

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 February 1991

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/32.524 — Screensport/EBU Members)

(Only the English text is authentic)

(91/130/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the EEC Treaty⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the application for a finding of an infringement submitted on 17 December 1987 pursuant to Article 3 of Regulation No 17, by W. H. Smith & Son Ltd and Screen Sport (formerly Screensport Ltd) (hereinafter 'Screensport'),

Having regard to the notification and application for negative clearance submitted to the Commission by the Eurosport consortium, Sky Television plc (hereinafter 'Sky'), Satellite Sport Sales Ltd, Satellite Sports Services Ltd and News International plc (hereinafter 'NI') on 17 January 1989,

Having regard to the Commission Decision of 5 December 1988 to initiate proceedings in this case,

Having given the undertakings and association of undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) and (2) of Regulation No 17 and

Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of council Regulation No 17⁽²⁾,

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

Whereas :

I. THE FACTS

Complaint and notification

- (1) On 17 December 1987 Screensport registered a complaint at the Commission concerning the following :
 - (i) certain activities of the European Broadcasting Union (hereinafter 'EBU') and/or its members, in particular, the refusal to grant Screensport sublicences to sports events to which the EBU and/or its members have acquired exclusive rights, with the effect that commercial cable and satellite companies such as Screensport are prevented from competing with the EBU and/or its members, in the field of sports programmes ;
 - and

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

- (ii) the joint venture between the EBU and/or certain of its members with NI establishing a television sports channel 'Eurosport'.
- (2) This Decision, while mentioning the EBU's activities, does not deal with the first aspect of this complaint, which is the subject of separate proceedings initiated by the Commission (Case IV/32.150). A statement of objections was sent by the Commission to the Eurosport Consortium and NI in connection with point (ii) above on 20 December 1988.
- (3) On 17 January 1989 the Commission received a notification and application for negative clearance concerning a series of agreements relating to the Eurosport sports channel television service, including:
- (i) the Eurosport Consortium Agreement, signed on 5 May 1988 between 16 members of the EBU (hereinafter 'Members'). Following withdrawals from and additions to the consortium the current membership is 17, namely ORF (Austria), BRT (Belgium), RTBF (Belgium), DR (Denmark), YLE (Finland), ERT (Greece), RUV (Iceland), RTE (Ireland), RAI (Italy), NRK (Norway), SVT (Sweden), SSR (Switzerland), BBC (United Kingdom), JRT (Yugoslavia), CYBC (Cyprus), TRT (Turkey) and IBA (Israel);
 - (ii) a Shareholders Agreement signed on 23 December 1988 between Sky Television plc and the Eurosport Consortium, providing *inter alia* for exclusive ownership of Satellite Sport Sales Ltd by Sky (see recitals (21) and (32));
 - (iii) a Services Agreement, signed on 23 December 1988 between Satellite Sport Services Ltd (hereinafter 'the service company') jointly owned by the Eurosport Consortium, and Sky;
 - (iv) a Facilities Agreement, signed on 23 December 1988 between Sky and the service company;
 - (v) a Guarantee, signed on 23 December, given by NI, parent company of Sky, to the Eurosport Consortium.

A supplementary statement of objections was sent by the Commission to the Eurosport Consortium and Sky on 10 April 1989.

The complainant

- (4) Screensport is a company registered in England providing a commercial transnational satellite television sports channel service which has been in operation since March 1984. Until March 1989 it

delivered its programmes by low power satellite to cable systems in various parts of Europe. Since then, in addition, the service has also been available directly to consumers by means of domestic satellite dishes following the launch of the Astra satellite in February 1989. The service, which is multi-lingual, is currently available in 12 European countries, including seven EEC Member States, provided either by Screensport alone or in conjunction with partners in certain countries (such as France, Germany and the Netherlands). 75 % of the shareholding in Screensport is owned by W. H. Smith Ltd. The remaining shares are held by ESPN Inc., the major satellite cable channel in the USA which is jointly owned by ABC and Capital Cities. In the year up to June 1989 Screensport's turnover was £3.3 million, resulting in a loss for the company in the same period.

- (5) The Screensport channel consists exclusively of sports programmes, transmitted in four languages — English, French, German and Dutch.

Eurosport

- (6) Eurosport, like Screensport, is a transnational satellite television channel service dedicated to sport, which came into operation on 5 February 1989 on the Astra satellite. Television viewers within the footprint of the satellite receive the service either by cable television operators or directly by domestic satellite dishes. It is currently received in 22 European countries, including eight EEC Member States, and it broadcasts for 17 hours a day in English, German and Dutch.
- (7) The Eurosport Consortium is the product of an agreement concluded between a group of EBU members. The Consortium is contractually linked to Sky, and/or undertakings within the Sky group of companies, and NI, parent of Sky.

The Eurosport Consortium

- (8) The Eurosport Consortium is a consortium of members of the EBU, an association of broadcasting organizations established in 1950. Membership of the EBU is open to broadcasting organizations or groups of such organizations from a member country of the International Telecommunication Union (ITU) situated in the European Broadcasting Area as defined by the Radio Regulations annexed to the International Telecommunication Convention, which provide in that country, with the authorization of the competent authorities, a broadcasting service of national character and national importance, and which furthermore prove that they fulfil all the conditions set out below:

- (a) they are under an obligation to cover the entire national population and in fact cover at least a substantial part thereof, while using their best endeavours to achieve full coverage in due course ;
- (b) they are under an obligation to, and actually do, provide varied and balanced programming for all sections of the population, including a fair share of programmes catering for special-minority interests of various sections of the public, irrespective of the ratio of programme cost to audience ;
- (c) they actually produce and/or commission under their own editorial control a substantial proportion of the programmes broadcast.

The EBU currently has 39 active members in 32 countries situated within the European Broadcasting Area, most of them public service broadcasters. Membership is also open to consortia, including the Eurosport Consortium.

- (9) All active EBU members are eligible to participate in an institutionalized exchange system for TV programmes, including sports programmes, via a European network, known as 'Eurovision', in which all but two members currently participate. The system is also open to consortia, consisting exclusively of active members from different countries providing together a transnational television programme service. Eurovision is based on reciprocity: whenever a broadcasting organization covers an event — including sports events — which takes place on its own national territory and is of potential interest to other Eurovision members, it offers the signal (basic video and international sound feed) 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 regarding events taking place in their respective countries. The originating broadcasting organization also provides the necessary infrastructure to enable visiting broadcasters to function properly (commentary positions, etc.).
- (10) Reciprocal arrangements of a similar kind exist with Intervision, the eastern European counterpart of Eurovision. Reciprocity has also been agreed among the six broadcasting unions which have jointly acquired world rights in the FIFA World Cup both in the past and for the future.
- (11) While facing growing competition from the new commercial broadcasters (see below), at present EBU and its members are still able to provide

exclusive programming with respect to many major sports events. They achieve this mainly by jointly acquiring the rights to sports events and exchanging the signal. This is part of the Eurovision system referred to above. At present the major proportion of the exchanges made under Eurovision consist of sports programmes (the balance being made up almost entirely of news items).

- (12) While acquiring the rights to such sports events, however, most EBU members in fact transmit only a small proportion of the events in question. Indeed, on average, members transmit only about 15 % of all sports events that are potentially available through the Eurovision system. EBU members attribute this to their 'public mission' obligations, which prevent them from concentrating unduly on only one type of programme. Thus, in order to provide more extensive coverage of these events, as sought by international sports federations, together with the need to reinforce its own negotiating position for the acquisition of rights to sports events in the face of the new and growing competition from commercial broadcasters for such rights, the EBU began in 1986 to examine the feasibility of an association establishing a satellite television channel dedicated to sport. A working group was set up to this effect, which reported to the interested member organizations of EBU. On the basis of this report it was decided to proceed with the establishment of such a channel. However, having already experienced a commercial failure in the establishment of a previous joint satellite channel (Europa TV), it was decided that a future joint sports channel should not be carried by EBU members alone but in conjunction with an undertaking experienced in the field of commercial satellite television and one which would be willing to bear the financial risk of such a project. Sky was selected from amongst four applicants, as was first announced to the press on 2 December 1987. Prior to its selection, Sky had been planning its own sports channel, as one of a number of specialist channels it intended to launch (see below).
- (13) The Eurosport consortium was established expressly to provide the Eurosport service on the part of the EBU members. The Agreement to this effect was formally signed on 5 May 1988, originally by 16 Members. Certain Members have subsequently withdrawn from the Agreement, while the Consortium has also attracted new membership, all members of the EBU in principle being eligible to participate. New Members are admitted with the consent of two-thirds of existing Members. There are currently 17 Members (see recital (3)).

(14) The Agreement provides that the Consortium, an association without legal personality, is established for a period of 10 years ending on the 10th anniversary of the start of the Eurosport service. The service itself comprises principally programmes based on material made available to the Consortium by EBU members, including the Members of the Consortium. The Members of the Consortium accept, however, that the Consortium is to be free to operate its own programme policy. In particular, it is entitled to include any programme in the service at such time and in such manner as it thinks fit. No Member, therefore, can withhold from the Consortium any programme or any right in any programme with a view to preventing or delaying its inclusion in the service. With regard to each sports programme produced or acquired by a Member, that Member must, at the request of the Consortium :

- (a) make the programme and such rights the Member has in relation to it freely available to the Consortium without restriction for the purpose of the service ;
- (b) use its best endeavours to secure, in consultation with the Consortium or its representatives, such additional rights as are necessary to permit the programme to be included in the service ;
- (c) use its best endeavours, in consultation with the Consortium, to extend the coverage of an event as long as the production facilities are on site ;
- (d) make its commentary available to the Consortium as a guide ;
- and
- (e) provide commentary positions at the event for the Consortium or its representatives in accordance with Eurovision reciprocity rules.

In this context it should be noted that under the Eurovision rules the EBU member originating a programme (the host broadcaster) is entitled to prevent Eurosport from broadcasting the same programme into its territory in its own language. However this limitation does not apply in the case of those sports events which belong to the common sports heritage of all European nations (Winter Olympic Games, Summer Olympic Games, Football World Cup, European Football Championships).

(15) Members are entitled to contributions from the Consortium for costs incurred in connection with the programmes made available and included in the service. These contributions take into account the type of sports programme made available by each Member and the number of hours of

programme material made available by them included in the service. In addition Members suffering a disproportionate impact of loss of audience due to the existence of the service are compensated from part of the profits arising from the activities of the Consortium

- (16) Members wishing to withdraw from the Consortium may do so up to the fourth anniversary of the date on which that Member joined, by giving at least one year's written notice of that fact while undertaking thereafter to use all reasonable endeavours during such notice to make available at the Consortium's request such sports programme material of the same type as it has previously at any time during the period offered to make available through the Eurovision programme exchanges.
- (17) The Consortium is required to inform the EBU Administrative Council regularly of its activities.

Sky

- (18) Sky Television plc (formerly Satellite Television plc), a company registered in England, is a subsidiary of NI. The ultimate parent company is the News Corporation Ltd, a company incorporated in South Australia. In 1988 the consolidated turnover of the group as a whole was £ 2 500 million. The turnover of NI is more than £450 million. Sky itself remains a loss-making undertaking at present.
- (19) The principal activity of Sky is the transmission of an English language satellite broadcasting service in Europe. In the past this has centred on Sky Channel, a general entertainment satellite channel, including sports programmes, which is received by over 15 million households in 18 countries in Europe, including nine EEC Member States.

In June 1988 it was announced that the channel would be relaunched as part of a four-channel direct broadcasting network called Sky Television. The four channels — including Eurosport and (a revamped) Sky Channel (now known as Sky One in the United Kingdom) — began transmission on the Astra satellite in February 1989. Sky Channel has also continued to acquire rights to broadcast certain sports events.

- (20) The involvement of Sky in a proposed European sports channel was made public by an announcement made to the press on 2 December 1987 that NI was involved in a joint venture with a group of EBU Members to launch a satellite sports channel to be known as Eurosport. In fact, representatives from NI had participated in previous meetings of the EBU Sports Working Party held to discuss and organize the setting up of the channel. Certain

elements of each party's involvement in the venture were made known at the time of the press announcement and in the following months, in particular the lease of transponders on the Astra satellite for the Sky channels, including Eurosport. Final details, however, were completed only on the signing of a series of agreements on 23 December 1988. These are as follows:

(21) *The Shareholders Agreement* (signed by Sky and the Eurosport Consortium) which provides *inter alia* that Sky and the Eurosport Consortium share equally in the ownership and management of the service company. As regards management, in particular, Sky and the Eurosport Consortium are each entitled to appoint three directors to the company; the Eurosport Consortium nominates the Head of Programming, while Sky nominated the Managing Director. The Agreement also provides that the sales company is wholly owned by Sky. Sky agrees, however, to appoint one director of this company on the nomination of the Eurosport Consortium, this director being provided with all data relating to the sales company available to all other members of the Board of Directors (including management accounts) and information on the trading position of the sales company, which he/she is then entitled to disclose to the Eurosport Consortium. In addition, the Agreement provides that:

- (a) the Eurosport Consortium is required to execute the Services Agreement while Sky and the Eurosport Consortium use their respective powers to procure the execution of that Agreement by the service company;
- (b) the Eurosport Consortium is required to execute the Sales Agreement and Sky shall procure the execution of that Agreement by the sales company;
- (c) Sky is required to execute and procure the execution by the sales company of the Finances Agreement;
- and
- (d) Sky is required to execute the Facilities Agreement and Sky and the Consortium use their respective powers to procure the execution of that agreement by the service company.

(22) Furthermore, the Shareholders Agreement also details the sports programming material which the Eurosport Consortium undertakes to make available for broadcasting on Eurosport. This is:

- (a) all sports programming produced or acquired by Members (other than such programming described in subparagraph (b) below);
- (b) all sports programming acquired by Members which is programming offered to the EBU Eurovision programme exchanges ("Eurovision") by members of the EBU who are not Members of Eurosport provided that programming forms part of Eurovision and;

- (i) it is not contrary to the national law of the place of incorporation or establishment of the relevant Member for such programming to be so made available;

- (ii) that any additional rights necessary have been acquired at the request of the service company by or through the Members concerned;

- (iii) the said programming shall be made available on a non-exclusive basis;
- and

- (iv) in the case of such programming, it shall be made available subject to such conditions, reservations or other qualifications as may be imposed in accordance with the regulations governing Eurovision from time to time.

(23) However, the Members undertake to Sky that, whenever granting a sublicense permitting the inclusion of such programming as is described in subparagraph (a) of recital (22) in a 'Reserved Service' (as defined below), which is provided primarily for reception within the service area of the transponder which for the time being is used for the transmission of Eurosport, they shall reserve priority for Eurosport for 48 hours after the end of an event or of the daily competition where an event lasts more than one day. It is understood that if a Member gives the service company notice that it wishes to sublicense programming specified in the notice to a Reserved Service without such reservation of priority, then, unless within 48 hours of receipt of such notice the service company gives that Member notice that it has selected such programming for inclusion in Eurosport within the 48-hour priority period described above, the Member may sublicense such programming without reservation of priority. For the purposes of this clause.

'Reserved Service' means:

- (i) a transnational television service, that is to say a television broadcasting service intended for reception in more than one country which is not aimed primarily at audiences in a single country;

or

- (ii) a third party national satellite television service, that is to say a television broadcasting service provided by means of a satellite (whether in the fixed-satellite or broadcasting-satellite service) aimed primarily at audiences in a single country, in which no Member has any *bona fide* economic interest except as a provider of programme material;

other than

- (i) any service provided by a Eurovision member (as that term is from time to time defined by the EBU);

- (ii) any service to which any Member is required in sublicensing such programming to do so without such reservation of priority by reason of any applicable law, regulation or decision of a court or other competent authority or by reason of any contract existing at the date of the Agreement which has been disclosed to Sky prior to the date thereof.

The application of the abovementioned clause may have been modified following a change to the EBU sublicensing rules. On 2 July 1990 the EBU adopted a new scheme for sublicences to non-members. This is dealt with in case IV/32.150 EBU/Eurovision. Under the scheme, sublicences are made available to all interested third parties subject to an embargo for a limited number of hours and further restrictions on the timing and volume of the transmissions.

- (24) A list of sports events to which the EBU, on behalf of its Members, has already acquired 'standard' or 'world' rights, as defined therein, was also attached to the Agreement. The Eurosport Consortium warranted to Sky that such rights were subsisting at the time of signature.
- (25) The Agreement is intended to continue for a period of 10 years. Early termination is permitted in certain circumstances. Provision is also made for extension of the Agreement.
- (26) *The Services Agreement*, concluded between the Eurosport Consortium and the service company (owned jointly by the Eurosport Consortium and Sky), provides that the latter supplies certain facilities and services to the Consortium, including:
 - (i) those relating to the establishment of the Eurosport-channel, including negotiation (on the Consortium's behalf) for the transponder and uplink facility together with technical support and liaison with suppliers, regulatory authorities, etc. necessary to establish the channel;
 - (ii) those relating to the operation of the Eurosport channel, including preparation and selection of programme material for inclusion on the channel;
 - (iii) accounting and administrative services and personnel and other services necessary for the operation and distribution of the services.
- (27) Copyright in the programmes included in the service and in all material included in them belongs to and remains the property of the Eurosport Consortium Members (whether as owners or licensees).

- (28) The *Sales Agreement* is concluded between the Eurosport Consortium and Satellite Sport Sales Ltd (hereinafter 'the sales company') which is wholly owned by Sky, but which includes one director nominated by the Eurosport Consortium.

Under the Agreement the Eurosport Consortium:

- (i) grants to the sales company the exclusive right to contract for the transmission of advertisements on Eurosport;
- (ii) authorizes the sales company to impose charges for the reception and (where appropriate) the retransmission of the satellite service. The contracts made with cable operators to this effect are required to be in a form previously approved in writing by the service company;
- (iii) grants to the sales company the right to enter into agreements with persons or organizations for programme association ('on-air sponsorship of programmes') included in the service. The agreements are in accordance *inter alia* with any guidelines laid down by the service company and with any existing sponsorship obligations of the Eurosport Consortium or any of its Members and which have been notified to the sales company.

In return, the Eurosport Consortium *inter alia* agrees to include in the satellite service the advertisements delivered by the sales company, and to provide the service itself on a daily basis as agreed. In addition, the Eurosport Consortium undertakes to make the satellite service available for distribution so as to enable the sales company to comply with its own obligations under the Agreement concerning the availability of the satellite service to the public generally within the coverage area.

- (29) The *Facilities Agreement* between Sky and the service company provides that Sky agrees to provide or procure for the service company, at cost, such experienced personnel, facilities, recommendations, information, know-how and advice as reasonably requested by the latter so as to enable it to carry out its obligations under the Services Agreement.
- (30) The *Finances Agreement* between Sky and the sales company provides that Sky agrees to provide the sales company such facilities (including know-how, executive and technical personnel and premises), services and funds (by way of interest-free loans) as the sales company shall require in order to carry out its obligations and activities under the Sales Agreement. In return, the sales company is required to pay Sky for the facilities and services provided.

- (31) NI, parent of Sky Television plc, irrevocably guarantees to the Eurosport Consortium, in consideration of the Eurosport Consortium entering into the Shareholders Agreement with its subsidiary, the due and punctual performance and observance by Sky and the sales company of their respective obligations under their Agreements, and in the case of their default, to perform and observe these obligations itself.

The nature of Eurosport

- (32) While accepting the need for Eurosport to be commercially viable, the Eurosport Consortium has constantly stressed that it represents an extension of its Members' activities and, as such, constitutes a public service channel. (At present about 50 % of the Eurosport programme schedule is made up of EBU programme material, 34 % of which is produced by Members of the Consortium, 16 % by other members of the EBU.) Emphasis is placed on the fact that the service is broadcast by the Eurosport Consortium and that they are responsible for its programme schedule. The services provided by Sky through the sales and service companies take the form of a subcontracting relationship. On this basis Eurosport enjoys the rights of an EBU member as far as the Eurovision system is concerned. Cable operators and sports organizers and/or their agents, in particular, are encouraged to accept the public service character of Eurosport. As such, it is inevitable that the service is considered by these bodies to be closely associated with the EBU and its members, including those which are not themselves Members of the Eurosport Consortium.
- (33) By contrast, the viewing public has tended to associate Eurosport more closely with Sky. On its inauguration the channel was heavily advertised, in the United Kingdom at least, as one of the four 'Sky' satellite channels launched by Sky Television on the Astra satellite. On the continent the channel has also been closely linked to Sky Channel by the fact that the two services have shared the same cable channel, with Eurosport replacing Sky Channel after 6 p.m. on certain cable networks receiving the service from another satellite.

The market

- (34) Until recently television viewers have been dependent upon their national public broadcasting organizations for access to televised sport, television itself being transmitted via national terrestrial networks, and licences to operate generally were confined to public organizations charged with 'public service'

obligations relating to programme quality, diversity, education, etc.

- (35) Sport has generally been considered to fall within the scope of this public mission, at least coverage of certain major international events, such as the Olympic Games, Football World Cup and European Football Championships, together with national events of particular interest to the domestic public. Some organizations have chosen to highlight sport or at least certain events more than others. However, in each case, extensive coverage has been constrained by the obligation to televise other types of programmes.
- (36) At the same time, however, the monopolies conferred upon national broadcasting services enabled them to secure exclusive and, frequently, long-term broadcasting rights to sports events — particularly where such rights were negotiated through the EBU. Furthermore, the Eurovision system guaranteed members free access to the signal for programmes broadcast in other members' territories, as well as other privileges. Prices for these rights were kept relatively low as sports organizers were more concerned to secure television coverage in order to attract sponsorship and widest promotion of their events through television audiences.
- (37) In recent years, technical innovation has resulted in the introduction of cable and satellite television services — that is the transmission of a television signal via a satellite to cable operators which have contracted to receive the service(s) in question, and then distribute it/them to the viewers in a given area. This, together with the deregulation of television broadcasting which has taken place in some Member States, has led to the establishment of a number of commercial broadcasters. They operate on a local, national or transnational basis, providing either a diversified range of programmes, including sport, or a more specialist service, such as sports, films, arts or children's programmes, etc.
- (38) The latest technical development has been direct-to-home broadcasting, whereby satellite signals may be picked up directly from small domestic satellite dishes erected for this purpose. Both Eurosport and Screensport operate on this basis, providing a transnational service across most of Europe. However, access to viewers via cable operators remains vital for both services at present, particularly in heavily cabled countries, pending growth of the domestic satellite market.
- (39) All commercial broadcasters are financed principally by advertising revenue although some, in addition, charge a subscription fee. They therefore compete with one another for such revenue, which

is based upon the audience ratings for their services. High ratings, in turn, depend upon the attractiveness of the programme content and its scheduling by the broadcasters concerned.

(40) Public broadcasters have not been immune from the impact of commercial television, even if they are not to the same degree financially dependent upon advertising revenue. On the contrary, all strive to attain the highest possible audience ratings for their services, even while other conditions of operating have also to be fulfilled.

(41) Sport is one area which has been particularly attractive to a number of the new commercial operators, whether as part of general entertainment channels or specialist sports channels. Audience ratings can be very high for certain events, and are also popular with commercial sponsors. National commercial channels are able to select events of particular interest to the domestic audience, while transnational services are attracted by the fact that sports programmes, above all others, transcend linguistic boundaries, making them especially suitable for transnational broadcasting and advertising. As a result, public broadcasters have increasingly faced competition in the acquisition of broadcasting rights to certain sports events. At the same time, organizers of such events, or their agents, have become more and more aware of the value of their events to broadcasters, and prices have accordingly increased. In addition, there has been an increasing tendency to 'unbundle' the rights themselves, that is, to distinguish between, for example, terrestrial, cable and/or satellite rights, whether events can be shown 'live' or on a deferred basis only, and/or whether extensive coverage is permitted or limited highlights only, and to sell these various rights separately.

(42) At present a number of national commercial broadcasters offering general entertainment services include a certain amount of sports programmes for national viewers in various Member States. Prominent amongst these are SAT 1 and RTL Plus in Germany, as well as Canal Plus, La Cinq and M6 in France. Some of these channels have outbid the EBU for specific sports events. In addition, UFA, a member of the Bertelsmann group, has purchased the exclusive world rights for Wimbledon other than the United Kingdom, previously shown on Eurovision.

(43) A commercial satellite channel dedicated to sport began operations in the United Kingdom during

May 1990 (British Satellite Broadcasting). On 10 November 1990 this company agreed to merge with Sky, creating a new company, British Sky Broadcasting. It is currently proposed that this company will operate a sports channel (Sky Sports) directed at the United Kingdom, while the Eurosport channel will be directed at audiences in continental Europe. Plans for a national commercial satellite sports channel also exist in France (Sport-2-3).

(44) Transnational satellite sports channels are currently limited to Screensport and Eurosport. Since both are transmitted on the Astra satellite their footprint covers the same geographical area, which includes most of the Member States of the European Community.

(45) Nevertheless, many sports organizers and/or their agents have sought to maintain their relationships with public broadcasters, a number of which have well-established reputations for the quality of the sports events which they transmit, and can guarantee national coverage of their events. In addition, the Eurovision system — which enables sports organizers or their agents to negotiate the sales rights for a number of countries, or indeed over the Eurovision area as a whole, through a single body, the EBU, and guarantees coverage to all EBU members wishing to participate in a particular event — greatly simplifies the dealing/selling process (notwithstanding its negative impact on competitors outside the system). In any event, the EBU currently still holds the exclusive rights to a number of major international events, the contracts to which have not yet expired.

(46) Moreover, while increased competition from private broadcasters has led to certain major events traditionally broadcast by EBU members (including the Wimbledon Open Tennis Championship) moving into the hands of private broadcasters, in practice the EBU is continuing to acquire rights to other major events. For example, the EBU has secured the rights to both the Summer and Winter Olympic Games taking place in 1992. It also has purchased the rights to the Football World Cup Championships until 1998, together with rights for the European Champion Cup and the final stages of the European Cupwinners' Cup competition.

(47) The creation of Eurosport, it is claimed by Screensport, has exacerbated its previous problems in acquiring access to major sports events, and in particular European events — national and international — which it would like to show on its own

transnational channel. Eurosport has direct access to programmes produced by EBU members (both Members and even non-members of the Eurosport Consortium) whereas Screensport does not, since it is not connected to the Eurovision network. This, it is claimed, discriminates against Screensport and prevents it from broadcasting more European-based sports events which it would like. Of particular concern to Screensport in this respect is that Eurosport has access to 'live' events, either simultaneously with one or more Member of the Eurosport Consortium, or even on its own (the Consortium Member may choose instead to show selected highlights at a later stage). Indeed the Eurosport Consortium has itself admitted that some programme coordination takes place between itself and Eurosport.

(48) As a result of the above, Screensport claims that cable networks cannot but favour Eurosport by comparison to its own service — including networks in countries where Consortium Members do not exist. This problem has been accentuated by Sky's policy of replacing the Sky Channel service each evening with Eurosport on established networks, and seeking to replace this service entirely by Eurosport once current contracts have expired.

(49) By contrast, Sky claims that the creation of Eurosport is pro- rather than anti-competitive, since consumers benefit from the introduction of a new, dedicated sports channel enabling them to have much more extensive coverage of sports events shown on national television, either live or possibly at a more convenient time, and possibly in combination with the national channel itself (e.g. early rounds of a competition shown on Eurosport, with the finals on the national channel). In addition, the viewer may be able to see, possibly for the first time, certain new events previously shown only to other national audiences.

II. LEGAL ASSESSMENT

Article 85 (1)

(50) The parties concerned in this case are undertakings within the meaning of Article 85 (1).

(51) The basic agreement establishing the transnational satellite television sports channel service Eurosport is the Shareholders Agreement signed by Sky and the Eurosport Consortium on 23 December 1989 and which *inter alia* creates the service company.

However, full details of the operation of the channel and of the rights and obligations of the parties thereto can only be found by reference to a complex series of agreements signed (i) between, currently, 17 members of the EBU which have signed the Eurosport Consortium Agreement, and (ii) between the Eurosport Consortium and Sky and/or undertakings within the Sky Group, together with the guarantee provided by NI, parent of Sky. These are agreements within the meaning of Article 85 (1).

(52) Collectively, these agreements have the object and/or effect of restricting and distorting competition :

(i) between the partners to the joint venture, to the extent that they are actual and/or potential competitors on the market for broadcasting sports events ;

and

(ii) with regard to third parties seeking to broadcast sports events, in particular, transnational dedicated sports channels.

Re (i)

(53) Prior to launching the package of four satellite channels including Eurosport in the United Kingdom and other Community countries, Sky (then Satellite Television plc) already operated a transnational satellite and cable television service known as Sky Channel, available to viewers in the UK and four other Community countries (Belgium, Germany, Ireland and the Netherlands).

(54) While being a general entertainment channel, the service included a number of sports events, and Sky was actively involved in seeking to acquire rights to such events for inclusion on the channel. Moreover, having decided to enter into direct satellite broadcasting, it was generally known that Sky was contemplating one channel dedicated to sports. Thus, when considering Sky as a potential partner in their own venture, the interested EBU members, later the Eurosport Consortium, were not only aware of Sky's qualities as an experienced broadcaster in transnational commercial satellite television, including sports events, but also of the threat that Sky might become a direct competitor as a transnational commercial satellite channel dedicated to sport. Sky, for its part, must have known that, in establishing such a channel on its own, it would encounter the same problems as, for example, Screensport, in acquiring sports programming material in competition with the EBU, or in the form of sublicences from the EBU itself.

(55) For its part, a consortium of EBU members, such as the Eurosport Consortium, can be regarded as a potential competitor to Sky, as it was clear that members of the EBU were contemplating the establishment of a transnational satellite sports channel. This is so even though it was decided to carry out this venture in collaboration with another undertaking. In this respect, it should be recalled that three undertakings, in addition to Sky, applied to enter into such collaboration. None of these applicants, however, were actual or potential sports channels, as far as was known at the time.

(56) It follows, therefore, that any incentive for Sky to offer substantive competition to Eurosport was eliminated and that any potential competition between the two parents in the form of rival transnational satellite television channels dedicated to sport ceased as a consequence of their agreement to establish Eurosport together.

Re (ii)

(57) It is pointed out by Sky that Eurosport is but one of many television channels whose programmes include sports programmes, and that more are planned for the near future, including a number of channels dedicated entirely to sport. As such, it is claimed by both Sky and the Eurosport Consortium that the existence of their own channel cannot have any restrictive effect on the market but, on the contrary, is entirely pro-competitive in nature and a stimulus for other potential channels.

(58) In this respect it is appropriate to examine the market for televised sports programmes in more detail. First, there are the established public broadcasters which are required to televise the most important major events, or at least extracts thereof, as well as events of great interest to the domestic audience, including sports of otherwise minority appeal. These broadcasters have an established national audience who expect the above-described events to be included on national television.

(59) The new commercial national television channels have recognised that certain sports events attract high ratings amongst domestic audiences — and hence advertising revenue — and have therefore sought to exploit this market by purchasing rights to specific sports events by which they aim to attract national audiences away from public broadcasters to their own services. Transnational commercial channels providing a general entertainment service may also seek to use sport to the same effect, the particular attraction of sport to these

channels being that it transcends linguistic boundaries. These channels, however, may elect not to select the same sports events as national commercial channels but may instead choose those which have a wider international appeal.

(60) Transnational channels dedicated wholly to sport cannot adopt such a selective policy. On the contrary, their mandate must be to carry a wide variety of sport including, as far as possible, the most extensive coverage of the greatest number of events of interest to their potential audience (including minority groups), taking into account that their financial viability rests on attracting advertising (and/or possibly subscription) revenue from high audience ratings. At present, only two transnational commercial television channels of this type are in operation, namely Screensport and Eurosport. Since both transmit from the Astra satellite they are direct competitors for the same geographic audience. They therefore compete for the same type of programme material, the same sponsors and also the same advertisers. In addition, they are also both seeking to succeed in a new domain, namely the direct satellite market. While awaiting the development of this market, however, both are dependent upon reaching the widest possible audience through cable network operators.

(61) When comparing the position of Eurosport with that of Screensport and other potential transnational commercial satellite television sports channels, the terms of the joint venture clearly confer a privileged position on the former over the latter. First, with regard to programme material, Eurosport is granted unrestricted access to all programmes produced or acquired by Members of the Eurosport Consortium, including programmes which they acquire through the Eurovision system from other EBU members which are not Members of the Consortium. No other service has priority access to these programmes, not even through sublicences granted by the EBU and/or its members (see recital (63)). A list of events to which the EBU and/or its members had already acquired exclusive 'standard' or 'world' rights (as defined therein) was included in the joint venture Agreements, including certain major international events. Eurosport is entitled to select from this list — and of course any rights subsequently acquired — the events it wishes to include in its service. It may also freely choose the extent of coverage it requires, and, what is of utmost importance, whether to offer the programmes live or on a deferred basis. It may do so independently of the Consortium Members themselves or it may choose to coordinate with them the scheduling of the event in question.

- (62) It should be recalled in this context that EBU members reserve exclusivity for themselves for all rights to live sports programmes produced or acquired by their members. By virtue of the Agreements at issue in this Decision, the Eurosport channel is included in this system.
- (63) In contrast to Eurosport, therefore, third parties may only acquire limited access to Eurovision material through sublicences granted by the EBU or individual members, the priority for live broadcasting being given to participants in the Eurovision system. Sublicences are in principle available only for deferred transmissions subject to an embargo and various other restrictions regarding the timing and volume of transmissions. Eurosport, however, has direct access to all EBU programmes without any restrictions imposed upon it. This effectively deprives third parties (in particular transnational television channels and nationally-orientated direct satellite broadcasting or satellite-to-cable channels) of an equal opportunity to compete with Eurosport for such programmes, in particular to show any 'live' coverage.
- (64) In addition, Eurosport has access free of charge to the signal transmitting the abovementioned programmes from the host nation, in the same way as all other members of the EBU, as part of the Eurovision system of reciprocity. No similar concession is available to other commercial sports channels which would always be required to pay for this signal, or provide it themselves.
- (65) Secondly, as to the market for the acquisition of rights to sports events, an important objective of Eurosport as far as the interested EBU members are concerned is to increase the benefits of the collective negotiating position of EBU members with regard to numerous international events. It enables them to make package deals including events which, though being of little interest to many national public broadcasters, constitute useful programme material for a dedicated sports channel. In the view of the Commission, the joint purchasing policy operated by the EBU through the Eurovision scheme already confers upon EBU members a certain degree of market power. This is so despite the fact that private broadcasters have been able to outbid the EBU for certain events. Even if the EBU's current market power appears to be rather diminished compared to its former position, it still continues to be a powerful body in a privileged situation on the market for the acquisition of programme rights, and is likely to remain so during the next years. For members of such a body to reinforce not only their own position but also that of a potential competitor (Sky) by long-term agreements favouring a joint transnational commercial satellite channel wholly dedicated to

sports events can only reduce the opportunities for third parties, in particular independent transnational sports channel services, to compete on an equal footing with Eurosport for the acquisition of satellite cable rights from the EBU.

- (66) Thirdly, the close link between the Eurosport channel and the EBU, through the Eurosport Consortium, and hence to Eurovision programme material, is a factor favouring Eurosport over other potential transnational sports channels as far as cable operators are concerned when determining which sports channel service(s) they may wish to include on their networks. Pending further development of the domestic satellite dish market, the role of cable operators may well be crucial to the continuing financial viability of transnational satellite sports channels, in securing sufficiently high audiences for them to attract enough advertising revenue to continue operation. In this respect, cable operators have been attracted by the claimed 'public service' character of Eurosport. In addition, a number accepted the daily switch from Sky Channel to Eurosport in their contractual relationships with Sky, thereby enabling Eurosport very quickly to have access to a very large audience.

Effect on trade between Member States

- (67) Given the transnational character of Eurosport, which is available either directly by satellite or via cable distribution throughout most of Western Europe, and includes sports programmes on events taking place in many parts of the world, the rights to which have been acquired by a group of broadcasting organizations from many countries in Western Europe, the restrictions on competition stated above affect trade within the common market as a whole. This is all the more so as the relevant advertising markets present strong transnational elements, given the interest of important advertisers engaged in the import and export business, to reach potential clients in other Member States. As such, therefore, this falls within the scope of Article 85 (1). The case is confined, however, to effects felt within the Community itself.

Article 90 (2)

- (68) It is claimed by the Eurosport Consortium that its Members need the satellite channel created together with Sky in order to fulfil their public mission, the purpose of the Eurosport channel being to transmit throughout Europe more of the programmes produced or acquired by the Members of the Consortium. Due to the subcontracting relationship on the basis of which the services to the Eurosport Consortium are provided, the channel is said to be a public broadcasters' channel whatever may be the commercial incentives for its creation.

(Reference is made to the Members' wish to recover the costs of those sports programmes which they have to produce but which they are otherwise not able to broadcast in view of the general programme constraints imposed on them.) For this reason the Eurosport Consortium argues that the exception provided for by Article 90 (2), under which undertakings entrusted with the operation of services of general economic interest must not be hindered by the competition rules from performing the particular tasks assigned to them, applies.

- (69) While it may be possible that the public mission obligations imposed by Member States on their national broadcasting organizations renders them undertakings entrusted with services of general economic interest to this extent, it is highly doubtful that, given the national character of these obligations, they could be interpreted as extending to transnational activities of a collective nature such as Eurosport. In any event, there is nothing in the possible application of Article 85 (1) to their joint venture Agreements with the Sky group which would prevent them from fulfilling these missions, not to mention the readily admitted commercial character of the venture which Sky has entered into for purely economic reasons, providing for management expertise and financial assistance, in the expectation of some day making a profit.

Article 85 (3)

Improvement in the production or distribution of goods or to promoting technical or economic progress

- (70) It is claimed by Sky that Eurosport improves production and distribution in the market in a number of respects: it is one of the first thematic television channels broadcasting across national boundaries promoting sport in general and less well-known sports in particular, thereby promoting a new audience, for the benefit of other channels to follow. Technical and/or economic progress is said to be encouraged through the increased use of satellite technology, the promotion of sport and increased investment in sport and opportunities for sponsors, advertisers Eurosport, etc. For its part, the Eurosport Consortium emphasizes the fact that Eurosport enables its members to optimize the exploitation of their transmission rights thereby recouping their investment. Screensport however rejects this argument by claiming that the same benefit could be achieved by licensing surplus

rights to a multiplicity of parties, including Screensport, while Eurosport, it says, tends to narrow distribution because EBU members prefer to continue channelling surplus rights through a sole outlet rather than being obliged by increasing commercial pressure to license them more widely or to desist in the first place from acquiring rights which they cannot exploit.

- (71) In reply to this argument the Commission acknowledges the achievement of Eurosport in setting up a second transnational commercial satellite television channel dedicated to sports. However, this is not an 'improvement' within the meaning of Article 85 (3) if, in practice, its effect is a disproportionate distortion of competition in the market in question. Nor is technical or economic progress 'promoted' in such circumstances. The Commission takes the view that it is of vital importance in new, developing industries, requiring considerable investment in technology and development, that priority must be given to ensuring that competition at all levels should remain as open as possible so as to confer upon all potential market entrants an equal opportunity to compete.

Benefit to consumers

- (72) As claimed by the parties, it is arguable that, in the short term at least, consumers benefit from the introduction of a new, dedicated sports channel enabling them to have much more extensive coverage of sports events shown on national television, either live or possibly at a more convenient time, and possibly in combination with the national channel itself (e.g. early rounds of a competition shown on Eurosport, with the finals on the national channel). In addition, the viewer may be able to see, possibly for the first time, certain new events previously shown only to other national audiences.

- (73) However, this reasoning fails to consider the possibilities offered by an autonomous development of a dedicated sport channel by the Sky group. It has already been publicly announced that the Sky group would go on anyway with extensive broadcasting of sports events. This being so, the consumer may be better served by being able to make an informed choice between at least two channels offering an equally wide variety of European sports programmes, including the major international events, which may differ in style, presentation, quality and content. In those circumstances, it is the consumer who decides ultimately which/how many channels of this kind should eventually succeed.

Indispensability

- (74) Contrary to the arguments of the parties, the Commission is not convinced that a transnational sports channel such as Eurosport could only come into existence on the basis of such a joint venture between a group of members of the EBU, with the backing of the organization itself, and the most likely main competitor capable of creating an alternative venture. In the view of the Commission, the creation of a joint venture on the basis of the present Agreements is excessive, and the implied restrictions of competition cannot be regarded as indispensable to the establishment of a dedicated sports channel with a transnational dimension capable of rivalling other sports channels to the benefit of the consumers.
- (75) Indeed, the Commission cannot accept that all the restrictions contained in the Agreements themselves are indispensable to the operation of the venture. In particular, the channel has a privileged position compared to other channels broadcasting sports events, especially transnational sports channels.

Conclusion

- (76) In these circumstances, from the viewpoint of competition law, the disadvantages linked to the scheme notified by the parents of Eurosport outweigh possible improvements and benefits on the market in question. For these reasons the Commission rejects the application for an exemption under Article 85 (3),

HAS ADOPTED THIS DECISION :

Article 1

The joint venture Agreements and all related contractual provisions between, on the one hand, the Members of the Eurosport Consortium, and, on the other hand, Sky Television plc, Satellite Sports Sales Ltd, Satellite Sports Services and News International plc which were notified to the Commission on 17 January 1989, constitute an infringement of Article 85 (1) of the EEC Treaty in so far

as they have as their effect the granting of direct access to the Eurovision system.

Article 2

An exemption under Article 85 (3) of the EEC Treaty for the Agreements and implementing and related rules as mentioned in Article 1 is hereby refused.

Article 3

This Decision is addressed to the following undertakings :

- (a) The Members of the Eurosport Consortium,
c/o Union Européenne de Radiodiffusion,
Case postale 67,
CH-1218 Grand-Saconnex (Geneva);
- (b) Sky Television plc,
Sky Television Centre,
6 Centaurs Business Park,
Grant Way,
Isleworth,
UK-Middlesex TW7 5QK ;
- (c) Satellite Sport Sales Ltd,
PO Box 495,
Virginia Street,
UK-London E1 9XY ;
- (d) Satellite Sports Services Ltd,
PO Box 495,
Virginia Street,
UK-London E1 9XY ;
- (e) News International plc,
PO Box 481,
Virginia Street,
UK-London E1 9BD.

Done at Brussels, 19 February 1991.

For the Commission

Leon BRITTAN

Vice-President