The European Model of Sport Under Threat?

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Dr. Katarina Pijetlovic
Reader in Sports Law, Manchester Law School
K.Pijetlovic@mmu.ac.uk
Twitter: @katpijetlovic
EUROPEAN MODEL OF SPORT
What is European Model of Sport?

- One federation per sport, per territory
- Promotion and relegation: open leagues
- Financial solidarity mechanisms
Consequences of the European Model

• Organisational efficiency
• Easily understood by public: European champion easy to determine
• Mandate of the governing bodies in a pyramid structure
• Monopolistic position of the governing bodies
• Conflation of regulatory and commercial functions: Legal challenges
• Collective sales of broadcasting rights
• Threats of formation of breakaway competitions/leagues
The organizational market in European sports

• The structure of the market for organizational services of sporting events

• Challenges to the market structure

• Demands for innovation
THE APPLICABLE LAW
EU competition law

**Article 101 TFEU**

PROHIBITS CARTELS

- An agreement between two or more companies; or a decision by association of companies
- that has as its object or effect the prevention, restriction or distortion of competition
- and that cannot be justified.

**Article 102 TFEU**

PROHIBITS ABUSE OF DOMINANT MARKET POSITION

1. What is the relevant market?
2. Is company dominant on the relevant market?
3. Has the company committed any abuse of its dominant market position?
4. Can the abuse be justified?
Analytical framework for sporting rules: Meca-Medina

1. **Initial (prima facie)** breach of Art. 101 and/or 102 (restriction on economic freedom)

2. Are there **legitimate objectives in public interest** for the restriction? (specificity of sport plays role here)

3. Is the restriction **suitable and proportionate** to achieve those objectives?

*Restrictions will be legal if they fulfil the conditions 2 and 3.*
Hypothetical examples in the sports industry: Rules and practices that breach Arts. 101 and 102

• A governing body adopts rules prohibiting match-fixing and doping according to which any breach results in life-long ban and a fine of life-long earnings

• FA Premier League enters into exclusive broadcasting agreements for the period of 7 years

• FIA places a massive financial penalty of 50% of the contract value on broadcasters if they televised anything that can be a competitive threat to Formula One

• An International Swimming Federation adopts a rule providing that all swimmers are banned from Olympics and World Swimming Cup if they participate in competitions organised by any third party
Blocking competitors on the organisational market: Clauses used by governing bodies to maintain monopoly

1. Clauses in the rulebooks that render the access to organisational market a subject to prior authorisation, but in practice make it excessively difficult/impossible to obtain such authorisation.

2. Clauses to control factors of production needed to stage a competition, such as imposing disproportionate sanctions on athletes, clubs, and leagues for taking part in the rival event.

3. Draft their contract with broadcasters and sponsors in such way as to block the competitor in the exploitation market or make that market commercially unattractive.
Example of prior authorisation as means to restrict access to organisational market

ARTICLE 49, UEFA STATUTES (2018)

1. UEFA shall have the sole jurisdiction to organise or abolish international competitions in Europe

[...]

3. International matches, competitions or tournaments which are not organised by UEFA but are played on UEFA’s territory shall require the prior approval of FIFA and/or UEFA and/or the relevant Member Associations
- **Controlling access to organisational market**

  - A part of the legitimate mandate of the governing bodies
  - However, prior authorisation system has to be in public interest and comply with principle of proportionality
  - System will comply with the principle of proportionality if:
    - *(inter alia)* is it **based on objective, non-discriminatory criteria which are known in advance** so that the regulatory power is not used arbitrarily;
    - it **does not duplicate the control already carried out**;
    - It **does not deter the rival operators from pursuing their business plan on account of its duration and the disproportionate cost** *(C-390/99 Canal Satélite Digital)*
C-49/07 MOTO.E case

• EU competition law does not allow a rule which confers on a legal person (which organises sports competitions and enters, in that connection, into sponsorship, advertising and insurance contracts) the power to issue licenses via prior authorisation system to organise such competitions, *without that power being made subject to restrictions, obligations and review.*

• A system of undistorted competition between economic operators can be guaranteed only if equality of opportunity is secured as between them.
Example of sanctions as means to restrict access to organisational market:

ISU case (EU Commission decision, 8 Dec. 2017)


- Rule 102 (2) (ii) of the ISU General Regulations made any person skating or officiating in a non-approved event ineligible to participate in events organised by ISU
- Rule 102 (7) provided for a possibility of a lifetime ban from all ISU competitions, including Winter Olympics and the World and European Championships (Rule 102(3))
- The ISU gave itself power to impose these penalties at its own discretion, even if the independent competitions pose no risk to legitimate sports objectives, such as the protection of the integrity and proper conduct of sport, or the health and safety of athletes.
• The Commission considered that the penalties restrict both the commercial freedom of athletes and the entry to the market for the new organisers of international speed skating events.

• ‘The ISU eligibility rules restrict competition and enable the ISU to pursue its own commercial interests to the detriment of athletes and organisers of competing events.’

• ‘The ISU eligibility rules prevent independent organisers from putting together their own speed skating competitions because they are unable to attract top athletes. This has limited the development of alternative and innovative speed skating competitions, and deprived ice-skating fans from following other events.’
A series of recent cases in Europe

- *SBF v KKV* (Swedish Market Court)
- *Swedish Bodybuilding and Fitness Competitions* (Swedish Competition Authority)
- *Show Jumping Ireland* (Irish Competition and Consumer Protection Commission)
- *Global Champions League* (Belgian Competition Authority)
- *Euroleague Basketball vs FIBA and FIBA Europe* (Munich Regional Court)
ISL and FINA dispute (2018)

• ISL is “a new initiative in the world of professional swimming”
• Planned to introduce a new format of swimming competition
• A total prize and appearance money of $2.1 million with equal shares for men and women, insurance and pension plans
• Planned to grow global audience by 100 million in 5 years
• FINA Memo: FINA did not recognise ISL or its international competitions. Reference to Art 4 of its General Regs - a threat to national associations and swimmers
• Later, FINA requested $50 million from ISL over ten years, as well as event ownership and FINA-naming rights in exchange for its approval.
• Swimmers and ISL filed lawsuits in the US
• FINA complied with law
Obstacles imply European Super League may be more blackmail than business plan

Ben Cronin 30th November 2018
Example of blocking rivals in exploitation market as means to restrict access to organisational market

FIA/Formula One case

• FIA issued licences to track owners, vehicle manufacturers, organisers of motor sport events and drivers.
• License holders were allowed to organise or enter only those events authorised by FIA. Entering or organising events not authorised by FIA would mean the loss of their license and the virtual end of any commercial activity in motor sport.
• The promoters’ contracts prevented circuits used for Formula One races from being used for races which could compete with Formula One.
• Agreements with broadcasters placed a massive financial penalty, ranging from between 33% to 50% of the price paid, if they televised anything deemed by FOA to be a competitive threat to Formula One.
• FIA forced the Formula One teams to assign to it all broadcasting rights in the Formula One championship.
ANOTHER SIDE OF THE LEGAL ISSUE
Can clubs breach the law?
The FIBA challenge before EU Commission

• History
• Counter-complaint against Euroleague CA under Art 102 TFEU before EU Commission
  – Tying as form of abuse of market dominance
  – All decisions controlled by six clubs
  – Destroying value of domestic leagues
  – Discriminating against financially weaker clubs

• No EU precedents
• NRWTV Triathlon (2013) in Germany
• Greig v. Insole (1978) in the UK
QUESTION

CAN EUROPEAN MODEL OF SPORT SURVIVE?
Thank you

K.Pijetlovic@mmu.ac.uk
Twitter: @katpijetlovic