Hand It Over: Eurovision, Exclusive EU Sports Broadcasting Rights, and the Article 85(3) Exemption

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INTRODUCTION

The acquisition of exclusive sports broadcasting rights is the main broadcasting issue in the EU.¹ In this highly competitive industry, broadcasters attempt to attract maximum audiences.² They do so by offering exclusive coverage of a given sports event.³ Sponsors and advertisers pay broadcasters more to advertise their products when they believe larger audiences will, in fact, watch an event.⁴ This belief, in turn, propels broadcasters to pay more for the right to be the exclusive broadcaster of a given event.⁵

Part I of this Note presents background information on the EU sports broadcasting industry. It then introduces the European Broadcasting Union (EBU), a non-profit consortium of public broadcasters, and Eurovision, its system of joint program acquisition and reciprocal exchange of signals. This section also considers the EU Competition laws, specifically Article 85(1) restraints on competition and Article 85(3) exemptions, which, if granted, declare 85(1) prohibitions inapplicable.

Part II compares public broadcasters like EBU members with private broadcasters, who have more commercial goals. It also discusses the tension resulting from the attempts of both to gain exclusive rights to broadcast sports events and thus to attract larger audiences.

Part III analyzes the Eurovision system, the competition between public and private broadcasters, and whether Eurovision deserves an Article 85 individual exemption. Finally, this Note concludes that though Eurovision does restrict competition between some EBU members and between EBU members and private broadcasters, the

² See id.
³ See id.
⁴ See id.
⁵ See id.
Court of Justice (ECJ) should grant an Article 85(3) exemption when it reviews the pending appeal challenging the arrangement.\(^6\)

I. BACKGROUND

A. Broadcasting Sports Events

Major sports events are among the programs that attract the most viewers.\(^7\) Examples include the World Cup and the Olympics.\(^8\) There is heavy competition to be the exclusive broadcaster of sports events in a given geographical area because broadcasters want to attract the advertising dollars that flow from large viewing audiences.\(^9\)

The broadcasting of sports events achieves high figures for viewers with strong buying power, particularly with sixteen to fifty year-old men.\(^10\) This target audience is essential for advertisers because it is a readily identifiable group not easily reached by other programs.\(^11\) As a result, the demand to advertise on sports event broadcasts has increased, as has the competition for the television right to broadcast those events.\(^12\)

The right to broadcast sports events is granted usually for a given territory, per country, on an exclusive basis.\(^13\) Broadcasters consider exclusivity necessary in order to guarantee the value of a given sports program.\(^14\) The value consideration is in terms of the number of viewers and the amount of advertising dollars an event attracts.\(^15\)


\(^7\) See Coopers & Lybrand, supra note 1, at 285. For example, the 1998 World Cup final game attracted almost 24 million viewers in the United Kingdom, sometimes reaching an 80% market share. See EBU Warning: Will the General Public Miss Out on the Next World Cup Celebration of Football in 2002? (visited Nov. 15, 1998) <http://www.ecu.ch/press_598a.htm>. It also attracted 24 million viewers in Germany and 20 million in Italy, sometimes reaching 74% and 84% market shares respectively. See id.


\(^9\) See Coopers & Lybrand, supra note 1, at 285.


\(^11\) See id.

\(^12\) See id.

\(^13\) See Coopers & Lybrand, supra note 1, at 284.

\(^14\) See id.

\(^15\) See id.
A sports event's organizer initially owns the broadcasting rights to a given event. The organizer controls access to the premises where the event occurs. It usually admits only one host broadcaster (i.e., the broadcaster in the country where the event takes place) to produce the television signal. In this way, the organizer controls the broadcasting of the event and guarantees exclusivity. The host broadcaster then must secure broadcast rights from the event organizer to televise the event within its own national territory.

Other broadcasters typically try to secure similar exclusive rights to broadcast events within their respective national territories. They do so either from the host broadcaster or some other owner of the television rights. These rights are either in the form of a license to exploit the material produced by the host broadcaster or an assignment of all rights. In an assignment, the host retains the ability to be the exclusive broadcaster of the event in its own national territory.

In the past, the prices for television rights to sports events stayed relatively low. Event organizers concerned themselves more with ensuring coverage to attract sponsorship and promote popularity of an event. In recent years, organizers have recognized the increased competition for the broadcast rights and, in turn, have increased the broadcast fees. For example, the fees paid in the EU for the right to broadcast the Olympics rose from $90 million U.S. for the summer 1992 Barcelona Games to $250 million U.S. for the summer 1996 Atlanta Games. These amounts skyrocketed to $3.44 billion U.S. for the exclusive European rights to the five Summer and Winter Olympics between 2000–2008. In comparison, NBC paid a similar $3.5

16 See id.
17 See id.
18 See Eurovision System, 1993 O.J. (L 179) at 27.
19 See Coopers & Lybrand, supra note 1, at 285.
20 See id.
21 See id.
22 See id.
23 See id.
24 See Coopers & Lybrand, supra note 1, at 285.
25 See Eurovision System, 1993 O.J. (L 179) at 27.
26 See id.
27 See id.
28 See id.
billion U.S. for the exclusive right to broadcast the same events in the United States. 30

International sports rights agencies also have emerged as players in this game. 31 Sports event organizers maximize revenue by selling broadcast rights for many territories in one bundle to an agency, which then unbundles the rights by selling them to individual broadcasters for the exclusive right to broadcast in their respective national territories. 32 The event organizers thus avoid separate negotiations with individual broadcasters for rights to broadcast in different territories. 33 This method facilitates rights acquisitions by private, commercial broadcasters who are not members of the EBU. 34

B. The EBU and the Eurovision System

The EBU is one of the most important EU players in the broadcasting world. 35 Created in 1950, it is a non-profit-making trade association of radio and television organizations. 36 It aims to promote radio and television exchange among its members by all possible means. 37 Because the EBU has no commercial goal, it does not admit purely commercial broadcasters as members. 38 Instead, its active members are public mission broadcasters who must satisfy obligations set by national law and practice regarding their programs and audience coverage. 39 Its associate members are broadcasters who other-

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31 See id. at 27–28.
32 See Coopers & Lybrand, supra note 1, at 286.
33 See id. at 286.
35 See Eurowision System, 1993 O.J. (L 179) at 23. However, the EBU has been criticized for the fact that Canal Plus (a French channel) is a current member even though, subsequent to entry into the EBU, it transformed into a pay-per-view commercial broadcaster. See Murray, supra note 29.
36 See Coopers & Lybrand, supra note 1, at 286.
37 See id. Currently, the EBU has 69 active members in 50 countries throughout Europe, the Middle East, and North Africa. See All EBU Active Members (visited Sept. 23, 1999) <http://www.ebu.ch/membership.htm>.
wise satisfy all of the EBU membership requirements but operate outside of the EBU broadcast area.40

EBU members are obligated to cover an entire national population and, in fact, actually must cover a substantial part thereof, while using their best efforts to achieve full coverage.41 They must provide varied and balanced programming for all sections of the population, including a fair share of programs catering to minority/special interests, irrespective of the ratio of program cost to audience size.42 Presumably, this prevents members from focusing strictly on major sports events that may be the most popular, and thus, attract the most viewers.43 In addition, members actually must produce, or commission under their own editorial control, a substantial portion of the programs they broadcast.44

Eurovision constitutes the main framework for the joint acquisition and cost sharing and the exchange of programs among active members.45 This system, created in 1954, is organized and coordinated by the EBU.46 EBU members compete individually against each other and/or private broadcasters for national sports events.47 Eurovision therefore applies only to international sports events.48 It is based on the understanding that members offer to the other members, on the basis of reciprocity, their news coverage of important events as well as their coverage of current affairs, sports events, and cultural events that are of potential interest to other members.49

The Eurovision system is based on reciprocity: whenever one member covers a sports event occurring in its own national territory, it offers coverage free of charge to all other members on the under-

40 See Eurovision System, 1993 O.J. (L 179) at 24. The EBU has 49 associate members in 30 countries, circling the globe from Australia to the United States and Canada. See All EBU Associate Members (visited Sept. 23, 1999) <http://www.ebu.ch/membership.htm>.
41 See Eurovision System, 1993 O.J. (L 179) at 23–24.
42 See id. at 24.
43 See id.
44 See id.
46 See Metropole Television SA, at 14 (Ct. First Instance 1996). Though the focus of this Note is the broadcasting of sports events, Eurovision does distribute current event footage for news and other programs, such as educational documentaries and music competitions. See The EBU in Brief (visited Sept. 23, 1999) <http://www.ebu.ch/overview.htm>.
47 See WISE & MEYER, supra note 45, at 1791.
48 See id.
49 See Metropole Television SA, at 14 (Ct. First Instance 1996).
standing that it will receive corresponding services from other members when events take place in their respective countries. 50

All interested EBU members jointly acquire television rights to an event, and then share the rights and the related fees among themselves. 51 Whenever EBU members from two or more countries want to broadcast a given sports event, they request coordination from the EBU. 52 A member in whose country the event occurs, or the EBU itself, then conducts negotiations (on behalf of the interested EBU member(s)) with the event’s organizer. 53 EBU members may negotiate separately only after joint negotiations fail. 54

Members who compete with each other for audiences have to agree among themselves on the procedure for attributing priority to one of them. 55 For example, they could agree to alternate transmission of an event. 56 If the parties do not reach agreement, they obtain non-exclusive rights to broadcast the event in their same national territory. 57

The EBU statutes provide for contractual access to Eurovision for third party non-members. 58 Non-members may gain access for live transmission if no EBU member in the country concerned has reserved its own live transmission of a sports event. 59 When an EBU member does opt to broadcast an event live in the country concerned, non-members may gain access for deferred transmission at least one hour after the conclusion of an event. 60 The third party and the EBU negotiate the access fees for both the broadcast right and the television signal routing right. 61 If a dispute develops over the access

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50 See Wise & Meyer, supra note 45 at 1791.
51 See id.
52 See Eurovision System, 1993 O.J. (L 179) at 28.
53 See id.
54 See id.
55 See Wise & Meyer, supra note 45, at 1791. These competitors may be members from the same country or members from different countries whose broadcasts reach the other’s country in the same language. See id.
56 See id.
58 See Wise & Meyer, supra note 45 at 1791.
60 See id.
61 See id. at 30.
fee, the parties may request arbitration by an independent expert, or, if both parties agree, by three experts.\textsuperscript{62}

\textbf{C. The EC Competition Laws}

Article 3(f) of the Treaty of Rome states that one of the activities of the European Community is the institution of a system ensuring that competition in the Community is not distorted.\textsuperscript{63} The fundamental rules on competition are contained in Articles 85 and 86.\textsuperscript{64} Article 85 provides the basis for the following analysis of how EC competition laws reconcile with the granting of exclusive rights to broadcast sports events.

Article 85 prohibits all agreements that may affect trade between the Member States and have as their object or effect the prevention, restriction, or distortion of competition within the common market.\textsuperscript{65} Any such agreements are automatically void, although there are certain exceptions to this general rule.\textsuperscript{66} Article 85 prohibitions become inapplicable to an agreement when the agreement otherwise contributes to the promotion of economic progress and only imposes restrictions indispensable to the attainment of the agreement's objectives.\textsuperscript{67}

Council Regulation 17 grants the Commission the power to implement Articles 85 and 86 and, therefore, to grant 85(3) exemptions.\textsuperscript{68} Direct parties to an agreement or those persons who otherwise have a sufficient interest may file a complaint to the Commission.\textsuperscript{69} The Commission has a number of options: it can dismiss the complaint, provide a negative clearance or comfort letter, or make an examination and decision regarding exemption.\textsuperscript{70} Should the Commis-

\textsuperscript{64} See id.
\textsuperscript{65} See id.
\textsuperscript{66} See id.
\textsuperscript{67} See id.
\textsuperscript{68} See VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 21, 69 (6th ed. 1997).
\textsuperscript{69} See id. at 21–22.
\textsuperscript{70} See id. A dismissal, negative clearance, or comfort letter are functionally the same: the Commission declares that, on the basis of the facts in its possession, there are no grounds for Article 85 action on its part. See id. at 144. A negative clearance is more formal than a comfort letter, which is less cumbersome and more frequently used. See id. When the Commission decides to implement Article 85 and examine whether an exemption is
sion decide to grant an exemption, it may issue either an individual or group exemption.\footnote{112}{See id. at 68-72. Individual exemptions govern only the agreement at issue; group exemptions define the sort of agreements that come within them, such as technology licenses or exclusive distribution agreements. See id.}

II. DISCUSSION

A. The Clash Between Public and Private Broadcasters

The issue of exclusive broadcasting of sports events should be considered in the context of the ongoing struggle between public and private broadcasters.\footnote{71}{See id. at 68-72. Individual exemptions govern only the agreement at issue; group exemptions define the sort of agreements that come within them, such as technology licenses or exclusive distribution agreements. See id.} In the past, public television companies dominated the market.\footnote{72}{See Coopers & Lybrand, supra note 1, at 285.} There are now, however, many private broadcasters who compete for exclusive rights to broadcast sports events.\footnote{73}{See id.}

These companies developed in part through a combination of the deregulation of the television broadcasting industry in some Member States and the introduction of satellite-to-cable and direct satellite television.\footnote{74}{See id.}

Private, commercial broadcasters are financed mainly through advertisers and subscription fees.\footnote{75}{See id.} Public broadcasters, on the other hand, receive financing mainly through a license fee and some advertisement revenue, subject to restrictions like revenue ceilings and maximum advertising spots per day.\footnote{76}{See id.}

When the EBU formed in 1950, public sector organizations entrusted with the operation of a public service provided most radio and television broadcasting services in Europe.\footnote{77}{See id.} These organizations enjoyed a seeming monopoly over the broadcasting of all television programs, including sports events.\footnote{78}{See id.} In the late 1980s, purely commercial, private broadcasters emerged to capitalize on the rising popularity of sports and the related market for viewers and advertising revenue.\footnote{79}{See id.}

due, it can either exempt the challenged agreement or order the parties to terminate the infringement. See id. at 68-72, 144.
In Europe, these private broadcasters include a number of all-sports broadcasters, such as Eurosport, Screensport, and Sky Sports.\textsuperscript{81} Today, the broadcasting industry is in a state of transition, with private, commercial broadcasters expanding their market activities and gaining significant audience shares.\textsuperscript{82} They provide technical innovations, offer broader choices for viewers, and create competition that benefits viewers, advertisers, and sports event organizers.\textsuperscript{83}

As their audience share increases, these commercial broadcasters prove formidable competitors to the traditional public broadcasters in both the advertisement and program procurement markets.\textsuperscript{84} The public EBU members compete sometimes at a growing disadvantage against commercial channels, which are in some cases backed by powerful media conglomerates.\textsuperscript{85} The EBU members face various constraints arising from their public mission that the private broadcasters do not encounter.\textsuperscript{86} In particular, members face limitations on sponsorship and advertising that often hamper their ability to buy and exploit programs in a commercially viable way.\textsuperscript{87}

Public and private, commercial broadcasters take different approaches to the broadcasting of sports.\textsuperscript{88} Public broadcasters, by virtue of their public mission, cater to minority, or less popular, sports in addition to major sports events.\textsuperscript{89} They tend to cover a broader range of sports events and do so from an event’s beginning to end, irrespective of costs and revenue considerations.\textsuperscript{90}

Purely commercial broadcasters, with the exception of all-sports channels, are more interested in mass-appeal sports events that attract advertisers and persuade viewers to subscribe to their services.\textsuperscript{91} Furthermore, they care less about sports events that require expensive production efforts relative to the broadcasting time and advertisement revenue generated from such an event.\textsuperscript{92}

\textsuperscript{81} See Eurovision System, 1993 O.J. (L 179) at 25.
\textsuperscript{82} See id.
\textsuperscript{83} See id.
\textsuperscript{84} See id.
\textsuperscript{85} See id. For example, Sky Sports is owned by BSkyB, a subsidiary of Rupert Murdoch’s News Corp. See Stanley Reed, Drawing a Bead on BSkyB, Bus. Wk., Nov. 11, 1996, available in 1996 WL 10771470.
\textsuperscript{86} See Eurovision System, 1993 O.J. (L 179) at 25.
\textsuperscript{87} See id.
\textsuperscript{88} See id. at 26–27.
\textsuperscript{89} See id.
\textsuperscript{90} See id. at 27.
\textsuperscript{91} See Eurovision System, 1993 O.J. (L 179) at 25.
\textsuperscript{92} See id.
B. Eurovision Does Distort Competition Within the Common Market

By allowing for the joint negotiation, acquisition, and sharing of broadcast rights and the exchange of programs, Eurovision's object and effect is greatly to restrict, if not eliminate, competition between EBU members. EBU members agree to joint acquisition and sharing of signals instead of competing against each other on an open market for the right to broadcast in a given area.

Eurovision enables EBU members to strengthen their individual market positions to the disadvantage of their competitors. Without Eurovision, EBU members would have less market power and, consequently, less ability to secure exclusive broadcast rights for major sports events. This is a result of the sports broadcasting industry developing into a rich person's game where broadcasters pay big bucks because they perceive advertisers and viewers as likely to do the same.

Eurovision distorts competition among EBU members and between EBU members and private, commercial broadcasters who do not share its rationalization and cost savings. Its effect is to exclude private broadcasters unaffiliated with the EBU from the reciprocal benefits of the joint acquisition and program exchange.

C. Eurovision Deserves an Article 85(3) Exemption

1. Procedural History Regarding Eurovision

In Eurovision, the European Commission (Commission) concluded that the Eurovision system violated Article 85(1), but nevertheless issued an 85(3) exemption. It reasoned that Eurovision reduced transaction costs, benefited smaller members, enabled coordination by different channels within countries, and facilitated exchange of programs between countries. In response, certain private

93 See id. at 31.
94 See id. at 28.
95 See id. at 32.
96 See Eurovision System, 1993 O.J. (L 179) at 28.
97 See Echikson, supra note 29; Murray, supra note 29.
98 See Eurovision System, 1993 O.J. (L 179) at 31–32.
99 See id. at 28.
100 See id. at 37.
broadcasters requested that the Court of First Instance (Court) annul the Eurovision decision.\footnote{See Metropole Television SA, at 8 (Ct. First Instance 1996).}

In Metropole, the Court ruled that the Commission failed to consider first whether the EBU’s membership rules were objective and sufficiently determinate and capable of uniform, non-discriminatory application.\footnote{See id. at 51–52.} The Court reasoned that the Commission had to make this determination before assessing whether the membership rules were indispensable within the meaning of Article 85(3).\footnote{See id.} In effect, the Court said that the EBU membership criteria were so vague that it was impossible to tell whether they were indispensable as required by Article 85(3).\footnote{See Lang, supra note 101, at 1331.}

Furthermore, the Court said that the Commission equated the EBU public mission constraints with Article 90(2) “services of a general economic interest.”\footnote{Prior to Metropole, the Community courts had never quashed an exemption granted by the Commission. See KORAH, supra note 68, at 70.} It also said that the substance of Article 90(2) could not be the criterion for applying Article 85(3), given that the Commission itself said that 90(2) did not apply.\footnote{See Lang, supra note 101, at 1331.} Public interest obligations may be considered, the Court reasoned, but only by explaining in financial and qualitative terms how exclusive purchasing is indispensable.\footnote{See id. at 1331–32.} The ECJ will have to decide the legality of Eurovision when it considers the EBU’s appeal of Metropole.\footnote{See Kruidvat, at n.88 (visited Oct. 11, 1999) <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&doci=100.htm>. The following analysis examines whether the Eurovision system merits an Article 85(3) exemption. It does not, however, comment on the propriety of the Court’s currently un-affirmed conclusion that the EBU membership criteria first must be reviewed or that financial and qualitative data must be provided. See Lang, supra note 101, at 1331–32.}

2. An Analysis of Eurovision

The ECJ should perform a four-factor test applied in Article 85(3) analyses and grant an individual exemption for the Eurovision arrangement.\footnote{See D.G. GOYDER, EC COMPETITION LAW 129–40 (2d ed. 1993).} In this analysis, the ECJ should ask and answer four questions: Positive Questions 1 and 2 and Negative Questions 1 and
Eurovision survives an Article 85(3) exemption analysis only if, during its review, the ECJ answers yes to the first two questions and no to the last two.\textsuperscript{112}

a. \textit{Positive Question 1: Does Eurovision Improve the Production or Distribution of Goods or Promote Technical Economic Progress?}

It is essential that the ECJ clearly identify and balance the economic benefits derived from Eurovision against the detriment placed on the competitive process.\textsuperscript{113} Improvement or progress can include almost any kind of beneficial alteration to the operation of industry or commerce, including an increased output from a given number of input, better quality in production, and a greater range of products produced from the same input.\textsuperscript{114} Typically, a flexible approach and broad interpretation results in an affirmative response to this question in a variety of situations and many different types of economic progress and technical advances.\textsuperscript{115}

The ECJ should respond affirmatively to this question.\textsuperscript{116} Via Eurovision, EBU members jointly acquire and transmit more sports events to more national territories and more viewers.\textsuperscript{117} EBU members otherwise would be unable to acquire rights to broadcast major sports events because they face limits on the amount of money they can apply to sports events, which comprise only a portion of their overall programming.\textsuperscript{118} Through Eurovision, these public broadcasters acquire rights from the joint acquisition system and share the related fees.\textsuperscript{119}

Viewers who otherwise would be unable to watch a given event also realize the benefits from Eurovision.\textsuperscript{120} For example, a given viewer who cannot afford to pay the subscription fees required by a private commercial broadcaster would not be able to watch a given event if the event were broadcast on such a commercial channel. Eurovision, however, enables that viewer to watch an event by ena-

\begin{itemize}
  \item \textsuperscript{111} See id.
  \item \textsuperscript{112} See id.
  \item \textsuperscript{113} See id. at 132–33.
  \item \textsuperscript{114} See id. at 133.
  \item \textsuperscript{115} See \textit{Goyder}, supra note 110, at 135.
  \item \textsuperscript{116} See id. at 132–35.
  \item \textsuperscript{117} See \textit{Wise \& Meyer}, supra note 45, at 1791.
  \item \textsuperscript{118} See id. at 1789–90 n.320.
  \item \textsuperscript{119} See Eurovision System, 1993 O.J. (L 179) at 28.
  \item \textsuperscript{120} See id. at 25.
\end{itemize}
bling public broadcasters to acquire and then broadcast the event on free television, as part of their comprehensive attempt to satisfy their public mission goals. In this process, there is an increased output and thus a greater range of products produced (more televised events on free television) from the same input (EBU members).

b. Positive Question 2: If So, Does Eurovision Allow Consumers a Fair Share of the Resulting Benefit?

A general sentiment exists that this condition closely accompanies an affirmative answer to Positive Question 1. That is, the benefit achieved by an affirmative answer to Positive Question 1 presumably trickles down to consumers. A broad interpretation assumes that so long as the agreement is capable of producing some advantage in the course of normal trade, even if no subsequent benefit has already been realized, it is sufficient.

A consumer may be either the ultimate end-user or those who acquire the goods at any stage of production. This implies that either viewers or EBU members themselves may be consumers who receive a fair share of the resulting benefit.

The ECJ should respond affirmatively to this question because two types of consumers receive the benefits of Eurovision. First, the individual EBU members are able to acquire the rights through Eurovision. Second, they pass these benefits to viewers when they broadcast sports events on free television.

c. Negative Question 1: Does Eurovision Impose Restrictions Not Indispensable to the Attainment of the Objectives Already Referred to?

It is essential that the restrictions are tailored strictly to the valid purposes of the agreement and that any damage to the competitive process not spill over to a wider effect. By considering necessity in

121 See Wise & Meyer, supra note 45, at 1789–90 n.320.
122 See Goyer, supra note 110, at 133.
123 See id. at 136.
124 See id.
125 See id.
126 See id. at 135.
127 See Goyer, supra note 110, at 135.
128 See id.
129 See id.
130 See id. at 136.
relation to proportionality, the underlying inquiry is whether the economic advantage can be obtained by less sweeping restrictions.\textsuperscript{131}

The ECJ should respond negatively to this question. While an alternative could be to allow both public and private broadcasters to share broadcast rights in a given geographical territory, this remedy runs contrary to the basic rationale of exclusivity in sports broadcasting: the idea that the value of the broadcast rights lies in the grant of exclusivity.\textsuperscript{132} If a broadcaster does not have the exclusive right to broadcast an event in a given territory, viewers may opt to watch an event on one of many channels broadcasting the event.\textsuperscript{133} Viewers become less likely to pay to watch an event when they can watch it on free television.\textsuperscript{134} Advertisers therefore become unlikely to pay large fees to a single broadcaster, especially since viewers may watch the event on another channel.\textsuperscript{135} Because Eurovision enables member broadcasters merely to compete better with private broadcasters as both try to secure exclusivity in broadcast rights (and related advertising revenues), it is not too sweeping.\textsuperscript{136}

d. Negative Question 2: Does Eurovision Afford the Possibility of Eliminating Competition in Respect of a Substantial Part of the Products?

This question relates to the external effect of the agreement and indicates the need for a market analysis on both the product and geographical ranges of the market.\textsuperscript{137} The ECJ should examine the nature of the market, the size of the enterprises concerned, their relative market shares, and any structural conditions of the market.\textsuperscript{138}

The ECJ should respond negatively to this question. The market affected by Eurovision is the granting of exclusive broadcast rights in the EU for international sports events only.\textsuperscript{139} Eurovision neither confers any benefit to its members nor affects in any way the competition for broadcast rights to national sports events.\textsuperscript{140}

\textsuperscript{131} See id. at 136–37.
\textsuperscript{132} See Coopers & Lybrand, supra note 1, at 284.
\textsuperscript{133} See id.
\textsuperscript{134} See id.
\textsuperscript{135} See id.
\textsuperscript{136} See Goyder, supra note 110, at 137.
\textsuperscript{137} See id. at 138.
\textsuperscript{138} See id. at 138–39.
\textsuperscript{139} See Wise & Meyer, supra note 45, at 1791; Coopers & Lybrand, supra note 1, at 285.
\textsuperscript{140} See Wise & Meyer, supra note 45, at 1791. For example, EBU members received no advantage from Eurovision in the competition for the exclusive broadcast rights to the
The ultimate effect of Eurovision is to help public broadcasters while conferring no identical benefit for non-EBU members.\textsuperscript{141} It does not, however, specifically take from the private broadcasters.\textsuperscript{142} They still have more finances and are able to compete for exclusive rights.\textsuperscript{143} Instead of the practical effect of competing among themselves (since only they, individually, have the funds to bid highest), commercial broadcasters have to contend with one more bidder by way of the EBU consortium.\textsuperscript{144} The entry of one more bidder does not dramatically reduce their respective market shares.\textsuperscript{145}

In addition, Eurovision does not totally exclude non-members.\textsuperscript{146} In fact, the EBU, subsequent to the \textit{Eurovision} decision, greatly strengthened third party access.\textsuperscript{147} Now, non-members may obtain a live transmission if no EBU member broadcasts an event.\textsuperscript{148} They may obtain a deferred transmission if an EBU member does broadcast an event live.\textsuperscript{149} In this way, non-members may gain some access even to those events that the EBU has exclusive rights.\textsuperscript{150}

\textbf{CONCLUSION}

The nature of the sports broadcasting industry in the EU has developed rapidly into a pay-for-play world. In the past, public broadcasters dominated the market and secured exclusive rights to events with the goal of encouraging interest in sports. In recent years, private broadcasters have entered the ring with the goal of profiting from the rising popularity of sports and the related popularity of sports on television. Event organizers have reacted to the growing popularity and interest (from both fans and broadcasters) by charging more money for the exclusive right to broadcast a given event.

The EBU and Eurovision technically may restrain trade, but the ECJ should grant the arrangement an Article 85(3) individual exemption. Eurovision enables EBU members who otherwise would be un-

\textsuperscript{141} \textit{See} Eurovision System, 1993 O.J. (L 179) at 23.
\textsuperscript{142} \textit{See} id.
\textsuperscript{143} \textit{See} id. at 25.
\textsuperscript{144} \textit{See} id.
\textsuperscript{145} \textit{See} Goyder, \textit{supra} note 110, at 139.
\textsuperscript{146} \textit{See} Eurovision System, 1993 O.J. (L 179) at 29–30.
\textsuperscript{147} \textit{See} Lang, \textit{supra} note 101, at 1331.
\textsuperscript{148} \textit{See} Eurovision System, 1993 O.J. (L 179) at 29.
\textsuperscript{149} \textit{See} id.
\textsuperscript{150} \textit{See} id.
able to be players in the rising market for exclusive broadcast rights to compete with private broadcasters who have more resources and unlimited program discretion. The private broadcasters remain formidable competitors, with each other and with EBU members, because they have extensive financial resources. In effect, Eurovision minimally alters the conditions but still ensures that the game plays on, with teams competing on a more level playing field.

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