The European Antitrust Review

2010

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GLOBAL COMPETITION REVIEW

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The interplay between competition law and the world of sport has long been acknowledged.[1] It is generally well accepted that EC law, including articles 81 and 82 EC apply to sport insofar as it constitutes an economic activity[2] (although drawing the line between economic and 'purely sporting' activities remains fundamentally open to debate). The past 20 years or so have seen sport become increasingly commercialised; as the economic value of sport as an industry increases, so the importance of competition law in regulating the behaviour of stakeholders and participants at every level increases.

A line of EC jurisprudence has established the key principles for applying competition rules to sport, a fact reflected in the European Commission's 2007 White Paper on Sport.[3] This was the first Commission initiative to address sport-related issues in a comprehensive manner, and provides an overview of the development of the Commission's decision-making practice in this field.

The White Paper on Sport, and the Commission's Working Document that supported it,[4] considered the application of competition law to sport media rights in particular detail. The right to broadcast sporting events, and in particular to screen live coverage of major leagues and tournaments, is the prime commercial asset of a sport: at the start of 2009, for example, packages of rights to broadcast UK Premier League football for the next three seasons fetched a total of £1.78 billion. With so much at stake, it is unsurprising that the way that rights are bought and sold, and subsequently distributed, is often contested. As a number of recent and ongoing cases illustrate, competition law remains at the heart of disputes over issues like joint selling, territorial allocation and access to content. This chapter will look at how competition law is applied to the management of media rights in sport, assessing the Commission's past practice, and highlighting key concerns for the future.

The White Paper on Sport also identified three 'main pending and undecided issues':[5] the release of players from clubs for international duty; nationality restrictions in clubs; and salary caps. These three areas are still largely unsettled, as recent developments outlined later in this chapter show.

Other notable topics at the interface between sport and competition include ticketing policies (which will take centre stage in the run-up to the Olympic Games in London and UEFA European Championships in Poland and Ukraine, both in 2012); the application of state aid rules to the organisation of major events; and the role of competition law in M&A in sport.

Reflecting on the White Paper on Sport after two years of change and development, and post-Meca Medina, unsurprisingly competition law remains prominent and a factor determining policy and outcomes in the sporting arena. Partly, this is due to the increased extent to which sport has become 'big business', to which the rules on competitive and anti-competitive behaviour apply. Partly, too, it stems from an increased awareness by the people that participate in this business, at whatever level, that they have recourse to EC law. One issue for the future is whether the treatment of sport as an industry subject to commercial legal principles has gone too far in some instances, and whether more account should be taken of the 'specificity of sport' – plainly the 'sporting exception' is no more, but how far should competition law interfere in the rules of the game?

Media rights – addressing concerns under articles 81 and 82 EC

The sale of media rights in sport is characterised by the small number of powerful players at each level of the supply chain. Upstream, sports associations sell the rights to broadcast and record sporting events, typically through joint selling: a single organisation (such as a national football league) will act on behalf of its member clubs to negotiate with broadcasters. Downstream, broadcasters bid for the right to screen this content on a variety of platforms, with pay-TV the prevailing medium.

The restricted structure of the market has frequently raised issues under articles 81(1) and 82 EC, and national equivalents, as well as under national broadcasting regulatory regimes. Media rights were the focus of considerable attention in the White Paper and, although the principles of applying competition law in this context appeared settled, a series of subsequent (and ongoing) cases highlights that this remains a live issue.

Competition concerns in the sale of rights

Concerns typically arise at the upstream level from the practice of joint selling. The Commission is satisfied that joint selling can deliver efficiencies (by providing a single point of sale, strengthening the brand of an event, and creating a 'full package' product), but imposes conditions on sales terms so that these efficiencies are not outweighed by potential restrictions of competition. Remedies applied by the Commission in the past[6] include mandatory tendering; limiting the duration and scope of exclusive contracts; and enforcing fall-back options, use obligations and parallel exploitation to make sure that output is not restricted by unused rights.

At the downstream level, the chief concern is the foreclosure by powerful buyers of their rival broadcasters. Sports media rights have been scrutinised intensively in the major pay-TV mergers such as *News Corp/Telepiu*,[7] with the focus on ensuring that access to premium content (such as live coverage of football league matches) is not unduly restricted. A key issue in coming years will be allowing content to be broadcast on a range of platforms, and preventing mainstream broadcasters (above all, pay-TV) from stunting the growth of internet and mobile providers by starving them of content (see, eg, the *Lega Calcio* investigation below).

Current issues

Competition cases and investigations continue to arise in this field, driven by the high revenue streams available and the relative scarcity of rights for sale. One of the most important pending matters could be the UK High Court's referral of the *QC Leisure* case to the ECJ.[8] This case, concerning the legality of decoders used to receive overseas satellite broadcasts, could have a significant impact on broadcasters' ability to defend the territorial exclusivity of the rights they acquire. This explains the intervention before the ECJ of Sky, Canal +, UEFA and the Motion Picture Association of America in a dispute ostensibly between the UK's Premier League and two importers of decoders.

There may also be further debate ahead on the legitimacy of joint selling agreements. In 2008, Germany's Federal Cartel Office condemned joint selling by the Bundesliga as a price cartel and ordered substantial changes to be made to the national league's €3 billion rights sale to pay-TV. The delay in brokering a new deal that satisfied the FCO's competition concerns led some prominent Bundesliga clubs to contemplate their own break-away deals with broadcasters. In July 2009, the Italian Competition Authority opened an investigation into suspected abuse of dominance by Lega Calcio. The Italian football league is accused of reducing competition in the sale of rights over the next two seasons by tailoring packages specifically for the leading satellite and digital pay-TV broadcasters.

These cases show that, despite clear guidance from the Commission on how joint selling can remain within the bounds of antitrust law – in both the White Paper and jurisprudence – broadcasters and associations continue to fall foul of regulators. Buyers and sellers of rights must carefully self-assess the competitive impact of their agreements: the fact that joint-selling was attacked in Germany as a cartel offence, and in Italy as an abuse of dominance, emphasises the risks these agreements face.

At the same time, clubs must protect the value of rights sold on their behalf and monitor the legality of how this happens. It remains in their hands to challenge their association's joint sales. In principle clubs could, of course, go it alone and make their own deals but the commercial and practical reality of the situation suggests joint selling will remain prevalent for some time to come.

Player release

When the White Paper was published, player release was identified as a major pending issue because the *Charleroi*[9] case was then before the ECJ. In *Charleroi*, a Belgian football club, supported by the G14 group of leading European clubs, contested FIFA's Regulations for the Status and Transfer of Players after a member of its squad was injured playing in an international friendly match.[10] The regulations were challenged under the antitrust provisions of articles 81(1) and 82 EC, as well as the free movement provisions of articles 39 and 49 EC.

Under the Regulations, FIFA required clubs to release players selected for national team matches, and clubs were generally not entitled to financial compensation for players' injuries in these games. The clubs, rather than the national associations, were responsible for insuring players against injury sustained while on international duty. Moreover, clubs were afforded no say in the scheduling of international matches.

The Charleroi dispute was resolved out of court in 2008 when the parties agreed a memorandum of understanding. Under the terms of this compromise, G14 agreed to disband so that a wider club group could be formed. In return, FIFA and UEFA gave a number of commitments including to make payments every four years to clubs who provide players for the UEFA European Championships, and to limit the number of qualifying games for the tournament.

Legal issues around player release have not been confined to football. Regional Rugby Wales, a grouping of the four regional Welsh professional rugby clubs, launched UK High Court proceedings in July 2009 against the Welsh Rugby Union (WRU) in connection with the release of players for a match against New Zealand. The clubs argue that, because the match is outside the International Rugby Board's designated window for international friendlies, they are not obliged to release players for it. The WRU was previously successful in a similar High Court case in 2008.[11]

The balance of power between player, club and country is not a new phenomenon; but with the revenues at stake at such high levels the balance is as hard fought as ever was the case. Competition law, and in particular the application of article 82 EC, will be central to the arguments of players and clubs challenging the associations' power.

Nationality restrictions

A number of sports associations seek to limit the number of overseas players representing domestic clubs in national or regional competitions.[12] However, the Commission has consistently opposed the introduction of any strict quota system based on players' nationalities.

In the landmark *Bosman* judgment,[13] the ECJ held that UEFA's '3+2' rule[14] breached article 39 EC by restricting the participation of EU nationals in competitions outside their member state of birth. Advocate-General Lenz went further, finding that the same restrictions would also infringe article 81(1) EC by preventing clubs from competing effectively by recruiting overseas players.

UEFA's 'home-grown-player' rule

Both FIFA and UEFA have recently proposed new measures to restrict football clubs' use of foreign players. Of these, the 'home -grown player' rule introduced by UEFA for the 2009/10 season so far seems more likely to be compatible with competition law and free movement principles. Under this rule, a club competing in the Champions League or Europa League[15] must choose from a squad of 25 players, of whom four must have been registered with that club, and four others registered with clubs in the same national association, for a minimum of three years between the ages of 15 and 21.

This is similar to the 'club-trained' rule in rugby's Super League, which requires each club's first team squad to contain at least eight club-trained players or academy juniors, and no more than five players who are neither club- or federation-trained nor academy juniors.

The UEFA rule may potentially be regarded as indirectly discriminatory in that it does not per se impose any requirements as to nationality. The EU Commissioner for Employment, Social Affairs and Equal Opportunities, Vladimir Spidla, has stated that the rule appears to be proportionate and compliant with European law; the Commission will conduct a further review of the rule after the start of the 2009/10 season and present further analysis in 2012.[16]

The FIFA '6+5' rule

FIFA's latest proposal for quotas on foreign players would require football clubs to start matches with at least six players eligible for the national team of the relevant association on the pitch. It

is thus – potentially – directly discriminatory, more restrictive on clubs than the UEFA equivalent, and if pursued, will set FIFA at loggerheads with the Commission.

FIFA President Sepp Blatter has argued that the 'specificity of sport' provisions in the Treaty of Lisbon would provide a legal defence of the rule, and a FIFA-commissioned report by the Institute for European Affairs (INEA) suggests that the rule is not necessarily contrary to EU law. However, the Commission has already indicated firmly that the rule, as drafted, will be incompatible with EU law[17] and that the INEA report does not provide a convincing argument to depart from this view.

If FIFA pressed ahead with '6+5' in the face of Commission opposition, it could reopen the *Meca-Medina* debate on what constitutes a 'purely sporting rule' that should be exempt from the application of EC law (including competition law), although cases such as *Simutenkov*[18] would seem to have excluded nationality restrictions from this definition. As well as being strongly opposed by the Commission, if FIFA's rule were ever implemented it would also very likely be challenged by clubs, players' associations, and individual players.

Salary caps

Although the practice is more widespread elsewhere, notably in the United States, salary caps are relatively uncommon in the EC. Some sports leagues within the EC do impose salary caps, such as the top divisions of rugby union and rugby league in the UK, with the stated objectives of improving competitive balance and protecting clubs in economic difficulty. There have been a number of proposals for the more widespread introduction of salary caps in other sports – particularly football – and the French Rugby Union will introduce a cap in 2010/11.

Salary caps as potentially anti-competitive

Salary caps have an inherent potential to breach EC competition rules. They may constitute an anti-competitive agreement or concerted practice between national or international sporting associations and either clubs or players' unions under article 81(1) EC. Equally, there is a potential for breaches of article 82 EC, given that sporting associations can be dominant in the market for the competitions they control. The fundamental principles of free movement under articles 39 and 49 EC would also come into play.

Salary caps in European football?

The President of UEFA Michel Platini, endorsed by a number of national football associations, has proposed the introduction of a type of 'soft cap' limit on the amount each club can spend on its players' salaries as a percentage of revenue. Support for a salary cap is not confined to governing bodies and smaller clubs, with senior representatives of major clubs such as AC Milan and Arsenal FC indicating their support. However, the chief executive of the English Premier League has spoken out against the introduction of a cap, and Sepp Blatter acknowledges that they remain unlikely.

If implemented, a salary cap in Europe's richest sport would be highly controversial. To avoid creating severe imbalances of competition and the type of talent-drain that has afflicted the salary-capped English Rugby Union Premiership, the cap would have to be applied consistently across all European leagues by UEFA, a process which itself is likely to be discriminatory, given the obvious imbalance between revenues and economic conditions in different countries. Unless the rule could be exempted from the ambit of EC and competition law altogether, as a 'purely sporting rule', UEFA would be unlikely to attempt its introduction. It would also likely face stiff opposition from some clubs, club owners, and players; but note that where caps do operate, they have survived without challenge for many years.

Further pending issues

Major events

The next major sporting events on the horizon in Europe are the Olympic Games in London, and the UEFA European Championships in Poland and Ukraine, in 2012. In both cases, as so often in the past, ticketing could raise competition concerns.

The Commission has a history of pursuing competition cases regarding ticket sales and allocation, having taken action during the 1998 FIFA World Cup in France,[19] 2000 UEFA European Championships (Belgium and the Netherlands),[20] 2004 Olympic Games (Athens),[21] and the 2006 FIFA World Cup (Germany).[22] Anti-competitive agreements including exclusive distribution rights, discriminatory territorial restrictions and restrictions in payment methods (credit card exclusivity) have all been targeted in the past, and the Commission will doubtless be alert to these offences in the run-up to 2012. Local and international organisers, as well as independent ticket vendors and agents, would be well advised to self-assess their proposed sales arrangements and beware potential challenges from competitors and fans.

The organisation of major events also raises questions under EC state aid rules. Huge public investment projects are already under way in London and across Poland and Ukraine, with funding pumped into infrastructure, facilities and stadia built for the events, but with a far longer lifespan. Whenever public funds are applied in this way, a view must always be taken on whether the money could directly or indirectly create an advantage for an undertaking, distorting or threatening to distort competition and affecting trade between member states. This could include, for example, a windfall for the owner of a stadium that is redeveloped with state-of-the-art facilities and increased capacity, while other local stadia receive no such benefit. Funding authorities and the recipients of public funds or contracts – as well as those who do not receive funds while their competitors do – should all take note of the relevant EC competition rules.

M&A activity in sport

Another area of potential future interest could be the application of competition rules to M&A in sports clubs. Private investment in sport continues to rise, and clubs are changing hands at increasing rates. European clubs remain attractive investments for foreign businessmen and wealth funds, with English Premier League clubs a particular focus for money from Eastern Europe and the Middle East – not least because, unlike in France, Germany and Spain, there are no requirements in England that clubs must be majority-owned by domestic nationals.

While some, including Sepp Blatter, argue that the English Premier League should introduce such a rule, stronger arguments could be made from a competition perspective for other countries removing these restrictions. Moreover, as clubs are still viewed at least by some as commercial vehicles capable of generating revenue, it is not impossible that investors may seek a stake in more than one. This would raise fundamental questions over UEFA's regulations preventing ownership of multiple clubs, which the Commission previously upheld in *ENIC*.[23]

At present, no two or more clubs participating in a UEFA club competition may be directly or indirectly controlled by the

same entity or managed by the same person. The Commission has upheld this rule as essential for the integrity of competition, despite acknowledging that it could breach article 81(1) EC. However, a competition lawyer might query how legitimate this rule is, particularly given the broad definition of 'control' that is typically adopted in the context of mergers. Should an investment fund be prevented from buying more than one club, if it is a mere financial holding company with no right to influence the club's management? An interested investor might wonder whether the Commission has overstepped the mark on this matter, imposing unnecessary restrictions on purely commercial transactions.

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On balance, it would seem that the Commission's consideration in the White Paper that only three issues of competition law and sport remain 'undecided' may have been rather optimistic. Several matters in the field continue to attract debate, and will do for some time, whereas two of the three 'pending and undecided' issues have not caused the level of dispute which might have been expected.

As the stakeholders within a sport battle for revenues in a recession – perhaps seeking to maintain the expectations set in more affluent times – competition and antitrust will remain at the forefront of the key issues in sport. Stakeholders in the industry show a clear willingness to seek redress under EC law when their commercial interests are threatened, and may be even more likely to do so as bottom lines are squeezed in the current recession. Applications of European law to sport are also cropping up in unexpected places, as shown by the CFI case brought by a Juventus supporters' association in July 2009[24] – their second – contesting the club's relegation from the top flight of Italian football in 2006 due to their involvement in a match-fixing scandal.

Moreover, issues of competition law are also argued before the respective regulatory bodies of sports associations. Examples include the dispute settlement proceedings before UEFA brought by PAOK Thessaloniki, concerning transfer rights, at which the alleged collective dominance of all members of UEFA was challenged. This interplay between regulatory, commercial, sport and competition law underlines the need to take a wide view on sporting disputes, even where these concern the narrow rules of one particular organisation.

As the largest revenue stream in sport, media rights will continue to be the focus of disputes across the EC and beyond. The next major battlegrounds are likely to include access to content on new media platforms, territorial broadcasting restrictions, and even a reopening of the debate on the legitimacy of joint selling. Competition law will be at the centre of cases and investigations in these areas, defining the threats and opportunities faced by parties active at all levels of this industry – from global organising bodies, to clubs and their owners, broadcasters, viewers, and sportsmen and women themselves.

Notes

1 See for example, case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405.
2 See for example, case C-519/04 *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-6991.
3 COM(2007) 391 final, 11 July 2007.
4 Commission staff working document, The EU and Sport: Background and Context – Accompanying document to the White Paper on Sport, 11 July 2007.
5 See Commission staff working document, section 2.3.
6 See cases COMP/37.398 Joint selling of the commercial rights of the UEFA Champions League; COMP/37.214 Joint selling of the media rights to the German Bundesliga; and COMP/38.173 Joint selling of the media rights to the German FA Premier League.
7 See case M.2876 *News Corp/Telepiú*.
8 See case *Football Association Premier League Ltd and others v QC Leisure* [2008] EWHC 1411 (Ch).
9 See case C-243/06 *Sporting du Pays de Charleroi and Groupement clubs de football européens*.
10 Abdelmajid Oulmers, a Moroccan international, was injured while playing for his country in November 2004 and was unable to resume playing for Charleroi for eight months.
11 See case *Welsh Rugby Union Ltd v Cardiff Blues & Others* [2008] EWHC 3399 (QB).
12 The justifications frequently cited for this are to encourage the development of young players; to improve the competitive balance of leagues; to ensure that clubs retain some link to local communities; and to improve the pool of players available for selection for national teams.

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Hammonds LLP is a leading commercial law firm with offices throughout Europe and Asia. The firm employs over 1,200 people, working from 11 offices in six jurisdictions.

The multi-lingual and multi-jurisdictional nature of Hammonds' team enables the firm to provide seamless antitrust and competition law advice across the member states of the EU and beyond. Hammonds advises on all aspects of competition law: from merger control, anti-competitive agreements, cartels and abuse of dominance, to state aid and public procurement. The team has particular expertise in competition and antitrust in Asia and Eastern Europe, acting for private parties and assisting national authorities.

The competition, trade and EU regulatory team provides an extensive range of commercial, corporate and regulatory advice to major clients in sectors including telecommunications, air transport, media, sport, energy, mining and metals, chemicals, and postal services. The team works closely with colleagues across the firm, including in corporate finance, commercial and IP and dispute resolution, to offer a one-stop-shop for the commercial interests of its clients.

Hammonds' team, led by highly respected specialists in EU and national law, is at the cutting edge of developments in the antitrust and competition sectors. Members of the team have advised national governments on matters of European law, and regularly represent the European Commission, including in disputes before the European Courts.

13 See case C-415-93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman*, *Royal club liégeois SA v Jean-Marc Bosman and others* and *Union des associations européennes de football (UEFA) v Jean-Marc Bosman*.

14 Under this rule, clubs could field a maximum of three foreign players and two 'assimilated' foreign players who had played in the country in question for five continuous years.

15 The Europa League replaces the UEFA Cup from the start of the 2009/10 season.

16 See Commission press release IP/08/807, 28 May 2008.

17 See Statement by Commissioner Spidla, 'The Commission shows a red card to the 6+5 rule proposed by FIFA', 28 May 2008.

18 See case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol*.

19 See Commission decision of 20 July 1999, Case 36888 1998 *Football World Cup.*

20 See Commission decision of 13 December 2002, Case 37932 *Cupido et al v. UEFA, Euro 2000 and ISL Marketing AG.*

21 See Commission press release IP/03/738 of 23 May 2003.

22 See Commission press release IP/05/519 of 2 May 2005.

23 See case COMP/37.806 *ENIC/UEFA*.

24 See cases T-273/09 and T-254/08 *Associazione Giullemanidallajuve v European Commission.*

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Riccardo is a partner in the competition, trade and EU regulatory practice in Hammonds' Brussels office, specialising in competition, regulatory and intellectual property law, state aid and international trade. Riccardo's experience in the antitrust field covers a range of markets including information technology, consumer electronics, microprocessors, PCs, new and traditional media, pharmaceuticals, mining and metals, chemicals, aerospace and air transport, financial services, telecoms, utilities and sport.

He has assisted multinational corporations in connection with multi-jurisdictional and transatlantic mergers and alliances, exclusive and selective distribution agreements, parallel trade, technology transfers, patent tools, patent disclosures to STOs and interaction with patent offices, selling and discounting practices, package deals, standard and R&D agreements, as well as cartel work including compliance and dawn raid programmes.

Riccardo's recent experience includes merger control filings within and outside the EU, including ECMR and Form RS proceedings; complaints on antitrust abuses in relation to the exercise of IPRs; international competition and IPR litigation; implementing antitrust and merger compliance programmes, and advising on revisions to national competition law in Eastern Europe.

Riccardo represents his clients within administrative and judicial proceedings before the European Commission, European courts in Luxembourg, national competition authorities and national courts in the EU and beyond, including the United States and China. Riccardo is a member of the International and the American Bar Associations and speaks Italian, French, English and Spanish.

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Stephen is a partner in Hammonds' commercial and dispute resolution practice and the head of the sports law group. His expertise covers all aspects of regulatory and contentious work for clients in the sports, media, advertising and marketing services sectors. Stephen acts for national and international governing bodies, rights owners, and clubs, including several Premiership football clubs.

Stephen has worked on some of the most high profile sports cases in recent years, including: for Heart of Midlothian in its claim against Andrew Webster and Wigan Athletic for compensation under article 17 of FIFA Regulations; for Chelsea in its claim against Adrian Mutu for compensation for the repudiatory breach of his employment contract; for UEFA and BSkyB against those who unlawfully retransmitted live broadcasts of sports events over the internet, establishing the precedent case for illegal streaming; for the International Tennis Federation in competition law claims before the High Court against the ITF and the grand slam events by adidas, Nike and Puma, relating to the classification of the adidas '3-Stripes' as a manufacturer's identification for the purposes of the respective dress rules; and handles rights protection programmes for major international sporting events.

Stephen represents clients before the Court of Arbitration for Sport, as well as national and European courts. He is widely published in sports law journals and regularly speaks at conferences on aspects of sport and commercial law.

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Will is a solicitor in the Competition, Trade and EU regulatory practice in Hammonds' Brussels office. Will works in all aspects of competition, antitrust and regulatory law including merger control – undertaking filings before the OFT and Competition Commission in the UK, before the European Commission, and before the national authorities of several EU and non-EU countries – as well as behavioural antitrust and the competition aspects of commercial transactions. In addition to working with international corporate clients, Will has advised public sector bodies on aspects of EU state aid and public procurement law, in particular in relation to development and regeneration projects in the UK. He has also developed and conducted competition law training programmes for clients, specialising in merger control and antitrust compliance.

Will's recent experience includes advising corporate clients on UK merger control inquiries before the Office of Fair Trading and Competition Commission, including a complex Phase II inquiry; advising a non-EU conglomerate company on merger control aspects of acquisitions across Europe and the United States; advising regional development agencies and local authorities on state aid issues in the funding of urban regeneration projects; and preparing preliminary advice on a High Court challenge against a Ministry of Defence procurement decision.

Will speaks English and French and has written for the UK and European legal press. He is a member of the Law Society Competition Law Section and the British Institute of International and Comparative Law. In 2008 Will received an LLM in European Law from the College of Europe, Bruges.