

Sport as Reflected in European Media Law

Part II

How do sports rights originate, what do they consist of and who owns them? These were the questions addressed in Part 1 of this report on "Sport as Reflected in European Media Law", which appeared in April as the first of a two-part *IRIS plus* (supplement to Issue 2004-4 of *IRIS*). Part 1 also examined the impact of European competition law on the sale, acquisition and exercise of sports broadcasting rights, specifically in regard to television.

A particular question for public broadcasting organisations seeking to acquire sports rights is whether or not such acquisitions fall within their public service remit and are thus subject to European Community rules on state aid. Part II of the report opens with a look at this issue.

It also examines the conditions that apply under European law to the transmission and dissemination of sports events. Among the issues explored are the rule that events of major interest to society should be broadcast on free-to-air TV, and the provisions on advertising and sponsorship. The main theme of this *IRIS plus* is therefore the regulatory approach to the questions of exclusivity and the content of sports programmes – matters of prime commercial importance to broadcasting organisations.

Strasbourg, May 2004

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IRIS plus is a supplement to **IRIS**, *Legal Observations of the European Audiovisual Observatory*, **Issue 2004-06**



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Sport as Reflected in European Media Law

Part II

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II. (continued) Conditions for the Sale and Acquisition of Rights

3. How Does the Acquisition of Sports Rights Fit into the Public Service Remit?

Is the acquisition of sports rights part of the service that public broadcasting organisations are specially mandated to provide? This question is crucial when assessing the financing of public service broadcasting from licence fee revenue (or otherwise from state resources) in the light of the EC Treaty rules on state aid.¹ Recent Commission decisions make it clear that the application of Article 87 of the Treaty depends upon whether state support for public broadcasting constitutes a permissible level of adjustment or over-compensation for the costs involved in fulfilling the public service remit.² The framing of that remit and any conditions that European law may place upon it are thus increasingly important. European Court of Justice rulings have established the basic principle that it is lawful to give public service television broadcasters a specific programming mandate.³ Referring to the importance of public service broadcasting in its social policy function and to the Amsterdam Protocol, the Commission has deemed a “wide definition” of the public service mandate to be consistent with the rules on state aid. It has also declared that within such a wide definition it is permissible to provide programming that preserves a “certain level of audience”.⁴ The Commission’s stance here is based implicitly on the Resolution of the Council on public service broadcasting, which actually declares that it is legitimate for public service broadcasters to “seek to reach wide audiences”.⁵ In the Commission’s view, too, there is nothing in the rules on state aid to prevent the creation of programming slots that can be marketed to meet the costs of programme making. It considers that a wide definition of the public service mandate reflects the aim of meeting society’s democratic, social and cultural needs and sustaining pluralism, including cultural and linguistic pluralism. As regards the definition of public service in the broadcasting sector, the Commission states that its own role is limited to checking for manifest error.⁶ Definition of the public service remit would be in manifest error if it included activities outside the scope of the Amsterdam Protocol, *i.e.* ones that went beyond meeting society’s democratic, social and cultural needs.⁷ This limitation notwithstanding, the Commission generally affords the Member States considerable latitude in defining services that are in the general interest in the realm of broadcasting. In this respect it goes beyond the terms of its Communication⁸ on services of general interest in Europe.

Thus the public service remit may include the acquisition of sports rights in order to achieve more attractive and rounded programming. In the process of making their own TV and radio productions, as well as in buying and exploiting rights for TV and radio productions made by others, broadcasting organisations must fulfil certain conditions. Specifically, they must act within the remit given to them. The acquisition of sports rights is part of a broadcaster’s programme procurement function if sport is included

in its remit and sports rights are required for particular programmes.⁹

III. Conditions for Broadcasting/Dissemination

Having looked in Section II at the conditions governing the sale and acquisition of rights, we will now consider whether European law imposes any conditions on the dissemination of sports programmes on different media.

1. Television

a) Conditions for Satellite Dissemination

The acquisition and transfer of rights to broadcast a sports event on television are governed by national (civil) law. The framing of contracts depends upon how the underlying rights of the event organiser are classified.

In advance of the 2002 soccer World Cup, pay-TV providers and free-to-air broadcasters were involved in discussions about the extent of contractual rights for the non-encrypted broadcasting of matches by satellite. The problem was that the intended transmission of certain content (namely the matches) would have impinged upon the broadcasting rights of other rightsholders, who might in some cases have been able to prevent its dissemination.¹⁰ Entitlement to broadcast therefore depends crucially on the extent of the rights afforded by “copyright” (in its widest sense) to the holder of broadcasting licences in relation to the transmission of programmes by satellite. For example, the BBC’s switchover to non-encrypted digital broadcasting meant it could no longer cover Scottish Premier League matches as part of its Scottish regional programming. The BBC made the switch from the encrypted BSkyB platform to non-encrypted broadcasting via ASTRA on 10 July 2003. This meant that its regional reception window was no longer delimited by BSkyB’s CA encryption system. Its non-encrypted programming would have been freely available throughout the United Kingdom. However, the BBC held the Premier League broadcasting rights for Scotland only, rights for the remainder of the UK being held by the pay-TV company Setanta, which acted to defend itself against nationwide broadcasting by the BBC. In order to avoid a legal battle, the BBC was forced to suspend its coverage of Scottish Premier League matches and the Scottish cup final until the expiry of its contract at the end of the 2003-2004 season.¹¹

To what extent does European law influence the rightsholders’ practice – which underlies the above examples – of splitting broadcasting rights on a territorial basis?

According to the definition in principle of the State in which the act of communication occurs, as set out in Article 1 (2) of Council Directive 93/83/EEC, it is no longer possible on a practical level to allocate rights on an exclusive territorial basis.¹² The Directive

only applies, however, to works in the sense of copyright law. As explained in Part 1 of this report, sports events are not generally deemed to be works in this sense with regard to rights for their transmission.¹³

For broadcasting rightsholders to insist on encryption raises issues with regard to cartel law, and the same applies in relation to encryption agreements concluded with broadcasting companies. Such issues emerge in particular where the purpose of the agreements is to split off viewing markets within the EC Single Market and protect them against one another. There is a (not undisputed) view that it is an abuse of the broadcasting rightsholder's dominant position in the sports rights market to use that position as a means of generating an unfair advantage in other, neighbouring markets. The argument is that a powerful position in the broadcasting rights market can be used as a lever to create a monopoly in a third market without any other objective justification for doing so.¹⁴

b) Broadcasting Important Events

Further European rules on the broadcasting of sports events are to be found in Article 3a of the "Television without Frontiers" Directive and Article 9a of the European Convention on Trans-frontier Television. These articles stipulate that official lists should be compiled in order to ensure that the public has access to coverage of events (including sports events)¹⁵ that are of major importance for society. Unlike the rules on short reporting, these provisions are framed restrictively; they relate only indirectly, if at all, to the questions of sale and acquisition.

aa) Conditions

Article 3a lays down no binding minimum conditions, but leaves it to the discretion of the Member States whether or not to draw up a list at all. If a Member State does compile a list it must observe the procedural stipulations contained in the third sentence of Article 3a(1), and should it seek to secure only deferred coverage of an event it must have objective reasons for doing so, in accordance with the fourth sentence of the same article. Member States are, however, required to be proactive under the terms of the protective provisions in Article 3a(3). They must ensure that broadcasters under their jurisdiction do not act in such a way as to undermine the protective effects of lists drawn up by other Member States.¹⁶

The "Television without Frontiers" Directive leaves it up to the Member States to define **events of major importance for society**. Recital 21 of Directive 97/36/EC, amending the "Television without Frontiers" Directive, stipulates that they should be outstanding events of interest to the general public in at least an important component of a given Member State. They should also be organised in advance by an event organiser who is legally entitled to sell the rights pertaining to them. Recital 18 names the World Cup and European Championship soccer competitions and the Olympic Games as examples of such events.

The Directive requires the Member States to ensure that "**a substantial proportion of the public**" is not deprived of the possibility of following such events. This indicates that the aim of the list system is not merely to prevent exceptionally high payment being required for broadcasting of the events in question. In order to afford wide public access to the coverage, the Directive's provi-

sions extend to free-to-air broadcasters with limited audiences. It is thus argued that Article 3a is framed in such a way as to require that virtually the entire population, or at least a considerable section of it, has such access.¹⁷

The Directive requires that listed events receive coverage on **free television**. Recital 22 of amending Directive 97/36/EC explains that "free television" means the broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without any special payment – apart from the normal charges such as licence fee or cable network subscription. Thus, forms of viewing such as pay-TV, pay-per-view or pay-per-channel do not fall within the definition.

There is scope for debate about the extent of protection afforded under Article 3a to exclusive rights acquired before notification of the relevant national list of events to the Commission (*i.e.* the issue of retroactivity). The only relevant reference is to be found in the protective provisions of Article 3a(3) ("exclusive rights purchased [...] following the date of publication of this Directive").¹⁸

Another open question is that of when an event included on a Member State's list acquires legal protection, *i.e.* from what date must broadcast coverage of the event be subject to the conditions laid down in Article 3a(1). Article 3a makes no provision in this regard. Recital 20 of the amending Directive, on the other hand, refers to the date of implementation in a given Member State. Thus, if a Member State lists an event only after publication of the Directive and transposition of Article 3a into national law, there is potential for conflict about when the measure becomes applicable in respect of broadcasters based in other Member States. There is a view, based on the provisions of Article 3a(2), that the defining date is that on which the Commission publishes the list of a Member State's measures in the *Official Journal of the European Communities*. An alternative view is that national lawmakers have discretion to fix the date from which their measures are deemed to apply in respect of all Community based broadcasters.¹⁹

The status of a Commission decision on the compatibility with Community law of measures notified to it by a Member State under Article 3a is unclear. A case has been pending for some time in the Court of First Instance in which the applicant challenges the decision by the Commission to approve measures notified to it by the United Kingdom in accordance with Article 3a. The application is based on the grounds *inter alia* of alleged breach of the principles of proportionality, the right to property, freedom to engage in economic activity, protection of legitimate expectations, non-retroactivity and equality.²⁰

bb) Assessment as Part of a Review of the "Television without Frontiers" Directive

In a consultation procedure as part of a review of the "Television without Frontiers" Directive, the Commission found a widespread view, in contributions made to it, that Article 3a was useful, necessary, effective and proportionate.²¹ It concluded that there was no urgent pressing need for this provision of the Directive to be revised, although it also raised the possibility that it should draw up guidelines providing specific information for Member States on the choice and implementation of national measures.²² The Commission took the view that the compilation of a European list (which had been discussed) would have no added value and



could not be seen to be in conformity with the principle of subsidiarity.

2. New Media and Interactive Services

There remains considerable uncertainty about how the list-based provisions will affect the exercise of transmission rights via new media. As discussed in Part I of this report (Section II, 2. b), the economic importance of new media rights is growing as the technology develops (notably with access to broadband). It is likely that sports rights will continue to play a significant role, as they are used to entice customers to new media services. Because, in the process of convergence, new media are likely to replace television to an ever-greater extent, it is conceivable that the list-based rules could be extended to cover new types of provision such as streaming.²³ Under the law as it stands, the services covered must be television services.

Transmission of sports events via new media is not only a phenomenon of growing economic significance, but also, as explained, one which raises fresh questions about future regulatory provisions for the new services – and, *inter alia*, about what requirements European law should impose in respect of their content.²⁴

IV. Conditions for Content Transmitted

1. Rules on Advertising

Rules on advertising – with their economic implications for the transmission of sports events – feature prominently in European legislation on content. The most relevant instrument in this respect is the “Television without Frontiers” Directive. The rules on advertising contained in the European Convention on Transfrontier Television are not substantially different from those in the Directive. In what follows, the Convention, its development and the texts associated with it will be referred to only in relation to areas where the rules differ or where the Convention’s provisions can assist in the interpretation of the Directive.²⁵

a) Nature of Television Advertising

The provisions of Article 10 on the form and presentation of television advertising establish principles for keeping the editorial parts of programming separate from the various types of advertising. These include the requirements that optical and/or acoustic means be used to make the distinction and that isolated advertising and teleshopping spots remain the exception, as well as a prohibition on subliminal techniques and surreptitious advertising.

The principle that advertising should be separate assumes particular relevance in sports broadcasts in relation to what is known as “graphic sponsorship”. This is where a time clock, scoreboard, or other measurement indicator at an event is linked to a corporate logo. In programming terms it can be classed as information in those cases where it is a form of source indicator, showing which company is responsible for the measurement in question.²⁶ Where there is no such connection between the information and the company, it constitutes advertising. The same

considerations apply in respect of so-called “crawls” – strips of text running across or along the edge of the screen, which are regarded as isolated advertising spots and have to be counted as part of the broadcaster’s hourly or daily advertising time quota. The issues raised here are also relevant in connection with the regulation of new forms of advertising such as split screen and virtual advertising (see below).

It is argued in some quarters that advertising inside a sports stadium need not be regarded as surreptitious advertising by the broadcaster of an event – even when it is directed primarily at a television audience. At the same time there is a view that broadcasters should be required at least to ensure that event organisers do not permit dishonest, unlawful or immoral advertisements to be placed where they will be shown on television.²⁷

b) Rules on Quantity

The Directive also places restrictions on the amount of advertising. Under Article 18, the total proportion of transmission time for all forms of advertising (teleshopping spots, advertising spots and other forms of advertising), with the exception of teleshopping windows, may not exceed 20 % of daily transmission time. Transmission time for advertising spots may not exceed 15 % of daily transmission time. The proportion of advertising spots and teleshopping spots within a given hour may not exceed 20 %. There are specific rules, set out in detail in Article 11, on the way that advertising spots are to be inserted between or during programmes.

Under Article 18(3) of the Directive, a broadcaster’s announcements about its own programmes and ancillary products do not fall within the definition of advertising. The article does stipulate, however, that it relates only to the broadcaster’s “own” programmes and to products “directly derived from those programmes”. This provision is relevant with regard to the classification of ancillary material derived from sports programmes, such as videos, CD-ROMs or books about sports events. Other merchandising items (such as towels with sports logos etc) cannot, however, be regarded as deriving directly from a programme.²⁸

The Commission, in its communication of 15 December 2003, stated its position on possible amendments to the Directive’s provisions on advertising.²⁹ It noted that most Member States supported the existing rules on the duration of advertising. In the consultation process on possible revision of the Directive, however, submissions from *inter alia* certain Member States and most commercial broadcasters advocated a greater degree of flexibility. The Commission therefore declared its intention to explore, with the help of experts, how the rules on duration might develop, taking account in particular of the degree of control exercised by viewers and the wider choice of programmes on offer.³⁰

c) Insertion of Advertising during Programmes

The provisions of Article 11 paragraphs 1, 2 and 4 of the “Television without Frontiers” Directive are particularly important in relation to the transmission of sports events.

Paragraph 1 lays down the principle that advertising and telespots must be inserted between programmes. Only exceptionally can they be inserted during programmes. Paragraph 2 provides for one type of exception in this regard. It stipulates that in



programmes consisting of autonomous parts, or in sports programmes, advertising and teleshopping spots may only be inserted between the parts or in the intervals. This must be done – in accordance with the second sentence of Article 11(1) – in such a way that the advertising and teleshopping spots do not prejudice the integrity and value of the programme, taking into account natural breaks in it as well as its duration and nature, and that the rights of the rightsholders are not prejudiced.

The concept of sports programmes covers all forms of sports broadcasting, *i.e.* both live and deferred transmission. It does not, however, include programmes that are editorially and journalistically structured and chiefly concerned with contextual reportage and analysis. For these programmes the general rule on insertion of advertising applies, as laid down in Article 11(4) of the “Television without Frontiers” Directive, in other words a period of at least 20 minutes should elapse between advertising breaks.³¹

In some countries, however, it is customary to slot more numerous short advertising spots into sports and other programmes. In Slovakia, for example the Broadcasting Council has ruled that the insertion of advertising during breaks in a match (*i.e.* not just in the intervals prescribed in the rules of the game) is compatible with national broadcasting legislation.³² Italian broadcasters also insert advertising spots of about five seconds’ duration during the transmission of soccer matches, both in short unplanned breaks and during play. This practice developed with the approval of the communications authorities because the provision transposing Article 11 of the Directive, word for word, into Italian law does not include any definition of an “interval”. There are therefore deemed to be “breaks” in a soccer match for free kicks and corner kicks, and also when substitutions are made during play.³³ The counter-argument is that intervals in sports events must be those that occur in accordance with the rules of the respective sports. Unintended breaks cannot thus count as intervals. An interval has to be part of the structure of the game, with time allocated for it under the rules, and this is not the case, for example, when play is interrupted as a result of a foul, and a free kick ensues. The same principle should also be applicable in sports other than football. Thus intervals for a change of ends, or between sets in a game like tennis, may be regarded as natural breaks for the purposes of Article 11(2). In competitions involving a series of individual bouts or similarly distinct sections, advertising can also be inserted in accordance with this stricter conception of the rules.

There is a view that motor sport events such as Formula 1 races do not follow a particular order of play and are not spatially focused to the same extent as team sports. The argument is that, by switching camera position or focusing on a different part of the race, the broadcaster itself can thereby impose segmentation and insert advertising.³⁴ The counter-argument is that because such events do not have prescribed intervals they do not fall within the scope of Article 11(2) at all. In this case the only relevant stipulation on the insertion of advertising would be that of Article 11(4).

As it undertook to do in its communication of December 2003,³⁵ the Commission adopted a position on the question of possible amendments to the advertising provisions in the “Television without Frontiers” Directive. In an interpretive communication of April 2004 it clarified the provisions on insertion of advertising during sports events.³⁶ The communication states that sports programmes which do not contain natural pauses or objective inter-

vals within the meaning of Article 11(2) fall within the scope of paragraph 4. This means that a period of at least 20 minutes should elapse between each successive advertising break within the programme.

Irrespective of these considerations, the Commission states that national authorities must ensure that the broadcast of so-called mini-spots during transmission of a sports event does not undermine the key principles laid down in Article 10 of the Directive. Such forms of advertising must be “readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means”. Furthermore, under Article 10(2) of the Directive, mini-spots should be broadcast only exceptionally in accordance with the rule that isolated advertising must remain the exception.³⁷

d) Sponsorship

Article 17 of the “Television without Frontiers” Directive lays down minimum standards for the regulation of television programme sponsorship. In particular it prohibits the exercise of influence by sponsors, and requires that sponsored programmes be clearly identified as such. By formalising programme sponsorship and requiring transparency this provision counters the multiple possibilities for surreptitious advertising and product placement.³⁸

Unlike advertising programmes or spots, sponsorship may not be designed to promote products or services but simply to support specific programmes, with a view to enhancing the sponsor’s image or transferring it by association. The transmission of international soccer matches involving the German team is thus frequently sponsored by beer manufacturers. Beyond the basic definition, however, national lawmakers are permitted a degree of latitude in framing practical stipulations. They may, for example, allow reference to a sponsor to appear in the form of a moving image or may permit such reference to include a logo alongside or in place of the sponsor’s name. Likewise they may choose to allow or prohibit the insertion of spots advertising the sponsor’s products or services during the sponsored programmes.³⁹

e) New Forms of Advertising

Many new forms of advertising have been developed for sports broadcasts, or at least are of particular importance in that context. Examples are split screen advertising and virtual advertising.⁴⁰

The split screen technique involves using part of the screen to present advertising, with editorial and advertising content being broadcast in parallel.⁴¹ In Germany this form of advertising was first used during the transmission of Formula 1 racing and boxing matches. Images of the sports events were shown in a reduced window on the screen alongside a larger window where advertising was broadcast.⁴² In terms of broadcasting law, the split screen technique is problematic with regard to the principle that advertising must be separate from other content. In this respect Article 10(1) of the “Television without Frontiers” Directive needs interpretation. Does it require that advertising be separated spatially and temporally, or can the requirement of separation be met by either a temporal distinction (as with traditional advertising spots) or a spatial one?⁴³ The European Court of Justice has ruled in relation to the “Television without Frontiers” Directive, that where the Community legislature has not drafted a provision of the Directive in clear and unequivocal terms, it must be given a

restrictive interpretation.⁴⁴ It is therefore argued that a spatial separation should suffice and that what is required is a “dividing line” to prevent an imperceptible merging of the advertising and the programme. Similarly the Standing Committee on Transfrontier Television in its Opinion on Split-Screen Advertising calls for a clear and recognisable separation of programming and advertising content.⁴⁵ The Commission has also taken this view.⁴⁶ It stipulates that the division must be such as to make “advertising and teleshopping [...] readily recognisable as such and kept clearly separate from other parts of the programme”. The weight of opinion supports the view that the duration of split screen advertising must be counted against the total advertising time. Thus, this form of advertising cannot be used to extend the amount of advertising.⁴⁷ The same applies in respect of “crawls” (see *a*) above), strips of text that run along the edge of the screen and carry advertising content.⁴⁸

Another new form of advertising is virtual advertising. This is a technique whereby images can be modified either by the superimposition of new advertising or by altering existing advertising messages (e.g. pitch-perimeter advertising in a stadium). From a legal standpoint there remains considerable uncertainty about the extent to which the requirement of separation must be observed with this form of advertising. Some pointers are to be found in a Council of Europe recommendation.⁴⁹ This stipulates that the presence of virtual advertising should be indicated to viewers, by appropriate means, at the beginning and the end of the programme concerned. There are also conflicting views on the question of how virtual advertising should be inserted into programmes. While rules in some countries stipulate that virtual advertising can only be used to replace advertising already in existence at the place (e.g. a stadium) from which the event is broadcast – virtual advertising could, for instance be run along a pitch-perimeter barrier⁵⁰ – the effect of other provisions is that it may appear wherever advertising boards are commonly available.⁵¹ Nor are there as yet any European rules on forms of virtual advertising in which figures move over the screen or advertisements are projected onto the field of play (e.g. where the originator of the transmission signal or the broadcaster inserts virtual advertising into the centre circle or over the entire field of play).⁵²

In its interpretive communication the Commission sets out how the principles enshrined in Chapter IV of the Directive should be applied to virtual advertising.⁵³ One of its stipulations is that broadcasters and viewers must be informed in advance of the presence of virtual images. In addition, virtual advertising may be used during broadcasts of sporting events only on those surfaces of the site or stadium where advertising can be affixed materially, and which are usually intended for such promotional purposes. The Directive’s provisions on sponsorship must be complied with in full.

f) Article 3 of the “Television without Frontiers” Directive

An important provision in terms of advertising legislation is Article 3(1) of the “Television without Frontiers” Directive, stipulating that Member States shall remain free to require television broadcasters under their jurisdiction to comply with stricter or more detailed rules in the areas covered by the Directive. It is a measure of discretion that works in only one direction, however, for the Directive lays down minimum requirements that may only be made more – and not less – stringent in their application to domestic broadcasters. Thus it does not prohibit the application of stricter

rules to a Member State’s own broadcasters and it is clearly not intended to prevent what is known as “reverse discrimination”.⁵⁴

Where Member States avail themselves of this regulatory discretion, problems can arise with programmes brought in from other countries and broadcast by domestic companies.

In the case of *Bacardi-Martini and Cellier des Dauphins v. Newcastle United Football Company Ltd*⁵⁵ the European Court of Justice rejected a British court’s application for a preliminary ruling, on the grounds that it was not sufficiently clear what the impact on the case would be if the French legislation at the core of the dispute were found to be incompatible with Community law.⁵⁶

In a similar case, however, Advocate General Tizzano argued that a prohibition on the televised advertising of alcoholic drinks was compatible with Community law.⁵⁷ He stated first that the obligation to use all available means to prevent advertising for alcoholic drinks from being shown on French television did indeed constitute a restriction on the principle of free movement of services. The restriction was, however, justified with reference to the protection of public health, inasmuch as it was proportionate to the aim it served. The French rule did not exceed what was required in pursuit of the aim of promoting public health. The Advocate General expressed the view that broadcasters did not possess the means to make advertisements for alcoholic drinks unrecognisable. Modern techniques for fading out televised images (and inserting virtual advertising space) were too costly to be deemed an alternative solution. Moreover, the brief duration of the appearance of this form of advertising (in this case on pitch-perimeter barriers) did not allow for either content control or for the inclusion of a warning about the dangers associated with alcohol consumption. Generally, the ECJ had found in previous cases that the application by another Member State of less stringent rules on the advertising of alcohol did not imply that stricter provisions were disproportionate.

It is interesting that the Advocate General regarded the indirect advertising of alcoholic drinks via the appearance on television of advertisements at sports events (pitch-perimeter advertising) as lying outside the scope of the “Television without Frontiers” Directive. He made the point *inter alia* that it did not fall within the legal definition laid down in Article 1(b) in the version of Directive 89/552/EEC on which the case was based (the article in question is now Article 1(c)). This provision referred only to sequences of televised images produced solely for the purposes of advertising and for which, as such, the broadcaster received payment. The only question to be examined, therefore, was whether the French legislation in question was compatible with the free movement of services.

2. Prohibitions and Restrictions on Advertising

The strongest checks on television advertising during sports broadcasting are in the form of prohibitions and restrictions on certain types of advertising.

a) The “Television without Frontiers” Directive

Article 13 of the “Television without Frontiers” Directive provides for the prohibition of tobacco advertising on television. The



provision has been ineffective – notably in the case of motor sport events, including Formula 1 racing – because although no tobacco advertisements have been inserted into the relevant TV programmes the manufacturers have advertised on the vehicles and at the venues.

b) Other Secondary Community Legislation

Article 3(1) of the so-called “Tobacco Advertising Directive”,⁵⁸ 98/43/EC, placed a ban on all forms of advertising and sponsorship of tobacco products. Its provisions were intended to apply, though, independently of the “Television without Frontiers” Directive, which had primacy as the instrument regulating the transmission of television programmes. The European Court of Justice annulled Directive 98/43/EC, however, on the grounds that the Community had insufficient basis for jurisdiction.⁵⁹

Subsequently, on 26 May 2003 a new Directive, 2003/33/EC,⁶⁰ came into force with the aim of approximating the Member States’ laws and regulations on the advertising and sponsorship of tobacco products. With its comprehensive ban on tobacco advertising, the new Directive is intended to regulate the advertising of tobacco products, and the sponsorship associated with it, in the media. Its aim is to remove barriers to the free movement of products and services between Member States. Again, with the new Directive, television is excepted from the scope of the provisions – there already being specific Community provision for television in this respect in Article 13 of the “Television without Frontiers” Directive. Article 5(1) of the 2003 Directive, however, prohibits sponsorship of events involving or taking place in several Member

States or otherwise having cross-border effects (for example through television broadcasts). The purpose of this provision is to avoid distortions of the conditions of competition due to differences in Member States’ national legislation. Recital 1 of the Directive makes the point that such distortions have already been noted in connection with the organisation of major sporting events with cross-border effects. Article 2(c) of the Directive contains a broad definition of sponsorship, namely: any form of public or private contribution to any event, activity or individual with the aim or direct or indirect effect of promoting a tobacco product. Tobacco advertising is thus prohibited not only on barriers at sports stadiums and other venues but also on vehicles and on competitors themselves at events or activities of a cross-border character.

Final Remarks

In recent years the economic significance of sports rights for television and the new media has grown markedly. As a result of this increased economic interest, new laws and regulations have tended to be introduced. Of relevance here are not only those provisions regarding the televised transmission of sports events that form part of broadcasting legislation as such, but also the interfaces between broadcasting legislation and other areas of law, and the influence of those other areas – copyright law and competition law, for example. In respect of the new media, too, there has been increased legislative activity. The development of the new media and their growing importance in the transmission of sports events may make it necessary to revise and/or adapt broadcasting laws.

1) See most recently the Commission’s request for information from the Federal Republic of Germany, CP 43/2003. A particular issue addressed here is the accusation by the private sector that public service broadcasters have been able to pay inflated prices for certain sports rights only thanks to licence fee revenue; see also *epd medien* Issue 32/2004, 28 April 2004, p. 19.

2) For more detail see also Roßnagel/Strothmann, *Die duale Rundfunkordnung in Europa – Gemeinschaftsrechtliche Rahmenbedingungen und aktuelle Ansätze zum dualen System in ausgewählten Mitgliedstaaten*, Vienna 2004, p. 99 *et seq.*

3) The cornerstone ruling was in ECJ Case 155/73, *Sacchi*, Rec. 1974, p. 409, paras 13–15.

4) Communication from the Commission on the application of state aid rules to public service broadcasting, OJ C 320, 15 November 2001, p. 5, para. 33. Reference to the significance of the Amsterdam Protocol and the Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 25 January 1999, concerning public service broadcasting, OJ C 30, 5 February 1999, p. 1, is also to be found in the Commission Decision of 22 May 2002, State aid No. N 631/2001, BBC licence fee, para. 37.

5) Council, Public service broadcasting, *op. cit.* footnote 4, para. 7.

6) Commission, Application of rules to public service broadcasting, *op. cit.* footnote 4, para. 36. The Commission takes the view that it is not for it to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or quality of a certain product.

7) Commission, Application of rules to public service broadcasting, *op. cit.* footnote 4, para. 36. Here the Commission mentions the example of e-commerce. It states that the public service remit describes only the services offered to the public in the general interest and does not cover the definition of a financing mechanism. Public service broadcasters may therefore perform commercial activities such as the sale of advertising space, but such activities cannot be regarded as part of the public service remit. How should we judge the situation where a public service broadcaster makes the point (publicly) that the cost of acquiring sports rights has to be met predominantly by revenue from the sale of advertising space? With regard to the rules on state aid it is possible that this constitutes a grey area. In approaching such a situation, a series of parameters applies. If we assume that the programme content in question is in line with the programming remit, then it is certainly legitimate to acquire it using resources already allocated to the fulfilment of that remit. In the case of particularly marketable programmes, there will also be considerable interest from the private sector. The attractive nature of the advertising slots makes it possible to finance in full the acquisition of the programme rights. Where a public broadcaster has to use such additional resources to cover the cost of programme rights, it means creaming off funds from the advertising market in order to acquire content within its public service remit. In effect, it is argued, the broadcaster uses the sale of advertising space – an activity that, as explained above,

is not part of its public service remit – as a means of fulfilling its programming remit.

8) Communication from the Commission on services of general interest in Europe, 2001/C 17/04, OJ C 17, 2001, p. 4.

9) *Beck’scher Kommentar zum Rundfunkrecht-Libertus*, Munich 2003, § 12, para. 101; Pleitgen, *Der Sport im Fernsehen, Arbeitspapiere des Instituts für Rundfunkökonomie an der Universität zu Köln*, Issue 127, Cologne 2000, p. 15.

10) In Germany, for example, the public service broadcasters ARD and ZDF acquired the World Cup broadcast rights for Germany from the KirchMedia group but the broadcasts could also be picked up via satellite in other European countries. The agreement between ARD and ZDF and the KirchMedia group stipulated that the licensees were entitled to broadcast the matches on a digital satellite platform only if this did not impinge upon the exclusive transmission rights of licensees in other countries. Problems started when the draw for the World Cup was broadcast in December 2001, with a dispute between the German rightsholders and the Spanish licensee Via Digital. ARD came up with a proposal to alter the digital transmission making reception possible only in Germany. The World Cup matches would thus be broadcast using a special signal that could not be processed by pay-TV decoders in other countries. The disadvantage of this solution was that German viewers with digital sets would have had to start a new channel search and for that reason ZDF initially came down against the proposal. Its counter-suggestion was simply not to use digital satellite transmission for the World Cup broadcasts. ARD’s proposed solution was tested and it was found that standard pay-TV decoders in Spain and Poland were indeed incapable of receiving programmes transmitted using the special signals. Nonetheless, the KirchMedia group turned down this solution in favour of encrypting digitally transmitted satellite signals. In the end the broadcasting organisations decided not to broadcast the matches on a digital satellite platform.

11) See press release at: <http://www.waveguide.co.uk/latest/news030804.htm>. In the interim the Scottish Premier League concluded an exclusive deal with Setanta for the live broadcast rights. See press release at: <http://www.scotprem.com/Article.asp?ARTICLE=188156>.

12) Roßnagel/Sosalla/Kleist, *Der Zugang zur digitalen Satellitenverbreitung*, Berlin 2003, p. 171.

13) The BBC was recently involved in a case where, by contrast, the issue was the broadcasting of works in the sense of copyright law. It illustrated the basic problems in relation to programme content that falls within the scope of Council Directive 93/83/EEC. The BBC concluded a deal with Buena Vista International Television (BVITV), the TV distribution arm of the Walt Disney Company, on TV rights for more than 100 films (see press release of 8 October 2003 at http://www.bbc.co.uk/pressoffice/pressreleases/stories/2003/10_october/08/buena_vista.shtml). The rights transferred were for terrestrial broadcasting within the UK, on the one hand, and satellite broadcasting on the other. The terrestrial broadcasting rights were granted to the BBC exclusively. The



- satellite rights, however, were non-exclusive and included the right for the BBC to broadcast the films via satellite throughout Europe unencrypted. The deal was reached (surprisingly) despite BVITV's fears that by granting freely receivable Europe-wide transmission rights it would lose out on income from licensing for other European markets. According to the BBC it paid no additional charge for the right to broadcast unencrypted.
- 14) Mailänder, *Fernsehen mit verschlüsselten Grenzen – Kartellrechtliche Fragen der Verschlüsselung*, ZUM 2002, 706, 710. Mailänder considers that these factors applied in the ARD/ZDF/KirchMedia case, inasmuch as there was a consequential attempt to impose a particular type of decoder.
 - 15) Those lists compiled to date designate many sports events as being of major importance for society. See http://europa.eu.int/comm/avpolicy/regul/twf/3bis/implementation_de.htm and, on the subject of proposed lists in France and the Netherlands, *IRIS* 2003-4: 8 and *IRIS* 2004-1: 15.
 - 16) The British House of Lords ruled in accordance with this duty of mutual recognition in its judgment of 25 July 2001 in the case of Regina v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd, available at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd010725/dan-1.htm>. See also in relation to this case, *IRIS* 2000-10: 11 and *IRIS* 2001-4: 13.
 - 17) *Beck'scher Kommentar-Altes*, *op. cit.* footnote 9, § 5a, para. 110. Regarding the requirements of Danish law in 2000 in this respect, see House of Lords' judgment, *op. cit.* footnote 16.
 - 18) See also Recital 20. For a refutation of the argument that the ban on retroactivity may be infringed, see Diesbach, *Pay-TV oder FreeTV*, Baden-Baden 1998, p. 168.
 - 19) See, concerning this debate, *Beck'scher Kommentar-Altes*, *op. cit.* footnote 9, § 5a, paras 58 *et seq.* and 129.
 - 20) ECJ, Case T-33/01, KirchMedia GmbH & Co KGaA and Kirchmedia WM AG/Commission, OJ C 134, 5 May 2001, p. 24 (now being pursued by Infront WM AG). For more detail regarding possible incompatibility of Article 3a with other Community law, see *Altes in Beck'scher Kommentar*, *op. cit.* footnote 9, § 5a, para 69 *et seq.*
 - 21) The Future of European Regulatory Audiovisual Policy, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2003) 784 final, Brussels, 15 December 2003, point 3.3.
 - 22) Concerning transposition of Article 9a of the European Convention, see Standing Committee on Transfrontier Television (T-TT), *Guidelines for the implementation of Article 9a*, T-TT (2002)18 rev1, available at: http://www.coe.int/t/e/human_rights/media/2_T-TT/6_Events/PDF_T-TT_2002_018rev1%20E%20Guidelines-2.pdf
 - 23) *Altes in Beck'scher Kommentar*, *op. cit.* footnote 9, § 5a, para 148.
 - 24) Commission press release of 30 January 2004, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=GF&doc=IP/04/134/0|RAPID&lg=DE&type=PDF. See, concerning this debate, McGonagle, *Does the Existing Regulatory Framework for Television Apply to the New Media?*, report on experts' seminar on The European Convention on Transfrontier Television in an Evolving Broadcasting Environment, 6 December 2001, T-TT(2001)er2, available at: http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2001_er3%20E.pdf; and *Does the Existing Regulatory Framework for Television Apply to the New Media?*, *IRIS plus* 2001-6.
 - 25) See ECJ, Case C-245/01, RTL Television GmbH/NLM, judgment of 23 October 2003, not yet published in the European Court Reports; C-6/98, ARD/ProSieben Media, Rec. 1999, I-7599.
 - 26) Kreile, *Die Neuregelung der Werbung im 4. Rundfunkänderungsstaatsvertrag*, ZUM 2000, pp 194, 197.
 - 27) Ladeur, *Neue Werbeformen und der Grundsatz der Trennung von Werbung und Programm*, ZUM 1999, pp 672, 677; see also *f* below.
 - 28) *Beck'scher Kommentar-Ladeur*, *op. cit.* footnote 9, § 15, para. 6.
 - 29) Commission, Communication COM(2003) 784 final, *op. cit.* footnote 21, see *IRIS* 2004-1: 6.
 - 30) Commission, Communication COM(2003) 784 final (*op. cit.* footnote 21), section 3.5 last paragraph. Contributions submitted during the consultation process are available at: <http://europa.eu.int/comm/avpolicy/regul/review-tw2003/contribution.htm>.
 - 31) Hartstein/Ring/Kreile/Dörr/Stettner, *Medienrecht, Kommentar zu § 44 Rundfunkstaatsvertrag* (Loseblattkommentar, Stand April 2000), paras 17 and 18.
 - 32) See *IRIS* 2004-6: 16.
 - 33) Based on: European Audiovisual Observatory (ed.), *The Insertion of Short Advertisement Spots During Football Matches and its Compliance with the "Television without Frontiers" Directive and the European Convention on Transfrontier Television*, Strasbourg 2002; available at http://www.obs.coe.int/online_publication/expert/ad_football.html.en (see the first paragraph of the introduction and the contribution concerning Italy in the comments).
 - 34) *Beck'scher Kommentar-Ladeur*, *op. cit.* footnote 9, § 44, para. 11. The Standing Committee on Transfrontier Television (T-TT), in its Opinion No 4 (1995) on Certain Provisions on Advertising and Sponsorship, also found that artificial breaks, introduced by the broadcaster in particular types of sport events that had no natural breaks, could be justified in some cases, and that Member States might enjoy a margin of appreciation in the interpretation of Article 14(2); see http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2002_ref%20E%20Opinions%20%20Recommendations.pdf
 - 35) Commission, Communication COM(2003) 784 final, *op. cit.* footnote 21, section 3.5.
 - 36) Commission Interpretive Communication on Certain Aspects of the Provisions on Televised Advertising in the "Television without Frontiers" Directive, C(2004) 1450 of 23 April 2004, available at: http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/1450_de.pdf, para 23.
 - 37) Commission Interpretive Communication C(2004) 1450, *op. cit.* footnote 36, paras 20, 21. On the basis of the explanatory report to the "Television without Frontiers" Directive, the Commission identifies only limited scope for derogations under Article 10(2). Examples are the case of a single long advertisement, or where the particular nature of the programme makes the period available for advertising or teleshopping very short.
 - 38) *Beck'scher Kommentar-Brinkmann*, *op. cit.* footnote 9, § 8 para. 6.
 - 39) Examples from *Beck'scher Kommentar-Brinkmann*, *op. cit.* footnote 9, § 8 para. 7.
 - 40) Blair, *How to Regulate New Advertising Techniques, Expert Seminar of the Standing Committee on Transfrontier Television (T-TT) on The European Convention on Transfrontier Television in an Evolving Broadcasting Environment*, 6 December 2001, T-TT(2001) 1, describes emerging problems and attempted solutions in the United Kingdom and Germany, available at: http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2001_er1%20E.pdf
 - 41) Hartstein/Ring/Kreile/Dörr/Stettner, *Medienrecht, Kommentar zu § 7 Rundfunkstaatsvertrag* (Loseblattkommentar, Stand April 2000), para. 32b.
 - 42) See *IRIS* 1999-4: 25.
 - 43) The Standing Committee on Transfrontier Television (T-TT) raises this question in its *Memorandum No. T-TT(2002) 19 on advertising rules and principles in the Convention*, 12 and 13 September 2002, p. 3, available from: [http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT\(2002\)019%20E%20Advertising%20rules%20Convention.pdf](http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT(2002)019%20E%20Advertising%20rules%20Convention.pdf)
 - 44) ECJ, C-6/98, ARD/ProSieben Media, *op. cit.* footnote 25, para. 30
 - 45) Standing Committee on Transfrontier Television (T-TT), Opinion No. 9 (2002) on Split-Screen Advertising, 29-30 April 2002, available from: http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2002_010%20E%20Compendium%20split-screen%20ad.pdf
 - 46) Hartstein/Ring/Kreile/Dörr/Stettner, *Medienrecht, Kommentar zu § 7 Rundfunkstaatsvertrag* (Loseblattkommentar, Stand April 2000), para. 32a; *Beck'scher Kommentar-Ladeur*, *op. cit.* footnote 9, § 7, para. 39.
 - 47) Commission, Communication C(2004) 1450, *op. cit.* footnote 36, paras 45 *et seq.*
 - 48) Commission, Communication C(2004) 1450, *op. cit.* footnote 36, para. 50.
 - 49) *Beck'scher Kommentar-Ladeur*, *op. cit.*, footnote 9, § 7, para. 39; Kreile, *Die Neuregelung der Werbung im 4. Rundfunkänderungsstaatsvertrag*, *op. cit.* footnote 26, p. 196.
 - 49) Recommendation (97) 1 of the Standing Committee on Transfrontier Television (T-TT), 20-21 March 1997, concerning the Use of Virtual Advertising Notably During the Broadcast of Sports Events, available at: http://www.coe.int/t/e/human_rights/media/2_T-TT/3_Texts_and_documents/PDF_T-TT_2002_ref%20E%20Opinions%20%20Recommendations.pdf
 - 50) See, for example, the German provision in § 7(6)(2) of the State Treaty on Broadcasting.
 - 51) See point 6, 3rd indent, FIFA Regulations for the Use of Virtual Advertising, December 1999, available at: http://images.fifa.com/fifa/handbook/Va/downloads/Virtual-Regs_e.pdf: "Outside the field of play, VA may only be applied during the transmission to appear on existing flat surfaces which may or may not be used in reality for publicity purposes (including advertising boards standing beside the field of play)."; point 2, European Broadcasting Union (EBU) Memorandum on Virtual Advertising, 25 May 2000, available at: http://www.ebu.ch/departments/legal/pdf/leg_virtual_advertising.pdf: "Virtual advertising may be inserted only on surfaces at the venue which are customarily used for advertising, subject to point 3 below."
 - 52) See, however, point 6, 4th indent, FIFA Regulations, *op. cit.* footnote 51: "VA may be applied to appear on the field of play in the centre-circle and in the two penalty areas (including the arc of each area) until the moment when the players enter the field of play before the start of each half of the match, from the moment when they leave the field of play at the end of the first half, and from the moment they leave the field of play after the match has officially finished (normal time, golden goal, penalty shoot-out)."; point 3 Memorandum EBU, *op. cit.* footnote 51: "Virtual advertising may be inserted on the field of play/surface, only outside competition times and only if there are no players/competitors on the field of play/surface."
 - 53) Commission, Communication C(2004) 1450, *op. cit.* footnote 36, paras 66 *et seq.* The Standing Committee on Transfrontier Television (T-TT) in its Memorandum No. T-TT(2002) 19, *op. cit.* footnote 41, p. 4, also sees a need for reform inasmuch as there is no consensus yet on which advertising rules should be applied to virtual advertising.
 - 54) European Audiovisual Observatory, *Transfrontier Television in the European Union: Market Impact and Selected Legal Aspects*, background paper prepared for a Ministerial Conference on Broadcasting organised by the Irish Presidency of the European Union, Dublin & Drogheda, 1-3 March 2004, available at: http://www.obs.coe.int/online_publication/transfrontier_tv.pdf.en; Roßnagel/Strothmann, *op. cit.* footnote 2, p. 185.
 - 55) ECJ, C-318/00, Bacardi-Martini SAS and Cellier des Dauphins/Newcastle United Football Company Ltd., Rec. 2003, I-905.
 - 56) The applicants, who produce and sell alcoholic drinks as a company constituted under French law, took a case in the British courts claiming compensation against a company constituted under British law, which owns a football club and a stadium. French law prohibits the televised advertising of alcoholic drinks. In the case of events that take place in other countries but are broadcast chiefly for a French audience, all those who conclude contractual agreements with the holder of the transmission rights are required, if advertising for alcoholic drinks is legally permitted in the host country, to use every available means to prevent the brand names of such drinks from being broadcast. On the basis of these rules the applicants and their advertising agency were barred from placing their advertising at a football match taking place in the UK and involving a French team because coverage of the game would also have been broadcast in France by a French broadcaster who had acquired the transmission rights.
 - 57) GA Tizzano, verb. in C-262 and C-429/02, Commission/France and Bacardi France/Télévision Française TF1 *inter alia.*, concluding arguments, 11 March 2004, not yet published in the European Court Reports.
 - 58) Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 213 of 30 July 1998, p. 9.
 - 59) ECJ, C-376/98, Germany/European Parliament and Council of the European Union, Rec. 2000, I8419.
 - 60) Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 152 of 20 June 2003, p. 16.