LICENSING (TELEVISION RIGHTS): THE M6, GT AND SIC CASES

Subject: Licensing

Industry: Television rights; sporting events

Parties: M6
Gestevisión Telecinco
SIC

Source: Court of Justice Press Release 80/02, dated 8 October 2002, relating to the judgment of the Court of First Instance in Joined Cases T-185/00, T-299/00 and T-300/00 (*M6 v Commission, Gestevisión Telecinco v Commission and SIC v Commission*)

(Note. This is a case in which an exemption decision by the Commission has been challenged successfully in the Court of First Instance by parties claiming that their access to the market was severely restricted by the Commission's approval of the licensing system in question. At the time of writing, the full text of the case is not available: if it adds substantially to the present summary, a fuller report will appear in due course.)

According to the Court of First Instance, the Commission was wrong to conclude that, even in a market limited to certain major international sporting events, the sub-licensing system set up by the European Broadcasting Union (EBU) guaranteed access to Eurovision rights for third parties competing with EBU members. Eurovision is a television programme exchange system based on the understanding that member radio and television organisations will offer other members their coverage of national sporting and cultural events likely to be of interest to them. It is coordinated by a professional association, the EBU, whose active members may participate in the joint acquisition and sharing of television rights to international sporting events, known as "Eurovision rights".

Four companies operating free-to-air television channels with national coverage - the French channel Métropole télévision SA ("M6"), the Spanish companies Antena 3 de Televisión SA and Gestevisión Telecinco SA and the Portuguese company Sociedade Independente de Comunicação SA ("SIC") - are contesting the rules governing the joint acquisition of television rights for sporting events, the exchange of the signal for sports broadcasts under Eurovision, and contractual access for third parties to that system, which gives rise to serious restrictions on competition. The four applications focus in particular on the sub-licensing system governing access to the Eurovision system for third parties broadcasting free-to-air.

A 1993 decision by the Commission granting an exemption from the Community competition rules applying to companies for access (broadly understood) to the rights held by the EBU was annulled by the Court of First Instance on 11 July

1996. Subsequently, at the Commission's request, the EBU adopted new provisions, which were the subject of a second Commission exemption decision covering the period 26 February 1993 to 31 December 2005, inter alia in the area of sub-licences, considered to offer wide opportunities for live and deferred transmission for non-members on reasonable terms. That second decision was the subject of the present action before the Court of First Instance, on the ground that the condition on which it was based - that is, the non-elimination of competition for non-members - had not been satisfied and that the exemption decision should therefore be annulled.

The Court of First Instance confirms the position of the applicants: the sub-licensing system does not guarantee competitors of members of the EBU sufficient access to the transmission rights for sporting events which members hold by virtue of their participation in that purchasing association. As a result, the exemption it enjoys must be annulled. The Court considered first the structure of the markets in question and the restrictions on competition resulting from the Eurovision system. That examination revealed the existence of an upstream market, for the acquisition of rights, and a downstream market, for the televised transmission of sporting events, and made clear that television rights to sporting events were granted for a given territory, normally on an exclusive basis. That exclusivity was considered necessary by broadcasters to guarantee the value of a given sports programme in terms of viewing figures and advertising revenues.

Analysis of the effects of the Eurovision system on competition shows that it leads to two types of restriction:
- first, the joint acquisition of television rights to sporting events, their sharing and the exchange of signal restricts or even eliminates competition among EBU members which are competitors on both the upstream and downstream markets;
- second, the system gives rise to restrictions on competition for third parties, since those rights are generally sold on an exclusive basis, an "aggravating" circumstance for non-members which are refused access to them.

While it is true that the joint purchase of televised transmission rights for an event is not in itself a restriction on competition in breach of the provisions of the Treaty and may be justified by particular characteristics of the product and the market in question, the Court of First Instance points out that the exercise of those rights in a specific legal and economic context may none the less lead to such a restriction. Barring access to programmes deprives non-EBU channels of potential revenue and demonstrates Eurovision's extreme exclusivity: if the same rights were bought by a media group, operators could negotiate to obtain them for their respective markets.

The Court of First Instance also considered whether the third-party access scheme to the Eurovision system compensated for those restrictions on competition for third parties and therefore avoided their being eliminated from competition. Two cases must be considered: live and deferred transmissions. Even if it were acceptable for EBU members to reserve the first category for themselves, nothing justifies their extending that right to all the competitions in a given event even when they do not intend to broadcast those competitions live. The possibility of

providing deferred coverage or roundups of events is subject to several restrictions, in particular as regards embargo times and the editing of programmes.

As a result, both the rules and the operation of that system fail, with a few exceptions, to allow competitors to EBU members to obtain sub-licences for the live broadcast of unused Eurovision rights. In reality, the system allows the transmission of competition roundups only under very restrictive conditions. The Commission has therefore made a manifest error of assessment in determining that the sub-licensing system could be granted an exemption. ■

Enviromental Aid (I): the Tuscany Case, Italy

The Commission has begun an in-depth investigation into certain aid measures planned by the Italian region of Tuscany for the protection of the environment. In November 2001 the Italian authorities notified the Commission of an investment aid scheme to encourage the use of renewable energy sources and measures to reduce energy consumption. However, in the case of aid for the production of electricity and thermal energy from photovoltaic installations, the Italian authorities have not as yet explained why the proposed aid intensity of 75% would be necessary. The Commission felt that the eligible energy conservation measures were not clearly defined; it was not evident that the investments would make for genuine energy savings; and the aid intensity admissible under the Community guidelines on state aid for environmental protection appears to have been exceeded in some cases.

Source: Commission Statement IP/02/1405, dated 2 October 2002

Environmental Aid (II): The Shotton Case, United Kingdom

The Commission has decided to open a formal investigation procedure into a planned aid of £23 million in favour of Shotton, a newsprint producer owned by UPM-Kymmene and located in North Wales. The planned aid will be granted under the Waste and Resources Action Programme (WRAP), which was established to promote sustainable waste management. The aid is intended to adapt Shotton's facilities to produce newsprint from waste paper rather than virgin pulp. Although the Commission recognises the environmental benefits of the project, it has serious doubts on whether this aid could be approved under the current guidelines on State aid for environmental protection. The main reason for opening the formal investigation procedure is that the Commission has doubts whether it qualifies as an environmental project believes that the project may qualify as a normal investment since it seems to be current practice to produce newsprint from waste paper. Moreover, even if the environmental guidelines were to apply, the Commission at this stage has doubts that the eligible costs were calculated in accordance with the environmental guidelines.

Source: Commission Statement IP/02/1404, dated 2 October 2002