

Power struggles in football and treatment of breakaway structures under EU competition law

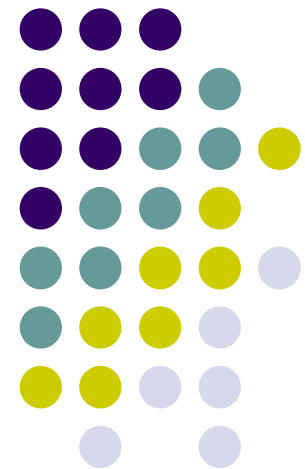
Katarina Pijetlovic, LL.M, LL.Lic.

Tallinn Law School, TTÜ

&

Simon Gardiner

Leeds Metropolitan University



The reasons for breakaway competitions



1. Media and other commercial interests are increasingly key 'drivers' – with the aim to generate income.
2. The professional elite in a sport argues that existing regulatory structures fail to fully exploit the commercial potential within the sport and/or the distribution of those commercial opportunities are not being properly distributed.

Benefits of breakaway competitions



- Exploitation of new income generation opportunities
- New mechanisms of distribution of income within clubs and players
- Innovation with new forms and strategies of the game

Disbenefits of breakaway competitions



- Development of mechanisms to secure external investment which may be detrimental to sporting values and the characteristics of the European Sports Model, e.g. closed leagues & lack of solidarity
- May adversely affect crucial sporting values such as the 'uncertainty of outcome' and contribute to the ever-increasing commodification and spectacularisation of professional sport.
- Diminish the interests of fans as major stakeholders in sport- the notion of 'fan equity'

History



- Rugby – Union & League - 19th century
- Cricket- Kerry Packer WSC - 1970s; ICL/IPL - 2007
- European Basketball – *suproleague* - 2000
- European Handball – current challenge of GCH against International Handball Federation (IHF) and European Handball Federation (EHF).

Breakaway Competitions in Football



- English Premier League – 1992
- European ‘Super League’ proposal -1998
- ‘Atlantic League’ – proposed 2000/01
- ‘Royal League’ – 2004-2007 ...
- Breakaway of Italian Serie A from Serie B – 2009
- European ‘Super League’ proposal mark two- 20??

Integrity of Sport



- Essentially breakaway competitions are a location for a battle over the *integrity* of a sport and in this case, European football. Should it be trusted to traditional, albeit monopolistic forms of governance, or should alternative actors emerge to provide new locales of provision that are not sanctioned by the former.

Underlying premise: The pyramid structure in football is unsustainable



1. Breakaway Super League in football: a matter of time?
2. Influence of the elite clubs is decentralising the governance of football
3. Reasons cited in support of maintenance of the structure are questionable
4. Some negative aspects of the pyramid structure
 1. *ultra nationalism and violence*
 2. *a break on Social Dialogue at European level*

Rules preventing formation of alternative structures



Art. 49(1) of the UEFA Statutes

“UEFA shall have the sole jurisdiction to organize or abolish international competitions in Europe in which Member Associations and/or their clubs participate”.

Art. 49(3) of the UEFA Statutes

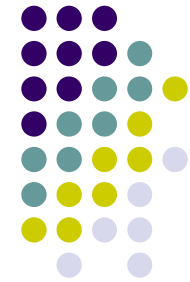
“International competitions and international tournaments which are not organized by the UEFA shall require approval of the later”.



The question is...

- Whether the rules of sporting federations which prevent, restrict or condition the creation of breakaway structures violate Articles 81 and/or 82 (i.e., should the clubs be allowed to ‘take the ball and go home’ and under which conditions, if any)?

What is the legal test against which the legality of the rules should be assessed?



No precedents in EU law directly address breakaway structures in sports, but...

- C-250/92 **Danish cooperatives case (1994)** – concerns application of EU competition law to breakaway structures in agricultural sector
- C-519/04 **Meca-Medina case (2006)** – concerns application of EU competition law to sporting rules
- Policy statements and soft law guidance, notably **White Paper on Sport (2007)**, Annex I, 2.1.2
- Cases on sports law decided under Internal Market rules

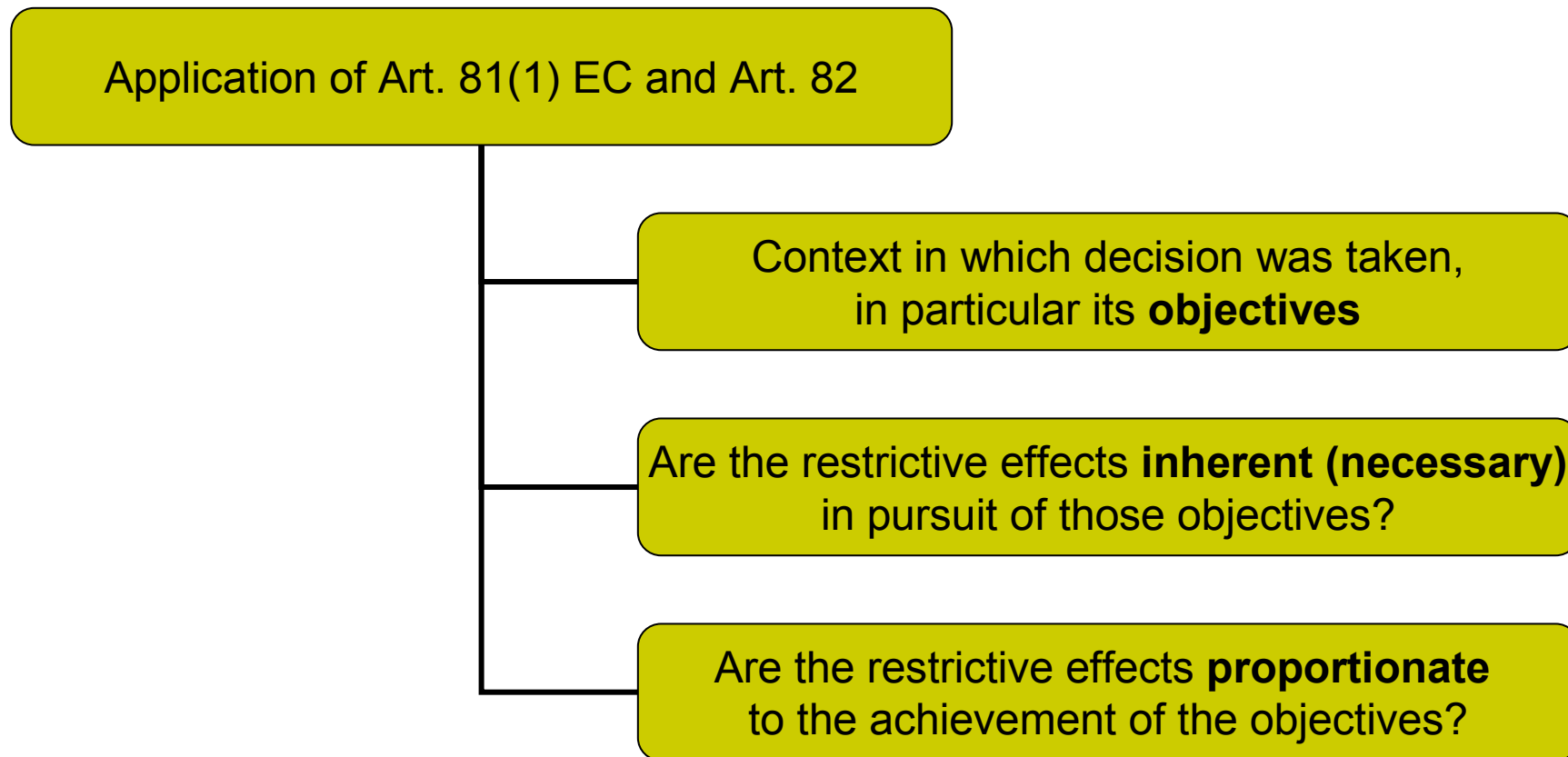
Commission White Paper on Sport (2007) Annex I, para. 2.1.2. on application



- Step 1: Is the sports association that adopted the rule to be considered an “undertaking” or an “association of undertakings”?
- **Step 2: Does the rule in question restrict competition within the meaning of Article 81(1) EC or constitute an abuse of a dominant position under Article 82 EC?** This will depend on application of *Wouters* test in para. 42 of *Meca-Medina*
- Step 3: Is trade between Member States affected?
- Step 4: Does the rule fulfil the four conditions of Article 81(3) EC?



Test under C-519/04 *Meca-Medina*, para 42



(Fact-specific) test under C-250/92 *Danish Cooperatives* case



Application of Art. 82 to the rule of dominant association prohibiting its members to participate in other forms of organized cooperation

Objective was to counterweight the purchasing power of the large producers in a market where price varied according to volume of orders

Rule restricted to what is necessary to ensure proper functioning of cooperation?

...and to ensure maintenance of contractual power over the large producers?

Objectives of UEFA Statutes Art. 49 - legitimate and worthy of protection?



- Vertical and horizontal financial solidarity mechanisms
- Effective organisation of sport
- Preservation of traditional European model of sport
- Socio-cultural functions of football (Fans, youth, health, education, culture, social inclusion, fight against racism...)

Some of the objectives are a part of UEFA mandate the fulfillment of which requires financial contributions obtained through collective sale of broadcasting rights

Are the restrictions caused by Art. 49 UEFA Statutes inherent in the pursuit of the objectives?



In other words, could the objectives be adequately taken care of in the absence of the rule under Art. 49 UEFA Statutes?

The ECJ would decide this question *a priori* on the basis of conflict between the policy goals to preserve the structure and the need to accommodate rapidly changing Regulatory and organisational requirements of the sector??



Are the rules proportionate?

- ... in other words, are there any other, less restrictive means to achieve the objectives?
 - Impose conditions instead of restrictions!
- Preliminary question in full proportionality test would be is the rule even suitable, i.e., capable of achieving the objectives?
 - History of breakaway threats demonstrates that they are probably not suitable

How to amend the rules to pass the proportionality test?



- Create a possibility for the teams to participate in/create alternative structures without becoming liable to financial and sporting sanctions, but rather a subject to fulfillment of proportionate conditions
- The conditions should be confined to fulfillment of the objectives which are the necessary for the restrictive rule

Additional/coincidental constraints on elite clubs breaking away



- The social aspect of football and the solidarity mechanisms are also acting as a constraint on breakaway desires of clubs in a different way:
 - a) The concept of special responsibility of dominant undertakings under Art. 82 also applies to collectively dominant undertakings
 - b) Corporate social responsibility of individual clubs



Conclusion

1. **When the rules under Art. 49 of UEFA Statutes are assessed under EC competition provisions they will:**
 - **be considered as justified by legitimate objectives...**
 - **...only some of which are necessary in the pursuit of those objectives**
 - **but will fail proportionality test and thus be considered in breach of Art. 81(1) and 82.**
2. **The rules cannot restrict formation of alternative structures in sports by making them liable to penalties and sanctions but can make such formation subject to proportionate conditions necessary in the light of legitimate objectives.**

Thank you!
Any questions?

Katarina Pijetlovic, LL.M., LL.Lic.

katarina.pijetlovic@ttu.ee

Simon Gardiner

s.gardiner@leedsmet.ac.uk