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The Advertising Appeal of Sports and the Legal Limits of the Incorporation of Sports in Advertising

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ABSTRACT

The aim of this work is to analyse the use of sports in advertising practise from sociological and legal perspectives. After outlining the reasons why sport is found to be such an attractive context for use in advertising, this article aims to establish the limits that law imposes on the use of sports in advertising; what threats should be borne in mind from a legal point of view when deciding to use sport in the promotion of one's goods or services. The first part of the article analyses the main findings of various pieces of sociological research concerning the key characteristics of sport and sports fans which make sport an attractive tool for advertising. The second part of this work deals with the 'official' involvement of sport in advertising including actions performed under sponsorship, endorsement, merchandising or broadcasting agreements, and aims to highlight frameworks imposed by legal regulation in order to control the three most important problems; the advertising of tobacco and alcohol in sports, ambush marketing relating to sports events and the implications of monopolistic status of most rights holders related to sport. In order to provide a comprehensive review, various levels of regulation are consulted including international and national instruments and documents enacted by international federations at the self-regulatory level.

KEYWORDS

Sport – Advertising – Tobacco – Alcohol – Ambush Marketing – Competition

INTRODUCTION: THE POPULARITY OF SPORT

It is said that 'sport has become a significant international currency' (Steven and Andrews, 1 2005, p. 4) and the actual figures correspond to this proposition. For example, the global sports industry accounts for 3% of world trade and more than 1% of GNP of the EU. To acquire the broadcasting rights to the Olympics from 1996 to 2008, NBC had to pay US\$ 4 billion. Nike contracted Freddy Adu, the 'soccer sensation', for US\$ 1 million when he was only 13 years old.

These examples represent the economic value of sport images to the global industry, 2 broadcasters and sports personalities. In fact, they also portray the value attributed to sports images by those making the actual payments - the market players, interested in employing sport to promote their businesses. They reflect how desperately businesses in a variety of markets, from car manufacturers to soft drink producers, contest to make associations with sport. And they presuppose a simple truth; the million-dollar investments are worth every cent, as they obviously produce even greater value. Sport sells because it is such a useful tool for advertising. Yet it can be questioned why this is so.

There have been many attempts to analyse the phenomenon of the popularity of sport. 3 Corvellec (1995) sees sport as a coeval and reflection of industrial civilisation, believing that the popularity of sport arises from its ability to reflect the overall values of modern society. Modern understanding of sport, he notes, is 'of the same age as industrial factories, the urbanisation process, and the development of modern means of transportation and communication'. He derives the idea of 'joint development of sport and industrial society' from the whole range of common features thereof. It is, he finds, the qualities of individuality, rationality, competition and measurement that make modern sport popular, because these categories are shared between sport and industries, as well as sport and modern society on

the whole. He also notes that the motives that determine the 'fascination of organisations for sports' are sport's suitability for 'articulating both globalness and localness', and also sport's 'aesthetic strength'.

Other authors point out additional features that explain sport's unique attractiveness as an advertising tool. First, it is the universality of the entertaining event; with sport as an ideal vehicle for capturing large audiences with its cross-cultural appeal. Second, the entire structure of sport is believed to ideally serve advertising needs; sport is attractive to consumers because of the uncertainty of outcome as well as because of its certainty in terms of scheduling, rules and commercial breaks. Third, the following features of sport provide further justification for its popularity: sport attracts devoted audiences; it is relatively cheap to produce compared to other types of programming; it shows human drama at its finest and, as Blackshaw and Crabbe (2005) claim, is becoming increasingly close to the format of a soap opera. Sport 'reveals people demonstrating limits of the body', is 'sexy and erotic' and associated with 'positive images of health and nationhood' (Steven and Andrews, 2005, p. 10). Finally, the fact that certain events in professional sports were originally presented as news events has also served as key factor in the development of sport's popularity, this being further increased by the development of more sophisticated forms of media (Whitson, 1998, p. 61).

SPORTS FANS AS CONSUMERS

Having briefly outlined the main arguments underpinning the attractiveness of sport to audiences, it must be noted that sports fans are sometimes believed to share certain categories that make them an exceptional audience: they are idiosyncratic consumers. In his attempts to analyse fans, Whitson (1998) refers to Wernick by stating that 'fans are linked to the patented cultural model, and to its imaged set of variants, by ties of loyalty which are only a more excited version of those which tie regular customers to any commodity brand'. Steven and Andrews (2005) notice that 'whether it be Summer or Winter Olympics, World Cup Soccer or Rugby, the Champions League, Super Bowl, World Series or Stanley Cup, major global sporting competitions have become regular features of our emotional calendars'. Most of us watch at least major sport events, while many do not imagine their everyday lives without it, regularly following their teams' plays and associating themselves with the sports teams and personalities, experiencing together the successes and defeats. A regular and devoted audience is of course an advantage to advertisers. Being 'devoted' could mean, for example, that if one is a fan, used to going regularly to the matches or watching the game on TV and/or following the results in the media, it is unlikely that s/he will suddenly cease such activities regardless of how much the quality of the game changes, or at least not as quickly as would occur with other forms of entertainment.

Besides the characteristics of loyalty, the sports audience is both huge and diverse. The number of spectators of popular sports, such as football, is enormous, and embodies people situated on nearly all rungs of the social ladder; sport is 'theoretically open and accessible to all, despite gender, race, class, sexuality', despite whether a person has disabilities, is amateur or professional, and despite the person's geographical location (Steven and Andrews, 2005, p. 9).

At the same time sports spectators can be specifically categorised. Some research shows that education and income are positive predictors of the direct consumption of sport (see Mehus 2005). Further, well-educated people are more likely to participate in sporting activities, with an expected spill over effect into sport spectatorship. It is also claimed that age is related to sport spectatorship, as younger people of both sexes are more likely to attend live sports events. This direct sport consumption correlates closely with indirect consumption, and the likelihood that a person will be involved in indirect consumption rises as direct consumption becomes more frequent. For example, 'spectators who participate in sport once a week are 90 percent more likely to watch sport on TV four times a week or more' (Mehus, 2005, p. 328). Therefore, most of the above-mentioned features of direct consumers of sports are probably also attributable to the indirect consumers.

Research yielding slightly different results was also performed, showing that 'the relationship between education and direct and indirect consumption of sports was negative. It was found, however, that participation in sport correlated significantly with age, the negative relationship indicating that older spectators participate less frequently in sport than younger spectators'.

Additionally, gender is seen as a strong predictor for consumption of sport, as according to some studies 'male spectators are 70 percent more likely than females to be high indirect sport consumers' (Mehus, 2005, p. 328).

Having in mind the above-mentioned findings, it is easy to note that the prevailing group of sports fans would be relatively young men, arguably earning a relatively high income; the group traditionally believed to be able to spend most, and therefore valuable to advertisers. It is easy to note also how the 'typical' consumer is reflected in the typology of goods and services being advertised during sports events; cars, alcoholic beverages and tobacco, shaving products and sportswear feature in the larger and more successful campaigns of manufacturers such as Ford, Toyota, Gillette, Nike and Marlboro. Such goods advertised with the help of sports personalities, teams and events are often associated with prestige and symbolise success, strength, respect and popularity. Even though the advertised product may be unaffordable to some fans at any given moment, the aspirational character of the presentation of the brand still benefits the advertiser by ensuring that for those who cannot afford them, these commodities will be a pursuit and a dream, whilst those who can obtain them are provided with the additional value that arises from their implicitly exceptional status amongst the targeted consumers.

LEGAL LIMITS ON ADVERTISING EMPLOYING IMAGES OF SPORT

This part of the article analyses the specific legal rules and the most important problems that advertising practices related to sport could meet in particular circumstances. The regulation of tobacco and alcohol advertising is a good subject to start with, as it has caused many debates and much trouble for advertisers. Although the two issues are governed on different legal bases and rest on different bodies of case law, they are similar in their essence: both relate to the dilemma of whether public health issues should prevail over the financial wellbeing of sports. Arguably, this suggests that, in some cases, the case law relevant to one has the potential to be applied to the other.

SPORTS AND THE ADVERTISING OF TOBACCO PRODUCTS

The 'friendship' of the sports and tobacco industries is a long-standing one. One of the first promotions of tobacco employing images of sports were the tobacco cards issued in Britain and USA in the 19th century, portraying popular sports, athletes and the Olympic Games. This expanded to other forms of advertising and the long-term involvement of the tobacco industry in sports sponsorship, including endorsement agreements with athletes by brands such as Camel, Lucky Strike, Marlboro. Today, such early advertisements would be deemed to be extremely misleading, as 'an early approach in the mass advertising of tobacco was to couple products with metaphors for health, beauty, purity, and freedom' (McQuistan and Squier, 2001, p. 101). The industry used sport to combat the emerging understanding of the harmful effects of smoking, employing the tactics of official sponsoring of motor racing, tennis, golf and other events.

According to McQuistan and Squier (2001), the first legal limitations concerning tobacco advertising appeared in the USA in 1965 and concerned warnings on cigarette packages. The elimination of cigarette advertising in television and radio broadcasting followed in 1971. Presently, the prohibitions are regulated at an international level, but it started with national attempts to impose bans.

Of course, tobacco industries immediately tried to overcome these constraints. In the USA, the tobacco industry has been able to circumvent American television restrictions through sponsorship of sporting events and by positioning advertising signage within the view of television cameras inside sports facilities (Gardiner and Gray, 2002, p. 2), whilst in the UK British American Tobacco purchased its own Formula One team in order to avoid having the status of a either a sponsor or an advertiser (Pearl, 2001, p. 16).

Sports entities also attempted to retain their tobacco sponsors. For example, after it was publicised in the media that Formula One was responsible for inducing people to smoke, the FIA's 'Melbourne Declaration' announced that they would ban tobacco sponsorship four years prior to the deadlines set by the EU if it was proven that tobacco advertising did encourage people to smoke (Action on Smoking and Health Organisation, 1998). Of course,

unambiguous evidence was impossible to present.

However such attempts to resist the ban were sooner or later overcome by additional legislation or unfavourable interpretation by the courts. Today, in many countries it would be impossible to advertise tobacco products, including the promotion in any forms employing sports. This is *inter alia* due to the enactment of regulation at the international level. Thanks to the World Health Organisation Framework Convention on Tobacco Control 2003, which has been signed by the representatives of 168 countries, the advertising of tobacco products, including cross-border advertising, has been banned. Many countries have already provided the means necessary for this, while others will have to report on the measures that they have implemented during the period between 2010 and 2012. 15

In the EU, the control of advertising tobacco products takes the form of a specialised instrument, Directive 98/43/EC of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. It must be mentioned that the enactment of this Directive was hotly debated and influenced both by the reports of various health organisations and lobbying by the tobacco industry. The Directive's predecessor, Council Directive 98/43/EC, was annulled following the decision of the European Court of Justice in *Federal Republic of Germany v European Parliament and Council of the European Union* (C-376/98, ERC 2000. Even before the new Directive came into force, tobacco advertising was banned in Belgium, Finland, France, Italy, Portugal and Sweden (Gardiner, 2006, p. 451). The Directive 'bans tobacco advertising in print media, on the radio, and over the Internet. It also prohibits tobacco sponsorship of cross-border cultural and sporting events'. Advertising is defined very broadly in the Directive. It covers 'any form of commercial communication with the aim or effect of directly or indirectly promoting a tobacco product' (Blakeley and Butler, 2006, p. 44). Concerning advertising on television, the Directive on Television Without Frontiers (89/552/EEC) applies and states directly that 'all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited'. 16

In the UK, tobacco advertising issues are directly dealt with in the Tobacco Advertising and Promotion Act 2002 and the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004/765. The latter bans nearly all forms of advertising and has survived an attack in the High Court, when evaluating whether the regulation interferes with the right to commercial speech. It was stated in *R. v Secretary of State for Health* ([2004] EWHC 2493 (Admin)) that the measures taken to protect health safety were proportionate and lawful. At the level of sports' self-regulation, the bans are also implemented in the internal documents of sports organisations. For example, the FIFA Equipment Regulations list certain types of advertisements that are banned, and advertising for tobacco-related products is among these strictly prohibited. This issue also affects advertising for alcoholic beverages. 17

SPORTS AND ADVERTISING OF ALCOHOLIC BEVERAGES

The main motives for banning alcohol advertising are in essence the same as those for banning tobacco adverts, and the regulation at all levels is similar. As with tobacco, it is also well known how brands of alcoholic beverages have been long associated with certain sporting events, for example beer with football or rugby through brands such as Carlsberg, Guinness and Heineken. It could be argued that the promotion of alcohol related to major sporting events was so successful that fans even today associate certain brands with the game despite the length of time since such advertising was banned. 18

However, the attempts to ban alcohol advertising itself, as well as banning its association with sport, were successful at least in the European dimension, because of the actions of the World Health Organisation (WHO). WHO's European Charter on Alcohol (1995), signed by all Member States of the EU, stated *inter alia*, that each Member State should 'implement strict controls...on direct and indirect advertising of alcoholic beverages and ensure that no form of advertising is specifically addressed to young people, for instance, through the linking of alcohol to sports' (Institute of Alcohol Studies, 2008). The Declaration of the Technical Consultation to the WHO on the Marketing and Promotion of Alcohol to Young People (2002) also notes specifically the importance of sports and cultural sponsorships and advocates the ban of such. 19

The EU, through the Television Without Frontiers Directive, provides that 'audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages'. Also, it is required that advertising for alcoholic beverages should comply with certain criteria, including not linking the consumption of alcohol to enhanced physical performance. At the national level, Member States are free to regulate the advertising of alcohol and sport within the framework of the Directive. Most Member States have general rules on alcohol advertising that encompass advertising employing sports. However, some of them have also stated directly in national regulatory instruments that certain forms of advertising that are related particularly to sport are prohibited. For example, Danish law prevents alcohol being associated with sport, alcohol sponsorship of sport and sports grounds, or advertising in sports magazines; the French *Loi Evin* bans the sponsorship of sport by alcohol companies; Ireland prohibits showing alcohol advertisements before sports programmes and in Portugal the advertising of beer and spirits is not permitted during sports events (Institute of Alcohol Studies, 2008). 20

It is also very important to have in mind the few decisions of the ECJ concerning issues related to alcohol advertising in sports events. They are related to French national regulation, the *Loi Evin*, which came into force in 1993 and established the ban of alcohol sponsorship/advertising at sports events inside France. In courts, including the ECJ, the issue of alcohol advertising on internationally broadcasted football matches was raised. They were primarily dealt with in several French cases: there was a criminal proceeding started against French television TF1 for broadcasting a football match between French and Dutch national teams played in a Dutch stadium with boards advertising alcohol (Manning and Taylor, 2000, p. 2). Similar issues related to the broadcast of the FIFA World Cup in Italy in 1990. However the French courts did not establish a unanimous practise concerning this. Finally, the issue of restraint of trade and free movement was raised, and the question was directed to ECJ. 21

In *Bacardi-Martini SAS, Cellier des Dauphins v Newcastle United Football Company Ltd*, (C-318/00, ECR 2003), the ECJ was asked by the English High Court whether prohibitions on the broadcast of advertisements of any form in sports events set in *Loi Evin*, as far as it applied slightly differently to foreign and local companies, were contrary to Art 59 of the EC Treaty. However in this case ECJ provided no substantive rulings, as it found that in essence the English court failed to explain how French regulation could influence its decisions. 22

However, in the following cases the fundamental question whether French legislation was compatible with the EU law was finally answered. In C-262/02, *Commission of the European Communities v French Republic* C-262/02 (ECR 2004), the Commission sought a declaration from the ECJ that *Loi Evin* was incompatible with Art 49 of EC Treaty on the freedom to provide services 'because it prevents the televising in France of sporting events taking place in other Member States if hoardings displayed at those events promote alcoholic beverages' (Hennigan, 2004, p. 257). In C-429/02, *Bacardi France v Television Francaise (TF1)* (ECR 2005), the ECJ was also asked by a French court whether the *Loi Evin* was compatible with Art 49 ECT (now Art 56 TFEU) and the requirements contained within the Television Without Frontiers Directive that Member States ensure freedom of reception and do not restrict re-transmission on their territory of television broadcasts, including television advertising. Bacardi brought the action before the French court believing that the fact that a number of foreign football clubs refused to let them rent advertising hoarding space around their pitches was a result of pressure applied by two French companies, Darmon and GiroSport. Bacardi claimed that they had instructed TF1, the French Broadcaster who on their behalf was acquiring the transmission rights to sports events, not to allow the names of alcoholic drinks to appear on television. In both cases, the ECJ held that the *Loi Evin* constituted a restriction on the freedom to provide services, however, its object was to protect public health and the restriction was appropriate for ensuring that alcohol abuse was effectively combated. 23

FIGHTING AMBUSH MARKETING

The public health issues are not the only ones raising threats to investors. One additional threat is the 'theft' of association rights, or ambush marketing. For example, the International Olympic Committee, describing the benefits to the Olympic Sponsors, points out that the Olympic rings is one of the most widely recognised symbols in the world and association with them provides unparalleled returns on an investment for sponsors, giving access to a global marketing platform (IOC, 2008a). Similar benefits are gained in other popular sport events, but the Olympic Games are definitely one of the most desirable opportunities at which to 24

advertise. Unsurprisingly the right to associate with the Olympic Games is attained for considerable amounts of money; sponsors invested approximately US\$ 866 million in the Beijing Olympics (Harris, Schmitz, and O'Hare, 2009, p. 74). After such investments are made, the sponsors as well as the organisers of the event being sponsored struggle to ensure that the benefits pursued by investors are received by the very investors, and not by any other parties that might attempt to associate themselves unofficially with the event; the ambush marketers.

Ambush marketing can be defined in different ways. In principle it 'concerns tactics used by brand competitors to spoil official sports sponsorship activation campaigns' (Lagae, 2005, p. 215). In legal terms, it is an 'unauthorised association by businesses of one or more elements of their business (usually their name, trademark or a particular product or service which they supply) with an event, team or individual' (Gardiner and Gray, 2002, p. 278). It is also known as parasitic marketing, guerrilla and vigilante marketing (Lagae, 2005, p. 216). As an example, at the 1996 Atlanta Olympics, Nike 'saved' the US\$ 50 million that official sponsors had to pay by plastering the city in billboards, handing out 'swoosh' banners for the public to wave and erecting Nike tower overlooking the stadium (Barty and Kilshaw, 2006, p12). 25

Ambush marketing can be performed using various techniques; unauthorised advertising campaigns, collaborating with the media sponsors, owning former sports personalities, distributing flags, baseball caps or flyers along the course or in the stadium and carrying out sampling actions without permission. In marketing theory, ambush marketing is divided into different types, of which, according to Lagae (2005), the advertising ambush is 'probably the most calculated form of all and aptly illustrates the shady aspect of ambush marketing'. He points out one of the many examples, American Express's campaign at the 1994 Winter Olympics with the slogan 'If you are travelling to Lillehammer, you will need a passport but you don't need a Visa!' as one of the more successful ambushes. Ambush marketing does not necessarily have to take place during a major sport event, however, usually it does so because it is the most efficient way of getting notoriety for free. 26

There are several ways to combat ambush marketing. The variety of non-legal measures of fighting ambush marketing include the use of unique logos and brand names for official sponsors, forming sponsor protection committees and creating integrated sponsorship communication strategies. Although legal means for resisting ambush marketing are referred to as inefficient, this inefficiency relating mainly to financial and time costs and the uncertainty of litigation, they are still used alongside the non-legal strategies. Legal regulation is invoked widely both as preventative tool and for punishing infringers. Sport regulatory bodies usually carry out massive media campaigns directed against ambush marketing, but also have regulations concerning impermissible actions in sporting events or in general. National authorities have also passed legislative instruments relating to the prevention of ambush marketing in relation with upcoming major sporting events. 27

Despite this, ambush marketing is very hard to control. At the Beijing Olympics, several Chinese State Authorities, including the State Administration for Industry and Commerce and the National Copyright Association of China (NCAC), helped the IOC to implement a robust brand protection programme, using domestic legislation as one of the key tools (IOC, 2008b). Despite the preparatory works of IOC and the Chinese government, ambush marketing still occurred. For example, Jamaican sprinter Usain Bolt held his Puma track shoes for the world to see three times after his victories in Beijing, although the official sportswear sponsor of the games was Adidas. As Harris, Schmitz and O'Hare (2009) comment, 'no amount of money can ensure that you are associated with the world's fastest pair of feet'. 28

Having this in mind, as well as considering the forthcoming Olympic Games in London, it is worth analysing UK legislation on ambush marketing. Of course, as Barty and Kilshaw (2006) note, the general rules in English law 'already offer considerable protection against misrepresentation and false impression of official endorsement, including via copyright, registered trademarks and designs and passing of laws'. Further attempts to protect the Olympic brand can be made by officially registering certain symbols as trademarks, for example the Olympic rings and the number 2012. However, with regard to London Olympics 2012, additional specialist legislation has been enacted. 29

The Olympic Symbol etc. (Protection) Act 1995 provides protection to the Olympic symbols, 30

mottos and certain protected words, stating that they can be infringed by the use, in the course of trade, of a representation thereof, as well as by the use of a representation of something so similar as to be likely to create an association in the mind of the public therewith. 'Association' in this sense includes any kind of contractual, commercial, corporate or structural connection. And, as again Harris, Schmitz and O'Hare (2009) note, differently from trademarks, symbols, mottos or words used do not have to act as a designation of source or origin.

Moreover, the UK has enacted the London Olympic Games and Paralympic Games Act 2006 31 which goes much further by conferring protection through a special exclusive right held by the London Organising Committee of the Olympic Games, the 'London Olympics Association Right'. The legislation prevents any other person from 'making a representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and the goods or services, or the person who provides the goods or services'. Because of the broad definition and the uncertainty of how the provisions will be interpreted by courts, concerns have already been raised as regards the effect of this Act (Harris, Schmitz and O'Hare, 2009, p. 75).

BURDENS ON ADVERTISING PRACTICES IMPOSED DUE TO THE MONOPOLISTIC STATUS OF THE MAIN RIGHTS HOLDERS

Advertising with the 'help' of sports images is also strongly influenced by the status of most 32 rights holders and the content of the agreements by which such rights are transferred. To understand the extent of the problem two types of agreements have to be taken into consideration. First, agreements with broadcasters, under which organisers of certain sports events (inter/national sport governing bodies), grant the rights to broadcast sports events to broadcasters. Secondly, agreements between sports governing bodies (or other rights holders) and the persons directly involved in the marketing of certain products, for example through sponsorship agreements. Both types of agreements tend to have some similar features that from one point of view make them attractive to persons acquiring the rights, but from another can cause legal problems. First, rights being sold and purchased under such agreements are usually monopolized; the sellers perform collective marketing and sale of rights and in some cases, such rights are also purchased collectively. Secondly, the rights are usually acquired in 'packages'. Thirdly, such agreements typically have exclusivity provisions prohibiting the grant and exploitation of such rights to market competitors. Fourthly, such agreements are usually entered into for a long term, for example, a whole playing season as concerns football, or an entire event as concerns Olympics (Schaub, 2002).

Such features of these contracts are certainly attractive to the advertisers, as they provide 33 the possibility of prohibiting competitors from benefitting from the same sporting events and maximise the effect of their own marketing campaigns. They are also the reason why the economic value of rights transferred under such agreements is so high. Because sport with its self-governance has an exceptional and internationally acknowledged status, enjoying monopolistic elements in its governance and management, advertisers can indirectly enjoy similar benefits. For instance, being the sole provider of certain category of products that is allowed to enjoy the benefits of associating with a certain sport or event. Also, when the rights are acquired from a sole existing seller and in packages, it is arguably easier to conduct advertising campaigns, the strategy usually by default unanimously covering all the channels for the message to reach the audience. In most cases it is probably also easier to negotiate, enter into agreements and implement them, when a sole rights holder needs to be contracted, provided that the acquirer is able to provide substantial financial injections.

However, it is clearly stated in the EC Treaty that cartels and monopolies abusing their 34 dominance in the EU market are objectionable practises that should be avoided. Hence due to the above-described features, especially collective marketing/selling and exclusivity, the discussed rights transfers are inherently restrictive of competition (Robertson, 2002, p. 423, 425), and *prima facie* anti-competitive. They therefore attract significant attention from national and European competition regulatory authorities. Although they are not entirely prohibited as such, entering into them requires justification. The process of entering into agreements on the sale and purchase of sports broadcasting rights is being watched closely. Such agreements can in certain cases require advanced permissions from competition authorities or can be challenged in courts and in some cases declared void.

The above-mentioned justification for entering into the agreements, following the opinion of ECJ, is likely to exist when as much variety as possible is ensured. This includes a variety of sellers, purchasers and products (rights). The agreements' provisions on exclusivity, terms of validity and sublicensing should also serve the same needs to ensure that different market participants are allowed to take part on an equal basis as far as is possible (Wachtmeister, 1998). In each case, the combination of the above-mentioned features is evaluated by competition authorities, and the actual operation and effect of the agreements rather than the formal provisions is taken into account. The position of the European Commission towards the monopolised sale of sports events' broadcasting rights is clearly stated in the *UEFA CL* (COMP37.398) and *FAPL* (COMP38.173) decisions. Both decisions concern the sale of rights to broadcast football matches, however their reasoning may be applied to most other sports that have centralised governance and rights management. In the *UEFA CL* decision, the Commission acknowledged that the rights for the matches are co-owned by the sports governing bodies and the clubs. It compelled UEFA to change the conditions of the agreements by, *inter alia*, dividing the rights to different packages that could be acquired by more than one broadcaster. The packages were formed not only by dividing rights to different games into several packages, but also by separating different 'types' of broadcasting rights, for example, broadcasting an event within one country, live broadcasting of an event abroad, delayed broadcasts of matches, match highlights, broadcasting by pay per view on cable or satellite and new media broadcasting rights including the internet and mobile phones.

In *FAPL*, attention was also drawn to the process of acquiring the broadcasting rights to sports events and a requirement was formulated that the bidding process should be 'open and competitive', and monitored by an 'independent Monitoring Trustee'. The Commission also formulated the 'no single buyer rule' that imposes a prohibition on a sole purchaser acquiring all the live broadcasting rights.

Similarly, the very practises of selling the above-mentioned rights by their owners, the sport governing bodies, are monitored by the European institutions and have been challenged by the relevant EU authorities. It is important to know the position of European authorities as concerns the permissible scope of activities of sports governing bodies. For instance, it was stated in *FIA/F1* (COMP/35.163, COMP/36.638), a case related to sports governing bodies and the transfer of rights, that a sports regulatory authority managing broadcasting rights should not also be allowed to be involved in exploiting these rights, and in such way restricting competitor events as such actions are considered to be anti-competitive practises. Further, in the *MOTOE* case (*Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, C-49/07, ECR 2008) the ECJ ruled that a 'legal person whose activities consist in organising sports competitions and in entering...into sponsorship, advertising and insurance contracts...must be classified as an undertaking for the purposes of Community competition law', despite it being related to sport and being a not-for-profit association. Classifying a sports governing body as an 'undertaking' means also that Community competition law rules apply to its activities. Accordingly, sports governing bodies cannot be allowed to both (i) organise sports competitions and enter into sponsorship, advertising and insurance contracts and (ii) have the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review.

CONCLUSION

As advertising employing sport is extremely effective as well as expensive, it has to be kept in mind that mistakes in the legal dimension could adversely affect the effectiveness of advertising. At the same time, the knowledge of one's rights could provide effective tools for protecting the legitimate interests of those investing in advertising employing sporting images. The references to the above-mentioned problems are not an exhaustive list of the problems faced by advertisers when employing sport in their promotions, however the described problems are believed to be the most typical and are of huge economic significance. Considering the poor legal restrictions on advertising employing sports in the past it can probably be stated that the present legislation and self-regulation provide a much safer environment for both the consumers of sport and the rival advertisers.

It can be seen that the regulation of the advertising of tobacco products employing sports is exhaustive and serves public health objectives rather than those of the tobacco industry and is rather successfully harmonised at the European level as well as worldwide. The same public

health motives should logically apply to the advertising of alcohol, however the regulations differ slightly. Arguably, the issue could be harmonised to a greater extent, at least at the EU level, as far as it concerns the problem of cross-border broadcasting and issues of free movement. Arguably an overall ban, that should be as justifiable as the ban of advertising tobacco, would simplify the broadcasters' activities and serve as a tool of even better protection of consumers' interests.

Ambush marketing remains the problem that, although widely regulated, is in many cases 40 better prevented by market means than legal instruments. Some might claim that the issue requires more attention and further legislation, which would enable a faster and more efficient reaction to the problem by public authorities. However this is arguable, as, first, this might mean unfounded restrictions of the actions of rival advertisers that after examination would be acknowledged legal, and, second, because in certain cases ambush marketing might be performed by actions that are potentially immoral, if not illegal, and that can be prevented only by smart marketing strategies. Regarding the monopolistic management, sale and purchase of rights, the European Commission has arguably provided enough decisions and guidelines to empower the acquirers of rights to avoid restrictive practises, and it should at least in theory serve the interests of more broadcasters willing to enter the market, as well as more advertisers being able to employ sport seeking to achieve their goals.

Finally, it is tempting to express the hope that the improving legal environment will benefit 41 sports, and, despite the regrettable commercialisation thereof, the financial capability will produce a better quality of professional sporting activities.

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