals, that the wholesale price Sky charges for Sky Sports 1 and 2 to platforms such as Virgin Media or BT will be reduced by around 10%.

Rights holders, especially those who have received large revenues from Sky for their broadcasting rights, are understandably concerned that their largest income source may contract quite significantly. Sky argues it will not be incentivised to pay millions of pounds for exclusive rights if other platform providers can simply purchase the programmes made by Sky using these rights at knock-down prices. Unsurprisingly, Sky believes competition in the pay-TV market is healthy, consumers are paying a fair price for a product they value and that Virgin, BT and others are being rewarded by Ofcom despite their lack of domestic sporting investment. The appeal process is in full swing in the Competition Appeal Tribunal (CAT), with the latest deadline being set for Ofcom to submit a defence of its decision by late November 2010. Therefore like the decoder cases, a decision by the CAT as to the legality of the Ofcom Decision may occur in 2011.

The significance of these two cases should not be underplayed. A decision against the PL in the decoder cases would mean the PL having to go back to the drawing board to assess how to sell its rights across the European Union. One option, if it cannot sell its rights on an exclusive territorial basis, could involve the PL setting up its own live football channel, selling the rights on a non-exclusive European wide basis (or agreeing revenue sharing arrangements) with a number of broadcasters who can then charge varying prices, as evidenced in the Eredivise example below. Similarly, having such selling arrangements in place would go some way to placating Ofcom that Sky (as it would no longer be one of two exclusive incumbent broadcasters, but just another platform that the PL sells its product on) would no longer have market power in the upstream wholesale market. This would be because the PL would be offering the wholesale product to any licensee that entered into a non-exclusive licensing agreement to broadcast the PL channel.

## Eredivisie Live analysis

For many years, the Dutch football broadcasting market was characterised by one supplier and one buyer of rights. In 1997, the clubs joined into a corporation named Eredivisie CV (ECV), which sold all the exclusive live rights to pay-channel operator Canal Plus. When the contract with Canal Plus was renewed in 2001, other broadcasters were foreclosed from access to Eredivisie content. Apart from highlights on the public service broadcaster NOS, consumers received no free-to-air access to national football matches. This was compounded by only 52 of the 306 matches per season being broadcast live on Canal Plus[4].

After a lengthy antitrust investigation, the Dutch Competition Authority (NMa) in 2002 prohibited the joint selling agreement between ECV and Canal+[5]. According to the NMa, the restrictions in the joint sale arrangement - particularly the exclusivity provisions - were not indispensable to encourage financial solidarity and maintain a competitive balance between the clubs. Contrary to what ECV had argued, the NMa considered that redistribution of revenue could occur without a joint selling arrangement. Consequently, the Eredivisie clubs needed to review the way in which they would exploit their broadcasting rights.

In 2004, the ECV proposed to the NMa a new arrangement for marketing the Eredivisie broadcasting rights for the 2005/6-2007/08 seasons. Following the principles set out by the European Commission in the UEFA Champions League Commitments package, the ECV offered the exclusive rights in six smaller packages. This proposal included one live free-to-air and one highlights package. The NMa agreed to this new arrangement without making a formal decision[6].

Under the new joint selling agreement, however, clubs were unsatisfied with the broadcasting revenues the new contract generated[7] and the ECV decided to exploit their broadcasting rights themselves.

Fuelled by the fact that top clubs Ajax and AZ were rumoured to be considering selling their live rights individually, the ECV looked for alternatives to boost its collective broadcasting revenues. Instead of selling its rights exclusively to the highest-bidding operator, the ECV took the bold step of launching its own branded channel 'Eredivisie Live'. As the ECV believed its rights were chronically undervalued, the league felt it could commercialise the Eredivise's popularity far more than the low-end bids they had received from the existing pay-TV broadcasters.

In order to run the channel, a joint venture was established between the ECV (who would retain 80% of the shares of the joint venture) and production company Endemol Sports (holding the remaining 20%). The major distinction between previous ECV broadcasting deals was that the Eredivisie Live station was to be distributed as widely as possible and would not be exclusively tied to one or two particular broadcasters. The joint venture company then set about agreeing distribution deals with all platforms (including cable, satellite and terrestrial platforms), but gave control of the price to the platforms to market the Eredivisie Live product. In return, the distribution deals - which have not been made public to date - are thought to include revenue-sharing mechanisms to incentivise subscriber uptake. In addition to the revenues generated by the pay-channels, NOS won the highlights rights for €21 million per year[8].

A model based on shared access to sports content and on royalties paid by the platforms for each subscriber appears a novel third way of encouraging multi-platform diffusion of content in the premium sports broadcasting market[9]. Such a non-exclusive, multiplatform strategy has opened up opportunities for operators to acquire premium rights that they otherwise would not have been

**Removing exclusivity moves the ECV's competitive landscape from content exclusivity to platform competition**

able to afford. Whereas previously competing broadcasters and operators were excluded from this sector due to broadcasters (Canal+, RTL and later Tele2) signing exclusive agreements for the live matches, this non-exclusive strategy guaranteed that alternative players were able to broadcast the channel. These new entrants can now compete at the downstream retail level to attract customers.

Removing exclusivity moves the ECV's competitive landscape from content exclusivity to platform competition based on pricing, quality of service, programming variety and innovative features10. The economic rationale is that non-exclusive distribution should intensify downstream competition. This should result in lower subscription prices. By viewers having greater product choice at a range of prices, consumers are not tied to the exclusive incumbent who can constrain downstream competition. The additional benefit of such an arrangement is that this distribution model allows more than one or two exclusive broadcasters (in the case of the PL) the ability to market the live games to consumers at retail level. Presumably from a consumer welfare perspective, such a system is preferable to an exclusive auction process, because broadcasters are not foreclosed from entering the market if they fail to win at auction level. This is currently the problem that Ofcom is currently trying to remedy in the UK.

## Assessment

It may not be attractive to the PL in the short term to go down this somewhat radical Eredivise path, bearing in mind the huge sums the PL's domestic broadcasters (Sky and ESPN) have showered on its 20 clubs. But bear in mind that the PL has started its own channel outside of the UK. Also during the last domestic broadcasting auction, the PL used the threat of starting its own live channel to ensure broadcasters, like Sky, paid top dollar at auction for renewal of its live PL matches contract. Changing the way the PL sells its rights would alleviate:

- Ofcom's concerns about other broadcasters and platforms not having upstream access to wholesale Sky Sports 1 and 2;
- the territorial issues associated with the decoder cases, discussed above, if a PL channel was sold to various broadcasters on a European wide, non-exclusive basis; and
- the European Commission's concerns, when a new commitments package comes to be renegotiated in time for the PL's next auction process, expected around 2012.

One of the positive outcomes of such a scheme would be that consumers would be able to pick a broadcast provider on the basis of price, quality of product and innovative features rather than because two broadcasters in the UK (Sky and ESPN) had previously won the right at auction to be the incumbents in the UK. The PL would effectively be championing consumer choice, maximising platform and channel exposure whilst creating new forms of upstream (non exclusive distribution licenses) and downstream (retail price competition) competition.

In the second instalment of this two-part assessment, a more in-depth analysis of the advantages and draw backs of the Eredivisie Live channel for consumers, rights holders and broadcasters is undertaken as well as a more detailed appraisal of why the Dutch model may be something that the PL may consider.

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1. Independent regulator and competition authority for the UK communications industries.
2. See Daniel Geey's Previous articles 'PL rights auction: economic and regulatory challenges', World Sports Law Report Volume 7 Issue 1, January 2009; 'Ofcom consultation into pay-TV content', World Sports Law Report Volume 6 Issue 10, October 2008 and 'The legality of football broadcasts in the UK and the lack of choice for publicans in the Premier League broadcasting market', Entertainment and Sports Law Journal, ISSN 1748-944X, August 2007. Available at www.danielgeey.com/pdf/a-geey.pdf
3. There is now a third related case called Union of European Football Associations (UEFA) v Euroview Sport Ltd, where the English courts have recently referred similar questions to those asked in the QC Leisure and Murphy cases, to the ECJ.
4. Dutch Competition Authority (NMa) 'Europa: voetbalrechten in de verkoop', 14 December 2004, available on www.nmanet.nl
5. The upshot of the NMa's prohibition was that most of the clubs sold their rights individually to Canal+.
6. Dutch Competition Authority (NMa), 'Informele zienswijze: Eredivisie exploitatie uitzendrechten' (Case 4237), 18 November 2004, available on www.nmanet.nl
7. For the 2005-2008 period, the clubs earned €69.9 million. It was believed that the cable company Zesko offered approximately €45 million for highlights and live matches for the 2008-2011 season, which was rejected by the ECV.
8. De Volkskrant, 'Eredivisiekanaal moet gat dichten', 11 March 2008.
9. A. Nicita & M.A. Ramello (2008). 'Access to audio-visual contents, exclusivity and anticommons in new media markets', Communications & Strategies, 71(3), 79-101.
10. As content is no longer the main differentiator between platforms, they will compete on price or develop innovative features to attract customers.

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