Annex 2

Increasing competition for the FAPL’s live rights

1 Introduction

1.1 The most recent auction for live rights to the FAPL in the UK, which was conducted in April and May of 2006, provided greater opportunity for new entry than its predecessors. This is, of course, confirmed by the outcome which resulted in Setanta becoming the first broadcaster other than Sky to acquire the rights to transmit live coverage of the FAPL in the UK.

1.2 Competition for the FAPL’s live rights could, however, be increased further by addressing the issues outlined below.

2 Balanced packages

2.1 It has long been recognised that balanced packages of live FAPL rights would improve the prospects for (i) attracting competing bids for such packages and (ii) developing more effective downstream competition between broadcasters (assuming that the packages are shared between two or more broadcasters).

2.2 In the initial commitments which the FAPL proposed to the European Commission in December 2003 (and which were made publicly available by the Commission with its Article 19(3) Notice dated 30 April 2004) the FAPL undertook that:

“[it] will create packages of live rights to the Premier League competition, balanced so as to create the conditions for competition ...”;1 (emphasis added) and

“the balanced packages of live rights to the Premier League competition shall reflect prevailing market conditions, including the requirements of broadcasters, and shall be created by the FAPL after taking into account matters such as the object of showcasing the Premier League competition, the number of and quality of matches in each package and the priority of selection rights attached to each package”.

2.3 Following the submission of comments by third parties on the initial commitments and the Article 19(3) Notice, the Commission discussed revisions to the initial commitments with the FAPL. On 17 November 2005, the Commission published a press release confirming that it had received revised commitments (the “Commitments”) from the FAPL and that these:


---

1 Paragraph 1.1 of the "Consolidated version of the FAPL’s commitments for settlement" – draft dated 19 December 2003.

2 Ibid.
“address the points raised in the public consultation including: … creating more evenly balanced packages of rights ….”³ (Emphasis added.)

2.4 The Commitments were made legally binding upon the FAPL by a Decision of the Commission on 22 March 2006.⁴ This Decision confirms that:

“the live TV rights will be offered in six packages, more evenly balanced in terms of the order of selection of the matches (the pick mechanism) than was previously the case ….”⁵ (Emphasis added.)

2.5 In practice, notwithstanding the Commission’s positive statements, there remain substantial imbalances between the six packages of live FAPL rights prescribed in the Commitments.⁶ These imbalances arise in terms of, among other things, the order of selection of the matches. For example, all 23 matches in package A are “first picks”; i.e. they are the best matches which will take place during each of the relevant 23 weeks of the FAPL’s season. In contrast, all 23 matches in package C are “third picks”; i.e. they are the third most attractive matches during each of the relevant 23 weeks of the FAPL’s season.

2.6 Furthermore, as the Decision confirms, the Commission only sought to ensure that the packages were more evenly balanced “in terms of the order of selection of the matches (the pick mechanism)”. The Commission did not seek to ensure that the packages were more evenly balanced in terms of the days and times when the matches would take place and be broadcast live. Indeed, the relevant time slot for each match is not addressed at all in either the Decision or the Commitments.

2.7 During the auction in 2006, package A (which clearly has the best selection of matches) was allocated the time slot of 4.00pm on Sundays – the most desirable time slot for live broadcasting of FAPL matches.⁷ In contrast, package C (which has the least desirable selection of matches) was allocated various time slots including 8.00pm on Mondays.

³ Commission press release IP/05/1441.
⁴ Commission Decision of 22 March 2006; Case COMP/C-2/38.173 – Joint selling of the media rights to the Premier League. The Commitments were made publicly available by the Commission on 28 March 2006.
⁵ Paragraph 36(a) of the Decision.
⁶ See Schedule 1 to the Commitments.
⁷ Regression analysis for Sky Sports FAPL audiences from 1999 to 2005 indicated that not only the teams involved (i.e. the “pick”) but also the time slot has an impact on audiences.

<table>
<thead>
<tr>
<th>Time Slot Effect (week night audience = 100)</th>
<th>Audience Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saturday 12.45</td>
<td>82.0</td>
</tr>
<tr>
<td>Saturday 17.15</td>
<td>86.5</td>
</tr>
<tr>
<td>Sunday 13.30</td>
<td>91.0</td>
</tr>
<tr>
<td>Sunday 16.00</td>
<td>121.0</td>
</tr>
<tr>
<td>Weeknight</td>
<td>100.0</td>
</tr>
</tbody>
</table>
1.30pm on Sundays and 5.15pm on Saturdays – which are all less desirable time slots for live broadcasting of Premier League matches.\(^8\) Thus, the way in which time slots were allocated to the six packages exacerbated the imbalances between the packages which already existed as a result of the order of selection of the matches which is prescribed in the Commitments.

3 Conditional bidding

3.1 In its Decision, the Commission recognises that:

“… the broadcasting rights to premium football events played regularly throughout the season constitutes [sic] a distinct relevant product market.”\(^9\)

3.2 The requirement for matches to be played regularly is a material factor for pay TV broadcasters. In order to be able to persuade viewers to subscribe to particular pay TV services, broadcasters need to offer regular instalments of attractive content.

3.3 In the Commitments, the FAPL undertook to offer six packages, each comprising of 23 matches. There are, however, 38 weeks in each FAPL season. Accordingly, any pay TV broadcaster which acquires the rights to just one package would be able to offer viewers access to live FAPL football on only six out of every ten weeks in the FAPL season. Such an intermittent pay TV offering would not be commercially viable. Thus, bidders for FAPL live rights need to acquire a critical mass of at least two packages of rights in order to be able to develop a viable offering.

3.4 Yet, the Commitments stated that:

“The FAPL will require that a separate, stand alone bid is submitted for each Package of Rights for which each Bidder bids.”\(^10\) (emphasis added) and

“Accordingly, the FAPL undertakes that, when determining to whom a Package should be awarded, it shall disregard: … each bid for that Package which is not a stand alone bid for that Package … and … every conditional variation which has the effect of increasing or decreasing the value of any Bidder’s stand alone bid for that Package.”\(^11\)

3.5 As a consequence of these provisions, even new entrants were unable to specify that their bids were conditional upon winning a minimum of at least two packages. Accordingly, by participating in the auction of live FAPL rights, a new entrant would be exposing itself to the risk of ending up with fewer (or less attractive) packages than it needed to create a commercially viable pay TV offering and incurring significant losses as a result of paying too

---

\(^8\) Ibid. Furthermore, it should be noted that the relative value of the two packages with the least attractive picks and time slots (C and D) is further reduced by the fact that neither package has been allocated a consistent time slot. In contrast, all 23 matches in package A will take place at 16.00 hours on Sundays thereby further enhancing the relative value of that package by enabling the relevant broadcaster to schedule consistently and thus create an “appointment to view”.

\(^9\) Paragraph 22 of the Decision.

\(^10\) Paragraph 7.5 of the Commitments.

\(^11\) Paragraph 7.7 of the Commitments.
much for that “rump” of matches. Thus, the prohibition on conditional bidding had the effect of increasing the risks of new entrants when bidding for live FAPL rights. This is entirely the opposite of the Commission’s stated objective which was that:

“The ban on conditional bidding makes a further contribution to levelling the playing field allowing competition to play in the distribution of the rights.”

3.6 In the circumstances, it is worth reconsidering the basis for this ban on conditional bidding. It appears that, during the 2003 auction, Sky submitted conditional bids – i.e. bids for particular packages which had different values depending upon which other packages Sky won. In the initial commitments, the FAPL stated that:

“[it] will agree with the Commission the terms for a jointly commissioned, independent economic study to evaluate, in the context of all the relevant facts, the parameters within which a “variable financial bid” by a dominant bidder may be justified by reference to the economic and commercial value of the relevant rights packages to the bidder in question and will have due regard to the conclusions of that study when conducting its next bidding process. For this purpose, a “variable financial bid” means an offer of financial terms for a package of live rights which vary depending on whether other packages of rights are also awarded to it.” (Emphasis added.)

Thus, the initial Commitments proposed a way to address a concern which had arisen as a consequence of the nature of Sky’s bids during the 2003 auction.

3.7 Yet, the proposal in the initial Commitments was for an independent economic study to evaluate whether conditional bids by a “dominant bidder” could be justified. As a matter of competition law, a conditional bid by a non-dominant bidder could never be anti-competitive.

3.8 Despite this background, the Commitments prohibited conditional bidding by all companies, irrespective of their market position. This approach had a greater adverse impact on prospective new entrants, such as ntl:Telewest, than it had on the dominant incumbent.

4 Maximum number of packages

4.1 At present, the FAPL’s Commitments preclude one broadcaster acquiring all six packages of live FAPL rights. Thus the next auction could result in one broadcaster (i.e. Sky) winning five packages of live FAPL rights and a second broadcaster winning just one package of live FAPL rights.

4.2 For the reasons explained in section 3 above, one package of live rights would only authorise the coverage of 23 matches over the 38 weeks of an FAPL season. Accordingly, one package of live rights is not sufficient to form the basis of a viable pay TV offering. During the 2006 auction, Setanta was able to acquire two packages of live rights.

12 Paragraph 40 of the Decision.
13 Paragraph 2.2 of the initial Commitments.
4.3 In the circumstances, in order to ensure that, at the next auction, a broadcaster other than Sky is able to acquire at least the right to broadcast one match live during every week of the season, the maximum number of packages which any one broadcaster can win should be decreased from five out of six to four out of six.