CASENOTE

CASE ASSOCIATES
COMPETITION & COMMUNICATIONS ECONOMISTS
in association with ECONOMISTS Inc., Washington D.C.
www.casecon .com

Competition Issue 24

November 2001

MARKETS IN SPORT

Competition Act 1998 case finds snooker body dominant

In *Hendry, Williams & Sportsmaster Network v WPBSA* Mr J. Lloyd found that the World Professional Billards & Snooker Association (WPBSA) was dominant in *"a relevant market ... between professional snooker players and promoters of snooker tournaments*", and that it had abused that dominance. This decision is of interest on two counts – it is one of the first under the *Competition Act 1998,* and its discussion of market definition/power in sport.

The facts

The WPBSA is a professional players' association representing all professional snooker players world-wide, and it is the main organiser of professional snooker tournaments. The Claimants had sought to set up their own tournament series, and alleged that the WPBSA's rules and actions had acted to prevent this, and that various rules were an abuse of their dominance. The rules related to the sanctioning of tournaments (Rule A5), the players' ranking system, logos and advertising (Rule P), and players' interviews/promotional work (Rule S). Prior to trial the WPBSA withdrew Rule A5 and admitted its dominance in the market for organising and promoting tournaments, but at trial withdrew this admission. Lloyd J found the WPBSA's sanctioning rules were an abuse, but not the others.

Application of competition rules to Sport

As the EC Commission has accepted, not all restrictions administered by sporting bodies are anticompetitive, and there are grounds for limiting the application of its competition rules to sport. However, this does not amount to either an exemption or automatic clearance for any conduct. Many sports bodies are in dominant positions even though many restrictions may be justified in the best interests of the sport.

The Defendant claimed that because the WPBSA in its "commercial" activities was a non-profit body acting in the best interests of the sport, it would not abuse its dominant position. That is, competitive conduct could be inferred from the status of an organisation. This formalistic position was correctly rejected by Lloyd J who declared that the *"status of the WPBSA is irrelevant; what matters is its activities".*

Regulatory v. commercial roles

The case raised the issue of professional sporting bodies which both regulate and commercially exploit a sport. The dual role of the WPBSA as regulator and tournament organiser created a potential conflict of interest. The EC Commission's recent analysis in *Formula One* concluded that this could distort competition sufficiently to require the complete separation of the two functions. While no decision was published in the Formula One investigation because the complaint was withdrawn, the EC Commission negotiated complete separation of the sport's regulatory and commercial functions in two unrelated bodies. Lloyd J. however, did not draw on *Formula One*.

The issue was tackled from a different angle. The Defendant argued that as a rule-making body the WPBSA was replaceable, and therefore did not have the ability to leverage its regulatory powers to create barriers to entry to its commercial activities. Indeed, as was pointed out, the third Claimant had sought to become the regulator of the sport as part of its bid to set up an alternative tournament series! Lloyd J rejected this argument concluding that third party statements and plans to replace the WPBSA did not mean they were commercially realistic or realisable, and in any case could not be carried out with the *"degree of ease"* sufficient to provide a practical competitive constraint on the WPBSA. Each restriction was to be assessed on the basis of its reasonableness and competitive impact.

Relevant market

In the proceedings there was considerable discussion as to what were and were not relevant product markets. Since the rules covered players, tournaments, broadcasting rights and sponsorship, inevitably a large number of product markets were identified.

The Defendant argued that the WPBSA in its commercial role did not operate in any relevant market affecting players and/or tournaments. It claimed that the WPBSA was not a buyer of players' services - players entered tournaments induced by prize money – but was the players' "agent". Therefore, since there was no buyer/seller relationship between the WPBSA as tournament organiser and players; there was no relevant market!

While in a contractual sense there was not a standard buyer/seller relationship (as indeed there was not a principal/agent relationship), there was a commercial and market relationship which had competitive significance. The WPBSA as a tournament organiser induces players to participate in tournaments, and sells a range of services to broadcasters, sponsors and fans. In these activities it competes with other commercial tournament organisers and with them for players' services as the critical input to organising a tournament.

The key market identified by Lloyd J was the market for professional snooker players' services, although he did not express it as such. All the restrictions affected players. Consistent with precedent, cases involving restrictions on players typically confine the relevant product market to the sport in question. The ability of a professional sports person to transfer to other sports or occupations within the time period required of competitive analysis is negligible, and therefore common sense and economics dictate that the market be confined to the sport. Since the WPBSA had a persistently high share of professional tournaments, it was found dominant.

You take the downstream and I'll take the upstream

The Defendant argued that the "downstream markets" of sponsorship and broadcasting were the relevant markets for competition law purposes. Since broadcasters and sponsors had close substitutes to snooker, the market was claimed to be wider than snooker, and therefore the WPBSA was not dominant. This claim was flawed because the alleged restrictions operated on the "upstream market" for players' services and tournaments, and not these "downstream markets". Therefore, the discussion relating to these markets by the defendant had only a tangential bearing on the core competitive issues.

The Defendant's focus on "downstream markets" would be appropriate only if the competitive abuse concerned restrictions on or complaints from broadcasters or sponsors. However, clearly if the restrictions operate in an *input* market (an upstream market), then it is this market which is the beginning, focus and core of any relevant and meaningful market definition/market power assessment. The fact that a broadcaster can substitute other sport and entertainment programmes to gain the same audience as snooker is irrelevant to whether a professional snooker player can escape a restrictive condition by applying his skills to another sport. In short, market definition must be undertaken from the perspective of professional snooker players not the final consumers of snooker tournaments.

The need to distinguish functional markets

In reviewing decided cases it is apparent that some confusion has arisen on how to examine markets in sport involving players' restrictions and/or the setting up of a new league. The question is often posed in terms of whether one sport can be considered a substitute for another. But as the OFT's *Market Definition Guidelines* (OFT 402) make clear the inquiry must start with the complaint or product/service supplied. In this case the restrictions inhibited players' choice and mobility, and in turn the position of rival tournament organisers. Further, the issue which must be addressed in these cases is not whether a seller can profitably raise price, but whether a hypothetical buyer (a monopsonist) of the services of all snooker players could profitably depress players' wages/remuneration by five to ten per cent. Finally, the test does not require that the actual sports body be a profit seeking buyer, only whether the hypothetical profit maximising buyer seeking to cartelised the market could raise price and increase profits.

In several recent cases the courts have erroneously assessed the competitive impact of restrictions on players by looking at downstream markets. For example, in the Australian *ARL SuperLeague* case (see Casenote 1), an action was brought by a broadcaster (News Ltd) seeking to set up an alternative league competition to gain broadcast rights. The judge looked at a host of downstream markets to conclude that rugby competed with many other sports as far as the groups of final consumers were concerned, perhaps because the Claimant was a broadcaster. This judgment has been heavily and correctly criticised – the judge asked the wrong questions, looked at the wrong markets, and came to the wrong answers. Mr J Lloyd did not make these mistakes; gaining one of those rare English sporting victories over the Australians.

Dr. Cento Veljanovski appeared as expert economist witness for the Claimants instructed by Maclay Murray Spens with Counsel Philip Shepherd QC and Fergus Randolph.

C A S E A S S O C I A T E S

are an economics practice providing advisory, strategic, and economic assistance in competition and regulatory proceedings from offices in London, Washington and Hong Kong. A description of Case's services and earlier Casenotes be found on http://www.casecon.com. For further information or to discuss a specific assignment contact:

Dr. Cento Veljanovski on + (44) (0) 20 7376 4418 or cento@casecon.com