

# worldsportslawreport

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# PL rights auction: economic and regulatory challenges

The Premier League has historically relied on an increase in the value of its rights packages in order to allow its clubs to keep pace with wage inflation and repay debt. However, in negotiating its next package for the 2010 to 2013 seasons, it faces new economic and regulatory challenges. David Geey, Barrister and Daniel Geey, Solicitor, examine how an ECJ ruling on whether EU competition law permits the use of decoders for Premier League broadcasters, an Ofcom consultation on competition in the UK pay-TV market and the economic downturn could undermine the principle of territorial broadcast exclusivity, which has enabled rights fees for football to continue to inflate in the UK.

The credit crunch, a global recession, record levels of Premier League (PL) club debt and high profile clubs for sale all paint a gloomy picture for the PL. The more confident among us have pointed to the PL's global popularity, pay-TV broadcasters continuing need for premium content and historical increases in the value of live PL rights as grounds for optimism, even in the current economic climate. Add to this melting pot the looming broadcasting rights auction that has in the past brought in huge sums from British and foreign broadcasters alike, and the scene is set for one of the most intriguing rights auctions in the last decade.

As Table 1 illustrates, the PL - under the guidance of its Chief Executive Richard Scudamore - has been surfing on a wave of global popularity leading to larger sums being paid to the PL for the broadcasting of live and delayed PL

matches worldwide. The latest combined figures for the 2004-2007 period gave the PL a record-breaking £2.7 billion pot to distribute.

Whilst many continue to have their say in the debate about the value of the next live rights package for the 2010-2013 season, many of the factors discussed have related to the current economic climate. If, however, one delves a little deeper into the UK and European regulatory environment, it is possible to see how two interlinked subjects could have a significant bearing on the PL's ability to maximise its revenues from its future broadcasting rights deals. These two linked regulatory issues appear to have remained in the shadows of any continuing debate about the inherent value of future PL broadcasting rights deals.

They concern, firstly, the continuing battle that rages on between the PL and decoder suppliers/publicans concerning the ability to either watch, or purchase decoders to view, live PL matches broadcasted or supplied from other European Member States. The second linked issue is the continuing Ofcom consultation into the pay-TV market in the UK. It appears quite likely that some type of remedy, which would allow other broadcasters to purchase live PL matches, and effectively 'recycle' them on their broadcasting platform (akin to the current approach by Virgin media), may be imposed on Sky, should they retain the live rights in the next auction.

## Pubs, decoders and rights protection

In two cases, publican Karen Murphy and QC Leisure, (a stockist and supplier of foreign decoders to publicans and the general public in the UK), have been prosecuted. In both cases, it has been argued that the PL's

exclusive contracts with broadcasters throughout Europe infringe competition law by:

- restricting the ability of a rights holding broadcaster to screen live pictures outside their own designated territory; and
- restricting the ability of consumers or companies to either view - or purchase - decoders to view live PL matches from any other source, other than the exclusive national broadcaster.

Conversely, the PL argue that it is perfectly permissible to put such restrictions in place in order to protect the value that is attached to their product. It is precisely because the rights are live and exclusive which in turn creates the value. Currently, the High Court in London has referred a series of questions to the European Court of Justice (ECJ) on the application of EU competition law (among other points of law), to the granting of exclusive territorial rights to broadcast Premier League matches. This Article 234 reference from the national courts to the ECJ may take many months if not years, to reach a conclusion so that a decision is not likely in the near future.

At the heart of the issue lies the conflict between the need to safeguard the value of highly lucrative premium sports broadcasting rights and the desire of some consumers to purchase live Premier League matches from the cheapest provider in the European Union. The cases raise questions of fundamental importance to rights holders and broadcasters alike; a decision from the European Court which is favourable to the publicans would overturn a twenty-year-old precedent on the exclusive licensing of broadcasting rights in Europe and could well usher in an era of pan-European licensed deals.

The PL argue that if such seepage

between Member States is allowed to continue unchecked, then it destroys the inherent value in the live product. The PL relies on the European Court’s seminal Coditel cases from the early 1980s, which establish (in the context of distribution of films) the right of content owners to grant absolute territorial protection to a broadcaster. This is in contrast to the position in relation to almost every other category of goods and services where absolute territorial protection is prohibited. The publicans attack the Coditel cases on the grounds that they no longer reflect market realities.

Should the PL’s arguments on the competition law aspects of the case be successful, the status quo remains. The worrying scenario for many (both content owners and, potentially, broadcasters alike), is if the court sides with Murphy and QC Leisure. This would lead to a radical shake up of the way that live PL matches, and potentially other types of broadcasting content, are licensed across the European Union.

These cases will be of huge significance to the PL because Sky and Setanta - as the incumbent exclusive broadcasters in the UK - pay a premium for being able to market live PL matches to UK consumers. If any viewer can simply shop throughout the European Union for the best deal with any other exclusive PL Member State broadcaster, then Sky and Setanta will have less reason to bid large sums for the UK’s territorial rights. This in turn would have a deflationary effect on any rights package to be subsequently marketed. Although the effect of any decision may not be felt for a few years until the ECJ makes its decision, the ramifications of a decision in favour of the publicans means rights holders will have to find

novel pan-European ways of auctioning off their product rather than segmenting each Member State territory to maximise revenues.

**Ofcom and remedies against Sky**

The second important consideration, especially for Sky, centres on Ofcom’s investigation into the UK pay-TV market, and in this instance, specifically live PL matches<sup>1</sup>. Should Sky bid for and win any of the six packages on offer in the latest auction, there is the distinct possibility that Ofcom may impose a ‘must-offer’ remedy on Sky. This would mean Sky would have to supply the live PL product to downstream competitors and would have the effect of obliging Sky to sell its pictures to any new broadcast platform on fair and reasonable grounds. At present, only Virgin purchase live PL matches from Sky, but allege that their live PL product is unprofitable for them to market because the wholesale price it pays to Sky is too high, leaving no profit margin. Therefore, they only continue to supply the package in order to stop subscribers leaving for Sky.

The ramifications for the PL are again significant because should

(as it likely) Sky retain some of the live packaged rights in the next auction and Ofcom follow through with their remedy proposals, it means that Sky runs the real risk of having to relinquish its exclusive packages to a variety of broadcasters should they pay the prescribed Ofcom amount. The Ofcom Consultation may conversely have the ultimate effect of discouraging Sky from bidding for the next rights at all. Such a strategy remains unlikely however, mainly because of a lengthy appeals process for any Ofcom imposed remedy, meaning that such an Ofcom measure may take years of legal haggling before implementation.

Any must-offer remedy imposed by Ofcom on Sky would mean further competition for Sky in the downstream broadcasting market for live PL matches. At present, only Sky and Virgin show the same live PL matches, with Virgin taking Sky’s feed. Setanta have their own set of 46 packaged games which they sell on multiple broadcasting platforms. If new broadcasters were given the opportunity to bid for Sky’s pictures, it would be difficult (though interesting) to predict the PL’s view, considering it would have little say in who Sky sold its live pictures to<sup>2</sup>.

**Table 1: Premier League TV Rights 2004-2007 Broadcasting Breakdown**

Broadcast companies	Packages	Approximate Amounts
<b>BSkyB</b>	4 of the 6 packages, equalling 92 games per season	£1.314bn
<b>Setanta</b>	2 of the 6 packages, equalling 46 games per season	£392m
<b>BBC</b>	Match of the Day highlights	£171.6m
<b>Various rights holders</b>	Additional packages, including broadband and mobile rights sold in Britain	£172m
<b>Overseas rights</b>	Auctioned to an exclusive broadcaster per territory	£650m
<b>Total</b>		£2.7bn

### Why are the two issues linked?

Both ongoing legal processes have repercussions for the PL as the rights holder. The packaged auction price is currently dependant on the features of territorial and broadcaster exclusivity to safeguard its value. Should one or more of these features be cast aside by either of the above matters, the PL will have to be pro-active in formulating ways to limit any value decrease.

Even if no decision from the ECJ or Ofcom comes in time to mould the next auction process (as the tender document has already been sent to prospective broadcasters in mid December 2008), many broadcasters could be wary of the regulatory landscape that the PL finds itself in. Such a process may encourage new entrants into a market where, historically, there have been few broadcasting players. This could enable PL matches to be viewed by a wider audience with new broadcasters willing to compete with the current incumbent PL broadcasters.

It seems likely that the £650 million that the PL received from non-UK broadcasters to screen PL matches around the world will increase, perhaps even more so if the PL agree to concluding the relevant contracts in pounds due to its current slump against the Euro and Dollar, especially. Indeed, there may well be increased value for money for US companies like ESPN, who are rumoured to be considering entering the bidding for the live rights, due to the devaluing pound.

Alternatively, should the auction process not result in the figures that the PL have been privately forecasting, a separate PL pay-TV channel has been mooted. A move, or any such plan on the PL's part, may well be to ensure that broadcasters realise there are no

### The Ofcom Consultation may conversely have the ultimate effect of discouraging Sky from bidding for the next rights at all

bargains to be had in winning a live package. It would seem that although the PL has close links with sports marketing and management company IMG and their broadcasting wing for the distribution of the overseas live rights packages, the absence of the production capabilities of both Setanta and Sky in the UK would leave a large broadcasting void to be filled.

It seems relatively improbable that any terrestrial broadcaster, in the light of falling revenues and/or budgetary constraints, will successfully bid for one of the live packaged rights. It is more likely that the Match of the Day program will be snapped up by a terrestrial broadcaster. Best placed are Setanta and Sky as the incumbent live broadcasters. At a time when the German competition authority has recently ensured that certain Deutsche Fußball Liga (DFL) games have to be screened live on terrestrial free to air channels in Germany, this possibility still seems somewhat off in the UK.

### Conclusion

An interesting scenario may develop if ESPN bids for any of the packaged rights, or even bids in conjunction with another established broadcaster (the caveat being whether that is permissible under the tender document or even under competition law rules). The consequences of a third, non-terrestrial broadcaster winning the rights to live PL matches may mean a third subscription that consumers may have to pay to watch every live PL match from 2010 onwards. Considering Sky was the only source of PL matches before the 2007-2010 season, one would imagine that for many subscribers, a one stop shop may be more practical and possibly cheaper than three subscriptions.

The next few months,

culminating in the auction result, promises to be one of the most eagerly anticipated outcomes yet. The regulatory and economic climate that the PL is currently facing may present challenging times for England's elite football clubs. The importance of this next broadcasting deal should not be underestimated at a time where the credit crunch may hit fans hard. The need to retain as much value as possible for the six live packaged rights is therefore seen as crucial in order for clubs to finance their transfers, pay the star players wages and ultimately attempt to balance their books.

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1. See [http://www.ofcom.org.uk/consult/condocs/second\\_paytv/](http://www.ofcom.org.uk/consult/condocs/second_paytv/)
2. For a further in depth assessment of the Ofcom consultation, see 'Ofcom consultation into Premium pay-TV content,' *World Sports Law Report* Volume 6 Issue 10, October 2008, pages 6-7, Daniel Geey and Victoria Ross.



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