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IS SPORTS BROADCASTING A PUBLIC UTILITY?

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1. INTRODUCTION

Increasingly sports leagues have come under criticism and regulatory investigation on the grounds that they restrict competition.[1] Sports leagues and associations are collaborations among competitors. This raises the inference that leagues have anti-competitive consequences involving monopolization of the market for player's services, teams, and television rights. The implication is that they harm the spectators of league sport by offering them less sport at a higher price. Indeed, some see leagues, such as the Premier League, as natural monopolies similar to a gas pipeline or the national grid. This is because there is often only one league for each sport. It has led some to propose a new watchdog – the Office for the Regulation of Broadcast Sport - to regulate access to and the price of sports TV.[2] The idea that sport, and indeed TV, is a public utility underlies much of the opposition to pay TV from spectators, politicians, and Governments.

Yet many of the arguments surrounding the competitive consequences of sports leagues overlook the fundamental point that team and league sport are "inherently collusive" but not necessarily monopolistic. Team sport has several features such as the scarcity of talented players and the tendency for larger more successful clubs to dominate the game which requires restrictive rules in order to maintain the consumers' interest in and value of the "product". These, and other factors, make league sports different from much other economic activity and give it a "peculiar economics".[3]

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[1] European Commission "Broadcasting of Sports events and Competition Law", (1998) *Competition Policy Newsletter* 18.

[2] J. le Grand & B. New, *Fair Game –Tackling the Monopoly in Sports Broadcasting,* DEMOS, 1988.

[3] W. C. Neale, "The Peculiar Economics of Professional Sports" (1964) LXXVII *Quarterly Journal of Economics* 1

2. The Economics of League Sport

Its "Peculiar" Economics

Teams can exist without leagues. For example, most sports in the US began as barnstorming teams with no leagues. However, the output of individual barnstorming teams, such as that of the Harlem Globetrotters, differs from league activity. Team sport has several peculiarities as an economic activity[4]. At least four can be identified:

First, and perhaps critical to any analysis, is that the league and not the individual club can be considered the relevant business unit or "firm". The "product" a league provides arises from the competition among clubs, not from the activities of any one club. Sports leagues and other co-ordinating bodies have reasonably argued that the quest for a championship is an essential element of the "product" their member teams jointly produce.

Second, the number of players (labour input) is usually fixed. There will be a set number of players allowed to participate in any one match. This means that the quality of players becomes a paramount consideration. The supply of exceptional and talented players is limited, and considerably less than the demand for good footballers. As a result, there is vigorous competition for the best players which in the absence of restrictive rules would be lured to the richest clubs and paid (as they are) very high salaries and transfer fees. These large sums are "economic rents" which reflect their natural scarcity value, and are not competed away in a competitive market.

Third, success breeds success in league sport. A club which enjoys playing success also enjoys financial success. Successful clubs attract more spectators, more appearances on television (for the Premier League clubs, at least), and greater merchandising sales. By using this financial muscle they attract and retain the best managers and players, and further playing success follows. These positive feedback effects can create a virtuous circle. Over time the disparity, on and off the field, between clubs widens, so that only a handful of clubs dominate the game. It then becomes increasingly difficult for other weaker clubs to effectively compete.

Fourth, uncertainty of outcome is key to the popularity of league sport. It is assumed that the more uncertain the outcome, the greater the interest in the league. If the outcome is foregone because there is a great disparity in the ability and resources of individual clubs, then interest in the league will dwindle. Of course individual clubs will want to maximise their success and profits, and this will create a tension. A club's objective is consistently to beat the other clubs, and win the championship. However, a predictable

[4] For an empirical analysis of the football economics and competition see Case Associates, *The Economics of League Football*, 1997; Case Associates, *Capital for Clubs*, 1998. Copies of these reports are available from the author.

outcome is of little interest even to Manchester United fans. Thus, a club will realise that its long run goal is to maximise its prospect of success, subject to maximising the leagues' overall prospects.

Factors three and four above point to the inherent tension in sports' leagues, and the need for rules that equalise resources so that the championship does not become a one-horse race. This requires a balance between competition, and co-ordination and restrictions, to ensure that the league maximises consumer benefits. It provides a competitive and efficiency explanation for why leagues routinely cross-subsidise clubs, place restrictions on players' mobility, and so on. These are done to equalise individual clubs resources in order to maintain vigorous competition within, and hence interest in, the league. It is therefore logical that clubs cede considerable powers to the league as a central co-ordinator and rule making body.

League Dynamics

The theory of cartels gives clues to some aspects of league behaviour. Sports leagues tend to be stable as far as cartels go. This is because individual clubs cannot produce the output of a league competition without joining another league. This would be expensive and require co-operation from a number of clubs. Though not impossible as recent experience has shown, nonetheless as a continuing competitive constraint this will be weak and sporadic. Second, the scope for price-cutting or expanding output (cheating) by individual clubs in a league is limited. This is because unlike OPEC, an individual club cannot decide unilaterally to play more matches or to do so on the cheap. The game is a team effort both in the traditional sense, and wider meaning of requiring several clubs to create a viable league structure and economic activity.

On the other hand there is strong evidence that UK league football has over-expanded "output" in terms of clubs and matches. This should not be surprising given the non-economic aspects of sport which may see the survival of clubs which are loss making. The clubs in the English football leagues (with the exception of the Premier League) have an average negative profitability, evidence of over-expansion which is inconsistent with the cartel/monopoly theory of leagues.

Further, the stability of sports leagues may be short lived. Like any institution, leagues constantly change. They can do so internally in response to changing patterns of demand and supply, technological innovation, or by direct competitive challenge. The UK has seen all these factors lead to changes in league structure. Clearly the greater the disparity between the prospects of individual clubs, the greater the tensions for a reorganisation of the league. Most leagues contain explicit cross subsidisation from stronger to weaker clubs. When efforts to reinforce club equality serve to disadvantage bigger clubs, a separatist movement may form.

In recent years there has been a breakdown in league structures as the economic value of the more successful clubs has increased. A major force has been pay television which has made the more successful clubs wealthier, and less willing to share the financial gains with a large number of smaller clubs. The Premier League was created partly in response to the development of pay TV in the UK. The top clubs, popular with television audiences, failed to see why their financial gains should be shared with the eighty less successful lower division clubs. As a result, they broke away to create a smaller Premier League. In the light of the over-expanded nature of football one cannot assume that this reduction in the number of teams is necessarily evidence of an attempt at monopoly restriction.

Pressure for change can also come externally from the television companies who want more "watchable" sport or entrepreneurs. The earlier experience with Kerry Packer's "cricket circus", and the creation of the rugby Super League are examples of direct action by TV stations to reorganise a sport. Several years ago, UEFA was under threat from a proposed new European SuperLeague. This had all the characteristics of a hostile take-over, and led to fundamental changes in European football.

3. Pay TV and Sport

In the last decade the fees for TV rights and ticket prices have escalated many times more than the rate of inflation, or most other leisure and media products. This has been demand-driven by the increased wealth in the economy, and by new ways of commercially exploiting sport especially through pay TV.

Sport is very important to pay TV operators who are willing to pay clubs and leagues high prices for the right to exclusively broadcast popular sports. Competition for league football events is particularly intense because they attract large audiences, and enhance the take-up of pay TV. The acquisition of broadcast rights by pay TV operators has led to general concerns among spectators and Governments that sport is progressively becoming the privilege of the wealthy. Football in particular, which was once offered free by public service and free to air broadcasters (BBC and ITV) is now on pay TV available to a more limited audience.

One concern is that pay TV deprives many viewers of the football they once received free. This is true. The audience for individual matches shown by BSkyB is far less than when broadcast on ITV. However in aggregate terms the same total audiences watch Premier League football on Sky. This is because it broadcasts more matches - 110 games compared to only 14 games covered when the League was shown on ITV. In the mid-80s the coverage was restricted to the big teams (Liverpool, Manchester United and Arsenal) and the viewer hardly ever saw teams in the top division such as Coventry City. Now every team in the Premier League has live coverage at least three times each season. In the mid-80s no games below the First Division were broadcast. Sky broadcasts live coverage of Nationwide League games. ITV started showing the Nationwide (then Endsliegh) League games after Sky signed the Premiership deal.

Again, there weren't many games broadcast each season and it depended on the ITV region you lived in.

As a result of pay TV fans get massively more football which is acknowledged as technically superior to that offered by the terrestrial broadcasters. Thus in terms of the quantity and quality of football coverage the viewer is better off if he or she is prepared to pay.

In football there may be free kicks but no free lunches. The critics of pay TV fail to recognises that there is a link between payment and the improvement in the sport. The implicit assumption of the "free TV sport school" is that sport does not need money. The romantic world of the impoverished clubs and moonlighting players sacrificing career and family as retirement looms in their mid-30s for the greater good of the game may satisfy some Victorian ideal of self-sacrifice, but it is not a practical solution to the problems and resources needed by professional sport today. And what was so good about the old days of football! Are we to ignore the disgraceful state of the game in the mid-1980s – the violence, sub-standard grounds, poor amenities and inadequate safety. Or the way ITV and BBC, the "cosy duopoly" not unfamiliar with their own set of monopoly abuses, impoverished the game with inadequate fees undermining the resources available to compete nationally and internationally, and the fact that even in this new era most clubs (even many in the Premier League) are bleeding money offering their owners negative returns. Pay TV has, in a nutshell, put English and other UK league football, back in contention!

The evidence is clear. As a result of pay TV there has been more major and minor sport coverage on UK television than any other time in the history of British sport. The monopolies of yesterday restricted output; the alleged ones of today have greatly expanded the quantity and quality of sport coverage and improved the game on the field by giving more money to clubs.

4. COMPETITION LAW

Stefan Szymanksi believes that while the situation has improved, things could be better.[5] For one, he believes that the Premier League has acted as a cartel and he holds competition law in high regard as the ultimate protector of the consumers' interest. However, this assumes that what is in the consumers' interests is obvious. From what has been said above the competitive dynamics and the balance between restriction and competition are complex. Competition authorities throughout Europe have launched numerous investigations into sports leagues.

The tension discussed above between the pro-competitive and anti-competitive nature of league rules underlies much sports litigation. Rules that appear to restrict competition between teams, for example rules regarding competition for players or rules limiting

[5] Paper to this seminar.

league expansion, have a strong (but not always) pro-competitive justifications. It is for these and other reasons that some argue that sports leagues should be exempt from competition law as in the USA. The EC Commission has stated that not all restrictions administered by dominant sporting bodies are anticompetitive. There are legitimate grounds for exempting certain "sporting rules" from the application of EC competition law:

> *"… (i) the Commission recognises the regulatory powers of sports organisations as regards the non-economic aspects linked to the specific nature of sport; (ii) the rules of sports organisations that are necessary to ensure equality between clubs, uncertainty as to results, and the integrity and proper functioning of competitions are not, in principle, caught by the Treaty's competition rules …"*[6]

League can act like monopolists. There is usually only one league in a sport, and sometimes the degree of competitive constraint on leagues from outside, such as from another league or from other sports, is weak or sporadic. Moreover, leagues have strict rules about entry and the size of the club, and engage in exclusionary practices. These can be viewed as a cartel-like arrangements designed to restrict output and raise price.

The cartel view of leagues has found favour with regulators. This is most clearly seen in the analysis underpinning the UK's Office of Fair Trading's (OFT) reference of the UK Premier League deal for pay TV rights with BSkyB and the BBC to the Restrictive Practices Court in 1998.[7] The Director General of OFT alleged that the Premier League operated as a cartel in selling television rights for matches on behalf of the clubs. The OFT lost its case against the Premier League, the first time ever before the Restrictive Practices Court.

The OFT's case against the Premier League rested on the claim that it restricted the number of matches broadcast on TV. It claimed that because the original BSkyB/BBC deal only allowed 60 (then increased to 110) of 380 Premier League matches to be exclusively broadcast live on Sky, with Sky and the BBC permitted to show recorded highlights of all other matches, that this was monopoly restriction.[8] That is, the Premier League had committed the "economic sin" of restricting output to raise prices, and therefore harm consumers. The OFT's claim did not convince the judge.

The OFT claimed that there was no close substitute for live Premier League football. In competition law terms it argued that Premier League matches constituted the "relevant

[6] "Limits to application of Treaty competition rules to sport: Commission gives clear signal" *EC Commission Press Release* IP/99/965, 9 December 1999; Also "Commission debates application of its competition rules to sports" *EC Commission Press Release* IP/99/133, 24 February 1999. These factors apply only to team sports. For individual sports a different set of considerations will apply. See C.G. Veljanovski, ""Markets in Professional Sports - *Hendry & ors v WPSBA* and the Importance of Functional Markets" (2002) 10 *European Competition Law Review,* forthcoming.

[7] *In the matter of the Restrictive Practices Act 1976 and in the matter of an agreement between the Football Premier League Limited and The Football Association Limited and the Football League Limited and their respective clubs* (1999) UK CLR 258.

[8] See the OFT's contribution to *Competition Issues Related to Sport* (OCDE/GD(97)128, Organisation for Economic Co-operation and Development, 1997, 75 ff.

product market” thus facing weak competition from other football leagues and sports. As a result “market power” arose from the scarcity value of the rights and rested primarily with the owner of the rights i.e. the football clubs. The OFT claimed that monopsony power (market power exercised by a single buyer) may permit the sports broadcaster to extract further rents. Nonetheless, the OFT concluded that by virtue of the exclusive broadcast rights BSkyB had itself market power which could be used to potentially block other sports channels.

The OFT’s position was simplistic. First, the value of the most popular matches is not likely to be influenced by the lack of availability of other matches that only a few wish to watch. That is, football matches are not homogenous. Second, and implicit in the first point, is that it is not the quantity of games physically available but their value to viewers and the commercial attractiveness to broadcasters. The reality is that just as the league must ensure that interest in the game is kept up, so television channels must ensure that the exposure to football is not so excessive that it diminishes the attractiveness of the coverage to viewers. Broadcasting every match would not necessarily be in the interests of the game. Third, it is not clear what impact the solution would have. As football has become more commercialised, the money has progressively flowed to the best clubs, and therein to the best players. It is this talent which is in short supply, and is the “bottleneck” in the industry. Enhanced competition does not dissipate the rents (incomes) that these players can earn; indeed it does the exact opposite!

The OFT suggested a number of remedies including prohibiting the collective selling of football rights by the Premier League, the unbundling rights, and limitations on the duration of TV rights contracts. However, it is far from apparent such regulatory intervention will either address the inherent market power issues in league sport, and benefit the sport as a whole, let alone the smaller weaker clubs. For example, a ban on the collective selling of live football TV rights is most likely to disadvantage the smaller clubs, and thereby undermine the inherent competitiveness of the league.

Restricting the duration of sports TV contracts may increase the level of competition for rights but it can also disadvantage clubs. Consider the contract duration issue in more detail. Long-term contracts are a feature of many sports in competitive television markets. In fact in more commercial markets, such as the USA, sports contracts tend to be of longer duration than in the mixed private/public broadcasting systems of Europe. There are good reasons why sports organisers want longer-term contracts. The popularity of sport, and so the desirability and value of any sporting event, follows a dynamic process. The value of the rights to a particular event will depend on the popularity of the sport and the participation of a national team or athlete. These factors are not static or predictable. A range of factors can change the popularity and economic value of team sport - new formats for programmes are developed which make events more televisable, new competitions are introduced e.g. Rugby World Cup, new stars develop in sports where countries have rarely been successful, the fortunes of established teams fluctuate, and the public perception of sporting personalities alter. These factors suggest that the popularity of an event cannot be predicted over anything but the short term. Sports organisers can therefore find themselves in a position of fluctuating revenues. In one year the rights for an event will be highly contested and the price the organiser can demand relatively high, the following year the national player might be injured and doesn't compete such that the interest of broadcasters is reduced. In order to insulate themselves from this, sports organisers, who are risk averse and have fixed costs, desire long-term contracts. They act as insurance and shift the risk from the sports organisers to broadcasters. Since broadcasters sign many sports rights contracts the risk is pooled and the exposure reduced. Consequently, if sports organisers are prevented from signing long-term contracts, the number of events staged will be reduced and concentrated into a few sports where the risks are smaller.

The above is not to say that every feature of the sports TV rights market is beyond challenge. It is questionable that the "last look clause" which allows BSkyB to match the highest bid is pro-competitive. This will act as a deterrent to bidding. It may lead BSkyB to bid low in the knowledge that it will always be able to match a higher (realistic) bid. Potential bidders aware of this clause will then not waste the time and money to put together a bid since the likelihood of being success is significantly reduced. However, this assumes a certain myopia on the part of the Premier League since the last thing it will want is to have one bidder.