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**Where Broadcasting and Football
Collide:**

**Conflicting Approaches to Football
Club Ownership**

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Long before the Monopolies and Mergers Report into the proposed takeover of Manchester United, media firms and media moguls have taken an interest in buying football clubs. Robert Maxwell, Elton John, and recently Rupert Murdoch, have all been synonymous with football club ownership. Quite problematically, there seems little, regulatory bodies can do to prevent such acquisitions, although this has been addressed to a limited extent by the ENIC decision¹ in the European Courts. Domestically at least, since the Monopolies and Mergers Commission (MMC) ruled illegal the proposed takeover of United by BSkyB, a number of disquieting features have appeared on the football ownership landscape. The biggest challenge in recent times was the MMC's decision to scupper BSkyB's bid for Manchester United as a consequence of which, more companies have become interested in gaining influence in football clubs, in order to tap into potentially lucrative broadcasting rights revenues.² Although outright ownership of a football club by a media firm was to have been outlawed by the MMC,³ now, media companies are exploring other avenues in order to gain inside influence without paying for outright ownership.

The Monopolies and Mergers Commission Report

It is important to restate the competition reasons which lay behind the failure of the bid. Primarily, Sky would have acquired an unassailable position in the hunt for Premier League rights. It would have owned the Premier League's most prized asset, and thus be in a greater bargaining position when the current television contract was being renewed. As a result, Sky would have the added benefit of information advantages, and would have been seated on both sides of the negotiating table. Sensitive information that only United would be able to receive about competing bids would have been used to Sky's advantage. It was also argued that ultimately Sky might have rather exploited United's dominant position as a bargaining tool, which may not have been in the wider interests of the national game (i.e. resigning from the League or initiating the individual selling of rights). As an additional public interest defence, the Commission was at pains to stress an increasing wealth polarization, with the top clubs creaming off more of football's income as television viewing figures grew with football's expanding popularity. The disturbing fact is that whilst these decisions were accepted by the Secretary of State for Trade and Industry, broadcasters use of toeholds to exert similar levels of influence are undermining the anti-competitive rationale which set out the justification for blocking the merger. Whilst takeover interest died after the Monopolies and Mergers decision, something potentially as damaging has been quietly gnawing away at football.

NTL's proposed acquisition of Newcastle, or at least the attempt to gain influence within the boardroom, was seen as a necessary counter-balance to Sky's increasingly dominant position. In its reasons for buying United, Sky contended that it wished to branch out into "content

¹ CAS 1998/200 Decision on August 20, 1999.

² For example, see Edward Broome and Nick Szczepanik, "Putting themselves about" The Times, June 6, 2001 p.12.

³ It has been considered that Sky, bidding for any other football club would have probably been successful and the takeover allowed. The United deal was an anomaly because the leading broadcaster was wishing to purchase the leading Premier League broadcaster.

ownership”.⁴ Therefore even at this initial stage, Sky did not view United as an investment per se, but rather as a means of exploiting the club and its property rights. Since the takeover was struck down, Sky along with other broadcasters have circumvented regulations, and their strategic plan to own content has been reinvented, repackaged and reintroduced in another form, namely toeholds.

The ownership stakes (toeholds) was one of a number of sticks that broke Sky’s back, in the bidding for United. In contrast to other articles that claim the decision was merely political, the contention is that the analysis by the Commission in comparing the economic as well as the socio-cultural assessments, was a fair and sound appraisal. One of the Commission’s strongest arguments concerned the detrimental effects that a toehold could confer on competitors without an ownership stake in the company they were bidding for.⁵ Such a consequence would impact on the bidding for Premier League rights. The disadvantage occurs when one company buys a relatively small share in another, and where the two companies are connected in a particular way. In the football industry this problem has surfaced when a broadcaster has bought less than 10 per cent of a football club, but is motivated by a probable strategy aimed at securing valuable media rights.⁶ To this extent, all competing bidders are not in an identical situation, as the bidder who has the toehold can bid more aggressively because a certain percentage of the bid will return to the bidder in the form of their ownership stake. For example, BSkyB could bid more aggressively for the Premier League rights because part of the money it bids may well return to it due to its minority holdings in Chelsea, Manchester United, Manchester City, Leeds, and Sunderland (before they were relegated from the Premier League).

This advantage is compounded by the operation of the “winner’s curse”.⁷ Such a situation occurs when there is some uncertainty about the value of the rights that are being bid for. As a result, if the other companies know that the bidder with the ownership stake can afford to pay more (due to some of the money being returned to it through its share holding), a bidder without the ownership stake who wins an auction may have in fact paid above the value of the rights in order to secure the rights package. Many have theorised that OnDigital in a vain attempt to steal Football League rights from BSkyB, made this fatal “winner’s curse” error.

“The analysis of almost 1500 tender offers in the US found that toeholds increase the likelihood of a single bidder contest and those without the toehold are unlikely to

⁴ Monopolies and Mergers Commission Report into the Proposed Merger between BSkyB Group plc and Manchester United Football Club plc (Cm.4305, 1999) 2.75.

⁵ One specific article in coming to the conclusion that the MMC decided to block the decision due to policy reasons, did not even consider the economic arguments surrounding toeholds before coming to its conclusion. (James Welsh, “BSkyB v MMC: Policy 1 Law 0” (1999) *Sport and the Law Journal* 7(3) p.44).

⁶ Adam Brown assessed that it would take BSkyB many years to recoup the initial investment in United. In stock market terms, £623 million for a company that had a turnover of £90 million in 1998 and a £25 million profit margin was a dubiously high amount for simply investment purposes. He concludes that it should be viewed primarily as a strategic purchase to gain control of United’s television rights. Adam Brown, “Sneaking through the back door? Media company interests and dual ownership of clubs” in Sean Hamil, Christine Oughton and Steven Warby *Football in the Digital Age, Who’sGame is it Anyway*, eds., (Mainstream, London, 2000) p.86.

⁷ MMC Report 2.107.

revise their bid upwards after the initial bidding”.⁸

The most likely outcome is that the bidder with the ownership stake will usually win an auction because its competitors will be wary of paying an inflated price, and bid more cautiously. Harbard and Binmore explain, “why no conditions on United’s participation in the selling of the Premier League rights would have alleviated the Monopolies and Mergers Commission concerns”.⁹ As assessed, a proportion of the bid returning to Sky as part of its ownership stake, gives it its initial advantage, and this factor coupled with the added concern of the winner’s curse, (i.e. how potential winners of an auction who do not own a toehold in the company will have usually paid over the competitive amount) highlights the overriding concerns of the Commission.

The best type of example that can be given within the current Premier League financial relationships is the deal between with Sky and Leeds United. Sky own 9.2 per cent of Leeds United’s holding company, which it acquired for £13.8 million in October 1999.¹⁰ As part of the agreement, Sky was contracted to be Leeds’ official media consultants whilst also taking a 30 per cent commission on every increase in revenue that Sky negotiated for Leeds.¹¹ By Sky potentially taking 30 per cent from every deal as its exclusive commercial partner, the broadcaster, in any collective (or theoretical individually negotiated deal) could bid well above the market price for Leeds’ rights because they would receive up to 30 per cent back due to their marketing arrangement. It could therefore bid up to 29 per cent more to secure these rights. Even more strategically, it may also be worthwhile if another broadcaster bid a similar amount to Sky, for it to accept the rival bid, which would accentuate the winners curse to an even greater extent. Either way, Sky would be in a position of great power. If Sky could make a bigger profit on the 30 per cent commission than on screening the matches themselves, then it becomes a viable option. The irony is that in this and other situations the

“leading broadcaster will effectively be negotiating with itself and extraordinarily be paying itself commission”.¹²

The presumption made by Binmore particularly, is that toeholds will allow broadcasters, especially Sky (due in part to NTL’s current debt problem) to gain rights at lower prices, than would occur in a truly competitive bidding process. In the longer term this is also true because once the broadcaster has gained those valued rights it will be in an even stronger position in the broadcasting market with fewer competitors/suppliers thereby generating less choice for the fan/consumer. The frustrating aspect of the Commission’s decision is that it seemed to be based on competition issues, not simply the public interest surrounding the emotive nature of

⁸ Harbard and Binmore, “Toeholds, Takeovers and Football” [2000] E.C.L.R. 143.

⁹ Binmore, “Toeholds”, 142.

¹⁰ Simon Banks, *Going Down Football In Crisis: How the game went from boom to bust*, (Mainstream, London, 2002) p.50.

¹¹ Patrick Harverson, “OFT not to refer BskyB’s stake in Leeds Sporting,” *The Financial Times*, February 4, 2000 p.24.

¹² Adam, Brown, “Sneaking through the back door? Media company interests and dual ownership of clubs” in Sean Hamil, Christine Oughton and Steven Warby *Football in the Digital Age, Who’s Game is it Anyway*, eds., (Mainstream, London, 2000) p.86.

football, yet these very anti-competitive issues are not being raised in the debate over toeholds; their effect in comparison to complete ownership however is extremely similar.¹³

“The theory draws no distinction between full ownership and 5 per cent of all 20 clubs; the toehold effect is still the same. If buying United was against the public interest, so is the collection of under 10 per cent stakes”.¹⁴

Far from seeking an active role in the running of the club, their aim was to achieve an active and influential role in the process by which future highly valuable rights were sold. A media company with close links with a club would be more likely to advance the case for a closer, mutually beneficial association. A Premier League full of broadcasters with competing and conflicting interests would bound to be detrimental football, and from the stance of the Office of Fair Trading, would appear to threaten efficient competition. Granada’s media agency agreements with Liverpool and Arsenal and Sky’s media consultancy roles with Manchester City and Leeds, give these broadcasters precisely what the Monopolies and Mergers Commission tried to outlaw; a seat on both sides of the negotiating table thereby gaining a strategic competitive advantage, by being privy to privileged information. The Commission’s decision was to prevent competition distortion, but plainly this still persists. Toeholds have the added effect of familiarising clubs with broadcasting companies. Just as the Premier League is synonymous with Sky, if individual rights sales become a reality, the incumbent broadcasters with toeholds will become the natural choice for individual broadcasting contracts as the link grows and relationships mature.

“The more clubs owned, the bigger the section of the market they [the broadcasters] could secure through ownership rather than through fair competition in the sale of rights”.¹⁵

Almost the entire rationale for the Monopolies and Mergers Commission Report was the focus on the advantages a broadcaster would gain by owning a football club. Sky’s takeover failure has spawned a fresh approach by broadcasters to gain influence. Toeholds have been acquired with consequent ease, and have gifted to Sky almost all the benefits that were deemed anticompetitive by the Commission. Broadcasters have been able to buy such investments that ostensibly are strategic in nature and further their aims, but not necessarily the football clubs objectives. This is achieved without any kind of regulatory approval and, in the United takeover example, without any significant capital outlay.

¹³ This does not however seem to be the view of the Office of Fair Trading in recent investigations into NTL and Sky’s investment in numerous Premier League clubs. For example an interim enquiry into Sky’s position at Leeds concluded that the 9.08% buy into Leeds could not be considered a merger and thus could not be referred to the Competition Commission for a merger investigation. John Brightman, the Director General of Fair Trading felt Sky’s investment did not add up to “material influence”. Reference: PN 08/00 February 3, 2000.

¹⁴ Stefan, Szymanski, “Toeholds” The Financial Times, January 14, 2000.

¹⁵ Brown, Digital, 87.

The Fallout from Toeholds

The City of London's flirtation with football stocks has had all the makings of an eventful marriage and subsequent messy divorce. Bolton and Nottingham Forest for example have recently ceased trading their shares on the AIM (Alternative Investments Market). A survey conducted charting football shares over a period of a year, found that almost £500m had been wiped off the value of clubs, with the total valuation of clubs stocks nose-diving from the heady heights of £1.25bn in August 2001 to £711m just over a year later. This phenomenon does not even seem to be a domestic anomaly either. Lazio, Roma and Juventus in Italy have lost 70 per cent, 54.8 per cent and 45.9 per cent of their respective values over the 2001–2002 period, whilst Celtic of Scotland have lost almost 60 per cent of their share value even after winning the League championship for the second year in succession last year.¹⁶ This becomes pertinent because in Britain especially over the last three years, media companies have invested heavily in British clubs, through the vehicle of toeholds, with the probable aim of exploiting their position as media advisers. One only has to look to the heavily indebted cable company NTL, to see the potential pitfalls in buying stakes in clubs only to see their value plummet. NTL paid Newcastle United £25m for a stake now worth £4.9m and have lost £20m. Rangers were paid £31m by NTL. The US broadcasters stake is now worth £5.8m. Other major debts include Aston Villa and Leicester City, with combined total losses estimated at around £78.4m.¹⁷

In mainland Europe, and by contrast with Britain, media companies control many clubs. Fininvest are major shareholders in AC Milan, whilst Cechi Gori Group (until its recent bankruptcy) owned Fiorentina.¹⁸ A consortium of Lazio, Parma and Roma allied with News Corp acquired 40 per cent of one of Italy's major digital operators, which is of interest because it is the exact opposite of the United takeover. This is an instance of reverse vertical integration, with clubs buying the broadcaster.¹⁹ In France, Canal+ has a controlling interest in Paris Saint Germain and Serville Geneva, M6 Bordeaux and Pathe' have a large, but minority share in Olympique Lyonnais. In Greece, Netmed controls AEK Athens and UFA has interests in Hamburg and Hertha Berlin.²⁰ In Italy, as recently as August 2002, the Italian League was thrown into chaos when clubs failed to agree terms with potential broadcasters, before the season began. Collective deals are not negotiated on a League-wide basis and clubs have the ultimate power to choose their own broadcaster. In reality however, many smaller clubs group together to increase their bargaining position and potential marketability. Whilst the top clubs like Juventus, AC Milan and Roma were courted by the two major pay-television networks Telepiu and Stream²¹ due to their huge fan base, the smaller clubs considered that RAI's (the

¹⁶ Brian McNally, "£500M wiped off fans shares", Sunday Mirror, August 18, 2002 p.66.

¹⁷ Geoffrey Spiteri, "NTL investment scores an own goal with top-flight teams" Independent Sunday, July 22, 2001 p.3.

¹⁸ Van den Brink, "E.C. Competition Law and the Regulation of Football: Part 1" [2000] E.C.L.R. 362–363.

¹⁹ Spink, Paul and Morris, Phillip, "The Battle for TV Rights in Professional Football" in Caiger, Andrew, and Gardiner, Simon (eds) Professional Sport in the EU: Regulation and Re-Regulation, (Asser Press, The Hague, 2000) p.187.

²⁰ Spink, TV Rights, 192.

²¹ These two companies are now in the process of merging, subject to competition authority approval.

state broadcaster) offer of £55m,²² which was only half the amount they received the previous year, was nothing less than derisory. To complicate matters further, the Italian Prime Minister, Silvio Berlusconi, had been accused of manipulating the already chaotic situation to his advantage. Not only does Mr Berlusconi, as head of the state broadcaster, control the running of the public television network, but he is also the

Table 1: Premier League Clubs Quoted

Company	Share Price 2001 (August) (p)	Share Price 2002 (August) (p)	Share Price 2003 (May) (p)
Arsenal Holdings	(£) 2,150	(£) 1,350	(£) 1,250
Aston Villa	171.5	116.6	132.5
Birmingham City	21	17.5	14
Burnden Leisure (Bolton)	8.25	3.5	Shares withdrawn
Charlton Athletic	31.5	16	21.5
Chelsea Village	36	24	19.5
Leeds United	10.75	7.25	3.38
Leicester	59.5	11.5	Suspended
Manchester City	45.5	32.5	19.5
Manchester United	178	102	142.75
Newcastle	34.5	21.5	36.5
Southampton Leisure	46.5	31	34
Tottenham Hotspur	47	26	17.5
West Bromwich Albion	(£) 75	(£) 82.50	(£) 55

Source: Soccer Investor and own stock market research

owner of AC Milan, and extraordinarily is also the owner of the most dominant commercial broadcaster Mediaset.²³ In Britain, it would be akin to Tony Blair, owning BSkyB, and having the power to control the BBC, whilst remaining Prime Minister. Unlike the concerns of the Commission about the BSkyB takeover bid of Manchester United, where the Commission were concerned with BSkyB having a seat on both sides of the negotiating table, Berlusconi seems to have three seats and sits on both sides of the table. This seems an untenable conflict of interests, especially if he uses his power in his state broadcasting capacity by offering a smaller figure only for his own television company then to bid for the rights at a depressed level, and perhaps get the rights at a bargain price.

Part or Full Ownership of Football Clubs

Football Association (FA) Premier League rules state that the FA may deem ownership in a club under 10 per cent threshold legitimate only if the shares are held for “purely investment purposes only”. Brown²⁴ questions the Manchester City and Leeds examples, which involved the appointment of a Sky official to the board and the appointment of Sky to act as a media partner.²⁵ It seems that strategic decisions and not merely “investment decisions” are being

²² Paul Betts, “Italian Fans Mourn Football Season Delay” The Financial Times, August 21, 2002.

²³ Philip Willan “Berlusconi in middle of football fiasco” Guardian, August 22, 2002.

²⁴ Brown, Digital, 88.

²⁵ This was until the OFT made recommendations suggesting that the “parties revoke the ability of BSkyB to appoint a Director to the Leeds board, as a way of pacifying the competition concerns that were raised as a consequence of the broadcaster buying numerous stakes in clubs.

taken by broadcasters to gain greater influence, mitigating in Sky's case, their failed takeover purchase of United.

The ENIC case²⁶ involved one company, which had a variety of investment stakes in several clubs competing in UEFA competitions in a single season.²⁷ It signalled the intention of the football authorities to instigate measures to ensure that conflicts of interest do not exist between clubs.²⁸ The ENIC benchmark is an interesting backdrop to the issue of minority stakes in Premier League clubs contravening Premier League rules. In 1998, UEFA brought a case against ENIC, but more specifically against two of the clubs it owned,²⁹ namely Slavia Prague and AEK Athens. UEFA was of the opinion, which was ultimately upheld by the Court of Arbitration (CAS), that both teams could not compete in the same competition. This was prohibited by a rule passed only a month before the case was brought. The "Integrity of the UEFA Club Competition: Independence of the Clubs" Rule was brought into force on May 18, 1998, for it to be used accordingly on June 25, 1998, almost certainly because of the scenario UEFA envisaged may occur with ENIC controlled clubs.³⁰ As the Rule had only been added after the clubs had already qualified for the following season's European club competitions, the ENIC ruling was directed only to come into force in time for the 2000/1 season.

ENIC's contention was that there would only be a problem in the future if Vicenza (who are now in the Italian second division), Prague or AEK were drawn in the same competition, but not their minority holdings in Basel, Rangers, or Tottenham.³¹ The distinction was therefore between outright ownership and a minority stake. But,

"just because ENIC do not necessarily have a majority shareholding or a 'controlling stake,' does not mean that they do not have influence. It would be difficult to imagine a company as focused as ENIC not wanting control for their large outlay".³²

On the charge of breaching UEFA's "integrity model" rule, it would seem that if Rangers were to meet Basel, there would still be an accusation of wrongdoing; yet the line between full and minority ownership becomes blurred especially when one considers that the chief executive of ENIC, Daniel Levy, is chairman of Tottenham; ironically one of the clubs that is not fully controlled by ENIC. The level of influence that ENIC must be able to exert could

²⁶ Francesco Cohen "Enic may be forced to cut football stakes", The Financial Times, June 28, 2002 p.24.

²⁷ At present ENIC has stakes in six European clubs. Glasgow Rangers 20.2%, FC Basel of Switzerland 11.8%, Vicenza Calcio of Italy 99.9%, Tottenham of England 29.9%, AEK Athens FC 42.8% and SK Slavia Prague 96.7%.

²⁸ This was the situation where the English National Investment Company plc (ENIC) owned AEK Athens FC and, who were competing in the same UEFA Cup competition in the same season.

²⁹ AEK Athens of Greece and Slavia Prague of the Czech Republic v UEFA.

³⁰ 1. No club participating in a UEFA club competition may, directly or indirectly

(a) hold or deal in the securities or shares of any other club or

(b) be a member of any other club or

(c) be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club

(d) have any power whatsoever in the management, administration and/or sporting performance of any other club.

³¹ Norma Cohen, "Enic may be forced to cut football stakes", The Financial Times, June 28, 2002, p.24.

³² David Conn, Chris Green Richard McIlroy and Kevin Mousley, Football Confidential 2 (Belmont Press Limited, Northampton, 2003) p.97.

surely be deemed “considerable”, and in line with the toehold arguments assessed above. Clubs with the same owner or same “part” owner face two significant charges.

The first is on a hypothetical yet highly probable situation in which two ENIC controlled clubs face each other in the group stages of the Champions League. Questions relating to integrity could be raised for example, if Tottenham needed to win a match against Basle, to qualify for the next round, whilst Basle were not in a position to qualify for the next stage. Accusations of match fixing would almost certainly follow, amid cries of impropriety and unsporting like conduct if Basle happened to field a weaker team. The concerns of ENIC for one of its clubs to progress to the next highly lucrative round would surely be a higher priority than the competitive ethos and spirit attached to emotive notions of football integrity. The single aim of winning may be compromised. A second potential concern would be the prospect of ENIC furthering the aims of the more popular club in a tie between two competing ENIC owned clubs. Factors such as which team could potentially raise more money through greater exposure, and attract larger television audiences and advertising revenue streams. All may take priority above the integrity of the game. CAS made very apparent the need for transparency and the legitimacy of UEFA’s competitions. The supporters’ perception of a particular game could be severely damaged if questions arose as to the propriety of a particular investment company. The support and loyalty of fans could be brought into question even by the potential perception of any wrongdoing.

This illustrates the reason, why on a European level, steps have been required to defend the game against such situations that are beginning to occur in the English Premier League. It remains to be seen whether English Courts would take such issues as seriously. It would have been interesting to see whether if the BSkyB takeover of United had been allowed, whether BSkyB would have been permitted to buy another club. As recently as the 2002/3 season, AEK Athens and FC Basle were in the same Champions League competition, and Prague and Rangers in the UEFA Cup. Whilst the ENIC ruling seemed to suggest that from 2000/1 season clubs owned by the same company could not compete in the same competition, ENIC seems to have used the technicality that they do not have majority holdings in Rangers and Basel to circumvent the UEFA rules. The Court of Arbitration for Sport ruled that for these purposes, the holding of 51 per cent or more could only amount to control. In Britain too, there seems to be little support for such regulation, in the face of broadcasters multiple ownership (of toeholds) of football clubs in the same Premier League competition.

The dissatisfaction shown by many, concerning the disparity between total and partial ownership of football clubs seems very real. The rationale that UEFA, the Premier League, and the UK Competition Commission are frustratingly showing is that minority stakes in football clubs are relatively insignificant in terms of potential competition breaches.³³ As assessed in the ENIC case, if two clubs that are fully owned (i.e. own more than 50.1 per cent)

³³ ‘BSkyB buy-in to Leeds Sporting not a merger says OFT,’ PN 08/00 3 February 2000 <http://www.of.gov.uk/news/press+releases/2000/pn+08-00.htm>.

meet in the same competition, then issues of integrity and fair play surface, but little controversy is stirred when a Premier League match between Manchester United and Leeds is played, even though they are both partly owned by BSkyB, coupled with the act that they seem in breach of their own Premier League rules concerning stakes for “investment” purposes. As explained previously, many commentators denounce the differentiation between partial and complete ownership, because influence, (the reason they are paying the exorbitant figures for toeholds,) can be equally as strong. Different types of ownership therefore only complicate an already complex situation, and where as in the ENIC case, UEFA, seeking to uphold the integrity of the competition, should have reasoned that a veto was required to prevent one organisation possessing a part ownership in two or more clubs. The fallacy now is that if two clubs are partly owned by a single entity, the integrity of the competition is not thought to be under strain. This seems to be illogical. The certainty that the Commission and UEFA have set out may seem proportional, but like the Premier League examples, it might not go far enough. The symmetry is mirrored by the English Premier League, and although a situation has not occurred where the integrity of the competition has been questioned, it could be that toeholds may in future years not only disrupt the competitive selling of broadcasting rights, but may also bring into question notions of fair play and even the motivation of a team to win a game.