DLA PIPER

SPORT NOW

ISSUE 1
DECEMBER 2017

SPORTS NEWS FROM AROUND THE GLOBE

CONTENTS

WELCOME

WELCOME TO THE INAUGURAL EDITION OF SPORT NOW, DLA PIPER'S GLOBAL MAGAZINE FOCUSED ON ALL THINGS SPORTS RELATED FROM THE LEGAL WORLD.

In each edition our aim is to update you on developments and provide insights from our sports lawyers based around the world – from Chicago to Shanghai.

In this edition our colleagues around Europe discuss issues ranging from state aid to audio visual rights, from Asia Pacific we hear about football investment opportunities and gambling, our US colleagues focus on ticketing lawsuits and we also shine the spotlight on the issue of human rights issues related to major sporting events.

We hope you enjoy reading about the developments across the sector, and to discuss any sports-related issues in your country please feel free to contact us directly, or chat to your local contact which can be found at the back of the magazine.

NICK FITZPATRICK AND PETER WHITE
GLOBAL CO-CHAIRS OF THE MEDIA, SPORT AND ENTERTAINMENT SECTOR

> THE INDIANAPOLIS COLTS WERE SUED AFTER THEY FAILED TO PROVIDE A BROKER WITH SEASON TICKETS HE RENEWED FOR 2016, DESPITE HIS CONSENT TO AN ADDITIONALRESALE FEE.

TICKETING LAWSUITS POINT TO FURTHER TURMOIL IN THE US

RECENT YEARS HAVE SEEN A NUMBER OF LAWSUITS CONCERNING CLUBS AND TICKETING POLICIES

This uptick appears to derive from litigious reactions to various factors, including the desire of initial ticket sellers to exercise more influence on sale and resale opportunities for anti-fraud and brand-related reasons, changes in initial sales methods, stadium construction and relocations. Clubs have generally had better success in defending litigation, yet disaffected parties have not been substantially dissuaded from pursuing claims.

Resale is a prime example. Technological tools through smartphone applications, online platforms and sophisticated vendors enable ticket sellers to assert what they consider their rightful control over event access — which triggers litigation flare-ups. For example, StubHub sued Ticketmaster and the Golden State Warriors when the Warriors required season tickets to be resold through a Ticketmaster exchange and threatened to withhold playoff tickets or season renewals to noncompliant holders. A disaffected season-ticket holder sued the San Francisco 49ers after the club began to use electronic tickets with barcodes released during a window of time before games to reduce fraud. A season-ticket holder sued the New Jersey Devils after the club required all secondary market transactions to occur on the NHL Ticket Exchange. The Minnesota Timberwolves faced a class action by season-ticket holders after the club required paperless tickets and secondary market transactions to occur on the Flash Seats platform. The Indianapolis Colts, in turn, were sued after they failed to provide a broker with season tickets he renewed for 2016, despite his consent to an additional resale fee.

Clubs have generally — not universally — had the upper hand. The lawsuits against the 49ers and Devils settled, while the Timberwolves case went to arbitration. Courts ruled in favor of the Warriors and the Colts on club-friendly grounds that could be harbingers. The court in the Warriors case ruled that the supposedly affected market of "secondary" tickets for Warriors games was too narrowly defined. The court determined there were not separate markets for primary versus secondary sales, nor a stand-alone market for Warriors tickets.

As for the Colts, the court's favorable decision turned on the prevailing principle that tickets are "revocable licenses." The holder asserted a form of property rights based on his previous

> “... JUST BECAUSE TICKETS MAY BE LICENSES DOES NOT MEAN THE HOLDER HAS NO RIGHTS.”

tickets. The court disagreed, explaining that a holder takes the license under its terms — meaning that rights are affected by the grant language. The language there made clear that tickets could be revoked, or not renewed, at the Colts' discretion. The court in the Warriors litigation expressed a similar view, as have courts in litigation against the Buffalo Bills, Madison Square Garden, Seattle Seahawks and others.

But just because tickets may be licenses does not mean the holder has no rights. In a somewhat rare victory for ticket holders, a court rejected a license defense that the Seattle SuperSonics asserted against claims when the club moved to Oklahoma. That court determined that ticket purchases were made via terms that did not provide sufficient disclosure of revocation rights. A less successful holder learned the importance of a ticket's scope when claiming the New England Patriots breached his rights by videotaping game signals. The court held that the ticket only granted spectators a seat.

Governmental enforcers are showing interest in sales practices. The New York Attorney General investigated a host of practices and issued a 2016 report criticizing ticket sales approaches in multiple industries. Other state enforcers have also indicated interest, suggesting a consumer-protection appetite to examine ticketing policies. While the legal parameters to date have been reasonably clear, turmoil may be coming with this conflict of interests.

Resale price restrictions are an apt illustration of uncertainties. Some sellers have tried to impose minimum resale prices. Outdated federal law, now economically suspect, held it a “per se” antitrust violation for an upstream party to set minimum resale prices. Modern federal law removes that “per se” prohibition and affords greater flexibility and options for resale prices. Yet states may set their own rules — and some maintain greater restrictions on resale price maintenance. These differing regimes can make it difficult to determine appropriate conditions, necessitating careful review of both federal and state rules.

John Hamill

Allyson Poulos

This column originally appeared in SportsBusiness Journal.

CHANCE & CHALLENGE

CHINA'S OUTBOUND INVESTMENT IN FOOTBALL

The acquisition of a 99 percent interest in AC Milan football club by a Chinese consortium was reported as completed on 13 April 2017, marking one of the latest investments by Chinese investors in the overseas football sector. AC Milan, the 118-year-old football club, is now owned by a Chinese consortium led by a businessman named Li Yonghong. From now on, the famous "Milan Derby" has become "Chinese Derby". AC Milan's arch-rival, Inter Milan, was acquired by Chinese retail giant Suning in June 2016.

Over the last couple of years, Chinese investors have acquired substantial stakes in almost a dozen of European football clubs (including famous ones such as Aston Villa and Lyon). Chinese investors can also be seen among the shareholders of mega clubs such as Atlético Madrid and Manchester City.

One of the drivers behind such active (and sometimes aggressive) investment initiatives was China's national policy. President Xi, famously known as a football fan, turned his vision for Chinese football into national policy. On 2 October 2014, the State Council (China's cabinet) issued a decree to promote China's sports industry and reform the professional sport regime in China – the objective is to create a sports economy with an aggregate value of US$725 billion by 2025. This decree also encourages high-quality Chinese enterprises to "go abroad". The General Administration of Sport of China, in its "Thirteenth Five-year Plan for Sports Industries", announced its aim to create a sports industry accounting for 1 percent of China's GDP by 2020. In particular, two high-level national plans to promote Chinese football were issued by the Chinese government in 2015 and 2016, respectively.

Chinese businessmen with political savvy soon came to realize that sport, especially football, could be the next "big thing" for China. Since early 2015, we have seen capital flooded irrationally to the Chinese Super League, or CSL (the top football league in China). Chinese football clubs spent significantly in order to bring superstars to the CSL. For example, in 2016 Shanghai SIPG created a CSL transfer record in its €56 million signing of Brazilian striker Hulk, which was soon broken in December 2016 by Shanghai SIPG's £60 million signing of Brazilian midfielder Oscar from Chelsea. Statistics from different sources all reflect the same result that, during the 2015 and 2016 transfer window, the CSL spent more money than any other football leagues in the world.

For Chinese investors, this is more than another buying spree with hot money; they aim bigger. Suning already owns a super CSL team, and its subsidiary brand PPTV owns the TV broadcasting rights to La Liga, Premiere League and Bundesliga in China. Reports suggest that in June 2016, Suning was very close to becoming the owner of Stellar, the world's leading football agency. With these aggressive moves, Suning has evolved from an electronic appliance seller to a content provider, which now has a significant say on how Chinese football fans can be entertained. Wanda, the real estate giant and an investor in Atlético Madrid, also aims to extend its entertainment network globally by investing in the football sector. In February 2015, Wanda acquired Infrontsports, a sports marketing and management giant, whose clients include FIFA and UEFA. These examples demonstrate how the Chinese investors aim to integrate both upstream and downstream business opportunities relating to the football sector.

But every opportunity has its challenges. In December 2016, ADO Den Haag, a Dutch football club, sued its Chinese owner United Vansen for its failure to fulfil certain financial obligations to the club. The lawsuit was a result of their dispute over how the club's money should be spent. Vansen wished to use the invested capital on new facilities and players, while the club management wanted to prioritize the needs in the budget. Admittedly, Chinese investors are often ambitious and full of liquidity, but they are still "amateurs" in the football sector (neither Wanda (a real estate company) nor Suning (an electronics retailer) was a football expert, although they are catching up fast). The general practice is still to leave the operations of the clubs to their management teams. But when the Chinese owners try to intervene, there could be clashes of business mentality, commercial practice, or even culture differences. ADO and Vansen reached an agreement to solve the funding dispute in early 2017, and both of them recognized that the conflict was a result of "cultural misunderstandings".

The biggest challenge, however, came from Beijing. By the end of 2016, as the valuation of RMB against US$ plunged, the Chinese government took active measures to curb capital flight by tightening control on overseas direct investments (or ODIs) by Chinese investors. As a result, Chinese investors with ongoing ODI projects have found it extremely hard to remit capital out. The closing of the AC Milan acquisition was delayed by a few months due to such policy change. On 6 December 2016, the Chinese government held a press conference to send a strong message that the authorities would pay closer attention to irrational ODI projects in the sectors of real estate, hotel, cinema, entertainment and sports. The buying spree of football clubs has cooled down significantly since then. This unwritten policy was put in writing on 4 August 2017, when the State Council issued a Notice explicitly restricting overseas investment by Chinese investors in certain sectors, including sports clubs (the "Notice 74"). As a result, Chinese investors have found themselves in a more difficult position in bidding for overseas targets, and the sellers have generally started to ask for solid proof from Chinese investors showing that they can mobilize funds in a timely manner in order to ensure deal certainty.

Despite the Chinese government's tightened scrutiny on investments in sports clubs, some Chinese buyers have found ways to circumvent the restrictions to strike deals. According to press reports, Chinese businessman Gao Jisheng's acquisition of Premier League club Southampton was completed on 14 August 2017, right after the Notice 74 was issued. Gao is reported to have funded the deal by using his family funds in Hong Kong and overseas bank loans. The successful example of Gao's investment may encourage other Chinese investors to adopt a similar funding structure in completing in the sports sector.

It remains to be seen whether China's foreign exchange control will be relaxed any time soon as the RMBUS$ exchange rate stabilizes, but Chinese investors' appetite for European football clubs seems to remain strong. The opportunities and challenges for Chinese investors are always there, and it will be interesting to see how things unfold in the next six to twelve months.

Stewart Wang

> "CHINESE FOOTBALL CLUBS SPENT SIGNIFICANTLY IN ORDER TO BRING SUPERSTARS TO THE CSL."

> "OVER THE LAST COUPLE OF YEARS, CHINESE INVESTORS HAVE ACQUIRED SUBSTANTIAL STAKES IN ALMOST A DOZEN EUROPEAN FOOTBALL CLUBS"

FACT FILE

DLA Piper has advised over

30

football clubs globally

FOUL PLAY BY ILLEGAL STATE AID?

A SWORD OF DAMOCLES: PUBLIC FINANCING OF PROFESSIONAL SPORTS

The European Commission has recently completed state aid procedures against, up to now, seven Spanish and five Dutch football clubs. The most prominent cases concern Real Madrid, FC Barcelona, PSV Eindhoven and FC Valencia. Therewith, a start in highly political state aid procedures has been made – but this trend is not only concerned with football, but goes far beyond that. Financing of or any privileges for professional sport entities could be a classified as illegal state aid and therefore be of a material risk for sports clubs and investors. For that reason stakeholders need to thoroughly review state aid implications as this has become quite an effective instrument of European competition law. A level playing field is not only guaranteed and supervised by internal sport competition rules but also highly influenced by European law.

Tax benefits as illegal state aid?

All clubs allegedly profited from various state benefits. Four Spanish clubs were, for instance, granted tax privileges in relation to corporation tax (Commission Decision (EU) 2016/2391). The clubs concerned were, in fact, classified as nonprofit organizations by the respective authorities. This classification resulted in a lower tax burden on profits compared to the other clubs in Spain which had to convert into sport limited companies. Regarding the fact that non-profit organizations may have fewer possibilities of access to the capital market, the lack of the possibility to sell shares on the capital market for instance does not justify a different treatment of the taxable profits for certain football clubs. Once again, the European Commission has found that tax rulings may breach EU State aid rules, because a lower tax rate leads to lower revenues for the state and therefore may constitute an advantage from state resources. Insofar, these cases are reminiscent of the Commission's spectacular procedures with respect to potential tax benefits in the billions for international companies.

There is good reason for these parallels to transnational companies. The Commission considers professional football to be an economic activity. This is due to the high revenues in various economic sectors, such as advertising, the selling of television rights and the transfers of players. The sources of revenue are linked to the teams' performance in competitions like the UEFA Champions League. This creates competition between the clubs which could be distorted by potential state aid. The UEFA Financial Fair Play has a similar approach. The joint statement of UEFA and the European Commission therefore stated, that the FFP rules are "consistent with the aims and objectives of European Union policy in the field of State Aid" (European Commission, Joint Statement 21 March 2012, para. 7). Both approaches are aimed at a fair competition between financially independent football clubs. The four Spanish clubs were obliged to repay amounts, in part totaling tens of millions of euros. Even if the actions brought by the Spanish clubs against the Commission's decisions are still in the nature of current cases and have to be carefully analyzed, they already reflect the following: The Commission is serious about this matter and shows the yellow card to the public financing of professional football clubs.

Spain has already adjusted its legislation on corporate taxation to end the discriminatory treatment which shows the political effect of European state aid rules and its enforcement by the Commission. Sports clubs can no longer rely on the goodwill of the municipalities. Although state aid law has until now barely played a role in professional sport, it is now clear that Member States (and their authorities and entities) are not allowed to grant any economic advantages in this field either. State aid law is a very popular and effective instrument in the protection of fair competition, also for competitors. The Commission's numerous investigation procedures in recent years have impressively demonstrated this.

FACT FILE

To keep up to date with developments in this space, and other issues covered in this magazine, please subscribe to our **MSE blog**

Interdisciplinary competition before the Community courts

The current approach may certainly be an economic threat to government-favored professional sports clubs. The risk is obviously not limited to football. Other professional sports such as handball, basketball, ice hockey, motor sports or golf may also become the focus of state aid law. Clubs, shareholders and other stakeholders have to ask themselves where they could have received obvious or concealed grants from the public authorities.

Furthermore, different professional sports can also be in an interdisciplinary competition with regard to state aid. For example, Spanish basketball teams have recently appealed the European Commission's decision on reduced tax rates to support football clubs (Case T-845/16 QG v Commission). They generally agree with the European Commission's decision on the issue of granted tax privileges in favour of four Spanish football clubs, but their appeals concern the issue of the possibility to consolidate the accounts of clubs that participate in more than sport. Only the clubs that were able to participate in professional competitions in different sports were permitted to consolidate the accounts in respect of football and basketball. The receipts from football are therefore reduced by the losses from basketball, which leads to a reduced corporate tax to be paid. In the opinion of the appealing basketball clubs, this also constitutes an unfair advantage.

The different types of state aid

State aid law goes far beyond typical and formal subsidies under national law. It may, in particular, concern any kind of contractual service or exchange agreement with public authorities. With regard to professional sports clubs, this may e.g. be tax benefits, advantageous property purchase agreements, stadium financing or rents, the use of municipal real estate, utilization of public resources or direct grants. The same applies to huge tournaments, partially financed by public means.

Hence, state aid law's sword of Damocles hangs over all such measures. The considerable popularity of sports does, in this respect, not protect against European competition law either. The measures taken within the association and promoting more fairness among the clubs are now joined by the efforts of the Commission, being a further guardian, aiming to ensure less the sporting than the economic protection against distortions of competition.

What clubs and investors must be aware of now

Professional sport clubs and operators have to thoroughly review their contractual relationship with public authorities, bearing in mind the background of European State aid law. The risk of an aid procedure is high in the case of non-notified support for a sports club, since such proceedings can also be triggered by complaints from competitors, politicians and even individual citizens (supporters). Granting unlawful aid has crucial consequences as underlying contracts might be void. Not all engagements of a public authority could be seen as a fundamental win for the sport. State aid law is competition law and the Commission is about to ensure that authorities do not distort competition by selectively favoring one market participant over another. A level playing field is crucial for clubs who have to operate without subsidies. At the end of the day a sport infrastructure financed with unlawful State aid is constructed on fragile foundations.

Guido Kleve

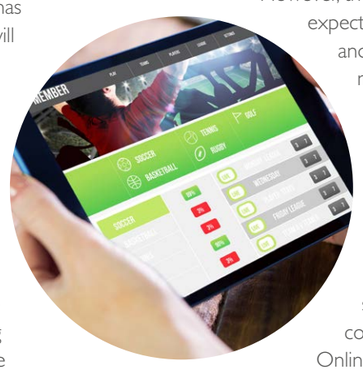
> UNDER THE PROPOSED REFORMS, GAMBLING ADVERTISEMENTS WILL NOT BE ABLE TO BE SHOWN FOR FIVE MINUTES BEFORE A LIVE SPORTS EVENT COMMENCES, DURING THE EVENT AND FOR FIVE MINUTES AFTER THE EVENT HAS CONCLUDED.

PROPOSED ADDITIONAL RESTRICTIONS ON GAMBLING

DURING BROADCAST (INCLUDING ONLINE PLATFORMS) IN AUSTRALIA

On 6 May 2017 the Australian Government announced the Broadcast and Content Reform Package which, among other things, affects the current broadcasting regime that covers gambling advertising and promotions during live sports broadcasts.

Under the proposed reforms, gambling advertisements will not be able to be shown for five minutes before a live sports event commences, during the event and for five minutes after the event has concluded. This prohibition will apply between 5.00am and 8.30pm, and applies across commercial television, commercial radio, subscription television, the Special Broadcasting Service (SBS) and online platforms.



Between 8:30pm and before 5:00am, the current gambling advertising rules will continue to apply. Under these rules, gambling advertisements are permitted in scheduled breaks in play (for example, half time) or in unscheduled breaks (for example, where play is delayed due to weather), but are prohibited during play (which includes ad hoc, unscheduled breaks such injury delays or after a goal or try is scored, a wicket falls etc.).

The current ban on promotion of live odds during play, any breaks (whether scheduled or unscheduled) and by commentators during 30-minute windows either side of the start and end of play will continue, as will the exemptions for racing-related advertisements and the advertising of lotteries.

This reform has been introduced to reduce the exposure of gambling to children, but has been limited so as not to deprive free-to-air broadcasters of an important revenue stream.

The Australian Government has proposed a period of consultation with industry stakeholders on how the changes can best be implemented. However, the Government's express expectation is that the media and broadcasting industry will make the required changes voluntarily through a process of amending broadcasting codes and standards in concert with the Australian Communications and Media Authority (ACMA), so that the changes can commence in March 2018. Online platforms have been carved out of this timeline and changes will be implemented as soon as practicable.

Further detail of the proposed consultation process and specific detail of the changes are yet to be developed and shared by the Australian Government.

Nick Boyle

SELLING AUDIOVISUAL RIGHTS

FOR SPORTS EVENTS IN ITALY

The regulatory framework

The Italian regulatory framework on the ownership and sale of sports-related broadcasting rights (in particular, on Serie A football matches) is primarily set forth by the Legislative Decree 9 January 2008, no. 9 – so called Legge Melandri ("Decree").

The Decree was adopted with the purpose of ensuring the transparency and efficiency of the broadcasting rights market and favoring competition as a result of very troubled seasons for the Italian Serie A, which saw the involvement of representatives of top clubs, referees and prominent members of the football establishment in numerous criminal and disciplinary proceedings.

To this end, the Decree introduced the system of centralized commercialization of the TV rights through the Italian Football League. Actually, the system implemented by the Decree – according to most commentators – did not lead to an effective competition in the relevant markets. This is the reason why on 18 July 2016 a bill ("Bill") aimed at revising the currently-in-force regulatory framework was assigned to the Commission of Culture of the Italian Deputy Chamber.

The tender procedure for the assignment of audiovisual rights on sports events

The procedure for the allocation of the audiovisual rights on sports events is primarily based on the following phases:

- Adoption of the Guidelines by Lega Serie A ("Guidelines");
- Approval of the Guidelines by the Italian Competition Authority ("AGCM");
- Approval of the Guidelines by the Italian Communications Authority ("AGCOM");
- Issuance of the Invitation to Offer by Lega Serie A;
- Submission of the binding offers by AVMS operators; and
- Assignment by Lega Serie A of the relevant bundles/"packages" of rights.

The procedure for seasons 2018/2019, 2019/2020 and 2020/2021

More in detail, on 17 May 2017 the AGCM (along with the AGCOM) approved the Guidelines issued for the centralized selling of audiovisual rights concerning seasons 2018/2019, 2019/2020 and 2020/2021 and regarding the following competitions:

- Serie A
- Coppa Italia (Tim Cup),
- Supercoppa
- Campionato Primavera
- Coppa Italia Primavera
- Supercoppa Primavera.

However, AGCM approval has been released subject to the scrutiny of the actual content of the Invitation to Offer and the remaining phases of the procedure.

On 26 May 2017, Lega Serie A issued the Invitation to Offer, according to which five main bundles/"packages" of rights have been set, i.e.:

- Package A: Satellite platform, including eight teams (four with the highest pool of users, one with the lowest and three newly promoted teams from the lower league – Serie B);
- Package B: DTT platform, including eight teams (four with the highest pool of users, one with the lowest and three newly promoted teams from the lower league – Serie B);
- Package C: Internet/IPTV/Wireless platforms, including the same number of teams of

FACT FILE

To compare and contrast audio visual laws around the world visit the **MSE Hub**

> "ACTUALLY, THE SYSTEM IMPLEMENTED BY THE DECREE – ACCORDING TO MOST COMMENTATORS – DID NOT LEAD TO AN EFFECTIVE COMPETITION IN THE RELEVANT MARKETS."

packages A and B above, divided in two sub-packages (C1 and C2);

- Package D: Satellite, DTT, Internet/IPTV/ Wireless platforms, including 12 teams (different from those sub A, B, C1 e C2), for a total amount of events equal to 324 (132 of which are not included in the packages A, B and C above).

In light of the foregoing, it may be argued that A, B and C packages have been set "per platform", whilst D package has been set "per product" (i.e., matches of 12 specific teams, regardless of the platform used).

This is the reason why one of the most important Italian pay-TV operators (Reti Televisive Italiane - Mediaset) appealed against the invitation to offer before the AGCM. According to Mediaset, indeed, the allocation of package D (with the highest bidding price, €400 million) "per product" would not ensure an effective competition and, in particular, would not take into account the reliefs raised by the same AGCM, according to which the assignment of audiovisual rights should be predominantly platform-based, as such criterion would determine "an actual competition in particular towards end users, who may choose among several competitive offers, without bearing the charges implied in a multi-platform subscription".

This pending litigation, regardless of the possible results, underlines the increasing relevance of the web-based exploitation of sports events which, for the first time in Italy, is afforded with a non-ancillary position compared to the traditional linear broadcasting platforms (satellite and DTT). This is also confirmed by the Bill under scrutiny.

The bill main contents

The main contents of the Bill may be summarized as follows:

New business opportunities for all players and newcomers

As stated in the Bill, "until now solely those companies holding satellite or DTT distribution platforms (Sky, Rai, Mediaset) (…) have been granted with audiovisual rights on sports events" and could "transmit Football League matches (…) Therefore, it is important to facilitate publishers, that do not hold any transmission capacity by intervening, for instance, on 'must carry' obligations, which require the operator to carry the other content providers' television channels". For these purposes, the Bill extends the right to access to third parties, platforms at fair, transparent, non-discriminatory and costs-oriented conditions to any operator, including newspaper publishers, foreign television groups, as well as content aggregators, such as Google, Apple or Facebook, even if they do not hold an ad hoc broadcasting authorization. If necessary and in any event, said authorizations may be obtained within six months from the tender for the allocation of the relevant audiovisual rights. This would reduce entry barriers for native-digital operators, also in the light of the regulatory framework set out for on-demand audiovisual media services providers and web-based (linear) TV, which, pursuant to the Italian Communications Authority Resolutions nn. 606/10/CONS and 607/10/CONS, are charged with less strict administrative proceedings and fees compared to DTT and SAT authorizations.

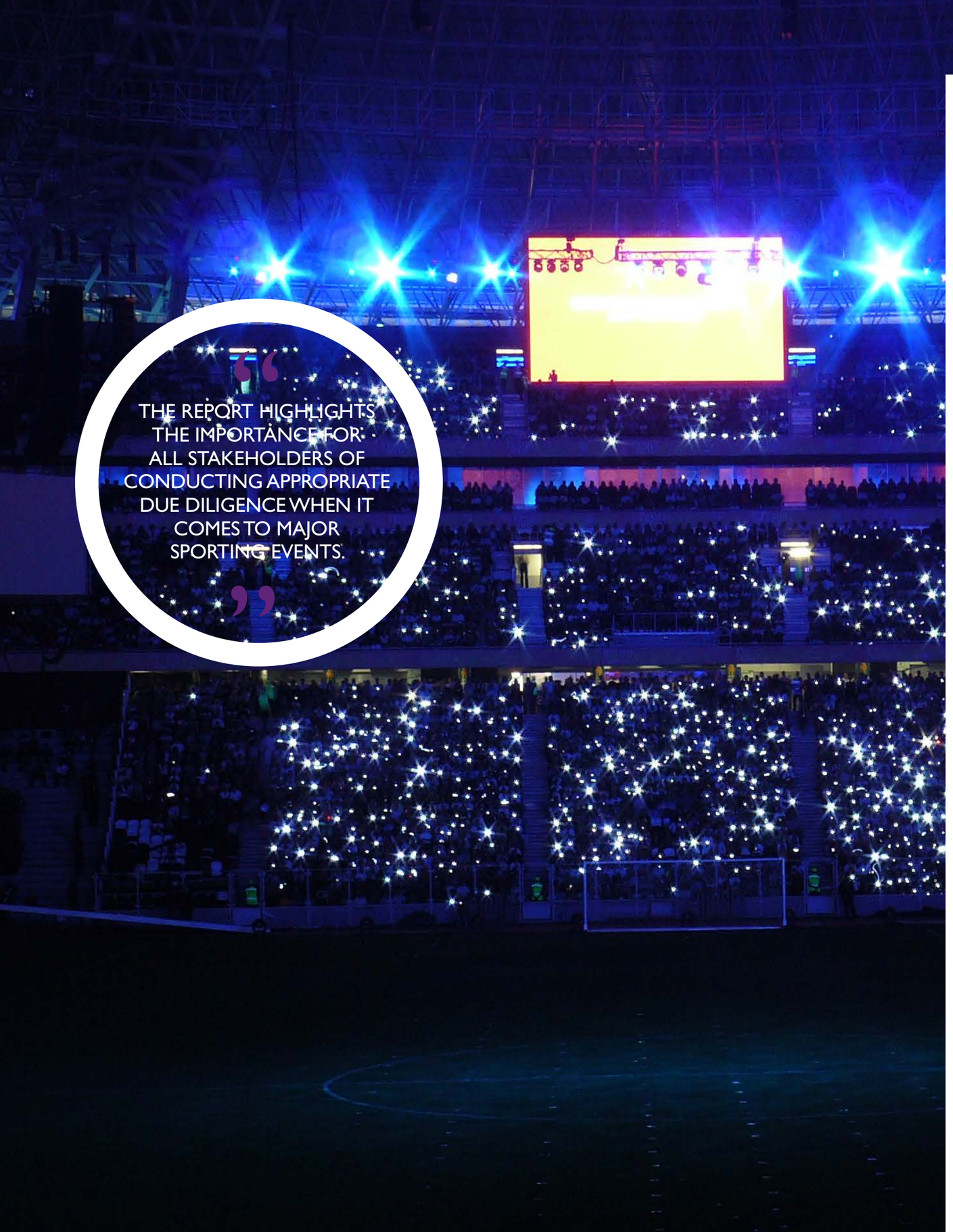
Role of the Advisor

In order to ensure more transparency to the system, the Advisor, i.e. the person / entity acting on behalf of the competition's organizer as a strategic and operational advisor for the sale of audiovisual sports rights, shall not (i) play the same role for two different organizers of the competition; and (ii) market archive and/ or sponsorship rights with clubs, while playing the role of advisor. Please note that the Bill is open to the participation of new organizers for the relevant tender procedures. The exclusive rights of the Italian Football League could be questionable.

Broadcasting of live matches free-to-air

The Bill contains a proposal aimed at periodically broadcasting live sports events on free television. As stated in the Bill comparing the internal allocation of TV rights to those pertaining to UEFA regarding Champions League, "the game will be certainly broadcast on pay television (it is not possible to prevent the allocation of all rights related to the Champions League to a sole operator) but the simultaneous broadcasting on free television of the matches would have a strong promotional function for image of national football". Moreover, it would favour competition.

> "THE BILL CONTAINS A PROPOSAL AIMED AT PERIODICALLY BROADCASTING LIVE SPORTS EVENTS ON FREE TELEVISION."



> THE REPORT HIGHLIGHTS THE IMPORTANCE FOR ALL STAKEHOLDERS OF CONDUCTING APPROPRIATE DUE DILIGENCE WHEN IT COMES TO MAJOR SPORTING EVENTS.

MAJOR SPORTING EVENTS AND HUMAN RIGHTS:

WHERE ARE WE NOW?

A report prepared by DLA Piper for the **Mega-Sporting Events Platform for Human Rights**, has highlighted the importance for sports governing bodies of identifying human rights risks in candidate cities for major sporting events.

The report, which reviewed information published by the United Nations Human Rights Council ("UN") and International Labour Organisation ("ILO") found these sources provided an important starting point for event-specific due diligence. Analysing UN and ILO literature on the Bahamas, the UK, Australia and South Africa, all of which are set to host major sporting events over the next two years, the report outlines potential human rights challenges in each country.

The report highlights the importance for all stakeholders of conducting appropriate due diligence when it comes to major sporting events. "In recent years we have seen a greater focus on social and human rights issues in the context of global events, and – once risks are identified – putting in place appropriate processes to mitigate them. International sports bodies are increasingly looking to include human rights criteria into their bidding requirements", commented Nick Fitzpatrick, Global Co-Chair of DLA Piper's Media, Sport and Entertainment Sector.

The Mega-Sporting Events Platform for Human Rights is a multi-stakeholder initiative working to ensure that actors involved in staging an event fully embrace and operationalise their respective human rights responsibilities throughout the mega-sporting event lifecycle. DLA Piper has been advising the Mega-Sporting Events Platform for Human Rights since 2016.

Nicolas Patrick, DLA Piper's International Head of Responsible Business said: "The trend in sport is consistent with a global trend toward businesses taking an increasingly sophisticated approach to managing human rights risks."

The report can be downloaded **here**.

Nicolas Patrick

Daniel D'Ambrosio

A FIRE SALE IN THE BELGIAN FOOTBALL COMPETITION?

THE STARS ALIGN FOR FOREIGN INVESTORS

On 16 May 2017, the management of the Belgian second division football club OH Leuven announced that it had reached an agreement regarding the acquisition of the club by Thai billionaire Vichai Srivaddhanaprabha's King Power Group. This sale is the latest instalment in a series of Belgian football clubs, specifically second division clubs, which have turned to foreign investors in order to avoid going under. These investors not only invest in a sector that has seen staggering surges in revenue over the past few decades, they also get to plot the strategic course for a professional football club – a special kind of thrill most will only ever experience in a video game.

We briefly discuss past legal developments, specifically the *Bosman* case at the European Court of Justice (ECJ) and the prohibition by UEFA of so-called Third Party Player Ownership (TPPO), which account in large part for the current economic reality.

Bosman case

In the Bosman case of 15 December 1995, the ECJ scrutinized (and abolished) two common practices in the world of football at the time.

The first was the transfer fee system, according to which a football player was not allowed to leave his club after expiry of his contract in favour of a club in a different Member State before the latter had paid a transfer fee.

The second practice related to a limitation imposed by UEFA on the number of foreign players that could be fielded. The so-called "3+2" rule stated that a maximum of three foreign players could be fielded, as well as two 'assimilated players' (foreign players who had played in their host country for an uninterrupted period of at least five years).

Despite vehement opposition from such parties as the Royal Belgian Football Association, UEFA and the German and Italian governments, the ECJ confirmed the applicability of then article 48 EEC (now: article 45 TFEU) on the free movement of workers to the issues at stake.

Regarding the issue of transfer fees, the ECJ stated that the rules in question constituted an obstacle to the free movement of workers because they could effectively prohibit a footballer from pursuing his activity with a new club established in another Member State.

Regarding the nationality limitation, the ECJ furthermore remarked that the distinction between employing a player and fielding him was irrelevant.

The judgment produced several consequences which lie at the basis of why many Belgian football clubs, not unlike many other European clubs, are in the financial predicament they are in today.

First of all, player salaries skyrocketed. Since players – upon the expiry of their contract – now have the freedom to choose which club to join, competition between clubs has increased substantially.

Secondly, transfer fees skyrocketed. Following the *Bosman* case, transfer fees are only allowed for players still under contract and even then within a limited timeframe. For that reason, clubs often choose to contract players for a long period of time to ensure that when talent begins to

develop, they are still in a position to move that player in exchange for a hefty transfer fee and to avoid competing clubs simply waiting out the duration of the contract. It should be noted that in Belgium, a boundary to potential abuse of an overly long duration of the contract is provided by article 3bis, 2° of the Belgian Act of 24 February 1978 on the employment agreement for paid sportspersons. According to that provision, such employment agreements may not exceed a duration of five years, although they are renewable.

Thirdly, the abolishment of the nationality restriction opened up the market significantly, and to a larger extent allowed football clubs to look for talent abroad, which drove up the price for truly talented players in the European Union even more. As a solution to the increasing price tag for domestic or European talent, many clubs saw fit to look for cheaper talent in more impoverished parts of the world, such as South-America and Africa, where football is immensely popular and where they also had high hopes of finding a diamond in the rough which they could later transfer for a significant profit.

Because of the above, combined with increased revenue from merchandising, broadcasting rights, and prize money, money became an indispensable factor in a European football team's success.

Third Party Player Ownership

Third Party Player Ownership is a system which was used to alleviate some of the financial burden of acquiring players post-Bosman. In practice, it allows third-party investors to pay a lump sum to a club in exchange for a percentage of the transfer fee gained from the transfer of that player. The advantages for clubs are twofold: on the one hand, they receive a quick injection of capital and on the other hand, they share the risk of an acquisition with third-party investors. If the player does not pan out and this lowers the value of the transfer fee then they can cut their losses without the resulting impact being devastating.

While TPPO was originally meant only to offer an investment opportunity for third parties, it quickly became clear that expecting investors to have no say in the management of the club they invested large sums in was wishful thinking. In time, FIFA began investigating the matter and in April of 2015 issued a worldwide prohibition of TPPO (although it grandfathered existing TPPO contracts). While definitely not without merit from an ethical point of view, this deprived clubs of a way to relieve the financial stress outlined above.

Economic reality

Many clubs, specifically lower-division clubs across the European Union, which already struggled to obtain revenue from merchandising, broadcasting rights and prize money, spiralled into deeper economic problems trying to keep up with the new money-dominated football. In order to stay competitive, clubs needed to be able to shell out large sums of money to attract promising players but in doing so an often unconquerable mountain of debt began to form. For investors, the issue was that they no longer had a framework within which they could invest in football, the exception being the purchase of a club in its entirety. In the Belgian second division, there have been many clubs struggling to make ends meet and history shows that they tend to accept a relatively low acquisition price. To return to our initial example: OH Leuven was sold for €7.5 million, a sum that may be recuperated in only one promising player's transfer fee. Many clubs in other European countries find themselves in a similar situation: Scotland's Rangers FC was sold for £5.5 million in 2012 and English club Leyton Orient was sold for £4 million.

Second division clubs such as OHL Leuven are not subject to the UEFA's Financial Fair Play rules (on account of their not being eligible for UEFA club competitions such as the Champions League and Europa League), which aim to prevent clubs from getting into financial troubles by sanctioning excessive spending behaviour. This means that wealthy investors have free rein to run the financial side of such clubs as they see fit. Until a similar regime comes into force for these clubs, the situation is unlikely to change.

Alexis Fierens

Senne Mennes

> "WEALTHY INVESTORS HAVE FREE REIN TO RUN THE FINANCIAL SIDE OF SMALLER SECOND DIVISON CLUBS AS THEY SEE FIT."

CONTACTS

MAIN CONTACTS

Nick Fitzpatrick
Global Co-Chair, Media, Sport
and Entertainment Sector
nick.fitzpatrick@dlapiper.com

Peter White
Global Co-Chair, Media, Sport
and Entertainment Sector
peter.white@dlapiper.com

EMEA

Nick Fitzpatrick
Partner, UK
nick.fitzpatrick@dlapiper.com

Stefan Engels
Partner, Germany
stefan.engels@dlapiper.com

Giangi Olivi
Partner, Italy
giangi.olivi@dlapiper.com

Alexis Fierens
Senior Lead Lawyer, Belgium
alexis.fierens@dlapiper.com

Diego Ramos
Partner, Spain
diego.ramos@dlapiper.com

Richard van Schaik
Partner, Netherlands
richard.vanschaik@dlapiper.com

Jamie Ryder
Legal Director, UAE
jamie.ryder@dlapiper.com

Johannes Gouws
Partner, South Africa
johannes.gouws@dlapiper.com

US

Frank Ryan
Partner, US
frank.ryan@dlapiper.com

Peter White
Global Co-Chair, Media, Sport
and Entertainment Sector, US
peter.white@dlapiper.com

ASIA-PACIFIC

Robynne Sanders
Partner, Australia
robynne.sanders@dlapiper.com

Stewart Wang
Partner, China
stewart.wang@dlapiper.com

www.dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities.
Further details of these entities can be found at www.dlapiper.com.