Kluwer Competition Law Blog

Barmi v. the Board of Control for Cricket in India: One to Send Upstairs?

Ruchit Patel (Ropes & Gray LLP) · Tuesday, February 19th, 2013

It will not come as a surprise to many that in the first few years of having competition law powers, the Competition Commission of India (the "CCI") has targeted one of India's most important industries: Cricket. The dust has not yet settled on last week's decision in relation to the activities of the Board of Control for Cricket in India (the "BCCI"). Let's see whether the CCI got this one right or whether it needs to be sent to the third umpire for review.

Facts

On November 2, 2010, Shri Surinder Singh Barmi (an individual living in Delhi) filed a complaint with the CCI alleging irregularities with the BCCI's grant of franchise rights, media rights, and sponsorship rights in the context of the Indian Premier League (the "IPL"), a private professional Twenty20 cricket league run annually in India. The IPL rights agreements are already the subject of a number of government investigations (including by the Indian Income Tax Department) and Mr. Barmi's complaint seemed to focus on the financial irregularities and possible corruption associated with the tendering process (see the dissenting order of M.L. Tayal). Notwithstanding, the CCI conducted an investigation by reference to competition law principles and did not limit itself to the confines of the complaint.

Key Findings

In short, the CCI's held that:

- The BCCI was an "enterprise" for the purposes of the Competition Act 2002 (*i.e.*, subject to competition law principles);
- The relevant market is the "*organization of private professional cricket leagues/events in India*;"
- The BCCI was dominant in that market, and
- BCCI abused that dominant position by (1) denying market access to potential competitors to the IPL by "*binding itself*" not to organize, sanction, or recognize any private professional domestic leagues/events other than the IPL; and (2) limiting the number of franchisees in one private professional league (the IPL).

Jurisdiction over Sports Bodies

The CCI held that the BCCI was an "enterprise" under the Competition Act 2002 because the BCCI's role as ICC governing body for cricket in India was "custodian" for the game and

"organizer" of matches. Although the BCCI was a "not for profit" society, its activities were revenue generating (*e.g.*, it sold media rights as well as tickets). Accordingly, the CCI held that insofar as their entrepreneurial (*i.e.*, revenue generating) conduct is concerned, all sports associations are to be regarded as "enterprises" for the purposes of the Act and treated "*at par with other business establishments.*" In so holding, the CCI placed reliance on established European law decisions (*e.g.*, *MOTOE v. Elliniko* and *Meca-Medina*), which held that the commercial exploitation of sport constitutes an economic activity which would be the subject of European competition rules.

It certainly seems intuitive that one of the most powerful and economically successful commercial organizations in Indian sport (the BCCI) should not be shielded from the reach of competition law, at least insofar as its activities are revenue generating (*e.g.*, where they concern the grant of media rights, sale of tickets *etc.*). However, as also recognized in the European precedents which the CCI cites, it follows that the purely "organizational" activities of the BCCI (*i.e.*, those that concern the laws of the game or are purely to do with the sport) should not be caught by the competition rules. As explained below, this can at times be a relatively fine distinction.

Relevant Market

The CCI found that the relevant market was the "*organization of private professional cricket leagues/events in India*." In making this finding, the CCI differentiated (1) sports from other forms of television (including movies and general entertainment programs), (2) cricket from other forms of sport, and (3) first class/international cricket (*e.g.*, Test Matches, One Day Internationals, or Ranji Trophy cricket) from cricket played in "private professional leagues" (such as the IPL). The differentiations are based on qualitative and subjective demand considerations (*e.g.*, "*every sports event is unique in itself*") as well as some viewer data. Critically, however, there does not appear to be any application of the SSNIP test nor any serious consideration of how media rights are granted and the way in which TV networks bid/make pricing decisions for content. That is not to say that the conclusions reached are necessarily wrong, but it does call into question, for example, whether it is truly the case that networks do not regard media rights for domestic international cricket to be substitutable with media rights for the IPL (though in that case, it is not clear whether it would make any difference to the BCCI's position as rights-holder for both domestic international cricket and the IPL).

Dominance

The CCI claims that the source of the BCCI's dominance arises *inter alia* from its regulatory powers, control over infrastructure, control over players, ability to approve/control the entry of other leagues, and "*monopoly status*." It cites, supported by European law, the BCCI's role as gatekeeper, *i.e.*, its ability to "*approve leagues*" and considers that to be "*critical to the organization and success of any competing league*." In the CCI's words, the "*BCCI's ability to control an input which is indispensable to the success of cricket events is also a source of dominance for it.*" As noted by the CCI, the BCCI contributed to the failure/temporary suspension of a competing private professional league (the Indian Cricket League or "ICL") by refusing to "approve" the league or grant it use of BCCI infrastructure, such as cricket grounds.

In the relevant market defined by the CCI, it is difficult to contend with the premise that the BCCI is the gatekeeper for private professional leagues in India and that it has unique control over essential infrastructure (*e.g.*, grounds and players). The experience of the ICL shows that it is

challenging if not impossible for rival private professional leagues to compete on a long term basis (and this is also shown by Kerry Packer's *World Series Cricket*, which tried but ultimately failed to establish a competing league in Australia).

Abuse

The CCI held that the BCCI abused its dominant position by:

- Denying market access to potential competitors to the IPL by "*binding itself*" not to organize, sanction, or recognize any private professional domestic leagues/events other than the IPL; and
- Limiting the number of franchisees in one private professional league (the IPL).

Limitation of Market Access

The focus of the CCI's analysis in relation to market access was Clause 9.1(c)(i) of the IPL media rights agreement (*i.e.*, the agreement between the BCCI and the networks), which states as follows:

"*BCCI represents and warrants that it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league.*"

The CCI held that the limitation of market access was possible only because the BCCI used both its commercial and regulatory powers when agreeing to Clause 9.1(c)(i) (*i.e.*, the CCI was at pains to labor the fact that this abuse did not stem from a purely sporting decision, but also concerned commercial exploitation). Accordingly, it considered that competition law principles applied to the conduct in question.

The CCI's analysis focused on Section 4(2)(c) of the Competition Act 2002 *i.e.*, the provision which prohibits dominant enterprises from "*indulging in practices resulting in denial of market access*." There is little guidance on what constitutes a denial of market access but the *Fast Way Transmission* case is informative. In that case, the CCI imposed a fine of Rs 8 crore (c. €1.1 million) on Fast Way Transmission, Creative Cable, and Hathway Cable for refusing to continue to supply the complainant media company (Kansan News Pvt) with access to the transmission network in Punjab and Chandigarh (decision of on July 3, 2012). The CCI determined that there was no objective justification for the termination and that there was evidence that the popularity of Kansan's channel was growing (potentially in competition with the downstream channels of the transmission companies). Accordingly, it seems that the principle of denying market access has parallels with the European law doctrine of refusal to supply (and specifically refusal to grant access to an essential facility or a network). Whether this case would satisfy the elements of the European refusal to supply doctrine is, however, by no means clear.

On the one hand, there seem to be strong arguments that BCCI "approval" and infrastructure are objectively necessary/indispensable to run a competitive private professional league (see the case of the ICL and the fact that the ICC's pyramid structure precludes a competitor to the BCCI being established). It also seems plausible to argue that the IPL is the BCCI's downstream private professional league (the league is owned and controlled by the BCCI but the franchises are privately owned) and so, consistent with a body of cases in Europe, a refusal to approve/supply a competing league to benefit an internal downstream operation seems to fit the type of case that normally bring about competition concerns (see paragraph 76 of the Article 102 Guidance Paper).

On the other hand, the prospects of this kind of case being brought in Europe would seem to be dampened by the fact that:

- It is not clear from the decision that there has been any actual or express refusal to supply. The limitation in the media agreement is hypothetical, *i.e.*, it would be invoked in the event that a competing private professional league sought to gain approval and the complainant did not himself seek approval/supply of any kind from the BCCI. The CCI sought to address this by invoking the case of the ICL and its failure/temporary suspension. However, it seems from the decision that the CCI is precluded from relying on the refusal to approve/supply the ICL (as it did not have competition powers at that time).
- The analysis of consumer harm is cursory. It is by no means established that the negative consequences of having one private professional league would outweigh over time the negative consequences of imposing an obligation on the BCCI to supply/approve competing leagues. It would need to be shown that the monopoly rents charged by the BCCI for IPL rights translated into higher costs to consumers (*e.g.*, through subscriptions) and that these higher subscriptions cost more in the aggregate than the costs of requiring the BCCI to approve/supply the competing league (which may also be subsequently passed on to consumers).
- There appear to be efficiency arguments that could be invoked by the BCCI (*e.g.*, in order for the BCCI to continue investing in the sport and producing first class cricket infrastructure and in order to maintain interest in the sport, it is necessary to have only one private professional league per season).

Limitation of Franchisees

The CCI also held that "*the game of cricket and the monetary benefits of playing professional league matches must be spread out and not concentrated in a few hands, in a few franchisees. In a country of large young population more private professional leagues open up more venues for youngsters to play cricket, to earn a livelihood and to find champions where least expected.*" Put simply, the CCI held that the BCCI's breach of Indian competition law arises from the fact that it limited the number of franchisees to a defined number. This premise, without more, gives rise to significant legal difficulties. First, it is not clear why the limitation of franchises could not be regarded as a purely sporting decision. Sporting associations lawfully can and do determine the "right" number of contestants for a given tournament/contest, provided that objective and non-discriminatory rules are applied (*e.g.*, through the use of qualifying events). The deficiency with the CCI's decision is that there is no clear indication of how many franchises would have been enough. Accordingly, even if there were double or triple the number of franchisees in the IPL, the law as expounded by the CCI would still mean that the BCCI was in breach.

Conclusion

As may be seen from the above, there is merit to much of the CCI's analysis (in particular as regards the application of competition law principles to sporting associations). However, as regards other aspects of the case, I can see why a careful review by the third umpire (the Competition Appellate Tribunal of India) is warranted.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Tuesday, February 19th, 2013 at 5:55 pm and is filed under Source: UNCTAD

“>Dominance
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.