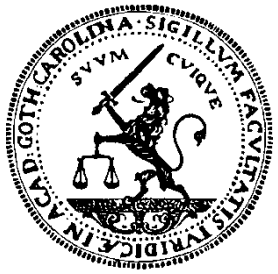

FACULTY OF LAW
Lund University

Maurits Schön

Joint selling of television rights – an EU competition law perspective and a comparative analysis of the impact of Regulation 1/2003

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Abstract

This thesis will deal with two competition law issues, a substantive one as well as a procedural and somehow political one. The substantive issue is the joint sale of television rights of football clubs from a EU competition law perspective. The procedural subject of this thesis is the impact of Regulation 1/2003 on competition law enforcement and on the uniform application of the competition rules within the European Union.

The thesis will firstly analyse the European Commission decision regarding the joint sale of television rights of the UEFA Champions League. This decision was an exemption decision, adopted under Art. 101(3) TFEU and the procedural Regulation 17/62. The analysis will focus on the legal assessment of the Commission under Art. 101(1) and 101(3) TFEU and carve out conclusions concerning the policy of the Commission.

In a second step, the thesis will picture how European competition policy is reflected in the new enforcement regime of Regulation 1/2003 and which changes this new regime introduced. The centre of portrayal will be the two big procedural changes: the shift from *ex ante* to *ex post* control and the decentralisation of competition law enforcement and also a substantive novelty, i.e.e. the new enforcement tool of commitment decisions under Art. 9 of Regulation 1/2003 and the benefits and risks linked to that tool. By critically assessing the Commission's own reports on the functioning of the new enforcement regime, the thesis will argue that it is necessary to take a closer look on the aims and approaches of the Commission and the NCAs in similar cases, to actually draw conclusions regarding the uniformity of the application of competition law and policy by the different competition law enforcers within the EU.

The fourth and fifth chapter will therefore contain a comparative analysis of several decisions concerning the same matter. Following the UEFA Champions League case, the Commission adopted two commitment decisions under Art. 9 of Regulation 1/2003 regarding the joint sale of television rights. The Commission ended proceedings in the German Bundesliga case, 2005, and the FA Premier League case, 2006, by making the imposed commitments binding on the associations of football clubs. Those commitments were only binding until 2009 and 2013 respectively; it was for the NCA of Germany and the NRA of the UK to further deal with the joint sale of media rights of their national football leagues after those commitments expired. The German Bundeskartellamt adopted commitment decisions in 2012 and 2016 under national procedural rules and the British Ofcom closed its investigation in 2016 by referring back to the European Commission's decision

from 2006. How the Commission and the two national authorities dealt with the joint sale and especially the legal assessment under Art. 101 TFEU and the commitments they used to target the anticompetitive constraints identified, will be assessed in detail and compared in this chapters. The thesis will show, that the new tool of commitment decisions under Art. 9 Regulation 1/2003, the margin of discretion for competition authorities regarding their allocation of investigative resources and the different approaches of the Commission and NCAs bear risks of an inconsistent policy and application of European competition law, that need to be kept in sight. On the other hand, the thesis will illustrate how Regulation 1/2003 and especially the competence to accept commitments provide a more flexible tool to react to the constant changes on economic markets.

In the last chapter of the thesis, the author will give an outlook on how competition law and law enforcers within the EU could deal with the joint sale of media rights in the future.

Preface

This thesis marks the end of my studies at Lund University. It has been a pleasant journey and wonderful year.

I want to thank my supervisor, Anna Tzanaki, for her support, interest and guidance throughout the whole process.

Since this thesis also marks the end of my seven-year lasting university education, I want to thank my parents for giving me the opportunity to follow my interests and support me ever since I can remember.

Maurits Schön

Abbreviations

BKartA	Bundeskartellamt
BSkyB	Sky UK (rebranded in 2014)
ECJ	The European Court of Justice
EU	European Union
ECN	European Competition Network
FA	The Football Association
GWB	Gesetz gegen Wettbewerbsbeschränkungen
Internet TV	Web TV, IPTV
Ofcom	Office of Communications
NCA	National Competition Authority
NRA	National Regulatory Authority
Setanta	Setanta Sports Ltd.
TFEU	Treaty on the Functioning of the European Union
TV	Satellite, Terrestrial and Cable Television
UEFA	Union of European Football Associations
UK	United Kingdom of Great Britain and Northern Ireland
USA	United States of America

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1. Introduction

1.1. Background

Sports have become far more than competition between athletes. Sports and especially football have evolved to a multi-billion dollar business in Europe. For that reason, European Law and European institutions in several cases have addressed sports-related legal issues.[1] Sports competitions are characterized by the necessity of competitors and the unpredictability of results. As distinct from economic competition in general, sports teams or athletes do not aim for the permanent elimination of their competitors, because without a sufficient amount of more or less equipollent competitors, there would be no sports competitions.[2] To guarantee certain unpredictability of the results of these competitions and keep them interesting for spectators, some cooperation between the athletes or sports teams is necessary. It is necessary to play by the same rules and one may establish a sports association that holds a monopoly in designing these rules, organizing competitions and ensuring adherence to the rules. At the same time, sporting equality is also linked to economic equality. If the financial differences between competing clubs get too big, unpredictability of results will be hard to achieve, because those clubs that pay their players the highest salary, will usually be able to recruit the best players.[3] A general derogation from the application of European competition law for the sports sector has been discussed and was rejected by the European Court of Justice.[4] Nevertheless, law enforcement and jurisdiction have recognized the particularities of sports-related legal cases and have taken those into consideration in their decisions and policy.[5] The biggest source of income for football clubs nowadays is the sale of television rights to broadcasters.[6] These broadcasting rights are usually not sold by single clubs, but by an association of all clubs, participating in the same football league. As football clubs are considered to be undertakings in the sense of Art. 101 TFEU [7], their practice of jointly selling broadcasting rights has been subject to three decisions of the European Commission.[8] The first decision was still adopted under Regulation

[1] Judgment of 18 July 2006, *Meca-Medina*, C-519/04, ECLI:EU:C:2006:492; Judgment of 15 December 1995, *Bosman*, C-415/93, ECLI:EU:C:1995:463; Judgment of 15 March 2010, *Olympique Lyonnais*, C-325/08, ECLI:EU:C:1995:463.
[2] Ulrich Loewenheim, Karl M. Meessen, Alexander Riesenkampff, Christian Kersting, Hans Jürgen Meyer-Lindemann, *Kartellrecht*, C.H. Beck, 3rd Edition 2016 [109].
[3] Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe,* Jeffrey S. Moorad Sports Law Journal, 2015, Vol. 22: Iss. 1, Article 2, 75, 76, 75-108.
[4] Judgment of 4 October 2011, C-403 and 429/08, *Football Association Premier League Ltd. v QC Leisure and Karen Murphy v Media Protection Services Ltd*, ECLI:EU:C:2011:631.
[5] Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms*, Oxford University Press, 5th Edition 2016, 249 ff.; *White Paper on Sport*, COM/2007/0391 final.
[6] <https://www.theguardian.com/football/2017/jun/01/premier-league-finances-club-by-club> accessed 15 May 2018.
[7] Robert C.R. Siekmann*, Introduction to International and European Sports Law*, Asser International Sports Law Series, Capita Selecta, 2012, 101.
[8] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League,* OJ L 291, 8.11.2003, 25–55; COMP/C-2/37.214 - *Joint selling of the media rights to the German Bundesliga*, OJ L 134, 27.5.2005; COMP/C-2/38.173 – *Joint selling of the media rights to the FA Premier League, OJ C 7, 12.1.2008.*

17/62[9] and was an exemption decision under what is currently Art. 101(3) TFEU. After the introduction of the new enforcement regime – Regulation 1/2003[10] - in 2004, the Commission was given the new enforcement tool of commitment decisions under Art. 9 of the new Regulation. The Commission adopted two decisions under Art. 9 of Regulation 1/2003 regarding national football leagues in 2005 and 2006. Regulation 1/2003 also empowered NCAs to fully apply Art. 101 TFEU, including the exemption of Art. 101(3) TFEU. The decentralisation of enforcement allows commitment decisions by the NCAs in the field of joint selling of television rights on the national market, while paying respect to the minimum requirements established in the Commission's decisions adopted before. Taking the first exemption decision as a starting point, this thesis will address the development of the joint sale of broadcasting rights and how the shift to a decentralised enforcement model and the new tool of commitment decisions under Art. 9 of Regulation 1/2003 have influenced law enforcement in the EU and the development in different Member States.

1.2. Research questions and aim of the study

The research question and aim of the study are twofold. The first aim is to analyse the legal assessment of the European Commission and the NCAs of Germany and the UK[11] regarding the joint sale of television rights of club football competitions under Art. 101(1) and 101(3) TFEU. This practice has raised competition law concerns in Europe and the United States and was subject of several administrative decisions and judgments, however the problem of how to deal with the joint sale has not been entirely solved. The thesis will therefore analyse the competition restraints, but also the efficiencies that result from this practice and the different approaches, as to how to strike a balance between those restraints and efficiencies, that have been suggested by competition law enforcers, courts and scholars. To provide an overall image of the advantages and disadvantages of these different solution approaches, the thesis will try to work out the effects the Commission and NCAs decisions had and have on the relevant markets.

The second aim of the study is to assess whether the new enforcement Regulation 1/2003 has led to an inconsistent application and enforcement of the competition rules in that particular matter within the EU. By comparing the enforcement approaches taken by the European Commission and the NCA of Germany and the NRA of the UK in the matter of joint sale of media rights, the thesis will

[9] Council Regulation No 17 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty, OJ 013, 21.02.1962.
[10] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in 81 and 82 of the Treaty, OJ L 001, 04/01/2003.
[11] When referring to the British NCA, the author is referring to the Ofcom, which is a national regulatory authority (NRA). The terms NCA and NRA are used interchangeably throughout this thesis, since the Ofcom enjoys the competence to deal with the joint sale of media rights in the UK, like NCAs do in other Member States.

scrutinize the new enforcement tool of commitment decisions under Art. 9 of Regulation 1/2003 and the decentralisation of enforcement. Since the European Commission adopted one exemption decision under the old Regulation 17/62 regarding this topic, followed by two commitment decisions under Art. 9 of Regulation 1/2003, after which the NCAs of Germany and UK had the competence to deal with the same matter as the Commission did before, when those commitments expired, the joint sale of media rights and the different decisions by different law enforcers under the old and new enforcement regime, offer the chance to be compared to each other and assess their consistency.

1.3. Delimitations

The thesis will be mainly dealing with the legal analysis of the European Commission decision before, and the European Commission and NCAs enforcement practice, after the implementation of Regulation 1/2003. The thesis will focus on a European competition law perspective and will engage with and discuss competition rather than other, for instance IP, issues. Competition law is necessarily linked to economics. The thesis will try to pay attention to these links and consider different economic effects to properly assess the legal issues of the joint sale of television rights. However, the goal of the study is not to present an in-depth analysis of the economic issues. The author limited the analysis to the German and British football leagues for three reasons. Firstly, it was only those two national football leagues that the Commission dealt with. Secondly, the different legal systems (common law and civil law) of the UK and Germany serve well to compare different enforcement approaches of the NCAs and explore differences regarding the application of the competition rules and lastly, because both national football leagues are two of the most important leagues in the world and their television rights the most valuable.

1.4. Methodology and sources

The author will use a descriptive method in order to give an overview of the joint sale of media rights within the EU and the legal issues connected to this practice. The primary sources used, mainly decisions of the European Commission and the NCAs, are analysed by using traditional legal dogmatic method. In chapters four and five, the author uses a comparative method to inquire and elaborate on the consistency and uniformity of the application of competition law by the European Commission and the NCAs. Since competition law is closely linked to economics, the decisions also rely on statistical research and economic assumptions, which need to be assessed as well. In particular, research publications of the Commission and NCAs were evaluated to support or criticise the assessments of the European Commission, the BKartA and Ofcom. For the purpose of

explaining the foundational legal context and the procedural novelties that were introduced to the competition law enforcement system by Regulation No. 1/2003, the author used literature from the field of competition law and the guidance that was published by the European Commission itself. To properly discuss the competition law issues linked to the joint sale of media rights, academic articles were used to critically assess the authorities' line of argument and to substantiate the author's own views. Since one aim of the thesis is to depict the developments and effects of the authorities' competition law decisions on the concerned markets and especially the effects for consumers, it was necessary to use economic magazines and newspapers to gather information about prices and selling arrangements of the joint selling bodies and the involved broadcasting operators.

2. European Commission decision under Art. 101(3) TFEU in the Old Enforcement Regime - Regulation 17/62

The UEFA Champions League is the most recognized and important European club competition for football. The best 32 teams of all UEFA member state countries compete against each other throughout the season (usually September until May).[12] As one of the top sports events in football, there is a very big interest for football fans to watch the games of the UEFA Champions League live on television and get access to video-highlights and reports on the games. Selling the rights to broadcast the games to media-operators is a task assigned to the organizer of the competition, the UEFA. The UEFA is the European football association of all national football associations. The European Commission raised objections against the joint sale of media rights in 1998 and the UEFA applied for negative clearance, or respectively an exemption decision under Art. 101(3) TFEU in 1999. The European Commission decided to initiate proceedings in the case in 2001 and adopted an exemption decision in favour of the UEFA and its members in 2003. This chapter will give an overview of the economic and factual foundations and background of the joint sale of television rights and analyse the Commission's exemption decision under Art. 101(3) TFEU and Regulation 17/62, especially the legal assessment under Art. 101(1) TFEU and the efficiencies identified under Art. 101(3) TFEU.[13]

2.1. Background and Foundations

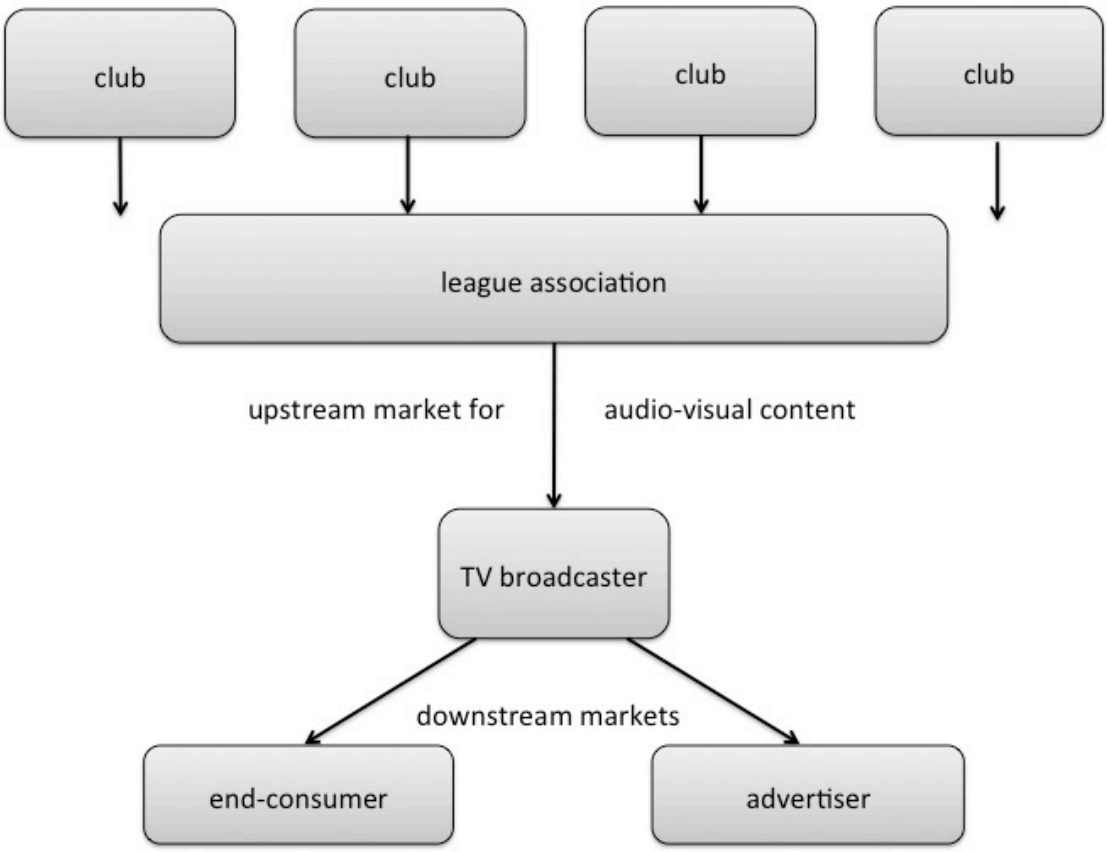
Joint selling of television rights in sports was a common practice before the Commission even started to investigate that practice for the first time. Usually, the football clubs are part of a separate legal person, referred to as the league association. The clubs assign the task of selling all media rights to the association, meaning the rights to broadcast the league games on television or via the Internet.[14] The clubs are not only considered competitors to each other on the football pitch, but also regarding the sale of club-branded merchandise, the sale of tickets or as employers for the best players on the market. The clubs participating in the league are usually the shareholders or members of the league associations and those associations are governed by rules and regulations adopted by the association itself.[15] The clubs empower the league association to sell the broadcasting rights on their behalf on an exclusive basis and for a certain period of time. The associations sell the rights to media operators. Thereby the media operators purchase the right to broadcast the football matches

[12] <http://www.uefa.com/uefachampionsleague/season=2018/competitionformat/index.html#/> accessed 15 May 2018.
[13] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League.*
[14] See for instance §§ 7, 19 *Satzung DFL Deutsche Fußball Liga e.V*.
[15] UEFA – *UEFA Statutes*; FAPL – *Articles of the Association of the Football Association Limited*; DFL – *Satzung DFL Deutsche Fußball Liga e.V*.

of the league as a whole on television and via the Internet. The selling arrangements concluded with these broadcasters are determined by the league association and are binding for its members.

An important fact when assessing the joint sale of television rights is that the contract concluded between the league association and media operators, regarding the sale and acquisition of audio-visual content, the so called upstream market, has a significant effect on the downstream markets. The downstream markets are all markets on which the media-operators, acquiring the rights to broadcast, are active. They mainly offer subscription services to consumers, like pay TV, free TV or Internet streaming of live football, but also sell broadcasting airtime on the market for advertisers.[16] Thus, the media rights have a very high economic value for broadcasters, especially when they are exclusive, since first division football is considered a key sales driver on the pay TV market [17] and promises bargaining power on downstream markets, like the one for television advertisement.[18] By granting exclusive licenses to broadcast, the joint sale on the upstream market leads to a very high concentration of market power on the downstream markets, since only one media-operator is licensed to provide end-consumers with live football of the league.

[16] Philip Kienapfel, Andreas Stein, *The application of Articles 81 and 82 EC in the sport sector*, Competition Policy Newsletter 2007, 6, 6-14.
[17] Stefan Wilbert, *Joint selling of Bundesliga media rights — first Commission decision pursuant to Article 9 of Regulation 1/2003*, Competition Policy Newsletter 2005, 45, 44-46.
[18] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [80].



As the figure above shows, the collective decision of the football clubs to sell their television rights jointly, leads to one supplier on the upstream market – the league association. In case of selling the rights on an exclusive basis to only one TV broadcaster, the joint sale leads to only one supplier on the downstream market as well. This practice has raised concerns about the compatibility with competition law.

2.2. Procedure and legal assessment under Art. 101 TFEU

2.2.1. Art. 101(1) TFEU

The *UEFA Champions League* decision from 2003 was adopted under Art. 2 of Regulation 17/1962. Thus, the Commission cleared the joint sale of television rights with an individual exemption decision under Art. 101(3) TFEU. The organisational structure of the UEFA slightly differs from what was laid out above.[19] The UEFA is not a national association of football clubs, but a European association of the national football associations.[20]

[19] See above, chapter 2.1
[20] <https://en.wikipedia.org/wiki/UEFA> accessed 15 May 2018.

The Commission first had to assess whether the joint selling of audio-visual rights falls within and conflicts with Art. 101(1) TFEU. The provision prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

In summary, the Commission made the following remarks regarding Art. 101(1) TFEU: The football clubs, respectively national football associations, by selling their media rights, engage in an economic activity and are therefore considered to be undertakings.[21] By agreeing to collectively market their rights to broadcasters, the football clubs conclude a horizontal agreement.[22] Furthermore and addressed with more emphasis by the Commission, the UEFA must be considered an association of undertakings and an undertaking itself, in the sense of Art. 101(1) TFEU.[23] This association is empowered to organize and process a joint sale of media rights on behalf of all clubs. By contracting with media operators and determining the selling arrangements in place of the clubs, the league association adopts a decision, within the meaning of Art. 101(1) TFEU.[24] The markets concerned are the upstream market for sale and acquisition of audio-visual content and the downstream markets for free TV, pay TV and Internet TV services, providing the consumer with live football or highlights of the league games and attracting advertisers based on the amount of subscribers.[25] The Commission also concluded that there is a single product market for audio-visual rights of football competitions that take place throughout the whole year. In other words, there is no substitute for seasonal league football, both on the upstream and downstream market.[26] From a geographical point of view, the markets concerned are usually national markets. On the upstream market this is due to the fact that the sale of audio-visual rights takes place on a national basis and is governed by national regimes, which are typically very country-specific in sectors that were liberalised recently and may be still governed by regulatory regimes, like telecommunications, railways or energy.[27] On the downstream market, geographical markets seem to be national because of linguistic criteria, mainly the language in which the service provider is broadcasting, since end-consumers prefer to watch in their own language.[28] The Commission generally comes to the conclusion that the joint sale of media rights is incompatible with Art. 101(1) TFEU, because this

[21] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [106].
[22] Kienapfel, Stein, (n 16) 11.
[23] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [109].
[24] ibid [114].
[25] ibid [56].
[26] ibid [62]; see also COMP/M.2483 – *Canal+/RTL/GJCD/JV*.
[27] Kienapfel, Stein, (n 16) 6; <http://ec.europa.eu/competition/sectors/telecommunications/overview_en.html> accessed 15 May 2018.
[28] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [90].

practice prevents single clubs from exploiting their audio-visual rights and competing against each other on the upstream market in individually selling those rights. It also prevents competition between the association and the clubs, as long as the clubs have no rights left to exploit individually. The association is determining price, quantity and quality of the product for the clubs and hinders the clubs from competition on innovation markets.[29] Most importantly, the collective sale leads to a single source of supply on the upstream market. Each of the single clubs only holds a small market share, which would normally cause a demand-led market. However, by selling collectively through one single body, the market becomes supply-driven.[30] By granting exclusive licences to media operators, without leaving clubs the possibility to exploit certain parts of their audio-visual rights on their own, the joint sale of the media rights also significantly impedes competition on the downstream market.[31] This legal assessment and the finding of incompatibility of joint sale of television rights with Art. 101(1) TFEU have rarely been contested, national authorities and courts unanimously agree with the European Commission. Starting from this legal assessment, the Commission was confronted with the question, which conditions need to be fulfilled in order to approve the joint sale of media rights under Art. 101(3) TFEU.

2.2.2. Art. 101(3) TFEU

Art. 101(3) TFEU allows for the enforcing body to exempt an anticompetitive behaviour from the application of Art. 101(1) TFEU. To exempt an anticompetitive behaviour under that provision, it is necessary for the agreement of undertakings or the decision of an association of undertakings to contribute to improving the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit. At the same time, the restriction is not allowed to impose restrictions on the undertakings that are not indispensable for the attainment of these objectives or to eliminate competition on a substantial part of the market. The aim of this provision is to avoid too inflexible enforcement of antitrust rules and to give authorities the possibility to weigh efficiency gains against any anticompetitive effects.[32]

The Commission identified several advantages of a joint sale: The first benefit is a single point of sale. A single point of sale was named as a benefit especially because of the European dimension of the UEFA Champions League.[33] The involvement of clubs from many nationalities and the different national broadcasters, operating on a varying number of national markets would cause

[29] ibid [114].
[30] ibid.
[31] ibid [116].
[32] Richard Wish, David Bailey, *Competition Law*, Oxford Competition Law, 8th Edition 2015, 165.
[33] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League*, [143], [144].

practical difficulties if each club would exploit its rights individually.[34] Furthermore, the Commission named the possibility for the UEFA to promote a league-branded product as a benefit. The UEFA Champions League is a combination of league and knockout-competition. Taking this into account, it would be practically impossible for a single club to offer any broadcaster a product, that guarantees being able to plan a programme schedule for the whole season, since no club can guarantee to play until the final round.[35] As broadcasters would still be interested in assuring to broadcast all games, in particular those of the final rounds, the Commission assumed that they would have to acquire more rights in the beginning of each season, in order to guarantee to their customers to be able to show all games of the knock-out stages, irrespectively of which clubs would play.[36] The Commission concluded that only a joint sale could prevent this situation and would also be beneficial for the clubs, since they do not have to build up commercial departments able to deal with the complexity of selling audio-visual rights to a large number of countries.[37] The Commission also identifies a league-branded product as one of the main interests of consumers on the downstream market. Many consumers would be interested in getting an overview of the UEFA Champions League, as well as to have a choice between several games on each match day. A joint sale of the rights would offer broadcasters the possibility to meet this demand.[38] This identified consumer demand and the advantage of a joint sale to create a product that pictures the league as a whole, has been supported by most scholars and is the foundation of those who favour the application of the single-entity doctrine.[39] Branding was in general also considered to be helpful, in order to promote the product itself and create efficiencies by wider recognition.[40]

In order to safeguard that these benefits are achieved and fulfil the conditions of Art. 101(3) TFEU, the Commission and the UEFA had an intensive communication, which resulted in a new selling arrangement, becoming operative from the season 2003/2004 on. This new selling arrangement established that the audio-visual rights are split up into several exclusive packages, which can be acquired by media-operators through a tendering procedure for a maximum period of 3 years.[41] By guaranteeing a fair tendering procedure and by limiting the length of the contracts, the Commission

[34] ibid [144].
[35] ibid [145].
[36] ibid [148].
[37] ibid [153].
[38] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [147], [152].
[39] See for detailed explanation, Loewenheim, Meessen, Riesenkampff, Kersting, Meyer-Lindemann (n 2), [109]; Hans-Joachim Hellmann, Stefan Bruder, *Kartellrechtliche Grundsätze der zentralen Vermarktung von Sportveranstaltungen, Die aktuellen Entscheidungen der Kommission zur Bundesliga und FA Premier League*, EuZW, 2006, 359-363;Holger Blask, *Die Anwendbarkeit der Single-Entity-Theorie im professionellen Fußball: Ein rechtsvergleichende Analyse der Bewertung im Us-amerikanischen, englischen, deutschen und europäischen Kartellrecht*, Heymanns, 2006.
[40] Kienapfel, Stein (n 16) 12.
[41] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [32], [33].

tried to enhance *ex ante* competition and to prevent long-term foreclosure on the upstream market. The Commission was also aiming for containment of the vertical restraints resulting from having only one source of supply on the upstream market.[42] As the figure above has shown[43], allowing an exclusive sale by a collective body, to only one broadcaster on the upstream market, will affect the downstream market as well. The exclusivity as a vertical restraint between the UEFA and the purchaser of the rights, would lead to a monopoly on the downstream market, if only one broadcaster purchased all rights. The Commission tried to prevent this situation, by splitting up the rights into several exclusive packages and thereby increased the chances of more than one broadcaster acquiring rights on the upstream market. The selling arrangements were constructed to ensure that free TV operators would usually acquire at least one package of live television rights and that the Internet would be utilised as a new distribution channel.[44] However, in the early 2000s the technical development of the Internet did not allow providing proper live streaming and was only introduced to provide highlight-videos etc.[45] One of the most interesting arrangements the Commission insisted on was the possibility for single clubs to exploit those live rights individually that the UEFA failed to sell.[46] The reasoning behind this particular arrangement, the so called fall back clause, was on the one hand, that the efficiencies of a joint sale, named by the Commission, only apply when the audio-visual rights are actually exploited by the collective body and on the other hand, that it helps to avoid unused rights and introduces competition between the clubs.[47] Analysing this arrangement and taking into account the temporal context gives some indication of the Commission's policy at that time. The Commission aimed to push forward innovations on the market, to open up new distribution channels, which would promote competition.[48] In particular, the Commission was concerned with promoting the Internet as a new medium and did so by assuring that clubs have the possibility to exploit the rights to show highlight videos etc. individually. By focussing on the prevention of unused rights and thereby indirectly pressuring the UEFA to sell all rights on the upstream market, one of the major concerns of the Commission was to provide a high quality product, for a reasonable price and a diversity of offers for consumers.[49] The Commission was focussing on preventing restrictions of output on the upstream market, which would cause a detriment to consumers on the downstream market. This leads to the conclusion that the *"faire*

[42] Ulrich, Immenga, Ernst-Joachim Mestmäcker/ Andreas Fuchs, *Wettbewerbsrecht Band 2:GWB,* C.H. Beck, 5th Edition 2014, § 2 [194].
[43] See above, chapter 2.1.
[44] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [33], [40].
[45] Torben Toft, Competition Policy Newsletter 2005, *Football: joint selling of media rights*, 49, 47-52.
[46] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [34], [35].
[47] ibid [158], [159].
[48] Toft (n 45) 50.
[49] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [169], [170].

share for consumers" criterion, incorporated in Art. 101(3) TFEU, plays a decisive role for the Commission's assessment in this context.

By limiting the contracts between the UEFA and the media-operators to a maximum length of 3 years and splitting up the rights into several packages, which were constructed to forestall one operator from acquiring all rights, the Commission addressed vertical effects like foreclosure on the upstream market and downstream market and tried to encourage *ex ante* competition on the upstream market. The foreclosure effect is based on the exclusivity of the sold rights. It seems like the Commission tried to somehow confine the effects an exclusive licence entails, without touching the exclusivity itself, except in case of unexploited rights by the UEFA.[50] This measure protects the market structure and competitive process itself. Noticeable at this point is that the Commission also justified this intervention on the upstream market, by referring to the better outcome on the downstream market meaning that of a better product for consumers. The consumer welfare approach seems to have been the driving policy behind the reasoning in this decision.

2.2.3. Effects on the market

The identified advantages of a collective sale of the audio-visual rights have hardly been contested. They also materialised in reality: The number of licensees in the EU has grown from 14 (ten sub-licenses) to 22 directly after the decision in 2003 and to over 30 at present.[51] In the majority of the EU Member States, there is more than one media-operator holding a direct license and broadcasting the UEFA Champions League live on television and usually one of the operators broadcasts on free TV.[52] Furthermore, since 2003, the number of games of the UEFA Champions League that are broadcasted has increased to full coverage of all matches, whereas before the decision, only a small amount of games was broadcasted.[53] The Internet, as a way of innovation, was promoted by the Commission and has become a new distribution channel on the live broadcasting market and thereby created a new way of market entry, to prevent foreclosure on the upstream and downstream market and offer consumers a variety of product choice on the downstream market. This culminated just recently, when it was announced that an internet-streaming operator, not broadcasting through terrestrial, cable or satellite television at all, purchased a large amount of broadcasting rights of the UEFA Champions League on an exclusive basis for the German speaking countries.[54] The initial

[50] ibid [34], [35].
[51] <https://www.uefa.com/uefachampionsleague/news/newsid=2398198.html#/ > accessed 15 May 2018, Toft (n 45) 47.
[52] <https://www.uefa.com/uefachampionsleague/news/newsid=2398198.html#/> accessed 15 May 2018.
[53] Toft (n 45) 47.
[54] <https://www.sponsors.de/dazn-und-sky-die-verteilung-der-champions-league> accessed 15 May 2018.

measures taken by the Commission in the *UEFA Champions League* decision can therefore be considered being a success. It remains to be seen how the Commission has evolved in its practice since this decision and applied these principles in the two subsequent decisions regarding national football leagues.

2.3. Summary and Conclusions

The Commission came to the conclusion that a joint sale of television rights constitutes a breach of Art. 101(1) TFEU. Nevertheless the joint sale is linked to certain efficiencies, which led to an exemption decision under Art. 101(3) TFEU. Following the detailed assessment of Art 101 (3) TFEU in the *UEFA Champions League* decision, it is possible to derive minimum standards for exempting the joint sale of television rights from Art. 101(1) TFEU:

1. The rights must be sold through a fair and transparent tendering procedure to organize a competitive bidding process.
2. The rights must be unbundled into separate packages.
3. The broadcasting rights are sold for a maximum period of three years.
4. Unexploited rights by the collective body shall fall back to the clubs to prevent unused rights.

An interesting fact about the decision is that the Commission omitted to properly assess the question of the pro-competitive effects the solidarity distribution of the revenues has on the athletic competition, which is one of the main arguments brought up by all sporting associations to justify joint selling of their media rights. However, those four conditions established in the first Commission decision regarding the joint sale of the television rights of the *UEFA Champions League*, have governed and influenced the commitments in all future decisions, as will be pointed out below.

2.4. A different perspective – the single-entity doctrine

The European Commission has addressed the competition issues arising from the joint sale of media rights in this decision for the first time and having a look at the legal practice and academic discussions in other legal systems, might help to see the issues from a different angle. U.S. sports leagues and their economic activities have been subject of several antitrust cases.[55] The U.S. legislator addressed broadcasting rights in 1961 and granted a general exemption for the professional baseball, basketball, football and hockey leagues under the Sports Broadcasting Act.[56]

[55] *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002); *American Needle, Inc. v. National Football League,* 560 U.S. 183 (2010).
[56] 15 U.S. Code, Chapter 32, § 1291.

The Sports Broadcasting Act expired due to the technological developments in the broadcasting markets. In antitrust cases against U.S. sports leagues regarding licensing[57], one of the key arguments brought up by the sports leagues, was the single-entity doctrine as a defence against the accusation of violating Art. 1 of the Sherman Act (i.e. the equivalent provision of Art. 101(1) TFEU). The sports leagues and scholars in the U.S. argued that the league, as the organizer of the competitions between the teams, should be treated as a single-entity regarding licensing rights, rather than differentiating between the league association and the clubs as several individual undertakings and Art. 1 of the Sherman Act should therefore be inapplicable. The possibility to picture sports leagues as a whole could only be created by the league itself and not by single clubs, since no single club is able to even form a league, without the cooperation of other competing clubs. Since consumers demand a league-branded product, clubs should not be treated as independent undertakings regarding the sale of those rights, because no single club could meet that demand.[58] U.S. courts mostly rejected the single-entity defence. However, the courts established an automatic rule of reason scrutiny for sports leagues[59], which gives those leagues the opportunity to justify anticompetitive behaviour by reference to the particularities of the sports industry, under which the reflections on which the single-entity doctrine is based take effect.[60]

This approach might be transferred to the application of European competition law in cases concerning the joint sale of television rights of clubs of a sports league as well and has been discussed and is partly favoured by scholars.[61] The European Commission identified the association on the supply-side as an undertaking itself [62] and due to the narrow market definition, a dominant position of the league association seems very likely and was assumed by the NCAs, as will be illustrated below.[63] Since European competition law contains the provision of Art. 102 TFEU, to effectively prevent an abuse of market power by a dominant firm, it might be an alternative approach for the Commission and NCAs to control the practice of joint sale of television rights under that provision. The general agreement between the clubs, to license their media rights through the league association might be so inherent in a league competition, that there is hardly any ground to challenge this practice without impairing the product consumers' demand. Furthermore, courts

[57] *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010).
[58] See for summary of discussion – Farzin, (n 3) 75-108; Michael S. Jacobs, *Professional Sports Leagues, Antitrust and the Single-Entity Theory: A Defense of the Status Quo,* Indiana Law Journal*,* 1991, Vol. 67: Iss.1, Article 3, 25-58.
[59] Farzin, (n 3) 75-108.
[60] ibid [90], [91].
[61] Blask (n 39); Karl-Heinz Fezer, Wolfgang Büscher, Eva Inés Obergfell, *Lauterkeitsrecht: UWG,* C.H. Beck, 3rd Edition 2016 [370]-[372].
[62] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [106].
[63] See further below, chapter 5.5.1.

have already used Art. 102 TFEU to challenge the conduct of sporting associations.[64] The thesis will get back to these reflections in the analysis of the German BKartA decisions.[65]

[64] OLG München, 15.01.2015 - U 1110/14 Kart.; LG München I, Endurteil v. 23.06.2016 – 1 HK O 8126/16.
[65] See further below, chapter 5.1 and 5.2.

3. New Enforcement Regime - Regulation 1/2003

In May 2004, a new competition law enforcement system entered into force – Regulation 1/2003. The old enforcement system was governed by Regulation 17/62 and was built upon two foundations. The first one was an *ex ante* notification and clearance system. The exemption of Art. 101(3) TFEU needed to be authorised by the Commission and agreements were not valid and enforceable until this decision was granted.[66] The second foundation was the Commission's monopoly over the application of Art. 101(3) TFEU. Although Art. 101 and 102 TFEU had direct effect in all Member States, the national courts and competition authorities did not have the competence to apply Art. 101(3) TFEU.[67] In the Modernisation White Paper from 1999 [68], the Commission analysed the status quo and proposed several models for a more efficient enforcement regime.[69] The outcome was Regulation 1/2003, which brought major changes to the application of competition law in the EU, namely a shift from *ex ante* to *ex post* control of EU competition rules and to a decentralised enforcement model. Regulation 1/2003 also embodies an alteration of the Commission's policy. The following chapters will assess the novelties introduced by Regulation 1/2003, especially those of importance to the topic of this thesis and will continue to analyse the impact of these changes on the development of the joint sale of media rights in Germany and the UK.

3.1. European Commission Policy

In the Modernisation White Paper from 1999, the Commission started by explaining the necessity of a centralised enforcement system based on *ex ante* control in the beginning of the EU. Starting with six Member States, two of them not having a competition law system [70], the centralised system would have served to firstly establish a "culture of competition"[71]. The integration of national markets and a uniform application of competition law were considered necessary and effective tools to promote the single market.[72] The Commission concluded that the Member States and undertakings had accepted the body of rules developed throughout the years of uniform application by the Commission.[73] Furthermore the Modernisation White Paper identified new challenges faced by law enforcement in the EU. Parallel to the growth of the EU, the total number of cases referred

[66] Alison Jones, Brenda Sufrin, *EU Competition Law: Texts, Cases and Materials,* Oxford Competition Law, 6th Edition, Chapter 1, 887.
[67] ibid 886.
[68] White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty, (EEC) No 2821/71, OJ C 132, 12.5.1999, (White Paper Articles 85 and 86 EC Treaty).
[69] ibid 22-26.
[70] Italy and Luxembourg, pointed out by the Commission - White Paper Articles 85 and 86 EC Treaty, 11.
[71] White Paper Articles 85 and 86 EC Treaty, 4.
[72] ibid 4.
[73] ibid 4.

to the Commission for negative clearance or an exemption decision increased and the officials in Brussels did not have the resources to guarantee fast procedures anymore.[74] The Commission emphasized that its new way of assessing competition law cases – the more economic approach - was linked to a more individual handling of each case, which would be practically impossible under the old enforcement system of Regulation 17/62.[75] Due to the imminent enlargement of the EU in 2004 as well as the completion of the Economic and Monetary Union, the Commission defined new policy goals of competition law in the EU and redefined its own role in that context. Having established a growing single market, the new policy goal of competition law in the EU should be to ensure effective competition, stop and detect cartels and maintain competitive structures on that market.[76] The new regime should serve to allow the Commission to become more active in the most serious infringements and stimulate and increase enforcement on national level at the same time. By reducing bureaucracy, compliance cost for the industry should be lowered and sustain the competitiveness of the single market in a globalizing world and economy.[77] As the guiding principle of the reform, the Commission names the "balance between the effectiveness of policy and a simplification of control"[78]. The Commission proposed several ideas of how to improve the enforcement of competition law and concluded that an abolition of the notification and exemption system, a direct application of Art. 101(3) TFEU and decentralised enforcement would be the essential pillars of the reform to face the new challenges and implement the new policy.[79] The new regime should also safeguard the consistency and uniformity in the application of Art. 101 TFEU, which was formerly guaranteed by the monopoly of the Commission to grant exemption decisions or negative clearances.[80]

The Modernisation White Paper can be summarised as a plea for a new era of competition law in the EU, characterized by more enforcement across the EU, more focussed enforcement by the European Commission and a reduction of workload for the officials of the Commission, not only by decentralising the enforcement, but also by delegating responsibilities to undertakings and the industry in general, since they had to self-assess their potentially anticompetitive behaviour, even if it may come with less legal certainty.[81] Departing from the former main policy goal of creating a

[74] ibid 11.
[75] ibid 30.
[76] ibid 5.
[77] ibid 5, 7.
[78] ibid 19.
[79] ibid 22-26.
[80] Jones, Sufrin (n 66) 888.
[81] See for detailed critical assessment: Mario Sigarusa, *A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules,* Fordham International Law Journal 1999*,* 1089-1127.

single market with a "culture of competition"[82], the new policy of the Commission is to effectively control compliance with the competition rules on the single market, governed by assessing each individual case with a more economic approach. Following the Modernisation White Paper from 1999, the Council adopted Regulation 1/2003 at the end of 2002 and the new regime became operative in May 2004. In the following the thesis will focus on the two major changes brought by Regulation 1/2003: the shift from *ex ante* to *ex post* control and the decentralisation of the enforcement and the Commission's new competence under Art. 9 of Regulation 1/2003, and picture their aims and effects.

3.2. Shift from *ex ante* to *ex post* control

The shift from *ex ante* to *ex post* control and the direct applicability of Art. 101(3) TFEU were based on the assumption of the Commission that over 40 years of uniform application and case law of the Commission and the European courts were enough to establish a foundation of competition law within the Union. Member States and undertakings would have accepted the body of rules developed over that time and would therefore be able to self-assess their compliance with competition law. By making Art. 101(3) TFEU directly applicable under Art. 1(2) of Regulation 1/2003, the exception laid down in Art. 101(3) TFEU does always apply if its conditions are fulfilled, without a prior decision of the Commission. This change was supposed to help the Commission to focus on more serious competition law infringements [83] and not spending most of its resources on deciding individual, mostly unimportant cases, but to give more general guidance to undertakings regarding novel legal issues and thereby help them to self-assess Art. 101 and 102 TFEU.[84]

It was argued, that this step to a direct applicability of Art. 101(3) TFEU and an *ex post* control system, would come with less legal certainty and a de-facto weakening of the implementation of Art. 101 TFEU, even though the substantive competition law provisions stayed untouched. This direct applicability of Art. 101(3) TFEU and the abolition of the notification and exemption decisions could lead to a pure system of control of abusive practices.[85] Scholars in favour of the reforms argued, following the Commission's line of arguments in the Modernisation White Paper that those 40 years of uniform application and the body of rules and case law established within that

[82] White Paper Articles 85 and 86 EC Treaty, 4.
[83] Alisa Sinclair, Vita Jukneviciute, Ingrid Breit, Competition Policy Newsletter 2009, *Regulation 1/2003: How has this landmark reform worked in practice?,* 23, 23-25.
[84] Eddy De Smijter, Ailsa Sinclair, Faull & Nickpay, *The EU Law of Competition,* Oxford Competition Law, 3rd Edition, 94, 95.
[85] Ulrich Immenga, *Eine Wende in der gemeinschaftsrechtlichen Kartellpolitik?,* EuZW 1999, 609; Fritz Rittner, *Kartellpolitik und Gewaltenteilung*, EuZW 2000, 129.

time would have safeguarded legal certainty.[86] Furthermore, those who argued against the reforms for the reason of legal certainty, would link the former system to a level of legal certainty that did not exist in reality, due to the large amount of cases and the overload of work for the Commission, which led to a high amount of unanswered requests and informal comfort letters.[87] With the biggest enlargement of the EU in 2004 ahead, the reform was considered necessary, since the old system was designed to work for a small amount of Member States.[88] This argument could have been turned around. Due to the enlargement of ten new Member States in 2004, it could have been considered necessary to establish the "culture of competition"[89] in those new Member States through a uniform application by the Commission. Especially because many of the new Member States were former socialistic states [90], the trust in a proper functioning of self-assessment by undertakings and the industry, only accompanied by general guidance, could have been questioned. In general, many scholars supported a reform of the old enforcement system, but the particularities of the new enforcement system were also subject criticism.[91]

3.3. Decentralised system of enforcement

The second measure to target a reduction of the workload of the Commission and implement a wider and more effective enforcement of competition law in the EU was the decentralisation of antitrust enforcement.[92] Therefore, Art. 3, 5 and 6 of Regulation 1/2003 were implemented to give national courts and NCAs the competence to fully apply Art. 101 and 102 TFEU, whenever trade between Member States is affected. NCAs are allowed to take the same measures the Commission is capable of taking under Art. 7-9 of the Regulation. Nevertheless, the Commission kept the competence to take over all cases with a Community dimension, Art. 11(6) of Regulation 1/2003.[93] To sustain a uniform application of community law, Regulation 1/2003 contains arrangements to establish a close exchange between the NCAs, national courts and the Commission, Art. 11, 12 and 15. Art. 16 of Regulation 1/2003 was implemented to safeguard that national courts and NCAs do not make decisions or judgements that run counter to a former Commission decision. Especially the establishment of a European Competition Network – a platform of cooperation of all NCAs and the Commission - was supposed to help maintain a uniform application and support a constant

[86] Felix Müller, *The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition,* German Law Journal 2004, 730, 721-740.
[87] Kay Wissenbach, *Systemwechsel im Europäischen Kartellrecht: Dezentralisierte Rechtsanwendung in transnationalen Wettbewerbsbeziehungen durch die VO 1/03*, Beiträge zum Transnationalen Wirtschaftsrecht 2005, 35.
[88] Müller (n 86) 723.
[89] White Paper Articles 85 and 86 EC Treaty, 4.
[90] Czech Republic, Estonia, Lithuania, Latvia, Poland, Hungary, Slovakia and Slovenia.
[91] Sigarusa (n 81) 1089-1127; Müller (n 86) 721-740; Wissenbach (n 87).
[92] See recitals 6-8 of Regulation 1/2003.
[93] Critical assessment of this measure – Rittner (n 85) 129.

exchange between the NCAs.[94] The Commission implemented guidelines and published notices to assure a coherent application of the law [95] and emphasised that the Commission would still be the in charge of determining European competition policy.[96]

The new competences of the NCAs and national courts in conjunction with the shift to an *ex post* control of the competition rules were subject to academic discussion. Scholars, who argued, that the Commission had been in charge of enforcing competition law on national markets, which the Commission would not have known well enough, endorsed the decentralisation. NCAs would usually have a better knowledge of the particularities of the national markets and thus be the more competent bodies to deal with the enforcement on those markets, which would naturally lead to more enforcement as well.[97] Furthermore, decentralisation would promote more enforcement of competition law through third parties, since a complaint by a private party would be easier to lodge to the national authority than to the Commission.[98] Many academics agreed that the decentralisation was necessary following the growing number of Member States of the EU. However, there was also a lot of criticism, scepticism and calls for adjustments.[99] It was argued that decentralisation would come at the expense of legal certainty and the danger of inconsistency and less uniformity in the application of competition law. The danger of inconsistency would be emphasized by the fact that the guidelines published by the Commission are not binding and that the functioning of the ECN would be based on the good will of all participating NCAs.[100] Many NCAs would be too inexperienced to properly enforce the competition rules, especially those of the new Member States.[101] It would be essential to safeguard a uniform application of the competition rules, otherwise the reform could lead to an inconsistent policy and a fragmentation of the single market into different national markets, governed by each NCA's and national courts' policy.[102]

[94] See recitals 15-18 of Regulation 1/2003.
[95] For instance: Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, (2004/C 101/08), OJ C 101, 27.4.2004; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2011/C 11/01) OJ C11, 14.1.2011.
[96] White Paper Articles 85 and 86 EC Treaty, 5.
[97] De Smijter, Sinclair (n 84) 93.
[98] Wissenbach (n 87) 23.
[99] See for instance: Sigarusa (n 81) 1089-1127; Arved Deringer, *Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art 85 und 86 EGV*, EuZW 2000, 5-11; Müller (n 86) 721-740.
[100] Sigarusa (n 81) 1089.
[101] Deringer (n 99) 5-11.
[102] Report on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, Final A5-0229/2001.

The fourth and fifth chapter will deal with this last concern in particular, by providing a generic comparison of decisions adopted by the Commission and the NCAs of Germany and UK in similar cases. The comparison shall assess, whether the new enforcement regime created space for an inconsistent application and enforcement of the law.

3.4. Art. 9 of Regulation 1/2003 - Commitment Decisions

After the introduction of Regulation 1/2003, the Commission and the NCAs enjoyed new powers to deal with infringements of competition law. In Art. 7-10 of Regulation 1/2003, the possibilities for new remedies are laid down for the European Commission.[103] Through Art. 5 of Regulation 1/2003, the same powers are given to all NCAs. Following the policy of creating a more efficient enforcement of the competition rules, Regulation 1/2003 contains in Art. 7 and Art. 9 two provisions to support this aim. Art. 7 of Regulation 1/2003 gives the Commission the power of finding and terminating infringements by decision, also in case of a third party complaining to the Commission. This new protection of individual interests in the procedural rules was implemented by the European Parliament and is an expression of a higher recognition of the complaint of third parties, by offering them the chance to promote the adherence to the competition rules, without taking proceedings to court.[104]

Of even more importance to this thesis and the more controversial provision is Art. 9 of Regulation 1/2003. Art. 9 allows commitment decisions to end proceedings, instead of adopting an infringement decision under Art. 7. The provision gives undertakings the chance to offer commitments to the Commission, which the Commission can accept and make the commitments binding upon the undertakings, with the consequence that there are no longer grounds for action. Those commitments can be proposed by the undertaking even before the Commission publishes a Statement of Objections. The Commission is only obliged to give a preliminary assessment and offer third parties the opportunity to make comments in this context, Art. 27(4) of Regulation 1/2003.[105] The novelty of this procedure is not only the possibility to informally end proceedings, without actually finding an infringement of Art. 101 or 102 TFEU, but the competence to make commitments binding and thus influence the future behaviour of the undertakings.[106] Used the right way, Art. 9 decisions are able to avoid long and costly proceedings for both undertakings and the

[103] Wish, Bailey, (n 32) 266.
[104] Ernst-Joachim Mestmäcker, Heike Schweitzer, *Europäisches Wettbewerbsrecht*, C.H. Beck, 3rd Edition 2014, § 21 [1]-[4].
[105] Described in detail in: Antitrust, Manual of Procedures 2012, 16 Commitment Decisions, available at: <http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf> accessed 15 May 2018.
[106] Jones, Sufrin (n 66) 945.

Commission. Furthermore, it is often in the public interest to end competition infringements quickly.[107] Art. 9 can also be seen as a helpful new tool for the Commission and NCAs to be responsive to the particularities of the case and the sector. It allows to come to very specific commitments that will help to overcome the competition concerns raised by the individual case, without prohibiting a certain agreement or behaviour as such.[108]

It has been argued, that this competence of the Commission comprises a high potential for abuse.[109] The argumentation is twofold. Firstly, the Commission gets the opportunity to end proceedings and pressure undertakings to commitments, without actually declaring an infringement of the competition rules. Since the severity of the infringement, meaning the details of the case, are therefore not properly assessed, there would be no implementation of a certain standard of commitments under Art. 9 of Regulation 1/2003, suiting the particular type of case and seriousness of infringement. Quite the contrary, the Commission would have a very wide margin of discretion and would not be bound to the principle of proportionality regarding the commitments, which has been later confirmed by the ECJ.[110] On the other hand, the proceedings under Art. 9 Regulation 1/2003 allow for the concerned undertakings to propose the commitments. By allowing the undertakings to choose the commitments they offer, the procedure under Art. 9 Regulation 1/2003 might be an efficient tool to accelerate the proceedings, but would not necessarily be in favour of competition law and in line with the competition policy. The commitments offered by undertakings would usually follow a corporate rationale and not the interests of competition law and society as a whole.[111] The problematic nature of this new tool is intensified by the lack of judicial review. The party that proposed the commitments will hardly contest those in court and third parties would have to prove that they are directly and individually concerned, to challenge the commitments in front of a court.[112]

The thesis will try to assess those pros and cons in chapter four and five in regard to the specific matter under review. Due to the increasing number of Member States and the EU competitiveness in a global economy, the old clearance and notification system and the monopoly of the

[107] Wouter P.J. Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003*, World Competition 2006, 7, 8.
[108] Wish, Bailey, (n 32) 268, 269.
[109] Wils (n 107) 8-10.
[110] Judgment of 29 June 2010, *Commission v. Alrosa.* C-441/07 P, ECLI:EU:C:2010:377.
[111] Mestmäcker, Schweitzer (n 104), [60]-[63]; Rittner (n 85) 129; Wissenbach (n 87) 18.
[112] Michael Hofmann*, Commitment Decisions in the European Energy Sector - Implementation of Sectorspecific Regulation via Competition Law*, ENLR 2014, 139, 131-140.

Commission to fully apply Art. 101(3) TFEU had served their time, but there was a lot of disagreement whether Regulation 1/2003 and the changes introduced were the right way to go.

3.5. Effects of the New Enforcement Regime

The European Commission reported on the functioning of the new enforcement system in 2009. The aim of this report was to assess and understand how the new regime has worked in the first five years after its implementation. The Commission reported that the shift from the clearance and notification system under Regulation 17/62, to a system of *ex post* control and direct applicability had gone "remarkably smooth"[113]. Businesses, enforcers and the legal community did not report any major issues regarding the more enhanced self-assessment approach. Furthermore, the Commission was able to reach the aim of increasing competition enforcement and to apply a more effects-based approach and focus on important sectors in the first five years of Regulation 1/2003.[114] The Commission referred to the new tool of commitment decisions under Art. 9 of Regulation 1/2003, and elaborated that this way of informally closing cases had been used 13 times and contributed to a more efficient enforcement and allocation of administrative resources.[115] The Commission also emphasized the well-functioning of the ECN and how it has helped to increase enforcement that is coherent and consistent.[116] Member States have improved their national enforcement systems and the coherent application of competition rules has developed to a common goal of all Member States. Nevertheless the Commission identified several areas that should be further examined.[117] Overall the Commission considered Regulation 1/2003 a success. Ten years after the implementation of Regulation 1/2003, the Commission published another communication to the European Parliament and the Council.[118] Like in 2009, the Commission firstly referred to the general increase of enforcement through the decentralised model [119] and the ability of the Commission to pay more attention to the most severe infringements and particular sectors, like the liberalised markets of telecommunications, media or energy.[120] The possibilities to find an infringement or bring to end proceedings with a commitment decision have been used by the NCAs and are considered valuable tools.[121] The Commission claims that NCAs have developed

[113] Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003, COM(2009)206 final [7].
[114] ibid [7], [8].
[115] ibid [13].
[116] ibid [23]-[33].
[117] ibid [43].
[118] Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014)453.
[119] ibid [8].
[120] ibid [7]-[10].
[121] ibid [20], [21].

to "key pillars"[122] in EU competition law enforcement. Convergence in the application of competition law has generally have been achieved.

However, due to the different national procedural rules and different institutional positions of NCAs within the several national legal systems, divergences still exist.[123] One identified issue by the Commission is insufficient human and financial resources of some NCAs.[124] The Commission concluded that Regulation 1/2003 has been successfully implemented and guarantees an effective enforcement of competition law throughout the EU. The important role of the NCAs and the more focussed approaches of the Commission have helped to create a competitive common market with beneficial outcomes for consumers.[125]

The reports of the Commission paint a picture of an overall very well-functioning enforcement system. The Commission emphasised how the new enforcement regime enabled it to focus on certain sectors. The outcome of this focus, on the energy sector for instance, has been criticised.[126] Hofmann assessed in a very detailed manner that the Commission mainly used commitment decisions under Art. 9 Regulation 1/2003 to heavily intervene to the market structure and went beyond what was necessary to maintain effective competition.[127] The Commission had evolved to a regulatory authority on this market and its broad discretionary powers under Art. 9 Regulation 1/2003 have supported this development. Fearing large fines in case of a decision under Art. 7 of Regulation 1/2003, undertakings were pressured to offer structural commitments under Art. 9 of Regulation 1/2003, which the Commission was aiming for [128] and which would have never been imposed in any infringement decisions under Art. 7.[129] If decisions of the Commission under Art. 9 Regulation 1/2003 and the commitment decisions of NCAs under the national procedural rules allow intervening heavily to the market structure, they might open a (back)door for implementing regulatory policies by the competent authority. This danger of implementing regulatory policy was illustrated above.[130] The cursory legal assessment under Art. 9 of Regulation 1/2003 and the lack of judicial review of commitment decisions increase this risk of a regulatory policy.

[122] ibid [23].
[123] ibid [30]-[34].
[124] ibid [26], [27].
[125] ibid [43]-[46].
[126] Torsten Körber, *Europäisches Kartellverfahren in der rechtspolitischen Kritik,* Zentrum für Europäisches Wirtschaftsrecht 2013; Hofmann (n 112) 131-140.
[127] Hofmann (n 112) 139, 140.
[128] ibid.
[129] Wish, Bailey, (n 32) 275.
[130] See above, chapter 3.4.

What the reports of the Commission are generally not able to assess is how the Commission and each NCA set their priorities while enforcing competition law and how they assess any individual case. Comparing similar cases and the approaches taken would allow drawing conclusions about the uniformity of the application and enforcement of the competition rules and the coherence of policy, especially in case of commitment decisions under Art. 9 Regulation 1/2003, since this way of enforcing competition law comes with a very broad margin of discretion for the enforcer.[131] The next chapter will therefore compare the enforcement approaches, commitment decisions and implemented policies by the Commission and NCAs of Germany and the UK in similar cases regarding the joint sale of television rights of the national football leagues.

[131] Mestmäcker, Schweitzer (n 104), [60]-[63].

4. Decisions under the New Enforcement Regime – European Commission

This chapter will deal with two commitment decisions of the European Commission, namely the *German Bundesliga* case and the *FA Premier League* case. After analysing the legal assessment, the commitments accepted by the Commission and the effects those decisions had on the market, there will be some first conclusions drawn from the analysis.

4.1. The German Bundesliga decision

4.1.1. Procedure and legal assessment under Art. 101 TFEU

Following the *UEFA Champions League* decision, the European Commission faced two cases concerning national football leagues. In the first of the two decisions, the Commission had to deal with the sale of media rights of the German Bundesliga. The German league association, called Ligaverband, of all first and second league German football clubs, applied for negative clearance, respectively an individual exemption under Art. 101(3) TFEU and Regulation 17/62. When Regulation No 1/2003 entered into force in May 2004, the procedures lapsed under Art. 34(1) of the Regulation. The Commission continued the investigation on its own initiative and adopted the first commitment decision under Art. 9 of Regulation 1/2003 ever in 2005.[132]

The Commission published a preliminary assessment according to Art. 9(1) of Regulation 1/2003, which contained the Commission's competition concerns in respect of the collective sale. The Commission mainly followed its own assessment in the *UEFA Champions League* decision and found the practice to be within the scope of Art. 101(1) TFEU and ended the proceedings with commitments.[133] It is interesting to see, that the Commission did not address the fact that it was now dealing with a national football league and not an international competition. Going back the *UEFA Champions League* decision, the practical difficulties caused by the different nationalities of the clubs was one of the arguments of the Commission to favour the collective sale over an individual model.[134] Especially when it comes to national leagues, scholars have argued that an individual sale is not practically impossible [135], which is underlined by the fact that in other Member States, the individual exploitation of audio-visual rights regarding the national football league was the current practice at that time.[136] It seems like the Commission somehow respected the

[132] Wilbert (n 17) 44.
[133] COMP/C-2/37.214 - *Joint selling of the media rights to the German Bundesliga* [21], [22].
[134] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [144].
[135] Jörn Kruse, Jörn Quitzau, *Fußball-Fernsehrechte: Aspekte der Zentralvermarktung*, Diskussionspapier Nr. 18 2003, 10, available at: <https://d-nb.info/997671254/34> accessed 15 May 2018.
[136] For example in Spain until the season 2016/2017.

tradition in Germany that clubs sold their media rights collectively for decades [137] and acknowledged the efficiencies linked to that practice, like the efficiencies of a single point of sale and a league-branded product, but still claimed that it was aiming to introduce competition between the league association and the clubs.[138] One of the major concerns of the Commission was innovation on the market for new media as a new distribution channel and a way of introducing competition and the prevention of unused rights.[139]

4.1.2. Analysis of the Commitments

Following the preliminary assessment, the Ligaverband subsequently offered commitments in order to respect the principles established in the *UEFA Champions League* decision under Art. 101(3) TFEU and remove doubts about the compatibility with competition law.[140] The Commission accepted those commitments without a detailed assessment of Art. 101(3) TFEU. The commitments can be summarized as follows: like the *UEFA Champions League* decision established, all rights must be sold in several packages through a transparent procedure and the licenses and sub-licenses are granted for a maximum length of 3 years.[141] To prevent unused rights, the commitments contained the same fall back clause as the *UEFA Champions League* decision, which would lead to a break with the exclusivity in case of a failure of the league association to sell all rights packages.[142] One of the packages had to be sold to a free-TV provider and contained the secondary right of coverage of deferred highlight-videos.[143]Apart from meeting the requirements established in the first Commission decision, the *German Bundesliga* case brought one important novelty. It can be seen as a consequent development, due to technical progress, that the Ligaverband had to sell one package of rights containing a license to broadcast the league games live via the Internet and thereby opening a new way of distribution on the downstream market, able to compete against the classical broadcasting technologies.[144] Deutsche Telekom, the biggest service provider for telephone and Internet services in Germany, acquired this new package.[145] At that time, the broadband-internet necessary to use Internet TV as a distribution channel, was only

[137] <http://www.rp-online.de/sport/fussball/bundesliga/bundesliga-das-kosten-die-tv-rechte-seit-1965-bid-1.2795571> accessed 15 May 2018.
[138] COMP/C-2/37.214 - *Joint selling of the media rights to the German Bundesliga* [41].
[139] ibid.
[140] <http://ec.europa.eu/competition/antitrust/cases/dec_docs/37214/37214_40_10.pdf> accessed 15 May 2018.
[141] COMP/C-2/37.214 - *Joint selling of the media rights to the German Bundesliga,* Annex, 2.3.
[142] ibid*,* Annex, 6.1.
[143] ibid*,* Annex, 4.5.
[144] ibid*,* Annex, 4.6.
[145] <https://de.statista.com/statistik/daten/studie/3177/umfrage/dsl-marktanteile-in-deutschland-in-2006-und-2007/> accessed 15 May 2018.

available to people living in several urban areas.[146] Thus, the number of subscribers to this service was comparably low in the beginning.[147] Nevertheless, the measure taken by the Commission to promote the Internet as a distribution channel for live-football, constituted an incentive for media operators and telecommunication providers to invest into the expansion of high speed internet throughout Germany. By granting clubs the right to individually exploit their rights shortly after the games, the Commission tried to introduce competition between the league association and the clubs.[148] This idea did not really seem to work out on the German market, even though clubs started to install Club TVs on their websites. Only one club had more than 10.000 subscribers in 2009, at the end of the 3-year period.[149] The vast majority of consumers on the downstream market favour a league-branded product, as the Commission explained in the *UEFA Champions League* decision. The commitments the Commission accepted were targeting the prevention of foreclosure on the upstream market, by guaranteeing a fair acquisition procedure rather than predetermining a certain outcome. Thus, nearly all rights to broadcast league games live on TV were split up in only 2 packages and could be acquired by one single operator. By focussing on innovation on the other hand, the Commission aimed to widen the upstream and downstream markets and ensure a high quality product for consumers.

4.1.3. Effects on the market

The aim of preventing foreclosure appeared to initially work out, when a totally new pay TV provider on the German market – arena TV - acquired all live television rights for the classical TV distribution channels.[150] However, the high costs linked to acquiring the rights in the first place and safeguarding a high quality broadcasting system overpowered the capabilities of the "new kid on the block". The acquisition of subscribers failed to meet an amount necessary to make the service profitable. This was mainly the case because subscribers refused to subscribe to an unknown pay TV operator and arena TV did not have access to all parts of the cable network throughout Germany.[151] Arena TV had to start a joint venture with the former licensee Premiere, right after acquiring the rights for the season 2006/2007. In July 2007 arena TV sold all their rights for the upcoming two seasons to Premiere and was forced to leave the market. Reducing barriers to entry

[146] Stephan Dieter, Dirk Schrameyer, *IPTV-Über Internet anders fernsehen*, 10, available at: <https://www.zdnet.de/39143671/premiere-plant-bundesliga-berichterstattung-mit-telekom/> accessed 15 May 2018.
[147] <https://www.heise.de/newsticker/meldung/Kostenlose-Bundesliga-soll-der-Telekom-mehr-IPTV-Kunden-bescheren-173206.html> accessed 15 May 2018.
[148] COMP/C-2/37.214 - *Joint selling of the media rights to the German Bundesliga* [41].
[149] <http://www.handelsblatt.com/sport/fussball/klub-tv-im-internet-fussballvereine-senden-exklusiv-fuer-fans/3105856.html> accessed 15 May 2018.
[150] <https://www.dfb.de/news/detail/dfl-vergibt-pay-tv-rechte-der-bundesliga-an-arena-5822/> accessed 15 May 2018.
[151] <https://www.heise.de/newsticker/meldung/Sueddeutsche-Bundesliga-TV-Sender-Arena-ist-am-Ende-148027.html> accessed 15 May 2018.

and preventing foreclosure played a key role in the commitment decision, but the difficulties arena TV faced show that acquiring the right to broadcast is not a guarantee to success on the downstream market and that consumers on the German market react sensitively to changes and expect a quality product in order to subscribe with a pay TV operator.

The Commission's goal of a high accessibility worked well on the German market. Ever since the decision in 2005, the rights of all 306 games of the league were sold on the upstream market and broadcasted live to consumers on the downstream market. In case of parallel games, the consumers also have the choice of watching a simulcast of all games that are played at the same time.[152] A peculiarity of the German market is the important role, the deferred highlight free-TV programme plays. Even though it is only a secondary exploitation of the media rights, the free-TV programme called *Sportschau*, showing highlights of all games on Saturday evening, was the programme attracting the most viewers, usually around 6 million in the season 2006/2007.[153] Maintaining this strong position of a free TV operator acquiring the secondary exploitation rights, can be seen as a way to pressure pay TV operators on the downstream market to offer a high quality product for a reasonable price, because consumers seem to rather pass on watching live football, than subscribing to an inexperienced and expensive pay TV service. The failure of arena TV in 2006/2007 and its consequences are the perfect example for that.

4.2. The FA Premier League decision

4.2.1. Procedure and legal assessment under Art. 101 TFEU

In 2006, the Commission adopted a second decision regarding a national league association, the FA Premier League. The FA Premier League as the association of all first division clubs of England and Wales sold their audio-visual rights through a limited liability company. The only shareholders of the FAPL Ltd. are all clubs of the League.[154] The FAPL was selling the rights in four packages on an exclusive basis through a tendering procedure. One particularity of the Premier League, compared to the German Bundesliga was, that the amount of games the Premier League sold on the upstream market was limited. While the German Bundesliga offered all live rights to media operators, the Premier League only offered 106 out of 380 live matches of the Premier League to be broadcasted on TV.[155] All live rights were hold by one single operator – BSkyB.[156] Furthermore,

[152] COMP/C-2/37.214 - *Joint selling of the media rights to the German Bundesliga*, Annex, 4.1, 4.2.
[153] Bericht des Ligaverbandes, 2004-2007, 114, available at: <https://www.dfl.de/dfl/files/berichte-ligaverband/Bericht-des-Ligaverbandes-2004_2007_klein.pdf> accessed 15 May 2018.
[154] FAPL – Articles of the Association of the Football Association Limited.
[155] <https://www.totalsportek.com/money/premier-league-tv-rights-deals-history-1992-2019/> accessed 15 May 2018.
[156] Summary of UK sports rights, Annex 10 to pay TV market investigation consultation, 20, available at:

there was no complete and near-live secondary exploitation of the rights on free TV, which strengthened the market position of BSkyB even more.[157] Football fans in the UK were therefore not able to access audio-visual content of all league games at that time and the clubs were prevented from exploiting their rights, even though the league association did not sell the games. The Commission intervened and tried to force BSkyB in 2004 to sublicense 8 league games, but no other broadcaster was able to meet the price BSkyB was asking.[158]

The FA Premier League applied for negative clearance, failing this, an individual exemption under Art. 101(3) TFEU and Regulation 17/1962 for the joint sale of their television rights for the seasons 2007-2010. The European Commission published its Statement of Objections and continued the procedure under the new Regulation 1/2003, after the application lapsed under Art. 34(1) of this Regulation. In the preliminary assessment, the Commission mainly named the same competition concerns as before in the *UEFA Champions League* and the *German Bundesliga* decision.[159] Paying attention to the strong position of one single media operator and the lack of full free TV secondary exploitation, the Commission focussed on live TV rights and the barriers to entry on the downstream market, due to the small amount of exclusive packages of rights that were offered on the upstream market. [160] The Commission also aimed to increase output, in order to give consumers a variety of choice and create a higher quality product.[161] This aim was backed up by research the British telecommunication sector regulator Ofcom published, regarding consumer preferences.[162] Following these two objectives, the Commission accepted commitments under Art. 9(1) of Regulation 1/2003.

4.2.2. Analysis of the Commitments

The FA Premier League committed to follow a fair and transparent tendering procedure and offer six instead of four exclusive packages of rights from 2007 on, for a maximum period of three seasons. The packages were sold on a technology-neutral basis, meaning the acquirer could broadcast via television and Internet at the same time.[163] Increasing the number of packages was

<https://www.ofcom.org.uk/__data/assets/pdf_file/0025/54187/annex_10.pdf> accessed 15 May 2018.
[157] Summary of UK sports rights, Annex 10 to pay TV market investigation consultation, 19, available at: <https://www.ofcom.org.uk/__data/assets/pdf_file/0025/54187/annex_10.pdf> accessed 15 May 2018.
[158] ibid.
[159] ibid [24].
[160] ibid [26], [27].
[161] ibid [37].
[162] Premier League Football, Research into viewing trends, stadium attendance, fans' preferences and behaviour, and the commercial market, Analysis advising the Commission of the European Communities relating to a proceeding under Article 81 of the EC Treaty in case COMP/C/38.173 – FAPL, available at: <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38173/38173_104_7.pdf> accessed 15 May 2018.
[163] COMP/C-2/38.173 – *Joint selling of the media rights to the FA Premier League* [42].

supposed to lead to more *ex ante* competition on the upstream market and offer more media-operators the chance to compete against BSkyB.[164] Furthermore, the total number of games offered had to be increased, in order to generate more output and provide consumers with more live football.[165] The most interesting and seminal commitment was that it was not allowed for one media-operator to acquire more than five of the six rights packages.[166] This so-called no-single-buyer-rule was targeting the strong market position of BSkyB and directly determined the market structure on both the upstream and downstream market. To ensure the effectiveness of this rule, the commitments also included the provision that all rights packages should be designed to be meaningful and each package should give the purchaser the chance to compete effectively on the downstream broadcasting market, by picturing the Premier League competition as a whole.[167] The introduction of a rule prohibiting one single acquirer was a measure supposed to introduce competition on the upstream market and prevent a monopoly on the broadcasting market.[168] The Commission assumed that this intervention would lead to more consumer choice and better value.[169] The tendering procedure for the seasons 2007-2010 ended with BSkyB acquiring live rights for 92 games (four packages of 23 games) and the Irish pay TV operator Setanta acquiring two packages (each of 23 games) and a total of 46 matches.[170]

The advantages of the no-single-buyer-rule have been contested. Especially in the particular way the Commission introduced this rule, the assumed effects have been seriously doubted from the beginning. By ordering the league association to sell platform-neutral, but exclusive packages to more than one buyer, it is argued that the Commission apparently created more than one monopoly on the downstream market.[171] Furthermore, it was held that to increase consumer welfare and actually promote competition on the downstream market, the rights would have needed to be sold on a non-exclusive basis, because it is the exclusivity of the rights that creates foreclosure and powerful media-operators.[172] The Commission's approach seemed to be a light touch approach, since it did not intervene with the exclusivity of the rights, but guaranteed a second broadcaster on

[164] ibid [40], [41].
[165] ibid [35].
[166] ibid [37 c].
[167] ibid [37 d].
[168] ibid [27], [28].
[169] <http://europa.eu/rapid/press-release_IP-05-1441_en.htm?locale=en> accessed 15 May 2018.
[170] Summary of UK sports rights, Annex 10 to pay TV market investigation consultation, 22, available at: <https://www.ofcom.org.uk/__data/assets/pdf_file/0025/54187/annex_10.pdf> accessed 15 May 2018.
[171] Seamous Coffey, *Two monopolies are worse than one*, 2009, available at: <http://economic-incentives.blogspot.se/2009/01/two-monopolies-are-worse-than-one.html> accessed 15 May 2018.
[172] David Harbord, Stefan Szymanski, *Restricted View: The Rights and Wrongs of FA Premier League Broadcasting,* Consumers' Association 2003, 25, available at: <http://market-analysis.co.uk/PDF/Topical/CAFAPL-SkyReport.pdf> accessed 15 May 2018.

the downstream market. However, the outcome of having two exclusive broadcasters on the market, sharing about the same amount of games that were broadcasted only by BSkyB before, was what a majority of consumers explicitly did not favour over the prior market situation.[173] Even if the intervention in the market structure would be considered an appropriate approach to introduce more competition on the downstream market, allowing five of six packages to be acquired by the same broadcaster and knowing that because of the current market structure, it was very likely that BSkyB would acquire the majority of rights, the measure was not suitable to actually install an equal competitor. Departing from the principle of exclusivity, in order to actually promote a variety of offer for consumers, might have been a better way to introduce competition on the downstream market and the chance to push forward the Internet as a new distribution channel.

It remains unclear why the Commission did not force the FA Premier League to offer at least one exclusive package of live rights to be broadcasted only via the Internet, as it did in the *German Bundesliga* decision. By selling the rights on a technology-neutral basis, no acquirer was actually obliged to broadcast via the Internet. Selling such a package would have had the effect of introducing competition on the downstream market, while pushing forward innovation at the same time, by guaranteeing the introduction of a new distribution channel and thereby actually creating consumer choice. The argument of the Commission that preventing a monopoly on the downstream market would cause better value for money is also questionable, since it was likely given Ofcom's research that consumers would stay subscribed to BSkyB [174] and would therefore effectively see less live football if they did not subscribe to the second acquirer, or do so and end up paying more.[175] It becomes even more odd when it is recalled that the joint sale of audio-visual rights is the practice causing the competition concerns, in which solely the football clubs are engaged and not the media operators, which are just confronted with the outcome of the league association's decision. The Commission was targeting BSkyB as a powerful purchaser of the rights, more than actually addressing the undertakings engaged in the anticompetitive behaviour. It seems like the Commission tried to reverse a development that started a long time ago and the competition authorities omitted to prevent – powerful media operators in the single market.[176] If the behaviour of BSkyB, namely their prices, selling arrangements or contractual conditions would have raised

[173] Premier League Football, Research into viewing trends, stadium attendance, fans' preferences and behaviour, and the commercial market, Analysis advising the Commission of the European Communities relating to a proceeding under Article 81 of the EC Treaty in case COMP/C/38.173 – FAPL, p. (iv), available at: <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38173/38173_104_7.pdf> accessed 15 May 2018.
[174] ibid.
[175] Coffey (n 171).
[176] Daniel Geey, Mark James, *The Premier League European Commission Broadcasting Negotiations* [27], available at: <https://www.entsportslawjournal.com/articles/10.16997/eslj.104/print/> accessed 15 May 2018.

competition concerns to the detriment of consumers, the Commission could have targeted those by opening proceedings under Art. 102 TFEU.[177]

4.2.3. Effects on the market

The joint sale under the new commitment decision generated £ 1.7 billion for the Premier League clubs for the three seasons 2007-2010, while it only generated £ 1.024 billion in 2004.[178] It seems like the biggest winner of the new selling arrangements and especially the no-singe-buyer rule were the Premier League clubs, since the no single-buyer-rule left the exclusivity of the rights untouched, which guaranteed a very high economic value of each exclusive package. In other words, the undertakings engaged in the anticompetitive practice seem to be the beneficiaries of the commitment decision, even though they only increased the total number of live broadcasting rights sold from 106 to 138 matches per season and clubs were still not able to exploit the unused live rights individually, in order to compete against each other on the live broadcasting market. The TV broadcasters, on the other hand, had to invest more than ever but each of them did get less broadcasting rights than the exclusive single licensee before. This development became visible on the downstream market and created difficulties for the media-operators, especially for Setanta as a new player. In order to provide a high quality product for consumers, Setanta tried to get into a sub-licensing agreement with BskyB, but could not match the reservation price asked. Setanta had invested more into live-football rights than it was able to generate in profit through the sale of advertisement spots and consumer subscriptions. The 46 live games offered, did not seem to be attractive enough, especially for those consumers who were already subscribers to BSkyB. Setanta could not come up with the payments for their license in 2009 and thereby lost it, one year before the deal expired. The firm failed and left the market.[179] The destiny of Setanta reminds noticeably of what happened to arena TV on the German market.[180]

Which actual benefits consumers were able to derive from these new selling arrangements, as Art. 101(3) TFEU postulates, stays nebulous. Quite the contrary, by promoting a sales model that led to two exclusive licensees and higher prices paid on the upstream market, consumers were likely to be the ones carrying this weight by paying higher prices on the downstream market or

[177] ibid.
[178] Summary of UK sports rights, Annex 10 to pay TV market investigation consultation, 22, available at: <https://www.ofcom.org.uk/__data/assets/pdf_file/0025/54187/annex_10.pdf> accessed 15 May 2018; <https://www.statista.com/statistics/385002/premier-league-tv-rights-revenue/> accessed 15 May 2018.
[179] <https://www.theguardian.com/business/2009/jun/28/sentant-bskyb-football> accessed 15 May 2018.
[180] See above, chapter 2.3.

relinquishing to watch the same amount of live football as before.[181] The decision of the Commission, keeping in mind the two former decisions in *UEFA Champions League* and *German Bundesliga*, is quite remarkable. While in both former cases, the Commission mainly focussed on introducing competition between the clubs and the association on the supply level of the upstream market, preventing unused rights and pushing forward innovation regarding new media, in the *FA Premier League* case, the Commission was more concerned with the market structure of the media market of the UK. With its decision in the *FA Premier League* case, the Commission very rigorously intervened in the structure of the British media market, but on the other hand did not force the league association to increase the output of sold rights to a larger extent and prevent unused rights, which was the clear demand of consumers [182] and might have helped to attract more subscribers on the downstream market, in order to make the service profitable for all broadcasters that acquired rights on the upstream market. The general disadvantages from a monopoly on the downstream market cannot be disputed, but the top priority of the Commission should have been to increase output in the first place, before determining how the comparably little amount of live games available were split up between two acquirers.

4.3. Comparison, Conclusions and Critique

The *German Bundesliga* decision under Art. 9 of Regulation 1/2003 seemed to be an effective solution to target the competition concerns linked to the joint sale of media rights. The Commission closely followed its own legal assessment from the exemption decision in the previous *UEFA Champions League* case and refined the commitments, whilst taking into account the particularities of a national market and the technical development of the Internet. At the same time, the commitment decision safeguarded a high output, by preventing any unused rights. All games of the league were available for consumers on the downstream market, provided by two different operators, broadcasting through different distribution channels. The Commission followed the logic approach to push the Internet in the *German Bundesliga* decision, with the aim of establishing a new distribution channel to enhance competition on the upstream and downstream market and promote a quality product.

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[181] Angelo Chetcuti, *The Exploitation of Football Media Rights in the EU: a competition law analysis*, 2008, 18, available at:<http://www.academia.edu/974423/The_Exploitation_of_Football_Media_Rights_in_the_EU_a_competition_law_analysis> accessed 15 May 2018.

[182] Premier League Football, Research into viewing trends, stadium attendance, fans' preferences and behaviour, and the commercial market, Analysis advising the Commission of the European Communities relating to a proceeding under Article 81 of the EC Treaty in case COMP/C/38.173 – FAPL, p. (iv), available at: <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38173/38173_104_7.pdf> accessed 15 May 2018.

Taking the general concerns regarding Art. 9 of Regulation 1/2003 into account and remembering the criticism of Hoffmann [183], the so-called "focus" of the Commission paid to certain sectors like energy, telecommunications and media, might have led to some kind of over-enforcement or at least a regulatory approach by the Commission, which is reflected in the second commitment decision. The Commission seems to intervene to the market structure, rather than just focussing on enhancing effective competition, like it did in the *German Bundesliga* decision. The decision illustrates two weaknesses of the procedures under Art. 9 of Regulation 1/2003. Firstly, the Commission accepted commitments by the league association without properly assessing Art. 101(3) TFEU. Secondly, the main beneficiaries of the commitments seem to be the undertakings involved in the anticompetitive agreement and committing to the decision. If the Commission had fully assessed Art. 101(3) TFEU, it would have been obliged to submit thoughts on the condition of "allowing consumers a fair share of the resulting benefit" and what economic impact the commitments would have on consumers. Consumers in the sense of Art. 101(3) TFEU are all customers of the parties, as the Commission pointed out in its own guidelines.[184] That means, that not only end-consumers on the downstream markets shall be allowed a fair share of the resulting benefit, but also the media-operators as customers of the joint selling body. As pointed out above, by implementing a no-single-buyer-rule but without targeting the exclusivity of the rights or increasing the output on the supply-side of the upstream market to a larger extent, the Commission accepted commitments that were mainly to the detriment of media-operators. The exclusivity of rights, combined with the no-single-buyer-rule, led to higher prices for less exploitation rights paid by the broadcaster already on the market (BSkyB) and at the same time maintained the relatively low level of competition on the downstream market, by not opening the market for smaller media-operators, which did not have the buying power to purchase an exclusive rights package. This measure was probably to the detriment of end-consumers as well, since high prices are usually passed on.

The *FA Premier League* case illustrates the legitimacy of the criticism on the new enforcement tool of the Commission under Art. 9 of Regulation 1/2003, especially the difficulties linked to the informal option of ending procedures without a proper application of Art. 101(3) TFEU and the wide margin of discretion given to the Commission regarding the commitments. Targeting monopolies on the downstream market is generally a legitimate approach to promote consumer welfare, but the particular measures the Commission took were not suitable to achieve that aim. The Commission more or less ignored the results of the consumer research provided by the British

[183] See above, chapter 3.5.
[184] Communication from the Commission, Notice, Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) [84].

sector regulator Ofcom. It remains to be seen which long-term impact this decision had on the British upstream and downstream markets and how the NCA of the UK dealt with the joint sale of the television rights after the commitment decision expired in 2013.

5. Decision under the New Enforcement Regime – National Competition Authorities

After the commitment decisions of the Commission expired, it was for the NCAs of Germany and the UK to further deal with the joint sale of media rights in their territory, since the Commission identified the relevant markets to be national ones.

5.1. Bundeskartellamt decision 2012

The BKartA – the NCA of Germany - investigated the joint sale of media rights in 2008, but closed the investigation. However, in 2012 and 2016 the BKartA adopted two commitment decisions under Art. 32b GWB, the equivalent to Art. 9 of Regulation 1/2003 in German competition law.

5.1.1. Procedures and legal assessment under Art. 101 TFEU

After submitting a preliminary assessment and offering third parties the chance to give their opinions on the issue, the BKartA adopted a decision in January 2012. The decision contained a legal assessment of both Art. 101(1) and 101(3) TFEU, which are evocative of the legal analysis of the European Commission in the *UEFA Champions League* case. The BKartA referred a lot to the exemption decision of the Commission.[185] The legal assessment under Art. 101(1) TFEU comprises an analysis of the market situation in Germany. The BKartA defined the relevant markets similar to the Commission in its former decisions and concluded, that the Ligaverband, as the supplier of the live television rights of the German national football league, holds a market share of above 60 % on the market for broadcasting rights of annual football competitions.[186] The BKartA dealt in a very detailed manner with the question of how the practice of collectively selling television rights by the league association restricts competition. From the perspective of the German NCA, the Ligaverband as an association of undertakings cannot be considered a typical horizontal cartel of the participating clubs. The BKartA argued that only very popular clubs would actually be able to exploit their media rights individually and that a certain collective organization of the clubs is inherent in a sports league. Such a league could not exist if the clubs would not cooperate to some extent.[187] Nevertheless, the BKartA came to the conclusion that the collective sale of all media rights of the league is in general incompatible with Art. 101(1) TFEU because of the horizontal restraints between the clubs and the vertical effects on the upstream and downstream market.[188]

[185] BKartA, Beschluss vom 2. Januar 2012, B6-114/10 [29], [43], [50].
[186] ibid [34].
[187] ibid [38]-[45].
[188] ibid [47].

The BKartA assessed Art. 101(3) TFEU in detail and identified several efficiencies linked to the collective sale, which would be passed on to consumers. The possibility of picturing the league as a whole and providing consumers with a league-branded product is named as the most important advantage of the collective sale. Due to research of the German NCA, most consumers would not be interested in following only a single club of the league, but the league as a whole. Furthermore, the BKartA referred to the quality of the product regarding the production of particular television formats. The production of the most popular television format, the simulcast of up to six games on Saturday afternoon, would be premised on a collective sale.[189] The BKartA also addressed the exclusivity of the rights and inferred that exclusive licenses are necessary to make the purchase of rights economically reasonable for the broadcasters and that an exclusive sale comes with a higher probability of actually realizing the efficiencies.[190]

5.1.2. Commitments

The Commitments to safeguard the efficiencies were very close to those accepted by the Commission in 2005. The sale had to be organized as a fair and transparent tendering procedure and the rights were split up into several packages. The rights were sold for a maximum period of four years and the league association had to guarantee the sale of one package that would allow for a free TV operator to broadcast deterred highlights of the games. The free TV format of highlight videos was still considered to affect the position of pay TV operators and actually compete with live broadcasting. The BKartA did allow selling all packages on a platform-neutral basis and ordered the league association to guarantee that there would be no unused rights.[191] The BKartA explicitly referred to the no-single-buyer-rule, but did not consider such a rule necessary and suitable to enhance competition. The BKartA elaborated that its intention was not to determine a certain outcome of the tendering procedure, but to guarantee free and undistorted *ex ante* competition.[192]

5.1.3. Effects on the market

The collective sale of the German Bundesliga rights in 2012 generated 2.5 billion Euros for four years, which was more than ever before. Sky, a subsidiary of BSkyB and successor of Premiere, purchased all three live rights packages.[193] Sky entered into a sublicensing agreement with Deutsche Telekom for the season of 2013/14. The subscribers of Telekom had the chance to keep

[189] ibid [59]-[64].
[190] ibid [75].
[191] ibid [104].
[192] ibid [102].
[193] <http://www.faz.net/aktuell/sport/fussball/bundesliga/fussball-uebertragungsrechte-finanzieller-meilenstein-fuer-bundesliga-11720863.html> accessed 15 May 2018.

watching live football via the Internet for one year. After the season of 2013/14, Sky ended the sublicensing agreement and consumers in Germany were forced to subscribe directly to Sky in order to watch live football.[194] Sky also held most live broadcasting rights of the UEFA Champions League and therefore had a very high market share on the national market for live football.[195] The result of the joint sale of television rights in 2012 was a very dominant position of Sky on the downstream market and high profits for the football clubs. At the same time, it offered consumers the chance to watch all games of the league with one single subscription. Especially the position of Sky as a result of the joint sale manifestly influenced the commitment decision of the BKartA in 2016, as will be illustrated below.

5.2. Bundeskartellamt decision 2016

In 2016 the BKartA adopted a second commitment decision under Art 32b GWB. The NCA of Germany followed the developments on the relevant markets and evaluated the effects of the expiring commitment decision from 2012.

5.2.1. Procedure and legal assessment under Art. 101 TFEU

Like in 2012, the BKartA provided a detailed analysis of Art. 101(1) and 101(3) TFEU in its decision. Before starting with the legal assessment of the relevant competition law provisions, the BKartA summarised the facts of the case, the situation on the German media market after its decision in 2012 and referred to the legal practice of other European countries dealing with the collective sale.[196] Unlike in 2012 and in all three Commission decisions, the BKartA followed a different approach in the legal assessment of Art. 101(1) TFEU. Starting with a very detailed analysis of the relevant markets in Germany, the NCA concluded, that the league association would have a quasi-monopoly or at least a dominant position on the upstream market and Sky was holding a quasi-monopoly on the downstream market for live football.[197] The BKartA held that the main restraints for competition would not result from the prevented competition between the single clubs, but from the dominant position on the supply side of the upstream market [198], while the Commission used to try to introduce competition between the association and the clubs, the BKartA seemed to desist from this aim. The BKartA also took into account that the three other football competitions played throughout the whole year, namely the DFB Pokal (German cup), the UEFA Champions League and Europa League, only had an aggregate market share of approximately

[194] ibid.
[195] BKartA, Beschluss vom 11. April 2016, B6-32/15 [92].
[196] ibid [46]-[60].
[197] ibid [23], [24], [25].
[198] ibid [108]-[112].

25 %.[199] The coordination of the UEFA, DFB and the Ligaverband, regarding the schedule of their competitions, would be likely to lead to a position of collective dominance, since the four competitions never take place on the same day or time.[200]

The BKartA identified foreclosure as the most dangerous restraint on competition, on both the upstream and downstream market[201] The exclusive sale of all live television rights to one single buyer would guarantee maximum profits for the league association, but at the same time prevent effective competition. The technical development of the Internet would have changed consumer habits and diminished the value of free TV. Free TV and deterred highlight videos would not be able to compete against live broadcasting anymore and would furthermore not be able to promote competition in innovation. Sky, as the dominant undertaking on the downstream market, would not be encouraged to innovate and establish more Internet based offers for consumers, as long as it held all live exclusive live rights.[202] The BKartA followed the general economic assumptions regarding monopolies [203] and concluded that to guarantee competition in innovation, prevent foreclosure on the upstream and downstream market and use the new technical opportunities offered through the Internet, the introduction of a no-single-buyer-rule would be necessary. The BKartA referred to its own decision from 2012 to argue that the dominant position of the league association would be inherent in the organization of a sports league competition and that the only way of enhancing competition in case of a collective sale was to control the output the league association generates. The division into several packages and the implementation of a no-single-buyer-rule would at least lead to competition and a variety of products on the downstream market.[204]

The BKartA concluded that the efficiencies named under Art. 101(3) TFEU, which were the same as in 2012, would allow the joint sale of media rights, even though the league association was considered to have a dominant position.[205] The BKartA also dealt with the question if consumers would be able to derive a fair share of the efficiencies. An identified issue was the question if consumers would now be forced to subscribe to two different providers, to watch the same amount of live football. Since there were no unused rights on the German market, the overall output of 306 games per season could not be increased. Especially for consumers already subscribed to Sky, the

[199] ibid [91].
[200] ibid [109].
[201] ibid [114]-[116].
[202] ibid [114].
[203] Gunnar Niels, Helen Jenkins, James Kavanagh, *Economics for Competition Lawyers*, Oxford Competition Law, 2nd Edition 2016, [1.44].
[204] BKartA, Beschluss vom 11. April 2016, B6-32/15 [160].
[205] ibid.

no-single-buyer-rule involved the danger of getting less value for money. The BKartA assumed that the two buyers of live rights would sublicense each other and consumers would not have to subscribe to two different pay TV providers.[206]

5.2.2. Commitments

The league association agreed to commitments under Art. 32b GWB that would guarantee a fair and transparent tendering procedure and to divide the live television rights into five, respectively six different packages (packages A-E). The rights were sold for a period of four years. It was not allowed for one media-operator to purchase all packages. The BKartA demanded that all live rights packages should be able to give an overview over the league as a whole. The weakest package (A) contained 45 of the 306 live games, 30 on Friday evenings and 15 on Sundays or Mondays. Third parties who submitted their comments argued that this single package would not serve to actually compete against another broadcaster acquiring all other live rights. The BKartA held that the acquirer would also have the right to show highlights of all other league games and considered the package sufficient to effectively compete.[207]

5.2.3. Effects on the market

The joint sale of media rights generated 4.46 billion Euros for the league association for four seasons, starting 2017/18. Sky purchased four of the five live rights packages and Eurosport (Discovery Communications) was only able to purchase one package (A). The weakness of this package was described above. Eurosport and Sky failed to enter into a sublicensing agreement and Eurosport has only been able to broadcast via the Internet. Eurosport considers itself as a pioneer on the streaming market, but has not been able to acquire many customers, even though the price for streaming Bundesliga via Eurosport ist very low.[208] It seems like the amount of games and the weekdays on which Eurosport broadcasts are not attractive enough to actually compete against Sky. Because Sky also holds most of the live-rights for the UEFA Champions League and UEFA Europa League, can hardly be considered a real competitor. The dominant position of Sky on the downstream market has not been impaired by the no-single-buyer-rule. The subscribers of Sky are currently getting less live football and face a price-increase for next season.[209] The higher prices Sky paid for the live rights are passed on to consumers and the no-single-buyer-rule implemented

[206] ibid [154].
[207] ibid [123].
[208] <https://www.morgenpost.de/wirtschaft/article211701731/Eurosport-sendet-Fussball-Spiele-am-Publikum-vorbei.html> accessed 15 May 2018.
[209] <https://www.abendzeitung-muenchen.de/inhalt.neue-preisstruktur-sky-bundesliga-wird-teurer-champions-league-billiger.7e1af69b-cc51-4204-aee8-52c1d82132a4.html> accessed 15 May 2018.

by the BKartA has not reached the aim of providing consumers with an actual variety of choice. However, the Internet based offers of Sky have increased. Sky established the possibility of getting access to live sports via the Internet, without subscribing to a long-term service. From a short-term perspective and the status quo on the German media market, the measures taken by the BKartA have not enhanced competition on the downstream market to the benefit of consumers, except regarding innovation. If the implementation of competition on innovation will create long-term benefits and enhance effective competition on the downstream market in general remains to be seen.

5.3. Enforcement by the British Ofcom

After the commitments from 2006 expired, it was for the British Ofcom to deal with the competition law restraints resulting from the joint sale of media rights. Even though the Ofcom is a national sector regulator (NRA), it enjoys several competition enforcement powers on the market for telecommunications.

5.3.1. Enforcement approach

The British Ofcom followed a different approach than the German BKartA. While the BKartA has been constantly renewing the commitments in reaction to the market situation, the Ofcom supervised that the standards established in the Commission's decision are satisfied and intervened occasionally. Since the no-single-buyer-rule introduced by the European Commission did not have the anticipated impact on the market structure, Ofcom forced BSkyB to offer its sports channels to other cable operators for a controlled price, due to the dominant position of BSkyB on the British media market in 2010.[210] This measure was reviewed and removed in 2015.[211] British Telecom entered the market in 2012 after Setanta failed and acquired one of the live rights packages. After a complaint by a third party, Ofcom started to investigate in the FA Premier League's joint sale of television rights in 2014. Ofcom provided a lot of consumer research [212], but closed the investigation in 2016. The British NRA referred to the commitments given to the Commission in 2006 and argued that the increase of output to a minimum number of 190 matches broadcasted live, from the season 2019/2020 on, in combination with the no-single-buyer-rule would serve to

[210] <https://www.theguardian.com/media/2010/mar/31/ofcom-sky-sports-price-cut> accessed 15 May 2018.
[211] Ofcom, Review of the pay TV wholesale must-offer obligation, 19 November 2015, available at: <https://www.ofcom.org.uk/__data/assets/pdf_file/0022/76081/Review-of-the-pay-TV-wholesale-must-offer-obligation-.pdf> accessed 15 May 2018.
[212] Premier League Consumer Research, Obtaining the views of fans who attend the matches and those who watch them on TV, 5 February 2016, available at: <https://www.ofcom.org.uk/__data/assets/pdf_file/0029/84872/premier_league_consumer_research_chart_deck_0508.pdf> accessed 15 May 2018.

overcome the competition concerns.[213] On its website, the Ofcom explicitly stated: "Due to the range of views expressed in the consumer research, significant further work – including additional research among football fans – would be required to conclude this investigation"[214] and "Ofcom's resources could be used more effectively on other priorities to benefit consumers and competition"[215]. The Ofcom has not modified the commitments since the decision of the European Commission and has not provided any new legal assessment of Art. 101(1) or 101(3) TFEU or any detailed analysis of the competition restraints resulting from the joint sale and how they impact the markets.

5.3.2. Effects on the market

The FA Premier League was able to increase its revenues from selling television rights constantly and is the most valuable football league on the globe. For the seasons 2016-2019 the FA Premier League earned 6.9 billion Euros from selling the rights to national broadcasters. However, in 2018 the seasons 2019-2022 were sold and the revenue decreased for the first time since 1992, but is still higher than in all other European football leagues.[216] Especially because of the high prices obtained by the Premier league and the limited output, the very reserved approach of the Ofcom is surprising. The FA Premier League still broadcasts only around half of all its games live on television, but subscribers pay a lot higher prices than for instance in Germany. Watching Premier League on Sky and getting access to the 42 games only broadcasted by BT as well currently costs subscribers over 50 Pound sterling a month, while subscribers to Sky in Germany have access to almost all of the 306 games, for less than 30 Euros a month. BSkyB and BT have entered into sublicensing agreements, thus consumers currently have a real choice between two different broadcasting operators.[217] However, the restricted output of the FA Premier League in combination with the high prices seems like a good reason for the British NRA to act. This fact is underlined by the results of the consumer research provided by Ofcom. Consumers did not ask to necessarily watch more games per season, but wanted to have a wider choice.[218] The possibility for consumers to choose between different matches or create a consumer-favoured product, like the simulcast, would come with a larger output in general. One of the major concerns since the first Commission decision in 2003 was

[213] <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2016/premier-league-football-rights> accessed 15 May 2018.
[214] ibid.
[215] ibid.
[216] <https://www.theguardian.com/football/2018/feb/14/premier-league-tv-deal-key-questions-subscriptions-bt> accessed 15 May 2018.
[217] <https://www.telegraph.co.uk/business/2017/12/15/sky-bt-strike-deal-sell-others-channels/> accessed 15 May 2018.
[218] Premier League Consumer Research, Obtaining the views of fans who attend the matches and those who watch them on TV, 5th February 2016, 148, 149.

the prevention of unused rights.[219] It remains unclear why the British Ofcom has considered the Commission's demand to increase output satisfied, when the FA Premier League still holds back so many live rights.

5.4. Comparison, Conclusions and Critique

Taking the approaches of the European Commission in its decisions as a starting point, the NCA of Germany and the NRA of the UK have developed very distinct models of enforcing European competition law, but followed the path taken by the Commission in the corresponding case to some extent.

5.4.1. Legal assessment of Art. 101 TFEU

It is interesting to see that the BKartA developed an assessment of Art. 101(1) TFEU that reminds of the argumentation of scholars who favour the application of the single-entity doctrine.[220] In 2012 the BKartA pointed out that the cooperation of sports clubs in order to establish and organize a league competition and sell a league-branded product, would be inherent in sports competitions. The consumer demand on the downstream market would be television programs that picture the league as a whole and not only the games of a single club. Accepting these inherent characteristics of a sports league and the dominant position of the league association, the BKartA shifted its focus in 2016 to the question of how to target the effects this position has on the downstream market for consumers and thereby desisted from trying to introduce competition between the single clubs. To effectively target the competition restraints resulting from this practice, the BKartA addressed the league association as one dominant undertaking. Its major concern was to introduce competition on the downstream market and prevent foreclosure. The introduction of the no-single-buyer-rule determined the results of the tendering procedure to a certain extent, without paying attention to the anticompetitive behaviour of the clubs on the supply-side anymore. In both decisions the BKartA explicitly referred to the possibility of controlling the joint sale of media rights in general and the specific selling arrangements in particular under Art. 102 TFEU as well.[221] By assessing Art. 101(3) TFEU in such detail, the BKartA made an important contribution to more legal certainty for the undertakings concerned.[222] The approach taken by the BKartA is consistent and logical. Consumer research in all of the cases discussed above allows the conclusion that single clubs might compete against each other on several markets, but regarding the media rights; the value of selling

[219] COMP/C.2/37.398 - *Joint selling of the commercial rights of the UEFA Champions League* [158], [159].
[220] Blask (n 39).
[221] BKartA, Beschluss vom 2. Januar 2012, B6-114/10 [104]; BKartA, Beschluss vom 11. April 2016, B6-32/15 [160].
[222] Loewenheim, Meessen, Riesenkampff, Kersting, Meyer-Lindemann (n 2), [114].

those rights is actually created by selling them as a whole league. It seems like consumer demand can only be met in case of a joint sale. The question derived from the two decisions should be, why the BKartA sticks to the application of Art. 101 TFEU and does not apply Art. 102 TFEU. If the major competition concerns result from the dominant market position of the league association, an application of Art. 102 TFEU might be the more suitable provision to apply and might be the future of assessing the joint sale of television rights of sports league associations.[223]

The Ofcom on the other hand, did not assess Art. 101(1) and Art. 101(3) TFEU fully again. The British NRA took the assessment of the Commission as sufficient and even after ten years as still accurate. This lack of legal assessment comes with less legal certainty for the industry. The occasional interventions of the Ofcom reflect this uncertainty and might have been prevented if the Ofcom would have given a clearer guidance. The measures taken by the Ofcom also aimed at impairing the market position of BSkyB, rather than addressing the league association, which reminds of the Commission's decision in the *FA Premier League* case. The BKartA adopted this approach in 2016, when it introduced the no-single-buyer-rule. This shift from the German NCA was well reasoned and even though it did not have the hoped-for effects on the market yet, the policy behind this measure was explained extensively and correlated with the detailed market analysis. It remains unclear why the Ofcom did not target the restrictive output on the supply-side on the upstream market, since it was the clear demand of consumers to have a wider variety of choice. A higher output on the upstream market might also have helped to introduce competition on the downstream market; by giving BSkyB's competitors the chance to acquire more live rights and obtain a better market position. The measure to force BSkyB to sublicense on the other hand was a very helpful tool to actually create consumer choice on the downstream market and should have been considered by the BKartA as well, since the purely hypothetical assumption that the broadcasters would somehow come to a sublicensing agreement was bold, but proved to be incorrect.

It is hard to evaluate the uniformity of the application of Art. 101(1) and 101(3) TFEU since the Ofcom hardly released any insight regarding their competition law perspective on the topic. The unequal allocation of resources and investigative powers of the two national authorities in such similar cases, give rise to justified doubts about a uniform application of competition law by the different law enforcers. Both authorities have not found the perfect solution for enhancing competition on the upstream and downstream markets and meeting consumer demand for a

[223] ibid [109].

reasonable price at the same time. While British consumers still suffer from a restriction of output on the upstream market, which causes a lower variety of choice, the attempt of the BKartA to introduce competition on the downstream market by implementing a no-single-buyer-rule has only worked in regards of competition in innovation for new media, but has not created an actual competitor for Sky and a choice for consumers.

5.4.2. Commitment decisions

The two BKartA decisions illustrate the advantage of a decentralised enforcement model, which gives NCAs the power to deal with national markets, of which they have better knowledge than the Commission. The detailed legal assessment of Art. 101(1) and 101(3) TFEU and the extensive consumer research of the BKartA emphasise the Commissions claim that the division of powers between more enforcement bodies would lead to a more focussed and more economic approach in each individual case. The BKartA's decisions from 2012 and 2016 show that the competence to accept commitment decisions helps to constantly react to changes on the relevant markets. On the other hand, the current practice in Germany, to accept commitments for only a period of four years, can be read as a reflection of the criticism of Hofmann, that it gives the competition law enforcers the possibility to develop to regulatory bodies.[224] It seems like the BKartA will stick to negotiate the conditions and selling arrangements of a joint sale every four years. Regulation 1/2003 was supposed to introduce a shift from *ex ante* to *ex post* control in competition law enforcement. If the BKartA constantly asks the league associations to present their sales model and commit to certain conditions before the rights are actually sold, the realisation of this change can be doubted.

The Ofcom followed a different enforcement approach and did not ask for subsequent commitment decisions after 2006. This imposes more responsibility on the league association and media-operators and entails the risk of unanticipated interventions from the NRA. While the shift from *ex ante* to *ex post* control is reflected in that approach and the danger of abusive or regulatory use of commitment decisions is diminished, the Commission's assumption of more enforcement through the decentralisation can be doubted in this particular case. The reasoning of the Ofcom, that its resources might be used "more effectively on other priorities" is difficult to accept in a case that concerns a multi-billion Euro business and a dominant undertaking that artificially restricts output and a legal issue in general that raised competition concerns in case of all big European football leagues.[225]

[224] See above, chapter 3.5.
[225] Germany, Italy, France and Spain.

6. Conclusions and future outlook

The extensive analysis of the different decisions regarding the joint sale of television rights and the effects of the new enforcement regime allow drawing several conclusions and giving a future outlook on the topic.

6.1. Joint sale of television rights under Art. 101 TFEU

The competition concerns linked to joint sale of television rights of league associations have been pointed out in detail and will remain subject of judicial or administrative review. The difficulty of balancing the restraints resulting from the cooperation of clubs, which is inherent in a sports league - like the dominant position of media-operators on the downstream market - with the consumer demand for a league-branded product has not been dissolved yet. The first assessment of the European Commission in 2003 and the minimum requirements to allow a joint sale established in the *UEFA Champions League* decision, have paved the way for the subsequent decisions of the Commission and the NCAs. However, the constant review of the market situation and the wider acceptance of the joint sale as an inherent feature of a sports-league competition have shifted the focus of competition law enforcers. The sale of television rights by each individual club can therefore not be a considered a solution that is able to meet consumer demand. From my perspective, there are two possible ways of dealing with the joint sale of television rights under competition law in the future, that will allow meeting consumer demand, but also enhance effective competition on the upstream and downstream market, at least to some extent.

The first way would be to keep applying Art. 101(1) TFEU and implement commitments, which break up the exclusivity of the rights. As pointed out above, it is the exclusivity of the rights that causes the foreclosure effects. Selling licenses to more than one broadcaster for the same games would be the measure actually creating competition on the downstream market and a variety of choice for consumers. This competition would depend on quality of the television formats, price and maybe innovation as well. Since the exclusivity of the rights is what makes those rights so valuable on the pay TV market and guarantees the horrendous earnings for the league associations and clubs, it seems very unlikely that this will happen. Sublicensing might be the first step into the right direction and has already been implemented in the UK.

The second possible way of assessing the joint sale under competition law provisions is linked to the single-entity doctrine and the reasoning of the German BKartA in their commitment decision from 2016. The legal assessment allows the prediction that Art. 102 TFEU rather than

Art. 101 TFEU might govern the future of the joint sale of media rights in Germany. The horizontal cooperation between football clubs was one of the major competition concerns in the first decisions of the European Commission, but extensive consumer research and elaboration of efficiencies under Art. 101(3) TFEU led the BKartA to the conclusion that this cooperation is indispensable for creating the product most consumers demand. Allowing the league associations, as dominant undertakings on the upstream market, to sell the television rights on an exclusive basis to only one or two broadcasters, will make those broadcasters (collectively) dominant on the downstream market. The most effective tool to control the practices of the associations and the dominant broadcasters would therefore be Art. 102 TFEU. It would give the competition authorities the chance to effectively control the selling arrangements, like maximum or minimum length of the license or subscription, price and restrictions of output on both markets and maybe even force dominant broadcasters to sublicense, like the Ofcom did in the UK. This way of enforcement would also come with the benefit of limiting the margin of discretion of the NCAs, since they would have to prove that a practice is actually an abuse of market power, to intervene in that behaviour.

Since the single market is one of the aims of the EU and this competition law issue has aroused in several Member States, a uniform solution should be promoted, to prevent different legal standards in different Member States. The ECN might serve as a forum of discussion to find such a uniform solution.

6.2. Impact of Regulation 1/2003

The comparison of the different enforcement approaches by the Commission and the two national NCAs have shown that the overall positive evaluation of the functioning of the new enforcement regime might be a bit too naïve. The detailed legal analysis provided by the BKartA, pointing out the developments and changes on the concerned markets, in comparison to the brief communication of the British Ofcom, could lead to a different legal standard in different Member States in the same matter. Regulation 1/2003 was supposed to decentralise and promote more, but also a uniform application and enforcement of competition law. This comparison of similar cases has shown that uniformity is in danger when national authorities control national markets without constant European supervision or central judicial review. Especially the margin of discretion regarding the use of investigative powers emphasizes this threat, since the decision to close an investigation without a proper legal assessment, makes it even harder to illuminate the reasoning and policy behind that decision.

On the other hand, the new competence of commitment decisions under Art. 9 of Regulation 1/2003 and the parallel competence for NCAs to accept commitment decisions under national procedural rules serve as efficient tools for the quick resolution of competition conflicts. It gives the Commission and NCAs the chance to find a suitable solution for the case by paying attention to the particularities of the factual situation. The flexible tool of commitment decisions has helped to push forward competition in innovation and promoted the Internet as a new medium for broadcasting of sports events. Nevertheless, the margin of discretion for the Commission and the NCAs regarding the commitments entails a certain risk of excessive regulation, rather than making room for undistorted and free competition. More judicial review and a strict application of the principle of proportionality should be promoted to safeguard that the Commission and NCAs preserve their role, as law enforcers and don not evolve into market regulators with uncontrolled powers.

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