

COMMISSION

COMMISSION DECISION

of 10 May 2000

relating to a proceeding pursuant to Article 81 of the EC Treaty

(Case IV/32.150 — Eurovision)

(notified under document number C(2000) 1171)

(Only the English text is authentic)

(Text with EEA relevance)

(2000/400/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area and in particular Article 53 thereof,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 ⁽²⁾, and in particular Articles 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted, pursuant to Articles 2 and 4 of Regulation No 17, on 3 April 1989, as supplemented on 27 August 1996,

Having published summaries of the application and notification ⁽³⁾ pursuant to Article 19(3) of Regulation No 17,

After consulting the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

1. INTRODUCTION

- (1) On 3 April 1989 the European Broadcasting Union (EBU) applied for negative clearance or for exemption pursuant to Article 81(3) of the EC Treaty in respect of its internal rules and regulations governing the acquisition of television rights to sporting events, the exchange of sports programmes within the framework of Eurovision and contractual access to such programmes for third parties.
- (2) On 11 June 1993 the Commission adopted Decision 93/403/EEC ⁽⁴⁾ pursuant to Article 81(3) of the EC Treaty granting a conditional exemption to the notified EBU provisions until 25 February 1998.

⁽¹⁾ OJ 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ C 251, 1990, p. 2 and

OJ C 248, 1.9.1999, p. 4.

⁽⁴⁾ OJ L 179, 22.7.1993, p. 23.

The exemption was subject to the scheme for sub-licensing by the EBU to third parties of the jointly acquired television rights to sporting events and to the obligation to inform the Commission of any amendments to the rules notified, of all arbitration procedures under the scheme for EBU non-members' access to Eurovision sports programmes ⁽⁵⁾ and of all decisions regarding applications for membership by third parties.

- (3) On 11 July 1996 the Court of First Instance annulled the Commission's decision following an application by a number of European television channels ⁽⁶⁾.
- (4) The EBU appealed against the Court of First Instance's judgment before the Court of Justice. The Commission is supporting the EBU's appeal which is still pending.
- (5) On 27 August 1996 the Guidelines of Interpretation of Criteria for EBU Active Membership (dated 12 August 1992) were submitted by the EBU to the Commission. The membership rules and the Guidelines of Interpretation were amended on 3 April 1998 by the EBU.
- (6) The Commission published a summary of the agreements notified in the Article 19(3) notice of 5 October 1990 and in a second Article 19(3) notice of 1 September 1999.

2. THE EUROPEAN BROADCASTING UNION ⁽⁷⁾

- (7) The EBU is an association of radio and television organisations set up in 1950 with headquarters in Geneva. The association is a non-profit-making association. However, to attain its objectives, it may pursue activities of a commercial nature. The objectives of the EBU are to serve the interests of its members in the programming, legal, technical and other fields. In particular, the EBU will coordinate and support television programme exchanges among its active members, in the framework of Eurovision, and will promote co-productions and any other form of cooperation among its members and with other broadcasting organisations or groups of such organisations. The EBU will assist its active members in negotiations of all kinds and, when asked, negotiate on their behalf. Solidarity is the EBU's guiding precept.
- (8) There are two categories of EBU members: active members and associate members. Only active members can be Eurovision members. Associate members are from countries outside the European Broadcasting Area. Associate members do not belong to Eurovision and thus have no access to Eurovision sports rights, beyond contractual access in the same way as non-members. They do, however, participate in the work of the professional association.

A. The EBU's conditions for active membership

- (9) The conditions for active membership of the EBU are set out in Article 3(3) of the EBU's Statutes as interpreted by the Guidelines of Interpretation of Criteria for Active Membership. Both Articles 3(3) of the Statutes and the Guidelines were amended on 3 April 1998 by the EBU. Active membership of the EBU is open to broadcasting organisations, or groups of such organisations, which provide, in a country situated in the European broadcasting area, a service of national character and national importance. They must cover virtually all of the national radio and/or television households and must all be under an obligation to provide, and actually provide, varied and balanced programming for all sections of the population. Finally, they themselves must produce a substantial proportion of the programmes broadcast. According to Article 3(3) of its Statutes, the EBU applies the following criteria to assess requests for membership.
 - (a) Technical coverage: 98 % of the national radio and/or television households are in a position and technically equipped to receive the entirety of their major radio and/or television programme service with satisfactory technical quality.
 - (b) Programme obligations: varied and balanced programming for all sections of the population in the context of television sports programming means that a minimum should be attained:

⁽⁵⁾ See Annex I.

⁽⁶⁾ *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities*, Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93. [1996] ECR II — 649.

⁽⁷⁾ For a detailed description of the EBU organisation, see paragraphs 2 to 5 of the Article 19(3) notice of 5 October 1990 and paragraphs 7 to 13 of the Article 19(3) notice of 1 September 1999.

- between 7 a.m. and 1 a.m., plus any live coverage between 1 a.m. and 7 a.m., programming should include at least 200 hours of sports programming per year,
 - sports programming should include at least 12 different categories of sport, of which at least eight have a total annual transmission time of more than three hours.
- (c) Own production: the production by the EBU's members at their own cost and under their own editorial control of a substantial proportion of the programmes broadcast means an own production of at least 30 % of the totality of the programmes broadcast.
- (10) In addition, the last subparagraph of Article 3(6) expressly requires the EBU's Administrative Council to ensure compliance with the membership rules. The Administrative Council must ensure at all times that participation in the joint acquisition and sharing of sports rights in the framework of Eurovision remains strictly limited to those organisations which fully comply with the conditions laid down in Article 3(3) of the EBU Statutes and in the Guidelines for Interpretation.
- (11) Finally, Article 3(15) provides for the possibility of recourse to arbitration for applicants. An organisation whose application for active membership has not been successful has the possibility of recourse to arbitration in Geneva in accordance with the Swiss arbitration concordat. The same right to arbitration applies where a non-member whose application for membership was not successful questions the Administrative Council's assessment that a given member in the same country is entitled to participate in the joint acquisition and sharing of sports rights.
- (12) Since 1998, the EBU has a set of rules concerning the continuing participation of former Eurovision members in existing sport programmes ⁽⁸⁾. In accordance with these rules, the entirety of the former member's rights will be offered in its country market and on the same financial terms as to the former member, first, to another existing Eurovision member and, in case of lack of success, to non-members (including at the end the former Eurovision member). The new rightowners will be bound by the 1993 EBU scheme on non-members' access to Eurovision sports programmes. Therefore, the new rightowners are subject to the sub-licensing obligations and the access of third parties to the jointly acquired sports rights is also guaranteed.
- (13) The EBU has 68 active members in 49 countries situated in the European broadcasting area and 50 associate members in 30 countries outside the area.

3. THE NOTIFIED ARRANGEMENTS: THE EUROVISION SYSTEM

- (14) The notified arrangements are the 'Eurovision system', that is, the rules which govern within the EBU and the Eurovision/Sports system: (1) the joint acquisition of sport television rights (2) the sharing of the jointly acquired sport television rights (3) the exchange of the signal for sporting events (4) the access scheme for non EBU members to Eurovision sports rights and (5) the sub-licensing rules relating to exploitation of Eurovision rights on pay-TV channels.
- (15) The notification does not include radio matters.
- (16) Eurovision is a TV programme exchange system organised and coordinated by the EBU, based on the understanding that members offer to other members, on a reciprocal basis, their news coverage of important events and their coverage of current affairs and of sports and cultural events taking place in their countries and of potential interest to other members, thereby enabling members to provide a high quality service in these fields to their respective national audiences. In addition, in the framework of Eurovision, EBU active members participate in the joint acquisition and sharing of sports rights.

⁽⁸⁾ The Commission was informed of these rules on 7 December 1998. The rules were first applied to Canal+. The EBU changed the membership rules on 3 April 1998 with the result that Canal+ can no longer participate in the Eurovision/sports system. The full text of these rules has been published by the EBU on the internet: <http://www.ebu.ch>

A. Joint acquisition of sport television rights

- (17) Television rights for international sporting events are normally acquired jointly by all interested members on an exclusive basis.
- (18) The joint acquisition of rights normally concerns only international sporting events and not national events such as national football, where national EBU members buy the television rights individually on the market, thereby competing with each other in some countries.
- (19) Whenever EBU members from two or more countries are interested in a specific sporting event they request coordination from the EBU. As a result, negotiations are carried out on behalf of all interested members either by a member — sometimes assisted by the EBU— in the country where the event takes place or by the EBU itself. Once negotiations for Eurovision rights have commenced, and until they are formally declared to have failed, members are required not to engage in separate negotiations for national rights. Only if joint negotiations have failed are members free to negotiate separately.

B. Sharing of the jointly acquired sport television rights

- (20) The Eurovision rights are acquired on behalf of the members who participate in the contract for their respective countries. Once the exclusive rights have been acquired, all members participating in the agreement share the rights and are entitled to the full benefit of the rights, regardless of the territorial scope of their activity and regardless of the technical means of broadcasting. However, members who compete for the same national audience (several members in one country or members broadcasting from their country into the country of another member in the same language) have to agree among themselves on the procedure for attribution of priority to one of them.
- (21) Several members in one country usually agree to share the rights, for example by alternating transmission of the event. If no such procedure can be agreed on, all the members concerned become entitled to non-exclusive rights with respect to the country or countries in question. Members which provide the coverage of an event (i.e. produce the signal) are, unless otherwise agreed, entitled to priority over foreign members aiming their broadcast at the same national audience.

C. The exchange of the signal

- (22) For events which take place within the Eurovision area the coverage (television signal consisting of basic video and international sound-feed) is produced by a member in the country concerned and is available to all other members via the Eurovision programme exchange system. The Eurovision programme exchange system is based on reciprocity: whenever one of the participating members covers an event, in particular a sporting event, which takes place on its own national territory and is of potential interest to other Eurovision members, it offers its coverage free of charge to all the other Eurovision members on the understanding that in return it will receive corresponding offers from all the other members in respect of events taking place in their respective countries. The originating member also provides the necessary infrastructure to other interested members such as commentary positions.
- (23) Since in each country there is at least one EBU member providing and producing sports programmes, it can be taken for granted that essentially all events that are of potential interest beyond national boundaries will be covered (provided that the members have been able to acquire the rights) and will be available to the members throughout the Eurovision area. The reciprocity system does not take account of actual input and withdrawal by individual members. In essence, it amounts to a solidarity system under which the financially more powerful organisations from large countries support organisations from smaller countries with a view to ensuring a broad flow of sports programmes to all parts of the Eurovision area.
- (24) If an event takes place outside the Eurovision area, and thus the coverage is produced by a non-EBU member, the members participating in a Eurovision agreement normally have to pay a fee, which they share between them, for the use of that other broadcaster's signal. However, there are reciprocity agreements with equivalent broadcasting organisations in other areas under which the signal is in some cases made available free of charge to EBU members.

- (25) The transport of the signal from the point of origin to the transmission facilities in the individual countries where the event is to be transmitted, is effected via a network which links all Eurovision members with each other. The network consists of permanently leased terrestrial circuits (supplemented on an ad hoc basis by occasionally leased terrestrial links) as well as a certain number of terrestrial circuits owned by individual members. In addition, the EBU leases some satellite circuits on a permanent basis and further satellite circuits on an ad hoc basis.
- (26) The Eurovision system also provides for administrative and technical coordination. Administrative coordination including programme coordination is carried out by the EBU's permanent services in Geneva or, for example, in the case of the Olympics, by special operation groups, with the object of coordinating the specific needs of the different members and of achieving optimal coverage of as many competitions as possible. It involves, in particular, the planning of scheduling, including dealing with possible time differences between the site of the event and the members' countries and the selection of competitions in cases where several competitions take place simultaneously. Technical coordination is carried out by the EBU's technical centre which deals, in particular, with technical planning, monitoring and quality control with regard to the signal itself.
- (27) The parties made some changes to the notified arrangements. These changes, which are part of the notified Eurovision system, are the 1993 and the 1999 access schemes for non-members.

D. The access scheme for non-EBU members to Eurovision sports rights (1993)

- (28) Under the scheme submitted to the Commission on 26 February 1993, the EBU and its members undertake to grant non-member broadcasters extensive access to Eurovision sports programmes the rights for which have been acquired on an exclusive basis through collective negotiations. The 1993 scheme grants live and deferred transmission rights to third parties of jointly acquired Eurovision sports rights. In particular the non-EBU members have significant access to the unused rights, i.e. for the transmission of sporting events which are not transmitted by, or of which only a minor part are transmitted by an EBU member. The terms and conditions of access are freely negotiated between the EBU (for transnational channels), or the member(s) in the country concerned (for national channels), and the non-member. However, the EBU and its members will in no circumstances grant less favourable access than stipulated in recitals 29 to 33.
- (29) Access for live transmissions is granted if the event is not broadcast live by the EBU member(s) in the country or countries concerned, except for those parts or competitions (particular disciplines, individual matches, rounds, etc.) which the member(s) have reserved for their own live transmission.
- (30) If an event (or, in the case of events lasting more than one day, a day of competition) is broadcast live by the EBU member(s) in the country or countries concerned, i.e. if the majority of the principal competitions constituting it are transmitted live, access is granted for deferred transmissions, beginning not earlier than one hour after the end of the event or the last competition of the day and not earlier than 10.30 p.m. local time (London time for pan-European channels).
- (31) Except where national law or regulation provides otherwise, the EBU and its members grant access to two news items of up to 90 seconds each per event or day of competition, with the possibility of repeating one such report later the same day, which must be included in regularly scheduled general news bulletins, or in regularly scheduled general sports-news programmes of dedicated sports channels within 24 hours.
- (32) The access fee (for access to the television rights and the television signal) has to be negotiated. For routing the signal, the non-member is free to make its own arrangements or may ask the EBU to route the signal via the Eurovision network. In that case the EBU will submit an estimate for the costs.

- (33) In the event of a dispute over the access fee where all other access conditions have been agreed at the request of the non-member the matter will be submitted to arbitration by independent expert(s). The expert(s) will be nominated jointly by the parties. Failing agreement, nomination will be by the President of the competent Court of Appeal in the case of national arbitration (concerning access for national channels) and by the President of the International Chamber of Commerce in the case of international arbitration (concerning access for pan-European channels). The expert(s) shall fix the access fee. The decision shall be final and binding.
- (34) The complete text of the scheme can be obtained by interested third parties from the EBU or from the national members. It has also been published by the EBU on the Internet: <http://www.ebu.ch> and it is attached at Annex I.

E. The sub-licensing rules relating to exploitation of Eurovision rights on pay-TV channels (1999)

- (35) As an addition to the general rules on EBU non-members' access to Eurovision Sport Programmes adopted on 24 February 1993, the EBU has adopted, and submitted to the Commission on 26 March 1999, a set of sub-licensing rules relating to exploitation of Eurovision rights on pay-TV channels.
- (36) Pursuant to the 1999 rules, when an EBU member transmits part of a sporting event on its national general programme channel and part on its pay-TV channel:
- a non-EBU member has all rights stemming from the 1993 rules for the broadcasting on its free-to-air or pay-TV channels, live or deferred. In addition:
 - A non-EBU member has the right to transmit on its pay-TV channel identical or comparable competitions to those presented on the EBU member's pay-TV channel.
- (37) The full text of those rules has been published by the EBU on the Internet: <http://www.ebu.ch>, and is attached at Annex II to this Decision.

4. THE RELEVANT MARKET

4.1. Product market

- (38) The EBU considers that the relevant market for the assessment of the case is the market for the acquisition of the television rights to important sporting events in all disciplines of sport, irrespective of the national or international character of the event. The EBU is only active in the acquisition of television rights to sporting events of pan-European interest ⁽⁹⁾.
- (39) The Commission shares EBU's view that sports programmes have particular characteristics; they are able to achieve high viewing figures and reach an identifiable audience, which is a special target for certain important advertisers.
- (40) However, contrary to what the EBU suggests, the attraction of sports programmes and hence the level of competition for the television rights varies according to the type of sport and the type of event. Mass sports like football, tennis or motor-racing generally attract large audiences, the preferences varying from country to country. By contrast, minority sports achieve very low ratings. International events tend to be more attractive for the audience in a given country than national ones, provided the national team or a national champion is involved, while international events in which no national champion or team is participating can often be of little interest. In the last 10 years, with increased competition in the television markets, the prices for television rights to sporting events have increased considerably (see recitals 50 to 58), this is particularly true with regard to outstanding international events such as the Football World Cup or the Olympic Games.

⁽⁹⁾ Sporting events of a pan-European interest include for example: the Olympic Games, the Football World cup, the European football Championships, the World and European Athletic Championships; Wimbledon, the US and French tennis Opens, the NBA basketball.

- (41) The preferences of viewers determine the value of a programme to advertisers and pay-TV broadcasters⁽¹⁰⁾. In free-to-air television we cannot directly observe viewers' reactions to changes in the price of broadcasts, and hence we cannot directly observe evidence on the price elasticities of demand. This is also true for pay-TV since pay-TV contracts usually involve monthly or annual payments for bundles of channels, but not individual prices for each programme. However, if we observe that sports broadcasts achieve the same or similar sized audiences whether or not they are competing with simultaneously broadcast sporting events, there is strong evidence that those events could determine the subscribers' or advertisers' choice of a certain broadcaster.
- (42) Indeed, data on viewer behaviour, among major sporting events, shows that for at least some sporting events which have been analysed such as the summer Olympics, the winter Olympics, the Wimbledon Finals and the Football World Cup viewing behaviour does not appear to be influenced by the coincidence of other major sporting events being broadcast simultaneously, or nearly simultaneously. That is, viewing figures for the major sporting events appear to be largely independent of whatever other major sports are broadcast at a similar time⁽¹¹⁾. Therefore, the offer of such sporting events could influence the subscribers or advertisers to such an extent that the broadcaster would be inclined to pay much higher prices.
- (43) In conclusion, the Commission's investigation shows that the market definition proposed by the EBU is too large and that there is a strong likelihood that there are separate markets for the acquisition of some major sporting events, most of them international.
- (44) However, it is not necessary for the purposes of this case to exactly define the relevant product markets. Taking into account the present structure of the market and the sub-licensing sets of rules granting access to non-EBU members to the Eurovision Sport Programmes these agreements do not raise competition concerns, even on the basis of markets for the acquisition of particular sporting events such as the summer Olympics.
- (45) As explained in recital 41, the acquisition of exclusive TV rights to certain major sporting events has a strong impact on the downstream television markets in which the sporting events are broadcast as part of the broadcasters' offer to viewers and/or subscribers.

4.2. Geographic market

- (46) Some sporting events rights are acquired on an exclusive basis for the whole European territory and, regardless of the technical means of transmission, to be resold thereafter per country, which others are acquired on a national basis. The kind of major sporting event rights for which the EBU bids, which have a pan-European interest from the viewers' perspective, such as the Olympic Games, will normally fall within the first category of European licences.
- (47) Nevertheless, irrespective of the scope of the licences, as explained in recitals 38 to 45, the preferences of viewers can significantly vary from country to country depending on the type of sport and the type of event and, therefore, the conditions of competition for the television rights can vary accordingly.

⁽¹⁰⁾ In the same way that customer substitutability determines the upstream market of the supply of digital interactive television services by service providers to content providers as the Commission has decided in Decision 1999/781/EC, Case 36.539, British Interactive Broadcasting/Open (OJ L 312, 6.12.1999, p. 1).

⁽¹¹⁾ When major sporting event A is broadcast simultaneously with another major sporting event B, event A achieves (on average) the same audience as it does when event B is not available. For instance, there is evidence that the elasticity of demand in the UK for the Wimbledon finals with respect to the World Cup Football is very small, and probably zero. World Cup Football viewers do not appear to watch Wimbledon Finals, even when the world cup is not available. The same can be said with regard to the Premier League Football broadcast by BSkyB in relation to the top 30/40 most viewed sport programmes in free-to-air TV in the UK. The test indicates that viewers of Premier League matches do not substitute to other major sporting events when broadcast on the same day. Source: 'Market definition in European sports broadcasting and competition for sports broadcasting rights' by Market Analysis Ltd, a study for the Directorate-General for Competition of the European Commission, October 1999.

- (48) With regard to the downstream markets affected by the present notification, the free-to-air and pay-TV broadcasting markets should be considered, largely for linguistic, cultural, licensing and copyright reasons, generally national or extending to single linguistic areas.
- (49) However, for the purposes of this case it is not necessary to define the relevant geographic market exactly. Taking into account the present structure of the market and the sub-licensing rules granting non-EBU members access to the Eurovision sport programmes, these agreements do not raise competition concerns even on the basis of national markets for the acquisition of sports rights, nor for the downstream markets of free-to-air and pay-TV broadcasting.

5. MARKET STRUCTURE

- (50) In the Community markets, competition between terrestrial broadcasters has increased everywhere, and a significant number of new cable and satellite companies have entered the broadcasting markets in the last 10 years. The number of broadcasting companies and broadcasting channels in the Community's five biggest television markets (Germany, France, United Kingdom, Italy and Spain) doubled or tripled between 1982 and 1997. The new national free-to-air broadcasters are obviously interested in spending large sums for attractive sporting events to increase the prestige of their channels. In addition, pay-TV broadcasters, particularly in France, the United Kingdom and Spain have discovered that having attractive sporting events is an enormously motivating factor in recruiting subscribers, in particular young males with disposable income. Consequently, the capacity devoted to sports broadcasts has increased dramatically in recent years and this growth has come principally from non-EBU broadcasters⁽¹²⁾.
- (51) Television rights to sporting events are granted for a given territory, normally on an exclusive basis. Exclusivity is generally granted for broadcasting by all technical means (satellite, cable, terrestrial). Exclusivity is considered necessary by the broadcasters in order to guarantee the value of a given sports programme, in terms of the viewing figures and advertising revenues which it can achieve. The rights are often offered as packages and comprise all matches, rounds or competitions forming one event (championship, tournament, cup, league round).
- (52) Television rights are normally held by the organiser of a sporting event, who is able to control access to the premises where the event is staged. In order to control the televising of the event and to guarantee exclusivity the organiser admits only one broadcaster (the host, broadcaster, i.e. a broadcaster in the country where the event takes place) or, in any case, only a limited number of broadcasters to produce the television signal. Under their contract with the organiser they are not allowed to make their signal available to any third party who has not acquired the relevant television rights. Organisers of widely popular sporting events are often rather powerful national or international associations which are in an extremely strong situation with regard to television rights to certain events or certain types of sports, as there is usually a single national or international association for each sport.
- (53) As a result of the new entrants and the increased capacity devoted to sports broadcasts, there are fierce bidding contests to obtain valuable sports broadcasting rights. The effect of that seems to be a transfer of profits away from downstream broadcasters and towards upstream rights owners⁽¹³⁾. The prices of the TV rights for sporting events have therefore increased sharply.
- (54) In this context, the EBU has lost significant market share in the relevant markets for the last ten years.

⁽¹²⁾ See diagram showing this evolution since 1990 at Annex III.

⁽¹³⁾ See Annex IV table 'The costs of the European rights to the Olympics for the EBU from 1984 to 2008': Source: market analysis, report of October 1999.

- (55) With regard to the acquisition of exclusive television rights to certain major sporting events, the EBU's position has been effectively attacked by the big European media groups ⁽¹⁴⁾, in particular those with interests in both generalist and pay-TV channels, and by the international brokers ⁽¹⁵⁾. The best example of this trend is that the EBU was unsuccessful in the bidding for the 2002 and 2006 Football World Cups. In 1987 the EBU paid GBP 215 million to show the 1990, 1994 and 1998 football World Cups. In 1997 the Kirch Group paid GBP 1,37 billion for the world rights to the next three World Cups, a sixfold increase. The EBU bid was 78 % of the winning bid for these worldwide rights ⁽¹⁶⁾. The EBU has also not acquired or has lost a very significant number of other important sporting events in the last few years because of higher competitive offers such as the Formula One Motor Racing, the Motor Cycling Grand Prix World Championships since 1998, the Athletics Grand Prix Meetings (Golden Four), the Gymnastics World Championships, the Ski World Cup races in Italy, Norway, France, Slovenia, Spain, Sweden, USA and Canada, the Basketball World Championships and European Championships from 1999, Wimbledon (since 1988), US Open (since 1985), Masters Final (since 1987), Grand Slam Cup (since 1990), the Davis Cup Final tennis tournaments, the Rugby World Cup and the Paris to Dakar rally.
- (56) However, the EBU remains in a strong market position in the acquisition of major international sporting events with a very strong appeal for European viewers in respect of which the rights owners still insist that the events must not be broadcast on pay television. In addition, the EBU still has a unique one-stop-shop position, which guarantees the organisers the widest possible viewing audience in Europe. Thus, the EBU holds the rights for the summer Olympic Games in Sydney (2000), Athens (2004) and the 2008 summer Olympic Games, the winter Olympic Games in Salt Lake City (2002) and the 2006 winter Olympic Games, the UEFA Cup Finals (1998-2000), Roland Garros (1998 to 1999), Australian tennis Open (1998 to 2000) and the FIS Alpine and Nordic World Championships (1999-2005). The EBU also has contracts for world and European championships in other categories such as athletics, basketball, biathlon, boxing, cycling, equestrian events, fencing, gymnastics, judo, rowing, skating, swimming, table tennis, volleyball, weight-lifting and wrestling.
- (57) It is particularly relevant that the European television rights for the Olympic Games have always been sold to the EBU. However, it is also worth noting that in the latest round of bidding the EBU bought the rights to all games between 2000 and 2008 for a total of USD 1,44 billion. News Corporation had bid USD 2 billion for the same rights. This reflects a policy of the IOC of keeping the most important events available on free TV but the trend resulting from the entrance of new players and the impact on EBU's market power is confirmed by the higher bid made by News Corporation for the rights to the Olympic Games between 2000 and 2008.
- (58) The market position of the EBU members in the free-to-air market in their respective national territories has also undoubtedly declined as a result of the sharp increase in new broadcasting companies entering the market. With regard to the pay television market, the EBU members are now starting to enter the market, normally through a still very limited number of thematic channels. Well established pay-TV operators such as Canal+, BskyB and Kirch hold very strong market positions in some European countries with very valuable sports rights.

6. THIRD PARTY OBSERVATIONS

- (59) In its notice of 5 October 1990, pursuant to Article 19(3) of Regulation No 17, the Commission indicated its intention to grant an exemption pursuant to Article 81(3) of the EC Treaty. A number

⁽¹⁴⁾ Kirch, Mediaset, Bertelsmann, BskyB, Canal+.

⁽¹⁵⁾ ISL, IMG, ISPR, Team or UFA.

⁽¹⁶⁾ Source: market analysis report of October 1999.

of third parties addressed critical opinions to the Commission on the notified agreements, mainly concerning the EBU sub-licensing scheme. As a result, on 18 and 19 December 1990, the Commission organised an oral hearing with all interested third parties, at which the sub-licensing scheme, which was found to be too restrictive, was discussed in detail.

- (60) As a result of the third parties' comments and the Commission's intervention, the EBU submitted a new scheme to the Commission on 26 February 1993, governing contractual access for non-members.
- (61) On 1 September 1999, the Commission published a second notice pursuant to Article 19(3) of Regulation No 17 and received further observations from interested third parties. The main concerns expressed in those observations were:
- (a) the conditions for active membership of the EBU as set out in Article 3 of the EBU's Statutes are not sufficiently objective and transparent within the meaning of the judgment of the Court of First Instance of 11 July 1996 ⁽¹⁷⁾. Those membership rules and the joint acquisition of sports rights by the EBU fall under Article 81(1) of the EC Treaty and cannot be exempted pursuant to Article 81(3) of the EC Treaty,
 - (b) the product market definition proposed by the EBU ⁽¹⁸⁾ is too broad.
- (62) The Commission has carefully reviewed all observations from third parties and concluded that the concerns expressed therein have been addressed during the notification procedure. In particular:
- (a) with regard to the EBU membership rules and the joint acquisition of sports rights by the EBU the Commission has taken into account the third parties' concerns in the assessment below,
 - (b) with regard to the question of product market definition, the Commission has taken this into account in recitals 38 to 49.

II. THE ASSESSMENT

- (63) The Commission has concluded that the notified arrangements fall within the scope of Article 81 (1) of the EC Treaty and Article 53(1) of the EEA Agreement, but that subject to the conditions and obligations set out in Article 2 of this Decision and following the changes made as a result of the Commission's intervention, the criteria of Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement are met.

1. ARTICLE 81(1) OF THE EC TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT

A. Agreements between or decisions by an association of undertakings

- (64) The EBU members are undertakings within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. The Court of Justice has ruled, in particular in Case 155/73 *Sacchi* ⁽¹⁹⁾, that public television broadcasting organisations are 'undertakings' within the meaning of Article 81(1) in so far as they exercise economic activities. The acquisition of television rights to sporting events and the granting of sub-licences for such programmes are clearly activities of an economic nature which are covered by Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.

⁽¹⁷⁾ See footnote 6.

⁽¹⁸⁾ The market for important sporting events in all disciplines of sports and irrespective of the national or international character of the event.

⁽¹⁹⁾ [1974] ECR 409.

- (65) The notified EBU internal rules and regulations governing the Eurovision system are decisions of an association of undertakings within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.

B. The EBU's membership rules

- (66) The Court of First Instance, in its judgment of 11 July 1996, annulled Commission Decision 93/403/EEC. The Court of First Instance assessed whether the membership rules were objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner vis-a-vis all potential active members. The Court of First Instance found that the Commission had omitted to carry out such an examination when exempting those rules. It did not comment on the restrictive nature of the membership rules.
- (67) The Commission recognises that Decision 93/403/EEC, because of its ambiguous drafting, gave grounds to the interpretation by the Court of First Instance that the Commission had considered the EBU's membership rules to be restrictive of competition and had exempted them, which was actually not the case⁽²⁰⁾. Indeed, the conditions for active membership of the EBU set out in Article 3(3) of the EBU Statutes were not even notified to the Commission by the EBU; only the 'Eurovision system' was notified.
- (68) The Commission continues to consider that the membership rules of a professional association of broadcasters cannot in themselves restrict competition within the meaning of Article 81(1) of the EC Treaty. It has to be remembered that many other organisations and associations in Europe, with economic activities in the market, have internal rules establishing conditions for membership comparable to those of the EBU⁽²¹⁾. There can be no obligation on such associations under Article 81(1) of the EC Treaty to accept members against their will. This is in particular true for associations like the EBU with a market position which does not allow them to eliminate competition (see recitals 100 to 103). Third parties wishing to create similar associations are free to do so.
- (69) The Commission finds that it is a completely separate issue whether within such an association, restrictions of competition might have been agreed. These possible restrictions will be assessed separately in recitals 71 to 80.
- (70) The Commission notes that the EBU membership rules which were in force at the time of the Decision 93/403/EEC annulled by the Court of First Instance, have been substantially amended. Indeed, the EBU transmitted to the Commission, on 27 August 1996, the Guidelines of interpretation of criteria for EBU active membership which were adopted on 12 August 1992. The 1992 Guidelines already contained a quantified criterion on the population coverage condition and detailed explanations on the programme and own production obligations. The membership rules and the Guidelines of Interpretation were again amended on 3 April 1998⁽²²⁾ by the EBU. The result is that the conditions set out in the membership rules were further quantified⁽²³⁾.

C. Restriction of competition between the EBU members as a result of the notified agreements

- (71) The EBU rules governing the joint acquisition and sharing of television rights to sporting events and the use of the Eurovision signal have as their object and effect the restriction of competition between members.

C.1. The joint acquisition of rights

- (72) The EBU rules governing the joint acquisition of television rights to sporting events on an exclusive basis have as their object and effect the restriction of competition between members.

⁽²⁰⁾ See in particular recital 50 and the obligation imposed on the EBU in Article 2 of Decision 93/403/EEC.

⁽²¹⁾ For an example of an association organising fairs, see Commission Decision 77/722/EEC of 7 November 1977 in Case 'BPICA' (OJ L 299, 299, 23.11.1977, p. 18).

⁽²²⁾ The amended Article 3 of the EBU Statutes and the amended Guidelines of interpretation have been published by the EBU on the internet: <http://www.ebu.ch>. See also recitals 9 to 13 describing the EBU organisation.

⁽²³⁾ See paragraphs 95 and 97 of the Court of First Instance's judgment.

- (73) As a result of the EBU statutes (Article 13(4)) and from the nature of Eurovision as a solidarity system, the EBU members bind themselves to jointly acquire television rights to sporting events. Therefore, the joint acquisition of rights within the framework of Eurovision restricts and, in many cases, eliminates competition between the participants in the Eurovision system. Instead of bidding against each other, members participate in joint negotiations and agree among themselves the financial and other conditions for the acquisition of rights. The restriction of competition exists notwithstanding the fact that the internal EBU rules governing the negotiation and acquisition of rights are only recommendations and not legally binding. As already stated, it follows from both the EBU Statutes (Article 13(4)) and from the nature of Eurovision as a solidarity system that members bind themselves to respect the common interest and to comply with the internal rules set up in this common interest. There is therefore pressure on the individual members to engage in joint negotiations. Members who are interested in acquiring the rights do, in fact, participate in the joint negotiations, and negotiate separately only once those joint negotiations have officially been declared to have failed. These cases are very rare.
- (74) Without the joint acquisition of rights within the framework of Eurovision, the EBU members would, in principle, compete with each other for the acquisition of television rights to sporting events. In particular, there are Member States with two or more EBU members, which would normally compete with each other for television rights to international events for broadcasting at national level⁽²⁴⁾. Furthermore, there are EBU members which broadcast via satellite and cable into other member's countries and which, therefore, would normally have to acquire the rights for those countries in competition with the national members⁽²⁵⁾.
- (75) In addition, when considering the obligation for the EBU-members to jointly acquire the rights at issue it has to be taken into account that those rights are in general sold on an exclusive basis (see recitals 50 to 58). Under those circumstances, the obligation on the EBU-members to acquire jointly could have a particularly harmful effect in the market. In fact, non-EBU members would not, in principle, have access to those rights at all. That is why the EBU submitted the 1993 and 1999 sub-licensing schemes, following the Commission's intervention.

C.2. *The sharing of the Eurovision rights*

- (76) The Eurovision rights are shared between the EBU members participating in the joint acquisition of the rights for a specific sporting event. All members participating in the agreement are entitled to the full benefit of the rights regardless of the territorial scope of their activity and regardless of their technical means of broadcasting. However, members which compete for the same national audience (several members in one country or members broadcasting from their country into the country of another member in the same language) have to agree among themselves on the procedure for attributing priority to one of them.
- (77) The Eurovision system notified provides that several members in one country are meant to agree to share the rights, for example by alternating transmission of the event. If no such procedure can be agreed on, there exists the theoretical possibility that all the members concerned become entitled to broadcast the rights with respect to the country or countries in question without taking into account the other members' programming. However, the solidarity principle which forms the basis for the Eurovision system creates a strong incentive for the members to agree on the sharing of the rights. Indeed, in practice the rights are almost always shared among the members. Finally, members which provide coverage of an event (i.e. produce the signal) are, unless otherwise agreed, entitled to priority over foreign members aiming their broadcast at the same national audience.

⁽²⁴⁾ France, Denmark, Germany, United Kingdom, Finland.

⁽²⁵⁾ According to the relevant EBU rules, all members participating in the joint acquisition of Eurovision rights are entitled to the full benefit of the rights regardless of the territorial scope of their activity.

- (78) Therefore, the rules on the sharing of rights restrict competition because the EBU members have to agree among themselves on the procedure for sharing the rights. In their absence the EBU members would compete for the same national audience, in particular when there is more than one member in one country.

C.3. The exchange of the Eurovision signal

- (79) For events which take place within the Eurovision area the coverage (television signal consisting of basic video and international sound-feed) is produced by a member in the country concerned and is available to all other members via the Eurovision programme exchange system. The Eurovision programme exchange system is based on reciprocity: whenever one of the participating members covers an event, in particular a sporting event, which takes place on its own national territory and is of potential interest to other Eurovision members, it offers its coverage free of charge to all the other Eurovision members on the understanding that, in return, it will receive corresponding offers from all the other members in respect of events taking place in their respective countries. The originating member also provides the necessary infrastructure to other interested members such as commentary positions.
- (80) Therefore, the rules on the exchange of the Eurovision signal restrict competition because they might oblige one member to offer the transmission signal to another member of the EBU free of charge.

D. Effect on trade between Member States

- (81) The Eurovision system concerns cross-border acquisition and use of television rights within the Community. This applies in particular to the joint acquisition of the rights by members from different Member States. The notified agreements will affect trade between Member States.

E. Appreciability of the restrictions of competition and the effect on trade between Member States

- (82) Many of the international sporting events addressed by the Eurovision system, such as the Olympic Games, are of such widespread appeal and of such economic importance, that any restriction on the acquisition, sharing or exchange of the Eurovision signal of the corresponding television rights among the European broadcasters is appreciable for the purposes of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.
- (83) The best example of the economic importance and therefore the appreciability of the joint acquisition of rights by the EBU is the last bid for the rights for the Olympic Games between 2000 and 2008 which were bought by the EBU for a total of USD 1,44 billion. News Corporation had bid USD 2 billion for the same rights. There is no question as to the appeal for European viewers of such a sporting event.

2. ARTICLE 81(3) OF THE EC TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

A. Improvement in the production or distribution of goods and promotional technical and economic progress

A.1. The joint acquisition of rights

- (84) The joint acquisition of rights in the framework of the Eurovision system improves the distribution of television services and promotes technical and economic progress.
- (85) Without the joint acquisition of rights the EBU members and in particular the smaller members would have more difficult access to the relevant television rights to sporting events.

- (86) Indeed, the joint acquisition reduces the transaction costs, which would be associated with a multitude of separate negotiations, improving the purchasing conditions. In addition, it is guaranteed that the negotiations are carried out by the most competent negotiator. This means either the national member in the country where the event takes place, which is familiar with local conditions, or the EBU itself, which has specialised staff experienced in negotiations on an international level. Therefore, the smaller members without such specialised staff benefit in particular in the context of the acquisition of rights for major international events. In the context of the joint negotiations the specific interests and needs of the participants in the joint acquisition are taken care of. In separate negotiations members, in particular members from small countries, would find it more difficult to secure contracts suitable for specific needs.
- (87) Therefore, as a result of this joint acquisition more sporting events are broadcast by a larger number of broadcasters. The resulting better coverage of the sporting events improves distribution.

A.2. The sharing of the Eurovision rights

- (88) Without the Eurovision rules which lead to the sharing of rights and the alternation of the transmission of an event by the members concerned, there would be less coverage of the event in question. Indeed, when at national level two or more members in the same country or members broadcasting from their country into the country of another member in the same language participate in the joint acquisition, there will usually be an alternation of the transmission of an event by the members concerned. This sharing means that the alternating members can guarantee quasi-permanent coverage of the sporting event in question, for example of the Olympic Games.
- (89) Therefore, distribution is improved as a result of the EBU's internal rules which govern the sharing of the Eurovision rights.

A.3. The exchange of the Eurovision signal

- (90) As a result of the reciprocity and solidarity principles of the Eurovision system as set out in the EBU statutes, any EBU member will be obliged to produce free of charge the television signal for events taking place in its country, even if it is not itself interested in the event, in order to enable other interested EBU members to show the event. This leads to more sports programmes being produced and shown on television. Therefore, distribution is improved.

B. Benefit to consumers

B.1. The joint acquisition of rights

- (91) As a result of the joint acquisition of rights, the participants in the Eurovision system can show more and higher quality, sports programmes, both popular sports and minority sports, to European television viewers. In particular, national participants in the joint acquisition from smaller countries can provide their chair viewers with a broad range of international sporting events with a commentary in their own language and tailored to their specific national interests.

B.2. The sharing of the Eurovision rights

- (92) The sharing of the Eurovision rights benefits European television viewers because as explained at recital 88 when, at national level, there is an alternation of the Eurovision rights (between two or more members in the same country or members broadcasting from their country into the country of another member in the same language), there will usually be a quasi-permanent coverage of the sporting event in question.

B.3. The exchange of the Eurovision signal

- (93) Since in each country there is at least one EBU member providing and producing sports programmes, it can be taken for granted that essentially all events that are of potential interest beyond national boundaries will be covered and will be available to the members and their television viewers through the Eurovision area. This is to the benefit of consumers.

C. Indispensability

- (94) The Eurovision rules governing the joint acquisition, the sharing of the rights and the exchange of the signal are, technically and economically, interdependent matters which are based on the principle of solidarity between the Eurovision participants. Therefore, if EBU members were forced to negotiate separately for television rights, were not to agree on the sharing of the rights or were not to offer the signal free of charge, the solidarity system would be jeopardised and with it all the objectives in terms of improvement of distribution and benefits to consumers.

C.1. *The joint acquisition of rights*

- (95) The joint acquisition of rights by the participants in the Eurovision system is indispensable for the achievement of the objectives described.
- (96) It is necessary for members to be required to refrain from separate negotiations once joint negotiations have commenced. The success of the joint negotiations would be put in jeopardy if individual members, and in particular the larger ones, simultaneously engaged in separate negotiations for national or transnational rights. It must be emphasised that EBU members are free to engage in separate negotiations once the joint negotiations are declared to have failed.
- (97) It is necessary under the Eurovision system for all members wishing to acquire the rights to be included within the joint negotiations. Otherwise Eurovision could not find a place at the negotiating table where the rights to the top sporting events are sold and the improvements in distribution described could not be brought about.

C.2. *The sharing of the Eurovision rights*

- (98) The agreements on the sharing of the Eurovision rights between the participants in the joint acquisition do not contain restrictions which are not indispensable to the attainment of the aforementioned objectives. These sharing agreements, in particular in domestic situations (with more than one member in the same country alternating the broadcast of the sporting event in question) or members broadcasting from their country into the country of another member in the same language, are indispensable to attain the maximum possible coverage of sporting events to the benefit of the European viewers.

C.3. *The exchange of the Eurovision signal*

- (99) The agreements on the exchange of the Eurovision signal do not contain restrictions which are not indispensable to the attainment of the objectives. The free exchange between the members of the Eurovision signal is an expression of the reciprocity and solidarity principles which form the basis for the Eurovision system and which improve the coverage of sports events to the benefit of the European television viewers. It is in particular indispensable for the smaller members which sometimes could not afford the costs of production and the fee for the use of other broadcasters' signal.

D. Non-elimination of competition in respect of a substantial part of the products in question

D.1. *The joint acquisition of rights*

- (100) The joint acquisition of the rights in the framework of the Eurovision system will not eliminate competition in respect of a substantial part of the rights in question.
- (101) It should be recalled, first, that the EBU in principle only acquires international events and not national events, which are the majority of the sports events shown on television, secondly, that there is increasing competition outside the Eurovision system from media groups and brokers and, thirdly, that EBU's market position has been declining for the last 10 years⁽²⁶⁾. From this perspective, the jointly acquired Eurovision rights can hardly eliminate competition to a substantial extent.

⁽²⁶⁾ See Annex III.

- (102) However, the Commission was concerned that some of the jointly acquired rights affect sporting events, for instance the Olympic Games, of particular economic and popular importance, which could constitute a separate market on their own and rights to which are exclusively held by the Eurovision members.
- (103) To address these concerns the EBU has modified the notified agreements to include a set of sub-licensing rules which make sure that non-EBU members have extensive access to the Eurovision sports rights. This counterbalances the restrictive effects of the joint acquisition of the sports rights. The schemes will provide extensive live and deferred transmission access for non-members on reasonable terms.

D.2. *The sharing of the Eurovision rights*

- (104) The restriction arising from the sharing of the Eurovision rights cannot eliminate competition given the current market structure and considering that non-EBU members will be able to participate in the broadcast of the sporting events in question following the EBU sub-licensing schemes.

D.3. *The exchange of the Eurovision signal*

- (105) The restriction stemming from the exchange of the Eurovision signal cannot eliminate competition given the current market structure. The economic disadvantage for non-EBU members of not having access to the free signal exchanged in the framework of the Eurovision system is of limited economic impact and cannot eliminate competition between broadcasters.

E. **The access scheme for non-EBU members**

- (106) The scheme includes the general rules on EBU non-members' access to Eurovision sport programmes adopted on 2 February 1993 and the rules relating to exploitation of Eurovision rights on pay-TV channels adopted on 26 March 1999 ⁽²⁷⁾. Both sets of rules have to be read together, as the 1999 scheme applies as an obligation additional to the 1993 scheme

(i) *The 1993 sub-licensing rules*

- (107) Under the scheme submitted to the Commission on 26 February 1993, the EBU and its members undertake to grant non-member broadcasters extensive access to Eurovision sports programmes for which the rights have been acquired through collective negotiations. The 1993 scheme grants live and deferred transmission rights to third parties of jointly acquired Eurovision sports rights. The 1993 sub-licensing rules were adapted to a situation in the market in which the EBU members did not enter the pay-TV field via thematic channels. Indeed, the 1993 scheme was sufficient to grant extensive access to non-EBU members in a context in which the EBU members' activities in the broadcast of sporting events took place exclusively in the framework of generalist channels broadcasting in free-to-air television.

(ii) *The 1999 sub-licensing rules*

- (108) First, as an introduction to this scheme, it is useful to recall the evolution of the European television market which led to the EBU members entering the thematic channels' segment. In each European country, television started as a national public service operation on one channel. This channel offered generalist programming. Then second channels were established, normally but not always offered by the same broadcaster. These second channels, while also offering generalist programming, tried to differentiate themselves from the first channel; usually, whereas mass appeal programming of all genres (news, sports, entertainment and so forth) was more concentrated on the first channel, the second channel specialised more in programming catering for minority interests. Then, in the late 1980s, commercial television started. Again, there would normally be one or two generalist channels with mass appeal programming, and further commercial channels which looked more specifically for niches in the market. Then came transnational programme channels (such as TVS, Eurosport,

⁽²⁷⁾ See Annexes II and III.

Euronews and NBC). Then, as a logical further development, came specialised (thematic) channels, especially in the fields of news, sport, music, films and children's programming. These channels may be pan-European (such as MTV, Eurosport, Euronews) or national (linguistic area) such as Kinderkanal. While some of these channels are still essentially advertising-financed, others are offered as pay-TV, and sometimes even pay-per-view television. Digital technology offers the technical potential for more and more such channels, and the large majority (if not the totality) of such further channels will certainly be both thematic (in terms of programming) and pay-TV (in terms of financing). Therefore, in the late 1990s when the possibilities for technical delivery were exploding and as a consequence, a multitude of different channels were offered and audiences were becoming more and more fragmented, the EBU members had to adapt and to diversify its programming offer accordingly with thematic channels. In this context, the 1999 access scheme became necessary in order to ensure that the joint acquisition origin of the EBU's rights would not unfairly place other pay-TV competitors at a disadvantage.

- (109) The 1999 scheme was submitted as part of the notified agreements by the EBU in order to reflect the changes in the pay-TV market and to ensure that competition would not be eliminated in that field. The 1999 scheme relating to pay-TV establishes a stricter sub-licensing regime for the EBU. Pursuant to the 1999 EBU rules applicable to competing pay-TV channels, a non-EBU member has the right to transmit, on its pay-TV channel, identical or comparable competitions to those presented on the EBU member's pay-TV channel arising from Eurovision rights. This places the non-EBU pay-TV operators on an equal footing with the EBU members with regard to those jointly acquired sports rights used in the pay-TV field.
- (110) Finally, it must be emphasised that EBU members are free to grant contractual access for their national territories on more favourable terms if they wish to do so. As regards the financial conditions, it is also important that any disputes will be determined by arbitration which will ensure reasonable prices.

3. DURATION OF THE EXEMPTION, CONDITIONS AND OBLIGATIONS

3.1. Duration of the exemption, starting date for exemption

- (111) Pursuant to Article 8 of Regulation No 17, a decision in application of Article 81(3) of the EC Treaty is to be issued for a specified period and conditions and obligations may be attached thereto. Pursuant to Article 6 of Regulation No 17, the date from which such a decision takes effect cannot be earlier than the date of notification.
- (112) In this case, this decision takes effect from 26 February 1993 when the EBU submitted to the Commission the access scheme for non EBU members to Eurovision sports rights and consequently all four conditions pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement were met. Afterwards, the market conditions changed and in 1999 additional sub-licensing rules were needed to reflect those changes in the market. However, during the period 1993 to 1999, the 1993 sub-licensing rules were sufficient to respond to the market situation. To conclude, the agreements should be exempted from 26 February 1993.

3.2. Duration of exemption, length of the exemption period

- (113) The Commission has explained in this Decision the structure and development of the relevant market which clearly marks a decline in the EBU's market position. On the other hand, the Commission considers it necessary to ensure that the joint acquisition of rights to particularly important sporting events takes place under conditions which respect the relevant competition rules and grant sufficient access to non-EBU members. Among those particularly important sporting events, the most relevant are undoubtedly the Olympic Games and, in particular, the summer

Olympic Games. It is, therefore, appropriate to take the moment at which the rights for the next summer Olympic Games will be offered in the market as a reference for the length of the exemption period in order to allow the Commission to reassess the competition situation at that time and make sure that the EBU's position will not eliminate competition if a change in the market structure occurs. The EBU has already acquired the rights for the 2008 summer Olympic Games. The negotiations for the 2012 Olympic Games will take place, following settled practice, six years in advance, i.e. in 2006. It is, therefore, appropriate to grant the present exemption until 31 December 2005.

- (114) In conclusion, given the structure and development of the relevant market and the effect of the notified rules thereon, exemption is granted pursuant to Article 8(1) of Regulation No 17 from 26 February 1993 until 31 December 2005. Regarding the European Economic Area Agreement, the exemption pursuant to Article 53(3) starts on 1 January 1994, date of entry into force of that Agreement.

3.3. Conditions and obligations

3.3.1. Conditions

- (115) In order to ensure contractual access for third parties to the television rights to sporting events acquired within the framework of Eurovision, such contractual access must be allowed under the agreements with the rights owners (sports organisers or rights agents). It is therefore a condition of the exemption that the EBU and its members only conclude agreements which allow the EBU and its members to grant access to third parties in accordance with the access scheme for non EBU members to Eurovision sports rights and the sub-licensing rules relating to the exploitation of Eurovision rights on pay-TV channels or, subject to the approval of the EBU, on more favourable conditions.

3.3.2. Obligations

- (116) In order to assist the Commission during the exemption period in checking whether the rules on contractual access for non-EBU members to Eurovision sports rights and the sub-licensing rules relating to the exploitation of Eurovision rights on pay-TV channels are applied in an appropriate, reasonable and non-discriminatory manner, the EBU must be under an obligation to inform the Commission of all amendments and additions to the access schemes and of all arbitration procedures concerning disputes under the access schemes ⁽²⁸⁾,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement and subject to Article 2 of this Decision, the provisions of Article 81(1) of the EC Treaty are hereby declared inapplicable from 26 February 1993 until 31 December 2005 and the provisions of Article 53(1) of the EEA Agreement are hereby declared inapplicable from 1 January 1994 until 31 December 2005, to the following notified agreements:

- (a) the joint acquisition of sport television rights;
- (b) the sharing of the jointly acquired sport television rights;
- (c) the exchange of the signal for sporting events;
- (d) the access scheme for non EBU members to Eurovision sports rights;
- (e) the sub-licensing rules relating to the exploitation of Eurovision rights on pay-TV channels.

⁽²⁸⁾ See Annexes I and II.

Article 2

The declaration of exemption contained in Article 1 shall be subject to the following conditions and obligations:

(a) The condition

The EBU and its members shall collectively acquire television rights to sporting events only under agreements which allow the EBU and its members to grant access to third parties in conformity with the access scheme for non EBU members to Eurovision sports rights of 24 February 1993 and the sub-licensing rules relating to the exploitation of Eurovision rights on pay-TV channels of 26 March 1999 or, subject to the approval of the EBU, on conditions more favourable to the non-member.

(b) The obligation

The EBU shall inform the Commission of any amendments and additions to the access scheme for non EBU members to Eurovision sports rights of 24 February 1993 and the sub-licensing rules relating to the exploitation of Eurovision rights on pay-TV channels of 26 March 1999. In addition, the EBU shall inform the Commission of all arbitration procedures concerning disputes under the access scheme for non-EBU members to Eurovision sports rights of 24 February 1993 and the sub-licensing rules relating to the exploitation of Eurovision rights on pay-TV channels of 26 March 1999.

Article 3

This Decision is addressed to:

European Broadcasting Union
Ancienne Route 17A
CH-1218 Grand-Saconnex (Geneva).

Done at Brussels, 10 May 2000.

For the Commission

Mario MONTI

Member of the Commission

ANNEX I

EBU NON-MEMBERS' ACCESS TO EUROVISION SPORTS PROGRAMMES**I. Principle**

The EBU and its members undertake to grant non-member broadcasters extensive access to Eurovision sports programmes the rights for which have been acquired via collective negotiations, in accordance with the terms and stipulations set out below and on a non discriminatory basis.

II. Access requests

Broadcasters providing a pan-European programme service shall submit their requests to the EBU.

All other broadcasters shall submit their requests to the EBU member(s) in the country in or from which they broadcast.

III. Scope of access

Access can be granted for the entire geographical area covered by the Eurovision contract.

Access is in principle granted on a non-exclusive basis, but it may also be granted on an exclusive basis vis-a-vis other non-members of Eurovision.

The contract concluded with a non-member stipulates the number of transmissions granted and the period for which the rights are acquired. It may also oblige the non-member to credit on-screen the organisation(s) which granted the access.

IV. Conditions of access

The terms and conditions of access are freely negotiated between the EBU or the member(s) in the country concerned and the non-member. However, the EBU and its members will in no circumstances grant less favourable access than stipulated below.

1. Live transmission**1.1. Transnational channels**

If an event is not transmitted live by any of the members of Eurovision to any of the audiences at which the programme service of a non-member transnational channel is normally aimed, the latter may transmit the event live, except for those parts or competitions which any such member has reserved for its own live transmission.

1.2. National channels

If an event is not transmitted live by an EBU member in a given country, a non-member in that country may transmit the event live, except for those parts or competitions which the member has reserved for its own live transmission.

1.3. Definition of live transmission

An event is considered to be transmitted live if the majority of the principal competitions constituting it are transmitted live.

Where for a given event two or more television signals are available simultaneously, live transmission shall be considered to be given if for the majority of the time during which the principal competitions take place the Eurovision member transmits live.

2. Deferred transmission

- 2.1. Where a non-member channel may not, pursuant to point 1, transmit live, it may nevertheless make a deferred transmission of the entire event or of the day's competitions, or a summary thereof, not earlier than one hour after the end of the event or of the last competition of the day, provided that such transmission shall not commence before 10.30 p.m. local time (London time for pan-European channels).

However, if such a channel does not take advantage of the possibility offered it to transmit live, it cannot make a deferred transmission until after the end of the presentation of a summary by the EBU member(s) concerned.

- 2.2. Subject to points 2.1 and 3.1, dedicated sports channels may re-broadcast the event an unlimited number of times, in whole or in summary form, such re-broadcasts to take place within 90 days of the opening day of the event.

3. *Financial conditions*

- 3.1. The global fee for access to the Eurovision programme is to be negotiated with the EBU or with the national member(s) concerned. The access fee shall duly reflect the fact that the programme is aimed at the same audience. In assessing the overall commercial value of the programme, all the relevant factors of the specific case shall be taken into account (in particular the rights fee paid by EBU or the member(s) concerned; the cost of production of the signal; any additional costs incurred by the EBU member(s) (such as Eurovision coordination costs, special EBU operations group costs, etc.) the results of which are also to the benefit of the non-member; the number of households reached by the programme service; the language(s) of the programme service; the targeted audience's specific interest in the particular programme; the timing, number and duration of the transmission(s)).
- 3.2. For routing the signal, the non-member is free to make its own arrangements. At the non-member's request, the EBU can assume responsibility for routing the signal via its own network. In such cases, the EBU will submit an estimate for the cost of routing the signal to the non-member's premises, plus transmission coordination and supervision.

4. *News access*

Except where national law or regulation provides otherwise, the following provisions shall apply:

Per event or day of competition the non-member is entitled to transmit up to two news reports of up to 90 seconds each, with the possibility of repeating once one such report. These news reports must be included, within 24 hours, in regularly scheduled general news bulletins or in regularly scheduled general sports news programmes of dedicated sports channels.

Non-members shall pay a fee based on the number of minutes transmitted. Tariffs shall be mutually agreed, country by country, between the member and non-member; such tariffs shall apply for news access to sports programmes granted by either party.

For pan-European services, the fee will be based on the average rate applied for countries within the European Economic Community.

5. *Arbitration*

- 5.1. In the event of a dispute over the access fee where all other access conditions have been agreed, at the request of the non-member the matter will be submitted to arbitration by an independent expert or, if both parties agree, by three such experts. If the transmission is carried out prior to arbitration the fee must be paid before the transmission subject to review by arbitration.
- 5.2. The expert will be nominated jointly. In the case of an arbitration board, each party nominates one expert and the two nominated experts will jointly nominate a third. Failing agreement, nomination will be by the President of the competent Court of Appeals in the case of national arbitration and by the President of the International Chamber of Commerce in the case of international arbitration.
- 5.3. Arbitration will be carried out in the city where the organisation granting the access has its headquarters. Unless otherwise agreed between the parties, the law and the language of the country of arbitration will apply. However, where EBU grants access to an organisation operating a transnational programme service with headquarters in an EC country, the law and the language of the latter country shall apply.
- 5.4. The expert(s) shall not be bound by any procedural rules. However, the parties' right to make both oral and written presentations to the expert(s) shall be guaranteed.
- 5.5. The expert(s) shall fix the access fee in accordance with the criteria listed in point 3.1. The decision of the expert(s) shall be final and binding and shall take effect as a provision of the parties' agreement.
- 5.6. The parties shall bear their own individual costs and share the costs of the arbitration equally between them.

6. *Reciprocity*

For all sports programmes for which a non-member has the contractual capacity to grant access to other broadcasters, the non-member is expected to grant such access to interested EBU members on conditions comparable to those outlined above.

ANNEX II

Sub-licensing rules relating to the exploitation of Eurovision rights on pay-TV channels

The following rules shall apply, as an obligation additional to the general rules on EBU non-members' access to Eurovision sports programmes adopted on 24 February 1993, when collectively acquired rights are to be exploited on a member's own pay-TV channel.

- (i) If a Eurovision member intends to use Eurovision sports programming on its own pay-TV channel (pay-per-view, pay-per-channel or, subject to point (v), a channel which is part of a digital bouquet or of a basic cable package), it shall offer competing pay-TV channels in the same pay-TV category and in the same country the possibility to do the same.

To do the same means

- identical embargo, if any, to that applying to the member's own pay-TV channel,
- identical competitions to those presented on the member's own pay-TV channel (e.g. eliminatory round matches, mixed-doubles tournament, everything up to the quarter-finals, etc.). Where the member presents a mix of competitions which take place simultaneously, or at least partially overlap in time, the non-member may choose to present its own mix, unless instead it prefers to cover the entirety of one given competition, or
- comparable/equivalent competitions to those presented on the member's own pay-TV channel (e.g. of 10 matches available for presentation on a pay-TV channel, the member would retain five matches for its own channel and offer five equivalent matches to the competing pay-TV channel). If the non-member is not satisfied that 'equivalence' has been given, it shall be entitled to demand the rights for identical competitions,
- identical volume of broadcast time as that offered on the member's own pay-TV channel (e.g. a maximum of two hours per day).

- (ii) The member remains free to offer the non-member more favourable conditions.

- (iii) The fee to be paid by the non-member shall fairly reflect the terms on which the rights were obtained by the Eurovision member, taking into account in particular the complementary nature of the rights, the volume and timing of the broadcast and which of the three pay-TV categories referred to in point (i) the channel operates in, as well as the number of its subscribers and the amount of its monthly subscription or per-view fee.

The same pricing policy shall apply where a member grants a non-member the right of pay-TV coverage, without itself exercising that right.

In case of a dispute over the fee, the matter shall be submitted to arbitration, in accordance with point 5 of the general rules on EBU non-members' access to Eurovision sports programmes.

- (iv) The member shall announce any possibility under the foregoing paragraphs for non-members' pay-TV channels sufficiently in advance of the event, but in no case later than

- three months before Olympic Games, World and European Football Championships and World Athletics Championships, and
- two months before any other events.

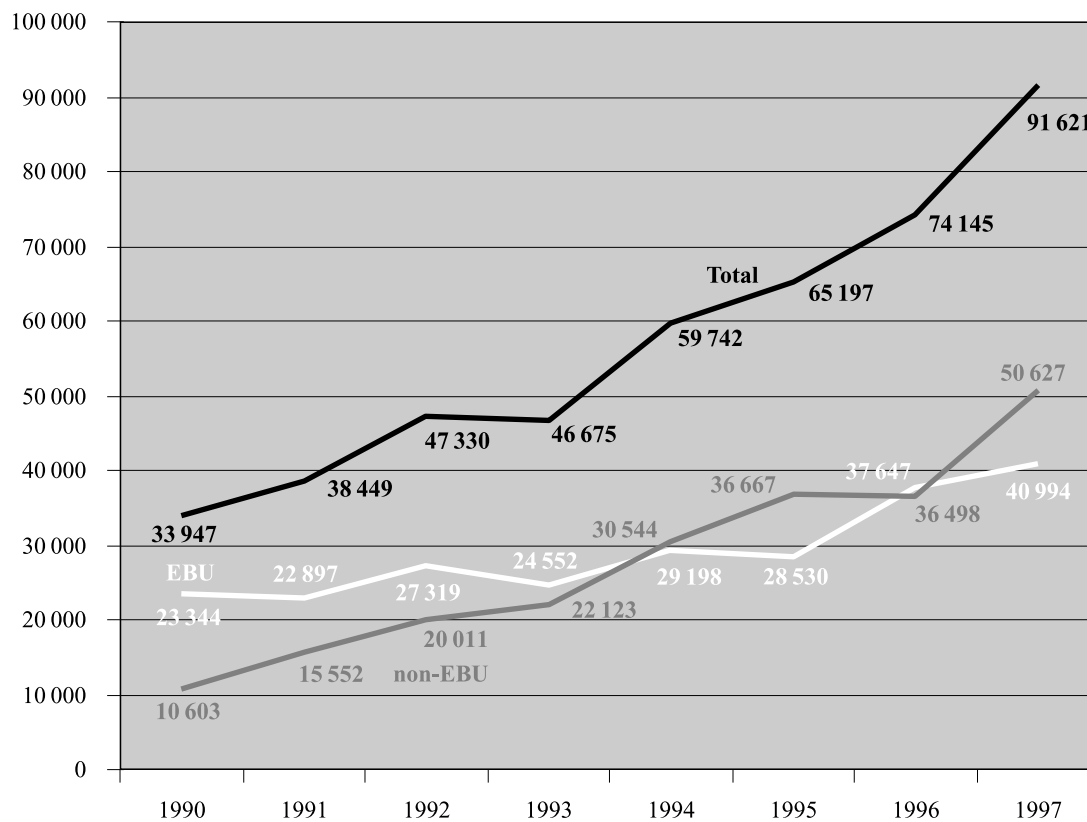
- (v) Channels which are part of a digital bouquet (basic package) or a basic cable package are not subject to the foregoing rules if the same programme service is simultaneously broadcast, in analogue or digital mode, for free-to-air reception in the same country.

In the case of a pan-European sports channel, the same shall apply where the service is broadcast, with at least one sound commentary in one of the major European languages, for free-to-air reception throughout the European Broadcasting Area, and where for the convenience of the respective local audience the same service is simultaneously made available as part of a digital bouquet or a basic cable package with a local sound commentary.

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ANNEX III

Hours of sports broadcasting in Europe



ANNEX IV

The costs of the European rights to the Olympics for the EBU*(million USD)*

Year	Cost of summer rights		Cost of winter rights	
	Nominal	Real (*)	Nominal	Real (*)
1984	22	30,5	4,1	5,7
1988	30,2	31,3	5,8	6,0
1992	94,5	85,4	27	24,4
1994	—	—	24	19,9
1996	240	181,4	—	
1998	—	—	72	51,3
2000	350	238	—	
2002	—	—	120	81,6
2004	394	267,9	—	
2006	—	—	135	91,8
2008	443	301,2	—	

(*) In 1985 US dollars. Real prices are calculated using the consumer price deflator provided in European Economy No 66 and we assumed that contracts are made four years in advance.

Source: BCC/IOC/Godard/Koranteng.