

## The German FCO's new role as a football referee

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With the Uefa European football championship (Euro 2016) in France about to start, and with national football league tournaments, such as the German Bundesliga, having just ended, football is a particular focus of public interest in the EU. The German Federal Cartel Office (FCO) seems to share this interest and football fans will be pleased to see the authority challenging ticket pricing and restrictions to broadcasting. However, given the lack of clear guidance and the purely national relevance of these cases, this is unlikely to be the final word on European football fans' ability to access matches live or via media across the EU.

### Tickets for Euro 2016

On 22 March 2016, the FCO initiated administrative proceedings against the German Football Association (DFB) to examine the way it was selling tickets for Euro 2016. The FCO is concerned that the DFB has abused its dominant position by tying ticket sales with a fan club membership of the German national team.

In Germany, the DFB is entitled to allocate 20% of the stadium tickets for matches involving the German national team, which results in 8,000 to 15,000 tickets for each of the three matches in the group phase. Similar rules exist in other countries. As the demand for these tickets is much higher than the actual supply, the DFB implemented a lottery system. However, in order to participate in this lottery – which took place between 14 December 2015 and 18 January 2016 – the DFB required those interested in purchasing tickets for the matches of the German national team to first sign up for a fan club membership of the German national team. To become a member, fans had to pay a membership fee, consisting of a registration fee of €10 plus an annual fee of €30. The DFB said that it had implemented this system in order to make it easier to exclude fans subject to a stadium ban and to grant a loyalty bonus to fans who supposedly attended matches of the German national team regularly. As a result of this policy, more than 11,300 new members joined the DFB in November 2015.

However, soon after tickets were sold out, fans complained to the authority, which prompted the FCO to open administrative proceedings against the German Football Association. The DFB was quick to react and offered those fans who signed up after 11 November 2015 the chance of cancelling their fan club membership and of being reimbursed if they were unlucky in the lottery and did not receive a ticket for Euro 2016. However, this outcome did not address the FCO's concerns, and the regulator continues to assess whether tying the purchase of tickets to an official fan club membership constitutes an exploitative abuse of a dominant position. The FCO president, Andreas Mundt, recently summarised the FCO's concern in a public statement, saying that tying the purchase of a ticket to a paid fan club membership both

increases the total ticket price and triggers a membership fee.

Tying is a classic type of abuse and explicitly mentioned in article 102 (d) TFEU. It occurs (among other things) where a supplier makes the sale of one product dependent on the purchase of another unconnected product. Applied to the case at hand, the FCO might argue that the DFB was making the mere chance of participating in the lottery to buy tickets for Euro 2016 dependent on membership of a fan club of the German national team, arguably two unconnected products.

In order to identify an infringement, the FCO will have to prove that the DFB is dominant in the market for ticket sales, and that the dependence of the access to the lottery to ticket sales on fan club membership was indeed the tying of two unconnected products. Moreover, fans must have been coerced into obtaining the fan club membership in order to participate in the lottery and the tie must have amounted to foreclosure of competition, something which is generally presumed by the courts. Finally, the tie must not be objectively justifiable. At the EU level, there have been a number of landmark cases which dealt with tying practices (*Hilti*, *Tetra Pak II* and more recently *Microsoft*) all of which have led to high fines.

The FCO is not expected to proceed in a similarly strict manner. In the present case, the FCO's action is simply an administrative proceeding, which only allows the FCO to adopt a decision – for example, to bring the infringement to an end – but not to impose a fine. However, if the FCO decides that the conduct of the DFB was unlawful, the decision could be the basis for private damages claims if the harmed parties are able to prove causation and loss. The fact that the DFB made it possible for the membership fee to be reimbursed if no ticket is received should have no influence on the legal analysis of the FCO. Fans who obtained a ticket still stay members of the fan club.

In the end, lottery participants will actually have to pay €70 in addition to the ticket price as the lottery started in December 2015 and the ticket allocation took place at the end of January 2016. In these circumstances, fans will have had to pay the annual membership fee of €30 twice, namely for 2015 and 2016. It remains to be seen how the FCO assesses the justifications of the DFB when it comes to security issues and loyalty bonuses for fans. As there was still the possibility of becoming a fan club member and applying for tickets during the sales process, the FCO will probably disregard the loyalty argument as these new fan club members were not loyal in the past either. Also, the FCO might not be convinced by the security argument as stadium bans can be imposed and detected without being a member of the fan club. Thus, the justifications seem to be an unsuitable way of reaching the DFB's objectives. Unlike Germany, 19 out of the 24 participating countries have made their ticket sales conditional

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merely on citizenship or residency criteria. However, other countries do have similar ticket sales practices as Germany.

### “No single buyer” rule

In a separate move, the FCO announced on 11 April 2016 that it has approved commitments concerning a sales model for awarding media rights for football matches containing a “no single buyer” rule for the seasons 2017/2018 until 2020/2021. Until now, Sky Deutschland has been the single buyer of these rights and therefore held the rights for broadcasting all Bundesliga matches. The FCO was concerned that, with a single-buyer model, innovative competition, especially from internet-based offers, would be restricted. With this new move, the FCO sees itself as levelling the playing field with other EU member states, such as the UK and Italy. Given ongoing proceedings in the UK, this is at least questionable. A “no single buyer” rule was also part of the commitments imposed by the Commission decision of 2006, when the FA Premier League committed to sell six broadcasting packages but where no one buyer was allowed to buy more than five.

In Germany, Bundesliga broadcasting rights are awarded exclusively by the German Football League (DFL) according to corresponding agreements with the affected football clubs. So the clubs do not have the right to market their (home) matches autonomously. In general, such a joint selling of media rights for the 1st and 2nd Bundesliga is likely to constitute an anticompetitive agreement under German and EU competition law, unless it can be exempted for leading to a product improvement that benefits the consumer and for which the restraint of competition is indispensable to the attainment of these objectives.

During the investigation, the German League Association and the DFL submitted commitments to the FCO trying to address the FCO’s concerns as regards the Bundesliga broadcasting rights. In these commitments, the DFL offered to implement a new system that included eight separate football broadcasting packages for live coverage and nine football broadcasting packages for highlights coverage of the German Bundesliga. With this new system, alternative broadcasters could buy the rights to broadcast between 30 and 102 “attractive” Bundesliga matches out of a total of 306 available per season per league. The number depends on whether all distribution channels or just internet and mobile distribution are included.

The first bidding process is expected to end in June before Euro 2016. The winner of the bidding process is entitled to broadcast the matches via traditional terrestrial and satellite signals, as well as via internet protocol television (IPTV) and over-the-top technology (OTT) (web-TV and mobile). Consequently, unlike the last bidding process in 2012 when Sky Deutschland obtained all pay-TV rights for the seasons 2013/2014 until 2016/2017, it will no longer be possible to become the sole rights holder of all live Bundesliga matches. In the light of these commitments, the FCO saw no reason to investigate the joint selling of these rights further.

Critics claim that, in future, German football fans may have to subscribe to more than one pay-TV service to watch all live broadcasts, which would not be in the interest of consumer welfare. However, the Federal Cartel Office referred to other EU national football leagues – such as the UK Premier League

and the Italian Serie A and Serie B – where the “single buyer rule” has already been abolished and where consumers are not required to subscribe to more than one pay-TV service to watch each football game, as pay-TV operators have sublicensed each others’ rights packages. Indeed, Sky is operating a similar model in the UK, where it shares the broadcasting rights with BT Sport.

The proposed commitments did address the FCO’s concerns and the FCO approved them, while refraining from going beyond a simple “no single buyer” rule. The fact that at least one alternative bidder will be able to purchase between 30 and 102 attractive Bundesliga matches was seemingly sufficient for the FCO to discontinue its investigation. This leaves a minimum of two-thirds and a maximum of 90% of matches with a single buyer. The reasons behind this approach may well have been that, in Germany, relatively detailed and early broadcasting coverage of the Bundesliga will remain available on free-TV, as is currently the case with shows on Saturdays like the “Sportschau” on the ARD channel and “Das aktuelle Sportstudio” on the ZDF channel.

However, whether a “no single buyer” rule is an adequate and proportionate solution will hopefully be assessed in the ongoing Ofcom proceedings in England. In November 2014, the UK communications regulator Ofcom launched an investigation into whether the joint selling system of media rights of the FA Premier League is anticompetitive and infringes UK competition law. The investigation results from a complaint by Virgin Media alleging that, with the current joint selling system, a lower proportion of live matches is available when compared with other European Leagues, and that the selling of the media rights leads to higher priced pay-TV packages. A decision by Ofcom is expected by the end of 2016.

### Conclusion

The new interest of the FCO in German football and its latest enforcement is what football fans will regard as a long overdue catch-up with other EU member states, especially the UK, France and Italy where regulators have been seeking to encourage competition among local broadcasters. Whether the investigations into the DFB’s tying practices give existing ticket holders additional rights in Germany remains to be seen. The FCO seems determined to reach a decision in this case.

However, with the new broadcasting sales model of the DFL, fans appear to have already brought home a victory as the broadcasting offers are expected to become more attractive with greater variety from the 2017/2018 season onwards. Whether the commitments go far enough will be seen next season. Unlike its intentions in the ticketing case, the FCO refrained from taking this opportunity to rule firmly on the question of a “no single buyer” rule and only adds a further commitment decision to this area of law. This move will bring the investigation by Ofcom in the UK back into the spotlight, with the UK regulator looking into whether the sales model of the FA Premier League has, since 2014, led to higher prices of football pay-TV packages for consumers. It remains to be seen whether the new sales model leads to cheaper watching and whether in practice sublicences will be available. Against this background, the new German sales model will, with luck, not turn out to be a Pyrrhic victory for football fans.