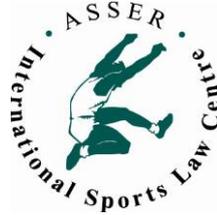


ASSER
INSTITUTE

Centre for International & European Law



Study on sports organisers' rights in the European Union

Executive Summary

February 2014



Instituut voor Informatierecht

FACULTEIT DER RECHTSGELEERDHEID - UNIVERSITEIT VAN AMSTERDAM

EXECUTIVE SUMMARY

The legal protection of rights to sporting events ("sports organisers' rights") is a contentious issue. While in recent years distinct aspects of the problem have been addressed by legislatures and courts, both at the national and at the European level, a great deal of legal uncertainty persists. Divergent views on the appropriateness, form and scope of such legal protection exist among stakeholders and other concerned parties, reflecting the complex nature and multiple functions of sports in modern society. The universe of sports and media is a complex network of social and commercial relationships with a variety of stakeholders, each one of whom can claim rights or specific interests in the value chain of organizing and exploiting sports events, such as clubs, leagues, athletes, federations, fans, media content providers, sponsors, owners of sport facilities, sports betting operators, and news media.

Consequently, the question of protecting sports events is by no means a one-dimensional legal issue, and should be framed in a broader socio-economic context. On the one hand, professional sport represents a large and fast-growing sector of the European economy – and in no small measure this is due to the commercial significance of sports media rights. On the other hand, sports are widely regarded as playing a pivotal role as a "social cohesive", an agent of communal, and conveyor of moral, values. This helps explain why major sports events qualify in various Member States as "events of major importance" for society, subject to special media rules mitigating exclusive rights of broadcasters to guarantee viewers' access to these events via free-to-air television.

The general objective of this study is to examine and critically assess a number of the most pressing questions of substantive law relating to the existence and exercise of sports organisers' rights in the EU. The specific objectives of the study are:

- To map the legal framework applicable to the origin and ownership of sports organisers' rights in the 28 Member States;
- To analyse the nature and scope of sports organisers' rights with regard to licensing practices in the field of the media, taking into account relevant EU law provisions;
- To examine the possibility of establishing licensing practices beyond the media field, notably in the area of gambling and betting;
- To provide recommendations on the opportunity of EU action to address any problem that may be identified in the above mentioned areas of analysis.

Protection of sports organisers' rights

Part 1 of the study focuses on the various types of legal protection presently available to the organisers of sports events. Property rights are the first category to be addressed. Most sports events take place in dedicated venues over which the sports organisers have either ownership or exclusive-use rights. This type of exclusivity, carrying the power to *exclude* unauthorized individuals or media from the venue and to allow entry subject to specific contractual conditions, serves as an important legal instrument of protection for sports organisers. This scheme is usually referred to as "house right" and while it has not been explicitly recognized by the courts in all Member States, it most likely exists and is enforceable everywhere in the EU.

Intellectual property rights comprise the second category. In the case of *Premier League v QC*

Leisure the (European) Court of Justice (CJ) has clarified that sports events *as such* do not qualify for copyright protection under EU law. The same does not hold true, however, for the audiovisual production, recording and broadcasting of sporting events. The images of sporting events attract the interest of constantly growing shares of TV and on-line audiences, and are often of enormous commercial value. The various media products resulting from the audiovisual recording and broadcasting of sports events give rise to a variety of intellectual property rights, especially in the field of copyright and rights related to copyright (neighbouring rights) – areas that are largely harmonized at the EU level. These rights include the copyright in the cinematographic work (film work) that, in many cases, is the result of audiovisual coverage, as well as an array of related (neighbouring) rights in the recording and broadcasting of the audiovisual registration of the sports event. While many of these rights find their origin in EU secondary law, some related rights occur only in distinct Member States, such as the special sports organisers right that exists in France under the *Code du Sport*, or the Italian sports audiovisual related right.

A third category of rights examined are so-called “image rights” - rights that protect the commercial likeness of sports players and athletes, based on a variety of legal doctrines, such as personality rights and right to privacy. While image rights form a heterogeneous legal category untouched by harmonization, most Member States do accord some level of legal protection against unauthorized commercial uses of players’ images. As recent case law in Germany and the Netherlands suggests, players or athletes can, however, not invoke their image rights to prohibit, or require remuneration for, audiovisual coverage of sports events in which they participate.

As Part 1 demonstrates, the rights and interests of sports organisers are generally well safeguarded at the substantive legal level. The “house right” gives sports events organisers and clubs (and indirectly the sports federations) a right to exclude unauthorized media from the venue, and thereby creates leverage for the event organisers to negotiate exclusive contracts regarding media coverage. In practice, these contracts may or may not provide for complete or partial transfer(s) to the sports organisers of the copyrights and neighbouring rights in the audiovisual recording and transmission of the event. Sports events organisers or their federations may, alternatively, elect to produce and distribute media coverage of the sports events themselves. Either way, the combination of house right, media contract(s), and intellectual property protection of the audiovisual recording and broadcast effectively allows the sports event organisers to enjoy complete ownership and/or control over the audiovisual rights in the sports events.

Recommendations

In the great majority of Member States the rights of sports organisers are found in the general laws of property and contracts, which are not likely to be harmonized in the EU in the near future. The same is true for the image rights of the athletes, which are protected heterogeneously, based on a variety of legal doctrines, and with only limited legal certainty, from one Member State to the next. By contrast, the laws on copyright and neighbouring rights that provide for legal protection of the audiovisual recordings and broadcasts of sports events are almost completely harmonized. This state of affairs does not, in our opinion, point to an urgent need for a harmonizing initiative.

While the calls of the sports organisers for effective enforcement remedies are comparable to those of the traditional content and information industries, the case for expedient remedies is arguably somewhat stronger here, given the highly perishable media value of many sports events, which is usually exhausted immediately with the live coverage of the event. What sports organisers, therefore, ideally want are enforcement remedies that can effectively and rapidly

terminate acts of unauthorized live streaming of events. While issues of enforcement are outside the scope of the present study, and it is doubtful that such remedies can realistically be conceived, it is recommended that these demands be assessed and evaluated in the context of a general review of the EU IP Enforcement Directive.

Sports organisers' rights management in the field of media

Part 2 of this study examines how sports organisers' rights are managed and licensed in the field of media. Regarding the marketing of sports media rights, it analytically describes the way in which these rights are sold and critically analyses the compatibility of current and evolving licensing practices with EU competition law and internal market law. Regarding the exploitation of sports media rights, it looks into the limits posed to exclusivity in order to grant access on free-to-air television for events of "high importance for the public".

The marketing of sports media rights: licensing practices

EU competition law enforcement has had a major impact on the way premium sports media rights are sold in the EU. Prior to the European Commission's precedent decisions on the joint selling of sports media rights (*UEFA Champions League 2003*, *DFB 2005*, *FAPL 2006*), the National Competition Authorities (NCAs) of various Member States had prohibited this practice on the basis of their national competition rules. The Commission, however, made clear that joint selling can be deemed compatible with EU competition law, albeit under strict conditions.

Ten years after the *UEFA Champions League* decision, the joint selling of sports media rights has become the dominant practice. Since Italy reintroduced the system of joint selling in 2010, Cyprus, Portugal, and Spain are now the last European markets in which first division football clubs sell their rights individually. Also for other sports, the individual sale of media rights is exceptional.

The comparative analysis of EU and national decisional practice reveals that for the most part the NCAs have replicated the heavy-handed remedy package designed by the European Commission. The "no single buyer" obligation, a remedy that was exceptionally imposed by the Commission in *FAPL*, is increasingly being emulated at the national level. Only with regard to the duration of exclusivity, more and more NCAs are demonstrating a readiness for a more flexible approach (i.e. by accepting exclusive rights contracts exceeding three years).

The imposed remedies, facilitated by technological developments, have effectively addressed concerns about output restrictions related to joint selling. The problem of warehousing of rights or unused (new media) rights no longer seems to be a concern. The positive impact of EU competition law intervention on the supply-side dynamics is all the more evident when considering prevailing practices in Member States where NCAs have not (yet) intervened. In these countries, sports media rights are still sold in one exclusive bundle, for a long period of time, and without a transparent public tender procedure.

EU competition law intervention has been less successful in terms of challenging existing market dynamics at the downstream level: the premium sports content bottleneck continues to frustrate markets for the acquisition of premium sports media rights. In various markets, the main vertical effect of the chosen remedies has been that in the downstream market a duopoly emerged in the place of a monopoly. This also has implications for competition in new media markets. The

emerging trend to market premium sports media rights on a platform-neutral basis favours powerful vertically integrated media content providers. This risks negating the progress that was made in enabling smaller operators to acquire earmarked packages for certain platforms.

The study also examined licensing provisions granting sports media rights on an exclusive territorial basis in light of EU internal market law. While initially the CJ's *Premier League v QC Leisure* judgment was considered a game-changer for the way in which sports media rights would be marketed in the EU, so far little seems to have changed. The English Premier League has responded by introducing new contractual provisions that, unfortunately, make consumers everywhere in the EU worse off. The *de facto* imposition of the UK "closed period" rule for Premier League matches across Europe, however, again raises questions about the public interest dimension of this old-fashioned measure and may indicate competition issues.

Recommendations

In view of the important role of the European Commission in ensuring uniform application of the EU competition rules, it is recommended that the Commission would provide guidance and/or assess (1) the increasingly divergent views of NCAs on the acceptable length of exclusive sports media rights contracts and (2) the impact of platform-neutral rights packages on access to premium content by smaller (new) media content operators.

The observation that certain rights holders, in particular those that generate significant value on the domestic UK market, have started to impose language restrictions and output limitations to ensure territorial exclusivity also deserves scrutiny.

Several Member States have codified in legislation general principles to ensure that the pro-competitive efficiency benefits of joint selling agreements outweigh the anti-competitive effects. Because it increases legal certainty, consistency, and transparency, it would seem beneficial that other Member States (especially those that have built up considerable market experience on the basis of EU competition law decisional practice) consider a similar approach.

The exploitation of sports media rights: right to short reporting

The study further analysed the right to short reporting as enshrined in Article 15 AVMSD and as implemented in the national regulatory frameworks of the 28 Member States of the European Union. Three scenarios have been tested. The first one sought to determine the conditions of access to the signal of a domestic broadcaster which has acquired exclusive TV rights on those events of high interest to the public as well as the conditions and modalities of use of the short extracts produced. The second scenario is similar to the first one, except that it involved two broadcasters established in different EU jurisdictions. It also sought to define which law is applicable to determine if an event qualifies as an event of high interest to the public. The last scenario tested the possibility for a broadcaster to get access to the venue of an event of high interest to the public to exercise its right to short reporting. In addition, the scenario checks whether the right of access to the venue extends to a right to record images in margin of the events.

The right of short news reporting is an important element of the EU legal order safeguarding the right of broadcasters to have access to "events of high interest to the public", such as important sports events, which are subject to exclusive broadcasting rights. However, the way this right is currently framed, allowing Member States the option of either mandating access to the transmitting

broadcaster's signals, or requiring direct access to the venue where the event takes place, has resulted in some differences in implementation by the Member States (i.e. on the duration of the short news reporting).

Recommendations

The right of short news reporting is an important element of the EU legal order safeguarding the right of broadcasters to have access to “events of high interest to the public”, such as important sports events, which are subject to exclusive broadcasting rights. However, the way this right is currently framed, allowing Member States the option of either mandating access to the transmitting broadcaster's signals, or requiring direct access to the venue where the event takes place, has resulted in some differences in implementation by the Member States (i.e. on the duration of the short news reporting). At the same time, the research shows that case law on the matter is limited. This could imply that solutions have been found in practice. It is therefore recommended that in a future review of the Directive the possible need for further harmonisation of the right of short news reporting be considered.

Sports organisers' rights management in the field of gambling

Part 3 of this study examines, from an EU and national legal perspective, the possibility for sports organisers to license their exploitation rights beyond the media field, notably in the area of gambling. In the last decade or so, the advent and rapid rise of online sports betting services has fundamentally altered the relationship between professional sports organisers and the gambling industry, creating commercial and promotional opportunities but also integrity threats for sport. The analysis focuses on the existence of a sports organisers' right to consent to the organisation of bets (“right to consent to bets”) and on legal limitations that restrict the licensing of other exploitation rights to gambling operators.

A sports organisers' right to consent to bets

With the enactment of a new gambling law in 2010, the French legislature, following case law precedent recognizing sports bets as a form of commercial exploitation of sports events, introduced a right to consent to bets. Apart from France, two other Member States have legally recognized a right to consent to bets, namely Poland and Hungary. Sports organisers in these countries, however, have so far no experience (Hungary) or only limited experience (Poland) with the actual enforcement of this right.

Numerous national and European sports organisers have called for the adoption of a right to consent to bets at the EU or EU-wide national level. This report dispels two general misconceptions that seem to persist in the debate on the merits of such an instrument.

First, when sports organisers advocate the right to consent to bets as a mechanism to enable a “fair financial return” from associated betting activity and to preserve the integrity of sport, the arguments are commonly framed within a perceived need for more legal protection. In essence, what is asked is the recognition of a broad-scoped sports organisers' right that would cover all kinds of commercial exploitation of sports events, including the organisation of bets. The analysis reveals however, that the financial and integrity benefits attributed to a right to consent to bets could be achieved well outside the framework of private law. A right to consent to bets can be introduced as

a regulatory condition in gambling legislation without recourse to an express recognition of a broad-scoped horizontal sports organisers' right.

Second, the right to consent to bet is not an efficient way to allocate revenue from betting to all levels of professional and amateur sport. Whatever the fee structure, the price paid in exchange for the right to consent to bets will always be relevant to the volume of bets that a sporting event is able to attract. Hence, financial benefits predominantly flow to professional sport and more particularly to the organisers of premium sports events. Small or less visible sports are unlikely to benefit from this instrument. Furthermore, there is no evidence for a link between the financial return stemming from a right to consent to bets and the financing of grassroots sports.

The review of the experiences with the implementation of a right to consent to bets in Victoria (Australia) and France further highlights a number of challenges associated with the introduction of such an instrument.

Since the exercise of a right to consent to bets is capable of constituting a restriction on the free movement of gambling services within the meaning of Article 56 TFEU, it must be justified by an imperative requirement in the general interest and comply with the principle of proportionality. The CJ has accepted the prevention of fraud as a legitimate objective justification. The financing of public interest activities through proceeds from gambling services, on the other hand, can only be accepted as a beneficial consequence that is incidental to the restrictive policy adopted. It follows that a strict regulatory framework that genuinely reflects a concern to prevent the manipulation of sports events must accompany the introduction of a right to consent to bets. Of the existing regulatory systems, only the Victorian regulatory regime clearly demonstrates a primary concern with safeguarding the integrity of sports events and is therefore recommended as a best practice model.

Regarding the institutional and operational requirements for the successful implementation of a right to consent to bets, it must be concluded that the transaction costs related to this instrument are particularly high. The integrity and financial benefits of a right to consent to bets can only be fully achieved when it is carefully managed by a national regulatory authority that:

- (1) actively prosecutes illegal betting services (including the offering of sports bets by licensed operators without the sports organisers' consent);
- (2) monitors the commercial exploitation of the right to consent to bets to prevent discriminatory or anti-competitive marketing conditions;
- (3) provides for an *ex post* mechanism for complaint handling and dispute resolution;
- (4) has the power to conduct on-going monitoring of the parties' compliance with the mutual rights and obligations contained in the contractual agreements.

Given that a number of national regulatory authorities suffer from limited staff and resources, it is questionable whether they would be capable of fulfilling this challenging task.

Recommendations

If Member States seek to secure a "fair financial return" from revenue derived from (commercial) betting or other gambling services to sport, it is recommended to put in place a centrally driven distribution system that allocates this revenue on the basis of transparent criteria (i.e. proportions and beneficiaries prescribed by legislation).

A right to consent to bets could be considered as one of the available mechanisms to protect the integrity of sport from betting-related match fixing on condition that the demanding institutional and operational requirements necessary for its successful implementation (listed above) can be satisfied. The Victorian (Australia) regulatory framework emerges as a best practice model. Yet it can only function as a partial regulatory response since it risks leaving less popular and visible sports more exposed to integrity risks.

Gambling advertising restrictions and sports sponsorship

In line with the principle of freedom of contract, sports organisers are in principle free to choose the contractual partners for the commercial exploitation of their rights. One main obstacle emerges, however. Restrictions on gambling advertising at the national level (may) create difficulties for sports organisers, clubs, and individual athletes to enter into sponsorship agreements with gambling operators.

The analysis of regulatory frameworks governing the advertising of gambling services reveals a patchwork of different national approaches. The potential for conflicting national restrictions causes in particular challenges for organisers of cross-border sports events and for clubs or individual athletes participating in such events (as they may be induced to infringe national gambling advertising regulations or breach personal sponsorship contracts).

Over and above the lack of consistency across Member States, a widely observed absence of legal certainty appears to cause the biggest problem. Even when national gambling advertising regulations exist, uncertainties remain about their applicability to sponsorship agreements. For example, only a few national gambling advertising regulations clarify the extent to which both parties to a sponsorship agreement, i.e. the sponsored party and the gambling operator, can be found liable for breaching these regulations. Inconsistencies in the enforcement of the applicable regulations make it even more difficult to anticipate the costs of non-compliance.

This legal uncertainty undermines the effectiveness of the measures that seek to protect consumers against the financial, social, and health risks associated with gambling. Moreover, it ultimately results in considerable market uncertainty and potential losses of sponsorship revenue for sports organisers, clubs, and individual athletes.

Recommendations

The EU should encourage Member States to address the generally observed lack of legal certainty as regards sports sponsorship by gambling operators in the context of their national gambling advertising regulations. It is recommended that sponsorship-related issues are included in the European Commission's upcoming "Recommendation on responsible gambling advertising". Other additional courses of action ought to be considered, in particular to facilitate enforcement co-operation between different national regulatory authorities concerning cross-border advertising of unauthorized gambling services.

Regarding cross-border sports events, further attention should be paid to the use of technological tools that may offer pragmatic solutions (e.g. virtual advertising). In any event, organisers of such events must respect national legislations. In case they induce participants in their events to infringe national gambling advertising and/or breach personal sponsorship contracts, they

should arguably be found liable and not the participant that is faced with a dilemma: respect the regulations of the sports organiser (that typically require participants to comply with the organisers' sponsorship arrangements) or respect national regulations and personal sponsorship contracts with the risk of being eliminated from the competition.

The Study on sports organisers' rights has been prepared by the T.M.C. Asser Instituut (Asser International Sports Law Centre) and the Institute for Information Law (IViR) of the University of Amsterdam, for the European Commission, DG Education and Culture.

The primary authors are Prof. Dr. Ben Van Rompuy (Asser) and Dr. Thomas Margoni (IViR). The project was led by Prof. Dr. P. Bernt Hugenholtz (IViR).

The research team consisted of three additional high-level experts and two researchers: Prof. Dr. Nico van Eijk (IViR), Dr. David McArdle (Asser / University of Stirling), Prof. Dr. Tilman Becker (Gaming Research Center, University of Hohenheim), Catherine Jasserand-Breeman (IViR, author of chapter 3), and Marco van der Harst (Asser). Further research assistance was provided by Fabienne Dohmen (IViR), Petroula Lisgara (Asser), and Tim Wilms (Asser). Annex III lists the national correspondents that also have contributed to this study.

The views expressed in this study are those of the authors and do not necessarily reflect the official opinion of the European Commission. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained therein.

