

## MONOPOLISATION OF CRICKET BROADCASTING IN INDIA: IMPLICATIONS, REGULATION AND LESSONS

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### ABSTRACT

The paper is an attempt to highlight the anti-competitive situation in the Indian sports broadcasting industry and the need for its regulation. With the background of Star India's monopolisation of the Cricket broadcast market in India, with a huge market share of over 80%, the paper sets out the current factual situation of Indian sports broadcasting industry. The Authors then explain how competition watchdogs in the European Union and the United States of America faced, tackled, and won over similar problems in the past. Going into the 'what-if's, the paper provides insights into the implications of the monopolisation of this industry. Imploring the need for regulation, the Authors analyse the two available methods to ensure an efficient broadcasting market and the one that would apply best to this situation. The paper then points out the problems that the competition regulators in the mature jurisdictions have faced while working to ensure an efficient, robust, and competitive sports broadcasting market, while simultaneously calling for the Competition Commission of India's (hereinafter "CCI") pro-active involvement in the

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industry to ensure better competitiveness and to eliminate any practices causing appreciable adverse effects on competition. The Authors conclude by listing the suggestions, both legislative and regulatory, that might help in ensuring a better sports broadcasting industry for all stakeholders.

## **1. INTRODUCTION**

Sport is getting a financial boost because viewers are ready to shell out a fortune to watch it. The viewers are injecting money into the sports broadcast industry mainly in indirect ways to gain access to the telecast of sports events. This usually happens through the extended time of advertisements spots and the commercials during live matches telecast on business systems; in subscription expenses to join the network of cable or satellite service providers; through taxes to finance public-service television. The financial contribution to the industry in direct form is typically through payment to broadcasters on a pay-per-view basis. ‘Pay-per-view’ is an arrangement where the viewer’s pay a certain amount to the broadcasters to watch a specific sporting event.

In a normal market, the advertisement revenues shall be a function of the number of viewers on the channel and therefore, subject to another consideration of the subscription cost which affects the number of viewers on the channel. To increase the number of viewers, the broadcasters should reduce the subscription cost. With higher number of subscribers, the advertisers would pay a lot more to feature on the valuable commercial breaks between sporting events being watched by millions. As a result, to maximise advertisement revenues, the broadcasters would reduce the subscription cost. However, a peculiar feature of the sports broadcasting

market is the inelastic demand for these events, where the users are ready to subscribe irrespective of the amount charged by the broadcaster, thereby disrupting this mutual regulation of subscription costs and advertisement revenues.

When the demand is high and cost of the services do not vary with the number of subscribers, the cost of access payable by each viewer, when driven by market forces should be less. However, because sports authorities control the supply of Television rights to broadcasters and because the demand for sporting events by viewers is usually not substitutable, these sports authorities charge monopoly prices while selling their broadcasting rights. In turn, the broadcasters making the huge investment on these TV rights demand higher time to recover their investment, which leads to negotiations for long-term contracts. As a result, these broadcasters then become virtual monopolies for the telecast of a specific event and these monopolistic prices trickle down to the viewers who are then required to pay exorbitant amounts to watch their favourite sport. Perfect examples of such trends worldwide would be America's National Football League (NFL), which currently has an eight-year contract worth an aggregate of \$15 billion with a couple of American Broadcasters.<sup>1</sup> BSkyB, a British satellite broadcaster, has a contract with the English Premier League for the rights to a number of its matches over four footballing seasons that involves a hefty sum of \$1 billion.<sup>2</sup>

Dominance in sports broadcasting industry is a precarious and threatening issue that needs immediate attention through either

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<sup>1</sup> *Tackling Monopolies*, THE ECONOMIST (Feb. 5, 1998), <http://www.economist.com/node/112929> last visited Jan 15, 2019.

<sup>2</sup> *Id.*

government regulation or supervisory intervention by the CCI. The increase in the cost of watching sports is driving the competition authorities to stock in experts to look at the arrangements between sports bodies and commercial TV rights acquirers. While England's Competition and Markets Authority (CMA) is investigating anti-competitive practices in broadcast contracts for English football, the European Commission has proactive examinations under progress into prohibitive practices, conduct and agreements in European football and Formula 1 racing among various other sports.<sup>3</sup> Though the CCI has a power to direct an investigation on its own motion<sup>4</sup>, the regulation part only comes into picture when the anti-competitive practices have hit the market, ergo making the regulatory intervention necessary.

## 2. THE INDIAN BACKGROUND

Of late, the sports broadcasting scene in India has changed altogether. With more than 675 million viewers, India is the second-biggest market for television media after China. Though the television industry's highest earnings come through advertisements, sports genre can possibly drive subscription revenue over the advertisement income.<sup>5</sup> The Sports industry in India has almost doubled in the past five years from

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<sup>3</sup> *Id.*

<sup>4</sup> The Competition Act 2002 § 19(1).

<sup>5</sup> R.S. Sharma, *It's all about watching good TV*, THE ECONOMIST (Dec. 26, 2018), <https://economictimes.indiatimes.com/blogs/et-commentary/its-all-about-watching-good-tv/> last visited Jan 15, 2019.

\$1.3 billion to \$2.7 billion; with expectations to grow four-fold in the next eight years crossing the \$10 billion mark.<sup>6</sup>

The two noteworthy telecasters in the nation — Star India and Sony Pictures Networks (SPN) — are contending seriously to procure global games properties. Sony made a major move in August 2016 when it procured Ten Sports from ZEE to expand its portfolio.<sup>7</sup> Sport broadcasting in India has brought another turn with the coming of different sports associations and commencement of national events. This includes the likes of Indian Premier League (Cricket), Pro-Kabaddi League (Kabaddi), Indian Badminton League (Badminton), Indian Super League (Football). While the broadcasters only competed to acquire the established global competitions like English Premier League (Football) or ICC Cricket World Cup earlier, they have now started taking a different approach. An example would be Star India, which launched its own production in the form of Pro-Kabaddi League in association with Marshal Sports that garnered great viewership across the country, second only to Indian Premier League (Cricket).<sup>8</sup> This has led to the broadcasters competing for viewers through both worldwide biggies and home-grown alliances. After the acquisition of Ten Sports by Sony, the sports broadcast industry

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<sup>6</sup> *Zee Entertainment completes sale of Ten Sports to Sony*, THE HINDU (Jan. 10, 2018), <https://www.thehindubusinessline.com/companies/zee-entertainment-completes-sale-of-ten-sports-to-sony/article9863353.ece> last visited Jan 15, 2019.

<sup>7</sup> *The Times of India Global Sports Show 2018*, DAILY HUNT (Dec. 4, 2018), <https://m.dailyhunt.in/news/india/english/tvnews4u-epaper-tvnews/the+times+of+india+global+sports+business+show+gss+2018+appeals+international+participation-newsid-103041442> (last visited Jan 15, 2019).

<sup>8</sup> *Pro Kabaddi League viewership second only to IPL*, THE HINDU (Sept. 15, 2014), <https://www.thehindu.com/sport/other-sports/pro-kabaddi-league-viewership-second-only-to-ipl/article6413148.ece> last visited Jan 15, 2019.

became a duopoly between Star and Sony, following elimination of Zee from this segment.<sup>9</sup>

The major share of sports broadcasting Industry in India belongs to cricket, almost totalling a massive 85% of the market share.<sup>10</sup> Therefore, for reference purposes in this paper, we shall only consider the Cricket Broadcasting Industry in India.

Star TV is the leader in Cricket broadcasting in India, holding exclusive rights to telecast both first-class and international cricket in India including the matches played between Indian national team and England, Australia or Bangladesh. In 2017, the Managing Director of Dish TV had held a press conference and had dispatched a letter informing the Competition Commission of India about Star's potential monopoly in the sports broadcast industry India if it managed to acquire the TV rights for Indian Premier League (to be auctioned then) for the next five years. His letter highlighted that:

*Once Star acquires the telecast rights for IPL as well, the market share in terms of viewership of Star skyrockets. The distribution platforms such as DTH and Multi System Operators will have no choice but to subscribe the Star Sports channels for cricket content because of Star's monopolistic position as a sole holder of cricket telecast rights.*<sup>11</sup>

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<sup>9</sup> *Sports in India*, ERNST & YOUNG (July, 2017), [https://www.ey.com/Publication/vwLUAssets/ey-sports-newsreel/\\$File/ey-sports-newsreel.pdf](https://www.ey.com/Publication/vwLUAssets/ey-sports-newsreel/$File/ey-sports-newsreel.pdf) last visited Jan 15, 2019.

<sup>10</sup> *Id.*

<sup>11</sup> Harveen Ahluwalia, *Dish TV warns Competition Commission on Star's Monopoly of Cricket*, LIVE MINT (Aug. 23, 2017), <https://livemint.com/Consumer/Uu5jTpVkaBnjANU0k4rSIJ/Dish-TV-warns-Competition-Commission-on-Star-Indias-monopol.html> last visited Feb 21, 2019.

Star went on to acquire the I.P.L. broadcasting rights in 2017, followed by acquisition of B.C.C.I.'s media rights in 2018 for all cricket matches played by India, where it pipped Reliance Jio and its rival broadcaster Sony in the auction.<sup>12</sup> However, the Competition Commission of India neither treated it as information nor started an investigation taking cognizance of the situation.<sup>13</sup>

With almost the entire cricket kitty in the bag for Star, it boasts of the telecast rights for nearly 76 per cent of all matches played by the Indian Cricket team.<sup>14</sup> However, this tally does not include Star's holding over the International Cricket Council (ICC) events. This includes the Cricket World Cups, the T20 World Cup, the Champions Trophy, and the Youth Category World Cups, which makes their market share in excess of 80% in respect of all the cricketing events in India.<sup>15</sup> This has led to a monopoly of Star in Cricket Broadcast Industry. After shelling out a fortune, Star would definitely look forward to a fair share of return on its investments through coveted spots for commercials and its monopoly would help it unilaterally leverage the bundled prices at which it supplies its sports channel to the Direct-to-Home (hereinafter "DTH") provider, who in turn would pass on the higher prices to consumers.

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<sup>12</sup> Tanya Rudra, *Star India bags BCCI Media Rights for a whopping Rs. 6138.1 Crores*, NDTV SPORTS (Apr. 5, 2018), <https://sports.ndtv.com/cricket/star-india-bags-bcci-media-rights-for-a-whopping-rs-6138-1-crore-1833325> last visited Jan 15, 2019.

<sup>13</sup> The Competition Act 2002 § 19.

<sup>14</sup> Tanuj Lakhina, *Star Sports bags IPL media rights, in blockbuster deal, but at what cost?*, THE INDIAN EXPRESS (Sept. 6, 2017), <http://indianexpress.com/article/sports/sport-others/star-sports-ipl-media-rights-what-cost-monopoly-sky-sports-bcci-4829847/> last visited Jan 15, 2019.

<sup>15</sup> *Id.*

Further, the term of these broadcasting contracts spanning several years virtually eliminates Sony from the Cricket broadcast industry and hence it has to look elsewhere for its revenues. This has led Sony to explore other options, which has now gotten its hands on the second most popular sport in India, i.e. Football.<sup>16</sup> However, the figures still do not come close to Star and Sony is barely keeping up with its rival network after acquisition of rights to telecast several other sporting events like World Wrestling Entertainment (hereinafter “WWE”), Golf, and National Basketball Association (hereinafter “NBA”). This gives rise to yet another problem, which is known as market division, a hard-core restraint in Competition Law. While Section 3 of the Competition Act proscribes agreements that divide markets<sup>17</sup>, the problem with its application to our situation is that there is no written or tacit agreement under Section 2 of the Competition Act, 2002 between Sony and Star to share markets. It is the natural course followed by Sony to save its business after Star’s monopolisation of the Cricket broadcasting industry and hence the necessary requirement of an agreement under Section 3 is not fulfilled.

Earlier, under the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007, all the private broadcasters had to share their content with Prasar Bharti who could show the live feed and telecast it on the Doordarshan channels. However, a recent Supreme Court ruling allows Prasar Bharti to telecast the live feed only on their terrestrial

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<sup>16</sup> Gaurav Laghate, *No India Cricket? No Problem for Sony as it set sights on broadcasting Football*, THE ECONOMIC TIMES (Sept. 8, 2018), <https://economictimes.indiatimes.com/industry/media/entertainment/media/no-india-cricket-no-problem-for-sony-as-it-sets-sights-on-the-goalpost/articleshow/65727524.cms> last visited Jan 15, 2019.

<sup>17</sup> The Competition Act 2002 § 3(3)(c).



network and free dish and not to telecast it freely on their channels mandatorily aired by all Cable and DTH operators, further restraining access of sporting events to the common people.<sup>18</sup>

In a July 2017 decision,<sup>19</sup> the CCI has ordered an investigation into the Indian Sports Broadcasting market against Star and Sony, taking notice of these facts, in a complaint brought by the Noida Software Technology Park Ltd. The investigation was on the count of refusal to deal with certain distributors and preferential treatment to certain other distributors. While finding a prima facie violation, the CCI dismissed the allegations of monopolisation or abuse of dominance under section 4, which makes the discussion in this paper relevant.

### **3. SPORTS BROADCASTING REGULATION IN MAJOR ANTITRUST JURISDICTIONS**

#### **3.1 U.S.A.**

The most popular sports in the United States of America are the sports otherwise considered unconventional worldwide. This list includes Baseball, Basketball, Rugby, and Ice Hockey. There is an increased appetite and consumption of domestic rather than international competitions of these sports because of the national popularity and peculiarity of these professional sports as compared to sports like Cricket or Football, which are enjoyed globally. The most important sporting events for broadcast in America therefore are the Major League Baseball (hereinafter MLB), the National Football League (hereinafter NFL), the

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<sup>18</sup> Union of India v. B.C.C.I., (2018) 11 S.C.C. 700.

<sup>19</sup> Noida Software Tech. Park Ltd. v. Star India Pvt. Ltd., Case No. 30 of 2017 (C.C.I.).

National Basketball Association (hereinafter NBA), and the National Hockey League (hereinafter NHL). Every one of these competitions is conducted as a joint endeavour of different teams.

The Sports Broadcasting Act of 1961 exempted the practice of collectively selling the sponsored broadcasting rights of matches played by different teams in a bundle by the leagues from the scrutiny of the American Antitrust Laws.<sup>20</sup> The Act overturned a 1961 decision of an American Court that reiterated the injunction issued in a 1953 antitrust suit against NFL from implementing its existing rules on broadcasting, which were held to be in violation of the Antitrust Laws in the country.<sup>21</sup> As a result, the MLB and NBA changed their policy as per which, the individual teams sold licences to telecast their games to TV ‘superstations’, which brought the games to United States household through cable systems. Further, the restriction by NBA on the carriage of only a certain number of games through cable systems was found to not be covered under the exemption provided by the Act.<sup>22</sup> Almost all these leagues now telecast to the households through direct broadcast satellite TV, including the NFL and the exemption does not apply because the games are telecasted without any sponsored advertising.<sup>23</sup>

Until the early 1970s, due to the Federal Communications Commission’s (hereinafter “FCC”) policy on broadcast, there were only three major players in the American broadcasting industry during peak

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<sup>20</sup> 15 U.S.C. § 1291–95.

<sup>21</sup> *U.S. v. Nat’l Football League*, 196 F. Supp. 445 (E.D. Pa. 1961); *U.S. v. Nat’l Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>22</sup> *Chicago Professional Sports v. N.B.A.*, 95 F.3d 593, 596 (7th Cir. 1996).

<sup>23</sup> *Shaw v. Dallas Cowboys Football Club Ltd.*, 172 F.3d 299 (3d Cir. 1999).

viewing hours, which also carried on the telecast of national sporting events as well. However, the broadcasting industry benefited from progression in late 1970s through court decisions and eased FCC norms. With the introduction of newer technology in the form of easy direct-to-home satellite TVs, a number of players entered the industry and the national leagues capitalised on this opportunity through increased competition among the broadcasters to acquire their rights. Hence, this two-way check (a) upon the leagues through Court decisions and antitrust laws (b) upon the broadcasters through intensified competition has thus far ensured no monopoly in sports broadcasting.

### 3.2 EUROPE

Europe has been a centre of anti-competitive practices related to sports broadcasting. The Commission has been playing a proactive role in identifying and addressing such concerns. The *UEFA Champions League* case,<sup>24</sup> the *German Bundesliga* case,<sup>25</sup> and the *FA Premier League* case,<sup>26</sup> are instances where the Commission has ably assessed and dealt with competition concerns related to the sale of media and broadcasting rights in football leagues. The concern has primarily been the monopolisation of the downstream market of broadcasting where the content is supplied to the TV viewers owing to the exclusivity of rights. Their approach has varied from introducing a ‘no single buyer rule’ in order to inject

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<sup>24</sup> COMP/C-2/37.398, Comm’n Decision of 23 July 2003 relating to Joint Selling of Commercial Rights of the UEFA Champions League, O.J. 2003 L 291/25.

<sup>25</sup> COMP/C-2/37.214, Comm’n Decision of 19 January 2005 relating to Joint Selling of the Media Rights to the German Bundesliga, O.J. 2005 L 134/46.

<sup>26</sup> COMP/C-2/38.173, Comm’n Decision of 22 March 2006 relating to Joint Selling of the Media Rights to the FA Premier League, C (2006) 868 final.

competition in the market to preventing unused rights and pushing forward innovation by introducing a new channel of distribution, i.e., the Internet. The authors have dealt with the practicality of these solutions in the latter sections of the article.

The delineation of European Community law administering the acquisition of broadcasting rights for sports is challenging. The European Union does not have a consolidated law to tackle these violations pertaining to sports broadcasting since these rights are in the form of property rights, which makes them a national subject to be legislated upon discretely by the different member states. This proposition is also sanctioned under Article 295 of the Treaty establishing the European Community (hereinafter EC Treaty), which itself states that “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership”.

Does that mean that the matters relating to sports broadcasting rights are rendered untouchable under the European Law? If the answer to that question were positive, then the agreements involving the acquisition of broadcasting rights would not be liable to Articles 101 and 102 of the Treaty for the Functioning of the European Union.

However, this is not the case and such agreements still need to be in consonance with the European Competition Law.<sup>27</sup> Article 295 merely reinforces the idea that the member states shall be ensured freedom and sovereignty while dealing with their systems for property ownership. However, any act done under those systems of property ownership should

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<sup>27</sup> S. WEATHERILL, *THE SALE OF RIGHTS TO BROADCAST SPORTING EVENTS UNDER EC LAW* 311-77 (T.M.C. Asser Press 2014).

also be acceptable under the minimum standards envisaged under the European Union Trade and Competition rules.<sup>28</sup> Therefore, such a procedure for property ownership should be in consonance with the EU Competition Law. Hence, awarding of these sports broadcasting rights should be compatible with Articles 101 and 102 of the Treaty for the Functioning of the European Union, notwithstanding Article 295 of the EC treaty.

Liberalisation of norms and entry of privately owned commercial networks, together with evolutionary changes in technology over time has led the sports broadcasting industry to become one of the most fiercely competitive markets in the EU. The EU has primarily faced three major issues while dealing with the regulation of the sports broadcasting industry: (a) Exclusivity: how to deal with the offer of exclusive right? (b) Aggregate offering: how to deal with the offer of rights in conditions where the venders consolidate, commonly as individuals from a league? (c) Aggregate obtaining: what is the legitimate way to deal with the securing of rights in conditions where the buyers consolidate?<sup>29</sup>

#### 4. IMPLICATIONS OF MONOPOLIZATION IN INDIA

The EU and the US have consolidated competition in sports broadcasting through development of their antitrust laws governing the industry. However, India has failed to frame rules to regulate such practices; still without a precedent in this regard. There have been limited enquiries by the Competition Commission of India with regard to

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<sup>28</sup> Kieninger, *Securities in movable property within the Common Market*, 4 EUR. REV. PRIVATE L. 41 (1996).

<sup>29</sup> WEATHERHIL, *supra* note 20.

disruptive practices in market of sports broadcasting in India, with little to no fruit in the form of guidelines, best practices or precedents to show for it.

The only eye-catching instance certainly remains to be the *Noida Software Technology Park Ltd. case*<sup>30</sup>, where the CCI identified a prima facie case pertaining to a constructive refusal to deal by Star India and Sony in the Sports Broadcasting market. The CCI ordered the DG to investigate into the allegations, and the case is still pending adjudication. The most important take away from this section 26(1) order was the virtual labelling of the Indian Broadcast market as a duopoly in the sports genre. These broadcasters (Star and Sony) were alleged to be indirectly related to several distributors and hence, vertically integrated. Although the Commission did not find any case for an abuse of dominant position on technical grounds of the Act not providing for Collective Dominance or cartelisation facilitated by the Indian Broadcast Foundation, it still hinted at unfair practices like refusal to deal being exercised by the broadcasters against the weaker distributors. These revelations should be enough to alarm the regulator and the government to the anti-competitive practices that the attempted monopolisation of sports broadcasting market might bring in the current scenario.

The failure of the competition authority to take notice in this regard may lead to monopolisation of the sports broadcasting sector as explained in the earlier part of the paper. This monopolisation may drive out the competitors and allow the major players to regulate the market on

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<sup>30</sup> Noida Software Tech. Park v. Star India Pvt. Ltd.

their whims and fancies with several appreciable adverse effects on competition, which the Competition Act, 2002 aims to prevent.<sup>31</sup>

The possible implications of monopolisation of broadcasting of sporting events include, but are not limited to the following:

#### **4.1 MORE ADVERTISEMENTS**

The dominant broadcaster may earn more advertisement revenue through longer and more commercial breaks in telecast. These commercial breaks would not only affect the telecast scenario but in cases of nation-only events, which receive broadcast only in India, it might affect the timing of sports to suit the needs of broadcasters due to its bargaining power. An example would be expansion of commercial breaks for Ranji trophy matches, which would spoil the experience of real-time viewers seated in the stadium because of the longer breaks between two overs to accommodate higher number of advertisements for a longer time.

#### **4.2 EXORBITANT PRICING**

The broadcaster may raise the subscription charges of the channel for the DTH and cable operators. Once, the broadcaster is able to eliminate other players in the market, it becomes the only entity supplying the required event to the viewers. Sporting events are natural monopolies; as a result, sporting events are not interchangeable and any operator wishing to telecast a particular event would have to subscribe to that channel necessarily, irrespective of the exorbitant pricing.

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<sup>31</sup> Competition Act, 2002, preamble.

### 4.3 TRICKLE DOWN OF PRICING TO CONSUMERS

The increase in subscription charges of channel will ultimately reflect in the prices paid by the consumer. Consumers would therefore, be paying highly to watch an event, which in ordinary course of competition in the market was available at relatively cheaper rates.

### 4.4 LEVERAGING THE PROMOTION OF NEW VENTURES

The dominant broadcaster may use that particular non-substitutable sport programme as an aid in promoting new ventures. An example would be Star TV, which has the exclusive rights for the live telecast of the English Premier League (Football) in India, has decided to broadcast the matches only on its newly launched High-Definition channels.<sup>32</sup>

### 4.5 EXTENSION OF MONOPOLY

Since sports have become an indispensable facet of life, the selling of exclusive rights in all cases leads to massive revenues to the buying operator. This makes the buyer financially stronger and hence monopolistic behaviour is extended to other broadcast sectors. E.g., A sports broadcaster like Star TV, which also has channels pertaining to other genres, might inject the revenue it forms from the sports sector to those sectors (e.g. entertainment) and monopolise the broadcast of entertainment programmes.

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<sup>32</sup> Gaurav Laghate, *Star India to move International Sports to Premium HD Channels*, THE ECON. TIMES (July 12, 2016), <https://economictimes.indiatimes.com/industry/media/entertainment/media/star-india-to-move-international-sports-to-premium-hd-channels/articleshow/53163929.cms> last visited Jan 15, 2019.



## 5. METHODS TO REGULATE THE INDUSTRY

The competition law does not prevent creation of monopolies. Monopolies can in fact be conducive to growth of the market due to their economies of scale models, efficient distribution systems, and more revenues leading to a bigger purse for carrying out research and development. The Competition Act, 2002 under section 4 only prevents abuse of this dominant position or monopoly. These monopolies in sports broadcasting can be prevented from abusing their position through one of the following two methods:

### 5.1 INJECTING COMPETITION

The broadcasters assert that sports already has competition from other programmes aired on television. However, this assertion is completely puerile since cricket supporters are highly unlikely to find football amusing, thereby ruling out competition from other genres. An example would be people preferring to watch a single World Cup every four years because of their curiosity to discover the country with the best team in the world; and any other football tournament would not be able to compete with the World Cup in that sense.<sup>33</sup> Therefore, injecting competition becomes very inconvenient and impractical in the presence of exclusive rights contracts executed by sports federations or authorities with the broadcasters.

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<sup>33</sup> *Tackling monopolies, supra* note 1.

The broadcasting industry accepts exclusivity as the usual business norm.<sup>34</sup> Exclusivity becomes even more pertinent in sports broadcasting because it ensures that all the viewers interested in the event come to the same network and broadcasters are able to reap returns on the high investment in acquiring rights. Hence, these assured returns make exclusivity gain importance because the value of sports events is only transient.

Exclusivity may give rise to competition problems. However, it should not in itself raise competition concerns when contracted for a short duration. Duration of exclusive broadcasting contract, quantity of matches, and upstream and downstream market power should to be considered while assessing whether the exclusivity cause appreciable adverse effects on competition.<sup>35</sup>

## 5.2 REGULATING THE MONOPOLY

The latter option of regulating the monopoly is more viable and convenient, as evident from both the US and the EU who have adopted a similar approach. Julian Le Grand and Bill New suggest that governments should set a benchmark for prices charged per viewer for the telecast of every sporting event, such that it ensures a reasonable return to both the team and the telecast network.<sup>36</sup> This would ensure that the broadcasters

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<sup>34</sup> A.M. Wachtmeister, *Broadcasting of Sports Events and Competition Law*, THE EUR. COMM'N (June 2, 1998), [http://ec.europa.eu/competition/speeches/text/sp1998\\_037\\_en.html](http://ec.europa.eu/competition/speeches/text/sp1998_037_en.html) last visited Jan 16, 2019.

<sup>35</sup> Wachtmeister, *supra* note 26.

<sup>36</sup> Julian Legrand & Bill New, *Fair game?: tackling monopoly in sports broadcasting*, 20 J. POL'Y STUDIES 23 (1999).

only spend such amount on acquiring rights as would allow them to reap a profit on the reduced charges set by the government. This shall ensure both lowering of the cost for acquisition of TV rights and trickling down of the reduced prices for the benefit the customers.

## 6. PROBLEMS IN REGULATION

### 6.1 MARKET DEFINITION

The first step in determining whether an entity is dominant<sup>37</sup> or not is the market where the violation is alleged to happen. The relevant market requires delineation of the geographic market<sup>38</sup> where the economic conditions are mostly similar and uniform and a differentiation of product market<sup>39</sup>, which includes all those products that are sufficiently substitutable or interchangeable on the demand side. However, one more question that might arise is the correct market delineation. Whether the broadcast of live cricket itself forms a market or the broadcast of live sports is the relevant market remains unanswered? This problem has been very evident even in mature jurisdictions like US and Europe.

The definition of the relevant market will be pivotal to the appraisal of cases concerning the issues alluded to above. In the present atmosphere of rapidly advancing broadcast innovation and methods for distribution, specifically, the improvement of technology and development of new methods like direct to home satellite connections and pay-per-

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<sup>37</sup> Competition Act, 2002, § 19(4).

<sup>38</sup> *Id.*, § 19(6).

<sup>39</sup> *Id.*, § 19(7).

view, the nature and extent of the business sectors are continuously evolving.<sup>40</sup>

Additionally, the globalisation of sports industry has led to the geographic market additionally ending up increasingly worldwide. With the rise and developing significance of committed membership to TV networks rising, the larger product market has also broken from a general sport market to a specific market for a few games e.g., ‘El-Clasico’ derby between Real Madrid and Barcelona would not be substitutable with any other match for a viewer.<sup>41</sup>

Standard market definitions may not have any significant bearing in any geographical area. Further, the business sectors are different in all countries, even different states of a diverse country like India, due to geographical preferences. When delineating the relevant market, demand side substitutability on the side of the final consumer does not paint the complete picture, and other factors like viewers easy access to substitutes, even when they are available should be considered.

The Supreme Court in the US has attempted market delineation in sports broadcasting cases only twice. A 1959 judgment held that the relevant market in a suit related to boxing matches broadcast was restricted to only include ‘championship boxing matches’<sup>42</sup> while a 1984 case regarding college football broadcast identified the relevant market as all the ‘college football broadcasts’.<sup>43</sup>

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<sup>40</sup> Wachtmeister, *supra* note 26.

<sup>41</sup> *Id.*

<sup>42</sup> *Int’l Boxing Club, N.Y. v. U.S.*, 358 U.S. 242, 250 (1959).

<sup>43</sup> *N.C.A.A. v. Board of Regents, Univ. of Oklahoma*, 468 U.S. 85, 111 (1984).

However, later decisions considered such delineation very narrow and therefore, expanded the definition to include certain substitutes to the relevant sport, which might interfere with the ratings of a particular telecast. Research scholars have often accepted the fact that professional sports do face competition from various unrelated sectors. The Appeals Court judgment laid down that “the NFL contends with different types of excitement for a limited audience (if to a great degree expansive) estimate and the loss of spectators to other types of entertainment essentially impacts the league or team's success.”<sup>44</sup> However, whether these factors would lead the Courts to resort to a more open market definition remains unanswered.

A contemporary judgment<sup>45</sup> perfectly captures the significance of the determination of the relevant antitrust issue and delineation of the relevant market pertinent to that issue in professional games. Despite this exercise being part of all antitrust cases, it is particularly important in sports cases where its need cannot be compromised.<sup>46</sup> A sports body can work in different markets with changing economic situations and behave differently with changing trends, ergo the markets that feel the effect of a particular anti-competitive practice is not plainly obvious.<sup>47</sup>

India is still without a solid precedent, which might help in delineating the relevant market in the Sports broadcasting sector. The limited trusts that the CCI has had with the sports broadcasting market in

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<sup>44</sup> *Am. Needle Inc. v. N.F.L.*, 560 U.S. 183 (2010); *See also Chicago Professional Sports v. N.B.A.*, 95 F.3d 593, 596 (7th Cir. 1996).

<sup>45</sup> *Am. Needle Inc. v. N.F.L.*, 560 U.S. 183 (2010).

<sup>46</sup> *North Am. Soccer League v. N.F.L.*, 670 F.2d 1249, 1260 (2d Cir. 1982).

<sup>47</sup> *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 726 F.2d 1381, 1392–94 (9th Cir. 1984).

India have not resulted in any hard and fast rules that might help in the identification of the relevant market in such cases. However, the identification of the relevant market in a couple of sports cases has pointed towards positive trends based on the international best practices as highlighted above, showing promising signs for a nascent competition jurisdiction like India.

In *Zee/Star Den* case,<sup>48</sup> the DG noted that TV channels of one genre are not substitutable with another; there is limited substitutability even within the same genre. However, the case was not concerned with this and the delineation was done at the distributor level identifying the relevant market as the market of aggregating and distribution of TV Channels to MSOs, DTHOs and IPTVOs in India.

The *BCCI* case,<sup>49</sup> is by far the most important precedent for our consideration because the DG, categorically identified that even two sports programmes were not substitutable at the consumer level. Though the core issue was with respect to anti-competitive clauses in the B.C.C.I.'s agreement to sell I.P.L.'s media rights to broadcasters, the DG went on to correctly identify the peculiar dynamics of sports broadcasting with respect to demand substitutability on the consumer side. The relevant market was defined as the 'market for organisation of professional domestic cricket leagues/events in India'. The key observations that come out from this definition include:

- i. Two Sports are not substitutable as cricket was identified as a separate market;

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<sup>48</sup> Yogesh Somani v. Zee Turner Ltd., Case. No. 31 of 2011 (C.C.I.).

<sup>49</sup> Surinder Barmi v. B.C.C.I., Case No. 61 of 2010 (C.C.I.).

- ii. Professional leagues are not substitutable with amateur leagues;
- iii. Domestic events and international events may form part of different markets.

In the most recent *Star* case,<sup>50</sup> the abuse of dominance claims were dismissed and hence, an opportunity to define the relevant market went begging. However, the CCI still tried to identify the relevant market while determining whether Star and Sony had significant market power to be able to cause a vertical restraint under section 3(4). It broadly identified the market for TV channels in sports genre as the relevant market. Such identification of relevant market does not help our cause here because:

- i. Allegations were at the upstream level of distributor;
- ii. Informant's (distributor) demands were with respect to the sport channels as a genre;
- iii. There were no allegations for anti-competitive practices with respect to a particular sport or a sporting event, which is the main concern in this paper.

## 6.2 EXCLUSIVITY OF BROADCASTING RIGHTS

Antitrust laws prohibit arrangements or agreements, which lead to restriction or distortion of competition in the market or foreclosure of the market for the would-be-competitors. There might be confusion in laws that automatically come into play whenever a seller gives exclusive rights to use his product for commercial purposes. The reasoning behind this would be that since the deal creates exclusive rights not available to other competitors, this would distort competition. However, such an argument is

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<sup>50</sup> Noida Software Tech. Park v. Star India Pvt. Ltd.

fallacious since it would bring all contracts under the ambit of competition law.

The complete exclusivity, though, is definitely restrictive to competition. A standout amongst the most vital early examinations of the issue is *Nungesser*<sup>51</sup>. Refusing an exclusive permit would take away the hope from entities with licenses, which could sabotage the distribution of data. So the Court inferred that “the grant of an exclusive permit, in other words a permit which does not influence the position of outsiders, for example, parallel merchants and licensees for different domains, is not in itself inconsistent” with the antitrust law.

Therefore, the offer of broadcasting rights on an exclusive premise relies upon the exact terms and the specific market. Close regard for important economic situations is effectively the standard.<sup>52</sup> Under the weights forced by these unpredictable circumstances paving way for market definitions, the Commission set out a clear sign of its approach in a powerful 1998 paper for its emphasis on the focal purpose of proper market examination.<sup>53</sup>

Procuring exclusive rights for the broadcast of a well-watched derby match might require different dealing in contrast to the rights to telecast a game of intrigue just to a minority, for example, squash or gymnastics. The business sectors are unique: along these lines, for instance, a 5-year arrangement would be exceptionally improbable to get

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<sup>51</sup> *Nungesser v. Comm'n*, Case 258/78, (1982) E.C.R. 2015.

<sup>52</sup> Subiotto & Graf, *Analysis of the Principles applicable to the Review of Exclusive Broadcasting Licences under EC Competition Law*, 26(4) WORLD COMP. LAW & ECO. REV. 589 (2003).

<sup>53</sup> Wachtmeister, *supra* note 26.



away from the scanner of the competition watchdog in the case of the match between rival teams yet may possibly do so in normal circumstances. In a case related to the broadcast of the Dutch Eredivise League Football Matches, the European Commission held that exclusivity for seven years leads to anti-competitive effects.<sup>54</sup>

## **7. CONCLUSION: SUGGESTIONS TO PREVENT MONOPOLIZATION OF BROADCASTING**

There should be no bundled selling of rights by the league or the sports authority. Individual teams should sell their home games' broadcasting rights individually. Germany's watchdog for competition regulation recommended the football clubs to follow this practice for international telecast, and is now in line to apply this rule to domestic ones as well.<sup>55</sup> Even in the rare case of bundled selling of rights, the broadcasting rights for the number of matches in the tournament for a particular operator could be capped to a maximum number as per the tournament or the competition.

Aggregate offering has clear financial preferences; however, it has costs as well, particularly in the restrictions on competition on the supply-side. The term of broadcasting rights in the contract should be for a short and limited time-period. The length of the agreement should be closely considered: the open doors for new broadcasters to rise and obtain rights is

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<sup>54</sup> Case No IV/36.033, Commission decision of 7 August 1996 on a licensing agreement for the broadcasting of Dutch football matches, O.J. 1996 C 228; *See also* Resolution on the broadcasting of sports events, OJ 1996 C 166/109.

<sup>55</sup> *See* COMP/C-2/37.214, Commission Decision of 19 January 2005 relating to Joint Selling of the Media Rights to the German Bundesliga, O.J. 2005 L 134/46; *See also* Tackling monopolies, *supra* note 1.

a key factor of understanding the entry barriers, particularly in an industry where innovation may lead to significant development that yields both financial and experiential advantages to the buyer. The European Commission as laid down in the *Champions League* case,<sup>56</sup> expects “an open tender; an unbundling of the offer to allow more than a single buyer; no excessive exclusivity – duration of the order of three years will often be acceptable; no automatic renewal, which is often just a disguised extension of the duration of exclusivity”.

However, in case of bundled selling of the broadcasting licenses by the sports authorities at exorbitant prices, the broadcasters are left with little discretion on the price. This excessive pricing trickles down to the consumers who in turn have to shell out a fortune while subscribing to these channels. Policy regulation by the government at the licensing level is the only solution to ensure that the broadcasters get the rights at fair prices. The broadcasting rights should be awarded through a fair bidding process. A board that consists of the relevant sports authority, the broadcast authority, and the competition authority of that country should lay down the rules for this bidding process. A delegation of broadcast operators may also be represented in the board to make sure that the interest of all parties is protected through a fair representation.

The competition authority should also work for regulation of the ownership of sports teams by media houses. Although, this phenomenon is rarely seen but it should be regulated since it could lower the bargaining power of other media houses fighting for the broadcast rights of the

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<sup>56</sup> COMP/C-2/37.398, Commission Decision of 23 July 2003 relating to Joint Selling of Commercial Rights of the UEFA Champions League, O.J. 2003 L 291/25.

competition where such team participates. E.g., after the competition investigation into BskyB's bid for Manchester United, UK's Merger Authority found that the acquisition would threaten competition, against the interest of the larger public, and would sabotage the standards of British football.<sup>57</sup>

The broadcasting rights for a particular country or area should be awarded as separate rights for different territorial zones. E.g., the broadcasting rights of Olympics (a global event) are awarded to different operators in different countries. This territorial demarcation leads to diffusion of market power of the different operators if a fair bidding process is ensured in every telecast zone of the country.

Further, sub-licensing of rights in order to diffuse the market power due to exclusive arrangements might be sufficient to ensure green signal from competition authorities. However, "sub-licensing should not be regarded as a solution to all the competition issues which arise. In most cases, it will be necessary and sufficient to deal with, for example, exclusivity which is of an excessive duration or scope".<sup>58</sup>

The expected rate of growth of the sports broadcasting industry suggests requirement of immediate safeguards to prevent its monopolisation and subsequent abuse. India should take these lessons early while the industry still grows and nip the problem in the bud. Utilisation of the practices already moulded and tested by mature jurisdictions like EU and US in dealing with the sports broadcasting cases

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<sup>57</sup> Janine Gibson & Nicholas Watt, *BSkyB bid for United blocked*, THE GUARDIAN (Apr. 10, 1999) <https://www.theguardian.com/football/1999/apr/10/newsstory.sport13> (last visited Jan 16, 2019).

<sup>58</sup> Wachtmeister, *supra* note 26.

should be seen as the guiding light by the Competition Commission of India. However, since majority of the suggested changes would require legislative intervention, the road ahead does not look easy and the foremost need of the hour would be pro-active steps on part of the Competition Commission of India, considering the current market duopoly of Star and Sony and their virtual monopoly in different sub-markets.