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LIV Golf and PGA Tour: Reinvigorated Issue of Antitrust in Sport

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ABSTRACT

LIV Golf is a professional golf tour launched by the Saudi Public Investment Fund as a competitor to the PGA Tour. Prior to the first event of the LIV in June 2022, PGA had warned that it would sanction golfers participating in conflicting to PGA LIV events. It later suspended the LIV event participants from PGA and associated tournaments. In August 2022, a group of suspended golfers filed an antitrust lawsuit in the US demanding reinstatement in the PGA tour. They were joined by LIV which claimed that such suspension practices would destroy its "ability to maintain a meaningful competitive presence in the markets." The US Department of Justice also launched an inquiry into the case. The primary issue in the matter seems to be whether PGA's reaction to LIV consists of legitimate business protection or monopolist practices. This paper attempts to answer this question based on review of the relevant antitrust legal framework in the US. Additionally, the paper will look into possible implications of the likely court decision for golf and professional sports overall.

Keywords: antitrust, business protection, LIV Golf, monopolization, PGA Tour, professional golf, sports laws.

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I. Introduction

Antitrust cases are nothing new in professional sports. As the industry offered ever-increasing profits due to commercialization of different leagues and events, it has become a point of attraction for organizations that desired their share of the market. This, naturally, clashed with the interests of the governing organizations that have historically exercised much control over sports economics and, as a result, received the lion share of the revenues. Antitrust lawsuits came about as a logical weapon against such practices, especially given strong anti-monopoly legal frameworks in the US and Europe. Using these frameworks, the plaintiffs would often challenge the existing governance structures and practices to reduce the power of the umbrella organizations.

Still, due to the special nature of the professional sports industry, its antitrust cases have been considered in a specific context. It has long been acknowledged that professional sports leagues resemble joint ventures consisting of organizers (governing organizations) and participants (clubs or individual players) (Ross & Szymanski 2006). The key goal of such ventures is to achieve and maintain good competitive balance that makes sport attractive (Farzin 2015). This encompasses rules governing player contracts and transfers, media contracts, and territorial rights (El-Hodiri & Quirk 1971). As such, professional sports leagues represent "a unique business, containing an unusual but necessary mixture of interparticipant competition and cooperation" (Jacobs 1991). Because of the special nature of business and professional sports in general, the organizations governing sports leagues have traditionally sought exemptions from antitrust laws. However, industry structure and nature alone have been found insufficient by the courts to grant such immunity.

This paper looks into what could become a major antitrust case in sports in the near future. LIV Golf, a professional golf tour backed by the Saudi Public Investment Fund, was launched in 2022 as a competitor to the Professional Golf Association Tour (PGA Tour). Prior to the first event of the LIV tour, PGA had warned that it would sanction golfers participating in conflicting to PGA LIV events (Pingue, 2022). It later suspended the LIV event participants from PGA and associated tournaments. In August 2022, a group of suspended golfers filed an antitrust lawsuit in the US demanding reinstatement in the PGA tour (Maese, 2022). They were joined by LIV, which claimed that such suspension practices would destroy its ability to maintain a meaningful competitive presence in the markets. The US Department of Justice has also launched an inquiry into the case (Stebbins, 2022). The primary issue in the matter seems to be whether PGA's reaction to LIV consists of legitimate business protection or monopolist practices. While the case is scheduled for trial in January 2024, it can have far reaching consequences for both professional golf and sports in general regardless which side prevails.

II. THE PGA TOUR AND LIV GOLF: BRIEF HISTORY

The PGA Tour (Tour) was established in 1968 by several professional golfers as a membership organization to collectively negotiate media rights and sponsorships over golf events. The Tour separated itself from the PGA of America which organized and managed professional golf events since 1916. The reason for the Tour creation was the desire to improve playing conditions and purse money for the events participants. The Tour became registered as a non-profit 501(c)(6) organization with no private ownership. The majority of the Tour's revenues coming from sponsors and media contracts are distributed among the members with the remaining going to fund the Tour's operations, popularizing golf, and other purposes such as charities. According to the Tour's financial statements, it earned over $1.1b in 2020 revenues (PGA Tour Inc., 2021). Over the course of its existence, the Tour has become the dominant organization in professional golf. With the exception of the four Majors and a few other tournaments (such as the Ryder's Cup), it organizes all main professional golf events in the US. It also formed a strategic alliance with the European Golf Tour over broadcasting rights, participation, prize funds, and other commercial opportunities (Herrington, 2020).

LIV Golf Tour was formally initiated in October 2021 with the financing coming from the Saudi Public Investment Fund (PIF). Positioning itself as a direct alternative to the PGA Tour, LIV Golf announced a series of professional events in 2022 with $255 million in prize money (Beall, 2022). Unlike the Tour, LIV Golf guaranteed payouts to all participants, regardless of the place (Shipnuck, 2022). For the first event, which took place on June 9, 2022, LIV Golf was able to sign dozens of prominent golfers, including former world number ones and winners of the Majors (Beall, 2022). After issuing a warning to all players prior to the event, the Tour suspended all LIV Golf participants from the later tournaments under its umbrella. A number of players sued on the antitrust grounds and were later joined by LIV Golf to challenge the Tour's practice. The lawsuit was filed with the Northern District Court of California meaning that the case would be tried based on the applicable US laws.

III. THE US ANTITRUST ABROACH IN SPORTS

The foundation of the US antitrust legal framework is set within three laws. The Sherman Act 1890 covers anticompetitive agreements (Section 1) and monopolization conduct or attempts of such conduct (Section 2). The Clayton Act 1914 expands antitrust framework by addressing additional pre-merger and merger practices. Finally, The FTC Act 1914 focuses specifically on unfair competitive practices. With regards to professional sports, the vast majority of antitrust cases in the US have been brought under Section 1 of The Sherman Act (van Rompuy 2022). In *Boston Professional Hockey Association. v. Cheevers*, it was established that "all professional sports operating interstate eventually will be ruled by the Supreme Court to be subject to the federal antitrust statutes" (266). Earlier cases established that organizations governing professional football (*Radovich v. National Football League*), hockey (*Boston Professional Hockey Association*, 348), and basketball (*Washington Professional Basketball Corp. v. National Basketball Association*) conduct interstate commerce and are, therefore, subject to Sherman's. Generally, to prove violation of antitrust policies under The Sherman's Act, the plaintiff has to establish that there is a concerted action that unreasonably retrains trade (or competition) through contract, conspiracy, or other forms of agreements, and the effect is on interstate commerce or foreign trade.

A. Concerted Action and Sport Entities

The "concerted action" part of the proof has been actively challenged by the sports organizations in the US. The argument would be that a given professional sports league is a single entity of interdependent actors while "concerted action" requires actions of two or more independent actors (van Rompuy, 2022). The basis for this arises from *Copperweld Corporation v. Independence Tube Corporation* (1984) where the court held that Section 1 of The Sherman's Act does not apply to parent companies and their subsidiaries. However, the courts only recognized a narrow application of *Copperweld* for professional sports. In *American Needle v. National Football League* (2010), the court had to decide whether NFL's decision to license its intellectual property to Reebok only would fall under restriction of trade under the Sherman's Act. While acknowledging "special characteristics" of professional sports, which among other things require cooperative behavior of clubs, the Supreme Court distinguished such form of cooperation from the one described in *Copperweld*. Specifically, it was acknowledged that professional clubs are independently owned and compete against each other in sports but also in terms of fan base, players, and licensing rights (*American Needle*, 196). As such, licensing of intellectual property was equated to a "concerted action" thereby denying the broad interpretation of *Copperweld* for sports and setting a precedent for considering the single entity argument for professional leagues with limitations.

B. Effect on Interstate Commerce

Another line of defense for sports organizations in the US has been denying the effect on interstate commerce or foreign trade. This stems from the *Federal Baseball Club v National League* (1922), where the Supreme Court infamously excluded professional baseball from antitrust law by arguing that baseball teams traveling from state to state was incidental in nature and, therefore, did not constitute interstate commerce. Interestingly, while *Flood v. Kuhn* (1972) later acknowledged that such interpretation was "an exception and anomaly," (282) it was not overturned. Recently, however, the courts have interpreted interstate commerce rather broadly, especially when the entity in question gains economic profit, which is the case with the majority of professional leagues in the US (Areeda and Hovenkamp 2014). Still, attempts at the argument continued for non-profit leagues. The courts in this case have to navigate what consists of commercial and noncommercial restrictions. For example, the courts in several NCAA cases acknowledged that its eligibility requirements are noncommercial in nature (Edelman, A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rule Violate Section 1 of the Sherman Act 2013), while more recently, in *O'Bannon v. NCAA* (2015) rejected that the use of images and names of players involved commercial activity.

C. Unreasonable Restraints on Trade

Further, The Sherman's Act prohibits 'unreasonable' restraints on trade. Because there are no specifics on what unreasonable in this context means, it has been up to the courts to draw the lines. Historically, two legal tests have emerged. The per se violation refers to blatant anticompetitive practices that do not require a serious inquiry into the reasons or consequences thereof (National Society of Prof. Engineers v. United States, 1978, 692). Examples, based on the Supreme Court decisions, are horizontal price-fixing, concerted refusals to deal with third parties, allocation of customers and markets, and bid-riding (van Rompuy, 2022). These self-evident violations, however, rarely succeed in sports cases. In American Needle, the court ruled that the per se rule would be inapplicable if there is evidence that certain restraints are necessary "if the product is to be available at all" (203). Since this is the case of the entire professional sports industry, specific practices are unlikely to be viewed within the per se rule.

The Rule of Reason is more flexible and less certain than the per se rule. Justice Brandeis described it as a test of "whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition" (*Chicago Board of Trade v. United States* (1918), 238)). Brandeis also recommended that the restraint is analyzed in terms of purpose, facts, conditions, and history. However, in later decisions, the courts have narrowed the Rule of Reason to promote/suppress competition only (Farzin, 2015). A comprehensive rule of Reason, in its contemporary interpretation, involves several burden-shifting tests following in sequence: 1) The plaintiff must demonstrate that there is substantial harm to competition in general; 2) The defendant must show that the restraint is, in fact, is pro-competitive in nature; 3) The plaintiff must show that the pro-competitive effect could be achieved without the restrictions in question; and 4) the court analyzes the pros and cons of the restrictions in a 'balancing exercise' (van Rompuy, 2022).

In practice, the vast majority of the sports cases in the US have been tried on the basis of the Rule of Reason. Commentators noted that this approach, on the one hand, affirms that the courts recognize special status of professional sports in antitrust law applications while, on the other hand, makes it difficult challenge the status quo (Carrier, 2009; Edelman, 2011; van Rompuy, 2022). The courts, in fact, made it clear that the burden lies squarely with the plaintiffs. Because there is no requirement in the existing antitrust laws to create the least restrictive regulations to achieve pro-competitive objectives, the plaintiffs have to meet a very strict standard of demonstrating that "significantly, not marginally, less restrictive means" can be applied for the matter (*National Collegiate Athletic Association v. Alston*, 2021).

To sum up, the following factors arising from the contemporary antitrust framework, as applied to professional sports organizations, will likely matter in the case of PGA Tour:

1) Professional sports leagues are subject to antitrust laws, although their special status and treatment are recognized.
2) With regards to sports, the courts are likely to follow the Rule of Reason, which in the current interpretation weighs the pros and cons of restrictions.
3) While the single entity and interstate commerce arguments are likely to be ineffective as defenses, the Rule of Reason offers much room for defense.
4) The focus of the sports cases is whether the existing regulations promote or restrain competitiveness.
5) Since there is no requirement in the antitrust laws to have the least restrictive practices and regulations in place, the burden is usually on the plaintiff to show that there is harm to competition in general and that significantly less restrictive regulations can achieve the pro-competitive objectives.

IV. The Current Case

The current case is the first serious attempt to challenge PGA Tour's dominance in more than twenty years. In 1994, the Federal Trade Commission (FTC) sought to challenge two rules that it considered anti-competitive: participation of players in non-Tour events and golf TV programs only with the permission of the Tour Commissioner. The FTC was arguing that such practices restricted opportunities for rival golf promotions. At the time, the Tour mounted a serious political and business support by arguing that the rules in question were necessary to sustain popularize golf, increase revenues, and make the professional events more attractive for the best players (Willman, 1995). The case never reached the courtroom as a result.

In essence, the current case is a repetition of the cancelled 1994 FTC lawsuit. The grounds for alleging the anti-competitive practices by the Tour are the same: it still forbids its players to participate in non-Tour events without explicit permission. LIV Golf came to replace the World Golf Tour (WGT) which was a planned rival alternative to the PGA Tour. Greg Norman, one of the most acclaimed professional golfers, who was going to head WGT, eventually heads LIV. More importantly, LIV managed to attract a substantial number of top players for its events and secure media rights from a number of prominent outlets. Accordingly, whereas the Tour only threatened to suspend the players in 1994, it did so for everyone who participated in the very first LIV Golf event in June 2022 (Beall, 2022). Unlike the FTC in 1994, however, LIV does not experience any lack of funding, and its backing of the players' suit against PGA means that the case will almost surely reach the trial stage.

A. Liv Golf and Players Claims

The claims by the plaintiffs (players and LIV) are outlined in the Complaint filed with the court in August 2022. At the center of the antitrust complaint against the Tour are its policies: the Media Rights Regulation and the Conflicting Event Regulations. Both were invoked in the aftermath of the first LIV event. The Media Rights Regulation prohibits the Tour participants from participation in live or recorded golf programs both during Tour events and outside of them (*Complaint*, 60). The plaintiffs consider the Regulation "inconsistent with the rights of the Plaintiffs as independent contractors, denying Plaintiffs the right to sell their own media rights to other bidders for their services" (*Complaint*, 62). Further, the plaintiffs argued that the application of the rule is anti-competitive in nature because, while denying a release requested by players for LIV Golf event, granted such releases for other tournaments (*Complaint*, 67). The only reason for this, according to the plaintiffs, is that PGA Tour sees LIV Golf "as a competitive threat" (*Complaint*, 67).

The Conflicting Events Regulations prohibit the tour players to take part in other competitions regardless of whether they participate in a Tour event or not. While the prohibition concerns the times of sponsored or co-sponsored by the Tour events, those cover 48 weeks in a year thereby, according to plaintiffs, effectively banning non-Tour participation both in North America and outside of it (*Complaint*, 70). According to the plaintiffs, the fact that the Tour Commissioner maintains exclusive discretion as to whether grant exceptions to the Conflicting Events Regulations, "does not permit meaningful competition by other tours" (*Complaint*, 71). Moreover, it is further argued that the Tour has changed its habitual practice to grant releases to international events for the sake of restraining LIV, which held its first event in London (*Complaint*, 71).

The third key point made in the Complaint is in relation to the strategic alliance between the Tour and the European Tour. Even prior to LIV, the Saudi Public Fund attempted to launch the Professional Golf League (PGL). In 2020, it initiated negotiations with the European Tour regarding events and co-sponsorship. The key idea was to allow the PGL participants to earn points towards a master's qualification. The plaintiffs alleged that the Tour induced the European Tour to cancel partnership with PGL "through threats and financial incentives" and with this, the parties entered into an agreement "with the illegal purpose to eliminate a competitor and future potential entrants" (*Complaint*, 98-99).

Following the Complaint, it can be concluded that, unlike the majority of antitrust sports cases before, LIV is employing both Section 1 and Section 2 of the Sherman Act and, possibly, some parts of the Clayton Act thereby employing almost all applicable legal means to challenge the Tour. Section 1 of the Sherman's will almost certainly be tested on the grounds of the Tour's "strategic alliance" with the European Tour. The burden on LIV will be to show that the alliance was created specifically to restrain trade by eliminating competition. Although LIV is arguing that the Tour violated antitrust both *per se* and under the Rule of Reason test by refusing to deal or boycotting (*Complaint*, 314–315), the analysis conducted above suggests that only the latter will likely be considered by the court. The challenge will be to overcome the Rule of Reason by showing that the existing structure in professional golf significantly reduces competitiveness and that the objectives of professional gold promotions can be achieved by less restrictive regulations. In this regard, LIV will likely argue that its approach to relationships with players, which does not prohibit playing in other events and preserves their rights for personal image, is better suited for the purpose.

With regards to Section 2 of the Sherman's, the burden on LIV is to show that Tour monopolized a specific market. Since Section 2 refers to "any part of the trade or commerce", it will most likely be acceptable for LIV to focus on Elite Golf Events. Interestingly though, the Complaint mentions the Tour not as a *monopolist*, but a *monopsonist* of professional golf services (299). That is, the Tour is charged for being a restrictive buyer, not a seller. Monopsony has been recognized by the courts to fall within Section 2 of the Sherman's (see, for example, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc*., 2007). Monopsony power exploitation is recognized in sports as well (Humphries & Pyun, 2016). Therefore, it will be interesting to see how the buyer power and the potential need to reduce it may be interpreted by the courts.

B. The PGA Claims

The Tour has filed with the courts its Opposition to the plaintiffs' claims. Analysis of the document suggests that the line of their antitrust defense is built on the arguments that 1) The Tour is not a monopoly (or monopsony for that matter) but an organization that protects its market position and players' contractual obligations and that 2) The existing structure and regulations are procompetitive and serve to benefit professional golf.

In addressing the plaintiff's Complaint regarding Section 1 of the Sherman's, the Tour argued that the claim of refusal to deal is invalid since boycotts are limited to horizontal agreements between direct competitors and that the Tour does not possess sufficient market power to exercise boycott (citing *Nova Designs, Inc. v. Scuba Retailers Ass'n,* 2000 and *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co*, 1998). These claims may be subject to debate, however. While it is logical for the Tour to argue that the mere emergence of LIV in the market of professional golf events shows the Tour's limited market power, the court will likely consider the power over making deals with the European Tour which, in fact, is the deal in question. Further, in *Nova Designs, Inc*. the court laid its own interpretation of how refusal to deal should work. While it may be sufficient to defeat the pure restraint of trade argument, the conduct may be deemed illegal even if sufficiently strong restraint is demonstrated. Once again, this suggests that the Rule of Reason rather than *per se* test will be applied. The court will likely look into the precise nature and goals of the Tour's strategic alliance with the European Tour. Interestingly, the Opposition did not explain thoroughly how the alliance could be justified from a pro-competitive standpoint, which could be an important aspect of this part of the case. Indeed, including a paragraph that prohibits the European Tour to deal with LIV may be considered an anti-competitive action, and the Tour will likely need to show what specific competitive aspects of the alliance bring more benefit that the harm exercised with regards to LIV.

In addressing the plaintiffs' claims regarding Section 2 of the Sherman's Act, the Tour argues that 1) Lacks the sufficient power to be called a monopoly; 2) Its Regulation are legitimate contract points that do not serve to restrict competition; 3) The Regulations serve pro-competitive purposes that outweigh the potential harm to competitors. The first defense echoes the one used against Section 1 claims. Once again, the Tour argued that it was not a monopsony due to LIV's "successful" market entry and the ability to attract the Tour's players (*Opposition*, p. 18). Specifically, it cited *Tops Mkts., Inc. v. Quality Mkts., Inc* (1998) to claim that market power alone is not sufficient for antitrust proceedings. However, the courts are willing to consider additional factors such as the defendant's behavior and market structure in the analysis. Since the argument put forth by LIV rests strongly on the Tour's anticompetitive behavior using its power, the question of monopsony will likely remain open to the rule of reason analysis.

The Tour further argued that its Regulations do not restrict competition because they do not prohibit from playing in other tours, including LIV. What the Tour does, in its own terms, is act on the breach of contract by players who decided to play in LIV events (*Opposition*, p. 19). Indeed, the regulations established by Tour can be viewed from the lens of the exclusive service contracts which are well-recognized in business (*Cogan v. Harford Mem'l Hosp.,* 1994). The freedom of players may be also sustained by the fact that some decided to voluntarily leave the Tour in favor of more lucrative LIV events without punishment on the latter's side. However, the practice of treatment for the remaining players may be questioned. The fact that the Tour grants permissions for its golfers to play on other tours but not in LIV could be considered restraining and antic competitive. On the other hand, The Sherman's purpose is to protect competition as a whole, not specific competitors (US Department of Justice 2008, 11). Therefore, balancing contractual rights and potential abuse of power is another important aspect for the court to address in this case.

The Tour also claims that the mentioned Regulations overall are pro-competitive. The argument is based on 1) exclusive dealings with players who are encouraged to promote the Tour and no other tours, and 2) avoiding freeriding by other tours (such as LIV) on the Tour's existing reputation and platform (*Opposition*, pp. 20–21). Both exclusive dealings and prevention of freeriding are recognized by the courts as legitimate business approaches (see, for example, *Omega Env't, Inc. v. Gilbarco, Inc.,* 1997; *PNY Techs., Inc. v. SanDisk Corp.*, 2014; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc*., 1986).

The Tour asserts that the regulations help maintain sponsorship and media coverage through bundling rights which allow to cover the Tour's operations and payouts to the players. These arguments will likely emerge in the course of the Rule of Reason testing and shift the burden back to LIV to show a different type of legitimate regulations to promote competition in golf.

An additional defense point made by the Tour, which cannot be omitted in the analysis, is questioning the reputation of one of the plaintiffs. The Tour specifically calls LIV as "the most recent example of 'sportswashing,' a strategy by the Saudi government to use sports in an effort to improve its reputation for human rights abuses and other atrocities" (*Opposition*, pp. 5–6). The Tour further alleged that with its access to "nearly unlimited funding," LIV had established itself as a competing tour by pouring enormous funds with no discernable strategy to recoup them (*Opposition*, p. 6). With this, the Tour hinted at considering LIV a threat to competitiveness in professional golf where players should be paid "based on their skill and performance" (*Opposition*, p. 6). Therefore, an interesting argument is promoted that the competitor plaintiff could, by its own nature and approach to sports, be a threat to competitiveness. Whether this argument is taken by the court remains to be seen.

V. Conclusion and Possible Implications

The case against the PGA Tour has reinvigorated the antitrust issue in professional sports. It is even more remarkable because professional golf has remained so far relatively unchallenged by antitrust lawsuits unlike the other major sports leagues. The FTC 1994 case never materialized largely due to political lobbying, although now the Tour is arguably faced by a formidable foreign opponent that has sufficient resources to challenge the Tour's alleged monopoly standing across many points of the antitrust legal framework in the US.

From a legal perspective, the case presents a number of interesting points for the court to navigate. One question to consider would be whether the Tour can be considered a monopsony for legal purposes. While LIV managed to enter the market of professional golf events, arguably, it did so only due to its tremendous financial power. It should be remembered that LIV participants are still not receiving the points towards the Majors, mostly because it could not secure the co-sponsorship deals with the European Tour after the Tour allegedly intervened in their negotiations. Accordingly, creation of the Tour's alliance with European Tour would be investigated through the lens of Section 1 of the Sherman's, and the parties will be arguing whether it had any pro-competitive creation reasons except for restricting LIV tour and, possibly, future competitors.

Another major point of consideration will be the Regulations imposed on the players by the Tour. The court will almost certainly employ the Rule of Reason to decide whether the Regulations represent legitimate business protection practices or unnecessary restrictions on players as independent contractors. LIV suggested that its approach of guaranteed payouts to all tour participants and maintaining image rights by the players is more pro-competitive than the Tour's Regulations that ensure bundled media rights and sponsorships. The court will have to decide whether this is "substantially" more pro-competitive than the existing mechanisms. Here, perhaps, LIV will be burdened to show that its model is financially sustainable, something that the Tour contended vigorously.

Last, but definitely not the least issue would be the use of plaintiff's public image in the antitrust case. In addition to the common legal arguments presented in its Opposition to the plaintiff claims, the Tour brought up the issue of 'sportswashing' and enormous financial power of LIV, which is backed by the Saudi Public Fund. The effect of the image may be stronger than it seems given that the case will be decided by the jury. Another question is the alleged anti-competitive approach by LIV argued by the Tour.

The aforementioned points will certainly have further-around implications regardless of the court's decision. Specifically, it will most likely affect the ways that the courts treat alliances in sports, balance independent contractual obligations with (un)necessary restrictions, and to what extent public image could become influential and, as a result, would be used in the future antitrust cases. Finally, golf is somewhat different from team competitions in the major sports leagues since it is the sport of individual competitors. Whether and to what extent its decisions could be extrapolated to the organizations managing club competitions remains to be discovered.

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CONFLICT OF INTEREST

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