

Rule 40 versus European Competition Law: A New Challenge to an Ongoing Sponsorship Concern

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Aim

Ever since the London 2012 Olympics, implementation of Rule 40.3 of the Olympic Charter has raised ongoing concerns about advertising restrictions placed on athletes' abilities to acknowledge their personal sponsors. Specifically, Rule 40 prevents an athlete from allowing his person, name, picture, or sports performance to be used for advertising purposes during the Olympic Games by brands who are not official IOC sponsors. Whilst such restrictions serve to prevent ambush marketing and protect official partners' exclusive rights in the increasingly complicated space of Olympic sponsorship (Grady, 2017), athletes assert that their marketing rights are too restricted as a result of Rule 40 and demand additional commercial flexibility with regard to their sponsors. Protests by athletes challenging Rule 40 mostly have taken place in the public relations sphere. German regulators, however, recently took aim at the restrictiveness of the rule's application during the Rio 2016 Games. In late 2017, Germany's Federal Cartel Office, acting on a complaint filed by the German sporting goods industry, took legal action against the German Olympic Sports Confederation (DOSB) and the International Olympic Committee (IOC) asserting an "effective monopolisation of marketing rights during the Olympics" and "an abuse of the dominant position of the DOSB and IOC," resulting in subsequent harm on the earning abilities of athletes ("German cartel office claims win ...", 2017).

Purpose

This presentation analyses the legal merits of the German cartel office's complaint and understand how competition law was applied in this case in favor of the athletes. Using comparative legal analysis, the researchers explore how other competition laws within the EU could be effectively used to challenge Rule 40, thus causing the IOC to have to reexamine the role of Rule 40 in preventing ambush marketing at future Games.

Background

Enforcement of Rule 40 has not typically been challenged by legal means. It has been handled through a delicately negotiated process between athletes, Olympic officials, and their National Governing Bodies (NGBs) who are charged with enforcing compliance with all Olympic rules. Significantly, each NGB has discretion in how they implement Rule 40 for their athletes within the home country and its advertising space. Rule 40 was relaxed by the IOC for the Rio 2016 Summer Games, which provided additional commercial flexibility for athletes and their personal sponsors. Yet, German regulators still took the novel legal step in challenging Rule 40 and to question how it is being implemented by Olympic officials going forward. This leads to a need to further understand how European competition laws can be used to challenge enforcement of Rule 40 and to question whether other European countries are likely to follow suit.

Competition laws play an important role in European competition policy. Unlike the U.S. anti-trust laws, which primarily focus on market efficiency, European competition laws seek to achieve market integration but also emphasize consumer welfare and fairness (Van den

Bergh & Camesasca, 2001). Most European competition laws exist as a means for the state to intervene in market processes in order to achieve public goals. For example, "Germany developed competition laws earlier than other European systems and German competition laws are considered the best developed and most effectively enforced system in Europe" (Gerber, 2007, p. 445). As the Federal Cartel Office (FCO) is the central institution in the administrative enforcement system, the Rule 40 challenge is a recent example of the FCO's enforcement power.

Implications

The initial legal challenge within Germany demonstrates the potential for other European countries to successfully challenge Rule 40 as a violation of competition laws. In particular, "it could lead to a domino effect where similar decisions are made across Europe" (Butler, 2017). For example, Section 5 of the Irish Competition Act 2002 similarly prohibits the abuse by one or more undertakings of a dominant position, leaving legal experts to question if the Irish Competition and Consumer Protection Commission may also consider Rule 40 with regard to Irish athletes in advance of the Tokyo 2020 Games (Fry, 2018). Moreover, given the expansion of private enforcement options under EU competition laws, the decision seems to empower athletes to continue to challenge rules they see as "too restrictive in their detail, [where] the athletes and their potential sponsors could be abused and the marketing of the individual restricted" (Butler, 2017). From a practitioner perspective, the German complaint shows little hesitation by regulators to challenge established Olympic rules when potential abuses exist. The legal challenge further supports the need for additional flexibility to support Olympic athletes' commercial opportunities. There is also a potentially significant impact on the European sport sponsorship landscape, raising complex legal and sponsorship issues. For example, if the sponsorship concerns a specific event, the host country's laws may be applied (Vieweg, 2018), necessitating a nuanced understanding of the host country's competition laws regarding athlete sponsorship and advertising.

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