



HERBERT SMITH FREEHILLS COMPETITION LAW MOOT 2020

## Problem Question

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**RURITANIA IS A FICTIONAL MEMBER STATE OF THE EUROPEAN UNION AND  
THE OFFICIAL LANGUAGE OF RURITANIA IS ENGLISH**

**REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION UNDER  
ARTICLE 267 TFEU FROM THE RURITANIAN HIGH COURT IN THE CASE OF:**

*Sport Europe Ltd v Ruritanian Cricket Board Ltd.*

### Introduction

1. The following paragraphs set out the factual and legal background to the questions referred to below, together with a summary of the parties' submissions to the Ruritanian High Court.
2. The case raises a number of issues relating to the interpretation of Article 101 TFEU in the context of the licensing of online broadcasting rights. These issues form the subject matter of the reference.

### Background

3. The Ruritanian Cricket Board Ltd ("RCB"), a limited liability company incorporated and established under the laws of Ruritania, is the governing body that organises the Ruritanian Professional Cricket League ("RPCL") – the leading professional cricket competition in Ruritania, a fictional Member State of the European Union. The RCB organises official commentary of each of the RPCL matches in English, the official language of Ruritania.
4. Under Ruritanian law, the RCB holds all of the intellectual property rights relating to the RPCL. These rights include the exclusive right to broadcast the RPCL to the public by any medium – including by cable, satellite and terrestrial television services, as well as through online broadcasting services.<sup>1</sup>
5. Sport Europe Ltd ("Sport Europe") is a limited liability company incorporated and established in Ruritania. Sport Europe's core business focusses on providing consumers with a range of satellite sports TV packages which enable customers to watch live major

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<sup>1</sup> All intellectual property rights are assumed to be valid and enforceable. Furthermore, compulsory licensing is not possible in Ruritania.



competitions, among others in football, basketball, volleyball, golf and tennis. Sport Europe's services are available on a subscription basis across the EU. Subscribers are charged a monthly fee dependent on the package of services for which they subscribe.

6. In an attempt to broaden its potential customer base and to offer innovative ancillary services to its subscribers, in addition to its core TV broadcasting services, in 2012 Sport Europe began investing in the transmission of digital content via its website *www.sporteurope.co.mn*.
7. These services enabled customers who had subscribed for sports TV packages from Sport Europe to access additional sports content via a subscriber-only log-in portal on Sport Europe's website. In order to access the subscriber-only content, subscribers needed to set up a web account, by: (i) providing a valid email address; (ii) creating a password; (iii) providing their TV subscription customer reference number; and (iv) indicating their residential address, including country.
8. Sport Europe considered the move to digital as being one of the next big competitive challenges for the sports broadcasting industry. By investing early in digital content it hoped to get a first-mover advantage in the market with a view to establishing a position as the foremost digital broadcaster of sports content in the EU. To this end, Sport Europe's long-term aim was to replicate its satellite TV services via its website. At its conception, due to technical limitations – in particular, the limited roll out of broadband services across its subscriber base – Sport Europe's principal online broadcasting content was limited to the transmission of audio commentary of sporting events. Sport Europe marketed this service as an alternative to radio commentary services that remained popular in many EU Member States.
9. In 2013, Sport Europe approached RCB to discuss the possibility for Sport Europe to include RPCL matches in its satellite television packages and to broadcast, live, the official (audio only) commentary in English via subscriber-only log-in portal on Sport Europe's website. Sport Europe considered that expanding its portfolio to include cricket – and in particular RPCL matches – would add considerable value to its business by enabling it to capitalise on the growing popularity of the RPCL across the EU. Following negotiations, in 2014 the RCB granted Sport Europe: (i) a ten-year non-exclusive licence to broadcast the RPCL on satellite television throughout the EU (the "TV Licence"); and (ii) a non-exclusive licence to broadcast live the official (audio only) English language commentary of RPCL games in Ruritania through its website for 10 years (the "Commentary Licence").
10. The Commentary Licence, governed by the law of Ruritania,<sup>2</sup> contained the following clauses:

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<sup>2</sup> It can be assumed that all clauses of the contract are valid under Ruritanian national law and can be read plainly.



### **Clause 1: Definitions**

**Content:** means the live official English language audio commentary of RPCL matches;

**Licence:** means the rights as described in Clause 2 of the present agreement;

**Licensee:** means Sport Europe Ltd;

**Licensor:** means Ruritanian Cricket Board Ltd;

**Parties:** means Sport Europe Ltd and Ruritanian Cricket Board Ltd (and each of which is a “Party”)

**RPCL:** means Ruritanian Professional Cricket League;

**Territory:** means Ruritania.

### **Clause 2: Scope of the Licence**

2.1 Licensor hereby grants Licensee a non-exclusive licence to broadcast the Content over the Internet for a period of 10 years from the entry into force of the present agreement.

2.2 The geographic scope of the Licence is the Territory.

2.3 For the avoidance of doubt, Licensor retains the right to broadcast the Content over the Internet, or to license such rights to third parties, in EU Member States.

### **Clause 3: Anti-circumvention**

Licensee shall take all necessary technical steps to ensure that the Content shall not be accessible to subscribers resident outside the Territory. Licensee shall not actively: (a) take steps which would undermine the value of the rights retained by Licensor; or (b) seek to obtain the custom of consumers resident in territories for which Licensee holds no licence to broadcast Content.

### **Clause 4: Termination**

Either Party shall be entitled to terminate this Agreement upon 6 months’ written notice in the event that the other Party commits a material breach of this agreement. For the avoidance of doubt, a breach of Clause 2 or Clause 3 shall constitute a material breach for the purposes of this Clause 4.

11. At the same time, RCB entered into a series of licences in other Member States on substantially the same terms. Each of these licences was restricted to the territory of a respective Member State. At this point, RCB’s policy was to only grant one licence per Member State, including Ruritania.



12. During the course of the negotiations Sport Europe enquired as to the purpose behind the restrictions in Clauses 2 and 3 of the Commentary Licence. RCB explained that online services were not subject to Council Directive 93/83/EEC (the “Satellite Broadcasting Directive”)<sup>3</sup> and that Clause 3 was simply intended to ensure that the scope of the licence was respected.
13. RCB also explained that it considered Clauses 2 and 3 to be of paramount importance to its network of online broadcasting licences. RCB established the price of the licence to each of its national online broadcasters by reference to the average household income of consumers in each territory. The price for licences in high-income territories was higher than in low-income territories. RCB considered that without the protection afforded by the territorial scope of the licence, there was a considerable risk that residents in territories with a higher average household income would find a way to subscribe to services offered by broadcasters in low average household income territories. Such a situation would force RCB to increase the price of the licence to broadcast in low-income territories. As licensees for these territories were likely to pass on the increased costs to their subscribers, RCB considered the territorial scope of the licences and Clause 2.3 to be to the benefit of consumers resident in those territories, such as Ruritania.
14. In line with the terms of the Licence, Sport Europe only allowed access to live audio commentaries of RPCL matches via its website to subscribers who provided a residential address in Ruritania when setting up their web account. Sport Europe would also prevent subscribers resident in Ruritania from accessing the live audio commentaries of RPCL matches if their devices IP address was not registered to Ruritania (e.g. if the subscriber was trying to access the live audio commentary from an internet access point outside of Ruritania).
15. Since entering into the Commentary Licence, Sport Europe’s online audio commentary service has become very popular. Over the years, Sport Europe has faced numerous enquiries from subscribers of its satellite TV services resident in EU Member States other than Ruritania as to whether they can have access to the live online audio commentaries of the RPCL. Sport Europe always refused – even if: (i) the relevant subscriber also subscribed for satellite TV coverage of RPCL matches; and (ii) regardless of the subscriber’s actual location at the time of accessing the service (e.g. even if s/he was attempting to access the commentary via a Ruritanian IP address).
16. The launch of Sport Europe’s online services was initially a big success, with satellite TV subscribers really appreciating the additional online content to which they had access.

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<sup>3</sup> It can be assumed that if the deadline to transpose a directive has expired, then it has been transposed into Ruritanian law by national implementing legislation.



However, during the last 12 months, Sport Europe has experienced a sharp decline in its new satellite TV subscriptions and a significant increase in existing subscribers terminating their subscriptions with Sport Europe. When contacted by Sport Europe's marketing department, consumers have indicated that the principal reason for either not taking up a satellite subscription or terminating an existing subscription is that Max Sports Ltd ("Max Sports") – a new sports media broadcaster – is able to offer EU-wide access to online live audio commentaries of sporting events – including the official English language commentary of RPCL matches. Max Sports' prices vary across Member States, depending on a number of factors including pricing of incumbent broadcasters. Customers indicated that while the principal service under the subscription was receiving satellite TV content, the additional online content was a real plus – in particular the possibility to listen to the official English language RPCL commentary online from wherever they are in the EU.

17. Following such customer feedback, Sport Europe contacted RCB, who confirmed that 12 months ago it had licensed the rights to broadcast online live audio commentaries of RPCL matches on an EU-wide basis to Max Sports. RCB achieved this by granting Max Sports a 10 year non-exclusive licence in every Member State. As such, Max Sports became the second licensee in every Member State, including Ruritania. Sport Europe requested that RCB amend the terms of the Commentary Licence so that it would also be licensed on an EU-wide basis. RCB refused on the basis that: (i) the price that Max Sports paid for the licence was higher than that paid by Sport Europe (and Sport Europe had made it clear on the basis of previous negotiations that it would not have been willing to pay a higher price than that agreed in the Commentary Licence); and (ii) it had agreed with Max Sport that it would not grant any other broadcaster the right to broadcast online live audio commentaries of RPCL matches on an EU-wide basis so as not to undermine Max Sport's investments in setting up its business and the value of the licence that it had been granted.
18. Faced with the need to stem the tide of subscribers switching to Max Sports, from 1 July 2019 Sport Europe began granting access to online live audio commentaries of RPCL matches to all its subscribers accessing its website from a Ruritanian IP address regardless of their residence details. This allowed, for example, Sport Europe subscribers based in other Member States to access online live audio commentaries when travelling in Ruritania, a popular holiday destination in the summer period, when many of the RPCL matches occur. In order to enhance the attractiveness of its offer, Sport Europe has explicitly advertised the introduction of this feature to its subscribers in other Member States (together with other improved offer terms).
19. Having become aware of Sport Europe's change in policy, on 1 September 2019 RCB sent Sport Europe written notice that it considered Sport Europe to have committed a material



breach of the Commentary Licence and was exercising its rights pursuant to Clause 4 thereof, with the effect that the Commentary Licence would terminate on 1 March 2020.

### The current proceedings

20. On 15 November, Sport Europe brought proceedings against RCB in the High Court of Ruritania seeking, (i) an injunction to prevent RCB from terminating the Commentary Licence; (ii) a declaration that either (a) the territorial scope of the licence set out in Clause 2 of the Commentary Licence or at the very least (b) the anti-circumvention provisions in Clause 3 of the Commentary Licence are contrary to Article 101 TFEU; and (iii) damages for lost revenue in subscriptions resulting from its compliance with the territorial restrictions in Clauses 2 and 3 of the Commentary Licence.
21. Sport Europe considers:
  - a. That the national territorial scope of the Commentary Licence serves to restrict competition for the provision of cross-border digital services and to create artificial barriers to trade across the internal market contrary to Article 101 TFEU;
  - b. The obligations under Clause 3 and 2.3 of the Commentary Licence reinforce and extend the anti-competitive object and effect of the territorial restrictions and, therefore, are also contrary to Article 101 TFEU;
  - c. Consequently, permitting subscribers outside of Ruritania to access online live audio commentary of RPCL matches does not constitute a material breach of the Commentary Licence that would entitle RCB to terminate the Commentary Licence; and
  - d. By virtue of the restrictions contained in Clauses 2 and 3 of the Commentary Licence, Sport Europe has lost potential revenue: (i) from subscribers who have terminated their subscription due to their inability to access the live official English language audio commentary of RPCL matches online, even when travelling in Ruritania; (ii) potential new subscribers who have not taken up a subscription because they are not resident in Ruritania and, therefore, could not access the live official English language audio commentary of RPCL via the subscriber portal of Sport Europe's website.
  - e. In addition, Sports Europe seeks an injunction to prevent RCB using its intellectual property rights in other Member States to prevent Sport Europe from supplying customers resident in any of those Member States.
22. In its defence, RCB submits that:





- a. It is entitled to define the scope of the licence by reference to specific territories within the EU. As such, the restrictions in Clause 3 and 2.3 simply mirror the territorial scope of the licence. Given that the territorial scope of the licence is valid, such clauses are incapable of restricting competition;
  - b. Sport Europe has not contested that the price for a licence covering the whole of the EU could well be higher than the price of a licence covering only Ruritania and failed to show that consumers would be better off in the absence of the limitations included in Clauses 2 and 3. Such analysis should take place at the stage of assessing whether the clauses, in their relevant legal and economic context, are harmful to competition. In any event, the limitations also satisfy Article 101(3) TFEU;
  - c. Regardless of whether the restrictions in Clause 3 are contrary to Article 101 TFEU, Sport Europe is not entitled to damages because it is party to the very agreement from which it claims that it suffered damages and because any revenue generated from broadcasting the Content to subscribers outside the Territory would have been in breach of the territorial scope of the Commentary Licence as defined in Clause 2.
23. Faced with such fundamental differences in interpretations and readings of the law, and the potential risks to Sport Europe's business if the licence were terminated pending its judgment, the Ruritanian High Court:
- a. Granted an interim injunction to prevent RCB terminating the licence pending the outcome of the proceedings before it; and
  - b. Stayed the proceedings before it for the purposes of referring several questions relating to the interpretation of Article 101 TFEU to the Court of Justice of the European Union.

### Questions referred

24. The Ruritanian High Court referred the following questions to the Court of Justice:
- a. Is a non-exclusive copyright licence for the online broadcasting of audio content that is limited to the territory of a single Member State (in accordance with the applicable national copyright law) to be regarded as a restriction of competition, by object or effect, within the meaning of Article 101(1) TFEU?
  - b. In the context of online broadcasting, do contractual provisions aimed at reinforcing the territorial scope of a licence limited to a single Member State, restrict competition, by object or effect, within the meaning of Article 101(1) TFEU?



- c. Is the fact that the price of a licence covering all Member States is liable to be higher than the price of a licence limited to one Member State a factor that has to be assessed when considering the relevant legal and economic context of the agreement under Article 101(1) TFEU or is it relevant only at the stage of assessing potential efficiencies under Article 101(3)?
  - d. In assessing a licence for the online broadcasting of audio content for its compatibility with Article 101(3) TFEU, how should a national court balance a potential price increase in one or more Member States with other considerations that are relevant under EU law, such as market integration?
  - e. Assuming the existence of an infringement of Article 101 TFEU, as regards potential damages to be awarded as a result of such breach:
    - i. Can a party to the agreement that is contrary to Article 101 TFEU seek compensation against the other party? If so, which conditions are relevant to establish whether one party is entitled to compensation against the other?
    - ii. In a situation such as in the present case, where a licence is agreed as being limited to one specific Member State, is the licensee entitled to claim damages for potentially lost revenues related to the alleged impact of that restriction?
25. The request for a preliminary ruling arrived at the Court of Justice on 22 November 2019. In accordance with Article 23 of the Statute of the Court of Justice, the Registrar has notified the claimant and defendant and has invited them to submit written observations to the Court. The deadline for submission is on 6 April 2020. Oral hearings are provisionally scheduled for June 2020.