



Margoni, T. and Van, R. (2015) UK horserace betting right: at odds with EU law? *European Intellectual Property Review*, 37(8), pp. 479-483.

This is the author's final accepted version.

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<http://eprints.gla.ac.uk/129433/>

Deposited on: 12 October 2017

Enlighten – Research publications by members of the University of Glasgow

<http://eprints.gla.ac.uk>

UK Horserace Betting Right: at odds with EU law?

Thomas Margoni and Ben Van Rompuy

European Intellectual Property Review (EIPR) 37(8), 479 – 483.

July 2015

About ten years after a previous initiative to replace the Horserace Betting Levy was abandoned following a judgment from the Court of Justice (CJ),¹ the UK government announced that it will introduce a Horserace Betting Right and repeal the Levy that to date has cross-subsidised horseracing. In this comment, the authors warn that the implementation of a Betting Right could be problematic from an EU law perspective. The UK government, and any other interested EU legislator, should reconsider the opportunity of a specifically devised betting right.

Background

The Gambling (Licensing and Advertising) Act 2014 gave new impetus to the long-running debate on the replacement of the 50-year-old Horserace Betting Levy, a statutory levy on the gross profit of betting on British horseracing (i.e. horseracing in England, Scotland and Wales) for the benefit of the horseracing industry.² The Act significantly altered the regulation of online gambling in the UK. It introduced a shift from a “point of production” to a “point of consumption” model: all gambling operators engaging with British consumers must now obtain a licence from the UK Gambling Commission, regardless of whether they are British-based or offshore-based.

The UK government launched a series of consultations on how it could bring the collection of the Levy in line with this new “point of consumption” regime. Under the current system, introduced long before the arrival of remote betting services, only onshore bookmakers taking bets on British horseracing are liable to pay the Levy. The Department for Culture, Media and Sport proposed two options: reforming and extending the Horserace Betting Levy (to offshore operators) or replacing the Levy with a Horserace Betting Right. Only one week after the consultation on the betting right option closed in March 2015, Chancellor George Osborne announced in his Budget speech that the government would introduce legislative proposals to establish the Horserace Betting Right.³ Apparently a careful analysis

¹The UK government considered that the judgment in *British Horseracing Board v William Hill Organization* (Case C-203/02) [2004] ECR I-10415 had cast doubt on the ability of the horserace industry to enforce substantial payments for the use of its data and, consequently, on the viability of the proposed replacement. House of Commons, Written Ministerial Statements, 14 December 2006, Column 95WS.

²The Levy in its present form was introduced by the Betting, Gaming and Lotteries Act 1963, sections 24-31.

³Chancellor George Osborne's Budget 2015 speech of 18 March 2015, available at <https://www.gov.uk/government/speeches/chancellor-george-osbornes-budget-2015-speech> [Accessed April 15, 2015].

of the responses to the consultation was no longer necessary to persuade the government of the merits of this form of intervention.

No timetable has been set for introducing new legislation and various details still need to be considered. Yet, what is clear is that the Horserace Betting Right will impact on all licensed operators offering bets on British horseracing to British consumers. They will be required to obtain an authorization in exchange for a financial contribution. According to the consultation document, the right would be vested in a racing authority named in statute and created before Royal Assent. The racing authority would set the terms and conditions of authorization, including fees that are “*fair, reasonable and non-discriminatory*”.⁴ The legislation, however, would define the activities on which funds raised through the Betting Right could be spent, such as: compiling the fixture list; regulation and integrity; prize money and related incentives; veterinary research and education; equine and participant welfare; and industry recruitment, training and education.⁵

At least three main areas of EU law could potentially contrast with, or pose considerable limitations to, the implementation of a right such as the one that may originate from the aforementioned general framework: database rights, competition rules, and fundamental freedoms.

Copyright and the *sui generis* database right

The main question of EU law compatibility here is whether a right such as the one proposed by the UK government is compatible with the Database Directive.⁶ As it is well known, copyright protection is excluded when the database reflects mere skill and labour, even in considerable amounts, but does not reach the harmonised level of the “author’s own intellectual creation”, that is to say the free and creative choices through which an author puts his personal stamp on the work.⁷ In the light of the subject matter here analysed it seems quite likely that copyright is not really an issue in this debate.

Slightly more complex is the case of the *sui generis* database rights (SGDR) provided for by Art. 7 Database Directive. Art. 7 requires a substantial investment in either qualitative or quantitative terms in order for a database to qualify for SGDR protection. However, and very importantly, the substantial investment has to be made “in either the obtaining, verification or presentation of the contents” of the

⁴Department for Culture, Media & Sport, Horserace Betting Right: A consultation on potential structure and operation, February 2015, paras. 4.9-4.10.

⁵*Idem*, para. 4.11.

⁶Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. For a critical analysis of the Directive and of its possible implications for present purposes see Mark J Davison and P Bernt Hugenholtz, “Football fixtures, horseraces and spinoffs: the CJ domesticates the database right” (2005) EIPR (3) 113-118; P Bernt Hugenholtz, “Abuse of Database Right Sole-source information banks under the EU Database Directive” in François Lévêque and Howard Shelanski (eds.) *Antitrust, Patents, and Copyright: EU and US Perspectives* (Edward Elgar, Cheltenham 2005) 203-219; P Bernt Hugenholtz, “Implementing the Database Directive”, in Jan Jan J.C. Kabel and Gerard J.H.M. Mom, *Intellectual Property and Information Law, Essays in Honour of Herman Cohen Jehoram* (Kluwer Law International, The Hague 1998) 183; Ben Van Rompuy and Thomas Margoni, “Study on sports organisers’ rights in the European Union”, February 2014, available at http://ec.europa.eu/sport/news/2014/study-on-sport-organisers-rights_en.htm [Accessed April 15, 2015].

⁷*Football Dataco v Yahoo! UK* (C-604/10) [2012] ECLI:EU:C:2012:115; Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edition Oxford University Press, Oxford 2014) 93.

database. In 2004 the CJ delivered four landmark decisions in which it “domesticated” the SGDR and clarified that investments not in obtaining, verifying or presenting the contents of the database, but in generating those contents, do not count towards substantial investment.⁸

Crucially, the CJ stated that investments in obtaining the contents of a database refers to “the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials”. Furthermore, the Court established that the purpose of the SGDR is “to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database”.⁹ Consequently, fixtures lists, schedules and any other “created” data do not benefit from the protection afforded by the *sui generis* database right.

Whereas the 2004 CJ judgments could be read in the sense that any reporting of facts constitutes data “creation”, the English Court of Appeal expressed a different point of view in an opinion it recently handed down in *Football Dataco v Stan James and Sportradar*.¹⁰ In this case, which concerned the collecting and reporting of football matches live statistics, the Court of Appeal sustained the view that facts observed, such as scoring of goals, are not “created”, but “obtained”. According to the Court, this is sufficient to recognise a *sui generis* database right in databases of collected sports statistics, provided that the overall investment in obtaining the data is substantial.¹¹ Consequently, while lists of match fixtures and schedules are certainly excluded from the protection offered by SGDR (as clearly established by the CJ), databases of collected sports results have been held to qualify for SGDR protection by the Court of Appeal of England and Wales. Whether this interpretation of the dichotomy between creating and obtaining data would survive the scrutiny of the CJ cannot be established with certainty and a proper analysis of the matter would largely exceed the purpose of this contribution.¹²

Suffice here to point out that some guidance towards the CJ's possible orientation on this matter can be sought in the words of the same Directive as well as in those of the European Commission. The Directive is wary of the potential harm that so called single-source databases – a form of database likely triggered in the case of sports data – could cause, and in particular of their anti-competitive effects. This scepticism is confirmed by a number of Recitals (e.g. 45 and 46) as well as by the legislative history of the Directive, which contained a specific rule on single-source databases providing for a system of compulsory licenses.¹³ The European Commission's evaluation of the

⁸*Fixtures Marketing v Oy Veikkaus Ab* (Case C-46/02) [2004] ECR I-10365; *British Horseracing Board v William Hill Organization* (Case C-203/02) [2004] ECR I-10415; *Fixtures Marketing v Svenska AB* (C-338/02) [2004] ECR I-10497; and *Fixtures Marketing v OPAP* (C-444/02) [2004] ECR I-10549; Mark J Davison and P Bernt Hugenholtz, “Football fixtures, horseraces and spinoffs: the CJ domesticates the database right” (2005) EIPR (3) 113-118.

⁹*British Horseracing Board v William Hill Organization* (Case C-203/02) [2004] ECR I-10415, para. 31.

¹⁰Case [2013] EWCA Civ 27, *Football Dataco v Stan James and Sportradar* of 6 February 2013.

¹¹*Idem*, para. 69.

¹²See Mark James Davison and P Bernt Hugenholtz, “Football fixtures, horseraces and spinoffs: the CJ domesticates the database right” (2005) EIPR (3) 113-118.

¹³See Art. 8 Proposal for a Council Directive on the Legal Protection of Databases, COM (92)24 final, of 13 May 1992; P Bernt Hugenholtz, “Abuse of Database Right Sole-source information banks under the EU Database Directive” in François Lévêque and Howard Shelanski (eds.) *Antitrust, Patents, and Copyright: EU and US Perspectives* (Edward Elgar, Cheltenham 2005) 203-219.

Database Directive of 2005 seems to confirm this orientation.¹⁴ In this official document it notes that “the ECJ’s narrow interpretation of the ‘sui generis’ protection for ‘non-original’ databases where the data were ‘created’ by the same entity as the entity that establishes the database would put to rest any fear of abuse of a dominant position that this entity would have on data and information it ‘created’ itself (so-called ‘single-source’ databases)”.

In conclusion, protection of created data by way of SGDR is clearly excluded by the CJ. This ban certainly applies to match fixtures and schedules, while collected live sports results have been held protectable by the English Court of Appeal, but to date this view has not been confirmed by the CJ and it is far from clear that this will happen.¹⁵

At this point the question becomes whether a right such as that proposed by the UK Government is bound by the above seen limitations relating to the protection of non-original databases, or whether national legislators are allowed to intervene in the field in order to create rules offering wider protection to non-original databases. In other words, the question is whether the field of database protection is pre-empted by EU law.

It is settled case law that the Database Directive created rules of maximum harmonisation with respect to copyright and arguably also SGDR protection.¹⁶ This means that this area is pre-empted by EU law and any Member State intervention in the same field should fully comply with the EU identified standards, at least with regard to copyright and the SGDR.¹⁷ The Directive explicitly leaves untouched other potentially connected areas of law such as unfair competition and contract law.

This raises the question of the correct legal qualification of the proposed Horserace Betting Right. Similarly to the analysis developed for the French right to consent to bets,¹⁸ if the right’s legal qualification – regardless of the chosen *nomen iuris* – will correspond to copyright or related rights,¹⁹ then the area is arguably pre-empted by EU law. On the contrary, if the proposed right will be construed

¹⁴See European Commission, First evaluation of Directive 96/9/EC on the legal protection of databases, of 12 December 2005, at 14.

¹⁵For instance the Belgian and Portuguese Governments expressed doubts that live football database can be eligible for SGDR protection, see Opinion of the AG Cruz Villalón in *Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG* (Case C-173/11) ECLI:EU:C:2012:642, para. 31.

¹⁶*Football Dataco v Yahoo! UK* (C-604/10) [2012] ECLI:EU:C:2012:115, para. 52; Ben Van Rompuy and Thomas Margoni, “Study on sports organisers’ rights in the European Union” (2014) 139; Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th Edition Oxford University Press, Oxford 2014) 107; Annemarie Beunen, “Geschriftenbescherming: The Dutch Protection for Non-Original Writings” in P Bernt Hugenholtz et al. (eds.) *A Century of Dutch Copyright Law: Auteurswet 1912–2012* (deLex Publishers, 2012) 3, 97.

¹⁷Idem; Estelle Derclaye, “Football Dataco: skill and labour is dead!”, Kluwer Copyright Blog, 1 March 2012, available at <http://kluwercopyrightblog.com/2012/03/01/football-dataco-skill-and-labour-is-dead/> [Accessed April 15, 2015].

¹⁸Ben Van Rompuy and Thomas Margoni, “Study on sports organisers’ rights in the European Union” (2014) 126.

¹⁹As suggested with respect to the French right to consent to bets by André Lucas et al. *Traité de la propriété littéraire et artistique* (4th edition LexisNexis, Paris 2012) 934.

as a general right to property²⁰ or as a rule of unfair competition its chances to escape EU law pre-emption would be higher.²¹

In conclusion, the space for a UK betting right in the light of the harmonised protection of databases is narrow, but not completely absent. Much will depend on the specific traits that the right will assume. The further away from copyright and related rights (and a general right of property may not be far enough), the easier to avoid issues connected with EU law compliance. If the right will look like a form of protection of non-original databases then it must comply with the prohibition of protection of fixtures and schedules, while protection of results remains, at least from an EU law perspective, an open issue. National rules relying on notions contained in Art. 13 of the Directive, such as unfair competition, would not be pre-empted by EU law so long as they do not materially reproduce the exclusive rights that the CJ deemed incompatible with the Directive.

EU State aid rules

Since the British Horserace Betting Levy in its current form was introduced in 1963, prior to the UK's accession to the EU, the measure constitutes existing aid.²² This means that the UK government was never obliged to notify the Levy to the European Commission for clearance under the State aid rules. Even if the Commission had initiated proceedings on its own motion or on the basis of a complaint (which it did not), the measure would have been protected from an order of recovery.²³ The option to extend the existing Levy to offshore remote betting operators, however, would have substantially altered the measure and converted it into new aid. The Department for Culture, Media and Sport was well aware that this implied that the Levy had to be notified and could not be implemented until it was approved by the Commission.²⁴ This hampered the attractiveness of this policy option.

The consultation document on the Horserace Betting Right repeatedly emphasises that beyond the adoption of the legislation introducing the right, the government “*wants to be as far as possible removed from any direct involvement in activities that take place under the legislation*”.²⁵ The racing authority would administer the right with any remaining disputes a matter for the courts or a tribunal. Yet it is uncertain that this strategy to circumvent State aid control will be successful.

²⁰This is the position upheld by the French Gaming Regulatory Authority in ARJEL, “Report of the French Online Gaming Regulatory Authority on the betting right” (2013). See also the French Council of State decision of 30 March 2011, n. 342142, available at <http://www.juricaf.org/arret/FRANCE-CONSEILDETAT-20110330-342142> [Accessed April 15, 2015].

²¹Ben Van Rompuy and Thomas Margoni, “Study on sports organisers' rights in the European Union” (2014) 139; Reto M Hilty and Frauke Henning-Bodewig, “Leistungsschutzrecht für Sportveranstalter?”, Study commissioned by the German Football association, the German Football League, the German Olympic association, and others (2006) 21-23.

²²Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L 83/1, Article 1(b).

²³The Commission has no power to order recovery of the existing aid. It can only propose appropriate measures to the Member State (i.e. modifications to or the abolition of the aid measure) as for the future. *Idem*, Articles 17-19.

²⁴Department for Culture, Media & Sport, Extending the Horserace Betting Right: A consultation on implementation, June 2014.

²⁵Department for Culture, Media & Sport, Horserace Betting Right: A consultation on potential structure and operation, February 2015, para. 2.6.

Economic advantages granted to specific undertakings are to be considered State aid pursuant to Article 107(1) TFEU only if they are imputable to the State *and* financed through State resources. A subsidy scheme imposed in a binding fashion by national legislation and allocated to certain pre-defined beneficiaries is clearly imputable to the State. The key question is thus whether the Horserace Betting Right can be regarded as State resources within the meaning of Article 107(1) TFEU. The distinction between aid granted directly by the State or by public or private bodies designated or created by the State is irrelevant.²⁶ The deciding factor is whether the funds in question are under public control and therefore available to public authorities.²⁷ The Commission has consistently found that the yield of a levy (e.g. collected from horseracing betting operators) constitutes State resources.²⁸ Whether or not an analogous reasoning applies to the Horserace Betting Right will ultimately depend on the extent to which the UK government intervenes in the determination of the modalities of the measure. While it suggests that it will not,²⁹ it is difficult to envisage that the government would not monitor, at the very least, whether the fees received are being used exclusively for the pre-defined purposes (e.g. on the basis of the racing authority's annual accounts, as proposed in the consultation document). Any opportunity to intervene will make the government cross the blurry line between public and private control.³⁰

A finding of State aid would not necessarily be fatal to the enterprise. Article 107(3)(c) TFEU provides for a possible derogation from the prohibition of State aid for support measures facilitating the development of certain economic areas. In assessing whether the Horserace Betting Right is compatible with the internal market, the Commission will balance the positive impact of the measure against its negative side effects (distortion of trade and competition). The most contentious element in the assessment would be the question whether the Betting Right can be deemed proportional to certain objectives of common interest. The UK authorities would need to demonstrate that the revenues generated by the right do not exceed costs directly connected to the organisation of British horseracing that also benefit all horserace betting operators. Most of the suggested activities on which funds raised through the Betting Right could be spent,³¹ could be considered in the common interest: integrity measures; veterinary research; equine and participant welfare; and training and education. The rational development of equidae production and breeding has also been recognised as a common interest objective.³² Hence, there is little reason to doubt that the UK government would be able to bring the Horserace Betting Right in line with the EU State aid rules. What is clear though is that a financial

²⁶See *PreussenElektra AG v Schleswag AG* (C-379/98) [2001] I-2099, para. 58; *Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA* (C-126/01) [2003] ECR I-13769, para. 23.

²⁷See *Commission v Italy* (173/73) [1974] ECR 709, para. 16; *France v Ladbroke Racing and Commission* (C-83/98 P) [2000] ECR I-3271, para. 50; *France v Commission* (C-482/99) [2002] ECR I-4397, para.37.

²⁸See e.g. Commission Decision of 19 June 2013 on State aid No SA.30753 (C 34/10) (ex N 140/10) which France is planning to implement for horse racing companies [2013] OJ L14/17, paras. 117-119; Commission Decision of 23 July 2003 on State aid NN118/2002 – Ireland Thoroughbred Levy, C(2003)2056fin, para. 29.

²⁹Department for Culture, Media & Sport, Horserace Betting Right: A consultation on potential structure and operation, February 2015, para. 4.15.

³⁰Compare *Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten* (C-345/02) [2004] ECR I-7139, paras. 35-39 with Commission Decision of 14 July 2008 on State aid No. N659/2007 United Kingdom (Scotland) QMS – Meat Quality Advertising Scheme, C(2008) 3549, paras. 21-25.

³¹Department for Culture, Media & Sport, Horserace Betting Right: A consultation on potential structure and operation, February 2015, paras. 4.11.

³²Commission Decision 2014/19/EU on State aid No SA.30753 (C 34/10) (ex N 140/10) which France is planning to implement for horse racing companies [2013] OJ L14/17, para. 137.

return for the use of fixtures or the subsidisation of prize money cannot be construed as furthering a common interest.

Restriction of the freedom of services

Even if the attempt of the UK government to avoid State aid control were successful, EU law would still require it to demonstrate that the Horserace Betting Right is appropriate for and genuinely directed to an objective of public interest. From an EU internal market perspective, the requirement for betting operators to obtain consent for the organisation of bets on British horseracing could impede or render less attractive the free provision of gambling services within the meaning of Article 56 TFEU.³³ The CJ has consistently held that restrictions on gambling activities are acceptable only if justified either by reasons set out in the Treaty itself or by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming.³⁴ Even if they are justifiable under these criteria, restrictions imposed by Member States must also satisfy the conditions laid down in the case law as regards their proportionality and must be applied without discrimination.³⁵

While some argue that the CJ treats justifications under the State aid and the free movement rules in a unitary approach,³⁶ it should be stressed that derogations from the principle of free movement are generally interpreted more restrictively since the justifications must be non-economic. It is settled case law that the financing of public interest activities through proceeds from gambling services cannot in itself be regarded as an objective justification for restrictions to the freedom to provide services. The financing of such activities can only be accepted as a beneficial consequence that is incidental to the restrictive policy adopted.³⁷ The European Commission raised this issue in the context of the French right to consent to bets.³⁸ Initially, the rationale of the right was solely expressed in terms of generating a fair financial return to sport (i.e. for the use of fixtures and results). Following the Commission's reasoned opinion that the exercise of the right to consent to bets would likely infringe Article 56 TFEU, the French legislature substantially amended the relevant provisions in its draft gambling law and redefined the right as a means to first and foremost preserve sports integrity.³⁹

³³European Commission, Detailed opinion under Article 9.2 of Directive 98/34/EC of 22 June 1998 – Notification 2009/0122/F, p. 4. All measures that prohibit, impede or render less attractive the exercise of the fundamental freedoms must be regarded as restrictions. See *Commission v Italy* (C-439/99) [2002] ECR I-305, para. 22; *Analir and Others v Administración General del Estado* (C-205/99) [2001] ECR I-1271, para. 21.

³⁴See e.g. *Liga Portuguesa de Futebol Profissional and Bwin International* (C-42/07) [2009] ECR I-7633, paras 55-56; *Piergiorgio Gambelli and Others* (C-243/01) [2003] ECR I-13031, para. 54.

³⁵*Liga Portuguesa de Futebol Profissional and Bwin International* (C-42/07) [2009] ECR I-7633, paras. 59-61.

³⁶See e.g. Andrea Biondi, Piet Eeckhout and James Flynn, *The Law of State Aid in the European Union* (Oxford University Press, Oxford 2004) 111-116.

³⁷See e.g. *Markus Stoß and Others v Wetteraukreis and Others* (C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07) [2010] I-8069, para. 104; *Questore di Verona v Diego Zenatti* (C-67/98) [1999] ECR I-7289, para. 36; Judgment of the EFTA Court in case 3/06 (*Ladbrokes*) §63.

³⁸European Commission, Detailed opinion under Article 9.2 of Directive 98/34/EC of 22 June 1998 – Notification 2009/0122/F, p. 4.

³⁹Ben Van Rompuy and Thomas Margoni, “Study on sports organisers' rights in the European Union” (2014) 136-138.

It follows once again that the UK government will have to design the Horserace Betting Right as a proportional measure to pursue well-defined public policy aims. The promise that the measure will secure and even boost revenues for the British horseracing industry that can be used for things like prize money clearly offers a false hope.

Final remarks

After years of advocating for “*an intellectual property right backed up by a licensing regime that catches the payments from offshore operators*”,⁴⁰ the British horseracing industry has finally found support for their position from the UK government. The introduction of the Horserace Betting Right, however, is fraught with legal questions from an EU law perspective. Database rights, State aid rules, and free movement rules are the main obstacles.

A final observation can be formulated. There seems to be a common trait between the proposed British Horserace Betting Right and the similarly devised French right to consent to bets, which was welcomed with some scepticism by EU institutions and commentators.⁴¹ This trait is the idea that an *erga omnes* right (and what better than an – intellectual – property right to this effect) can be created to protect what EU rules and settled case law already defined as not protectable (mainly due to anti-competitive effects and the need to preserve a thriving market). Whereas the possibility to channel revenue from associated betting activity to the horseracing industry is not in itself incompatible with EU law, to try to proceed along the narrowest of the possible trails can be seen as a risky endeavour at best. The alternative option of reforming the tried and tested Levy would have been a much safer bet.

⁴⁰Greg Wood, Racing united in seeking 'betting right' payments from bookmakers, *The Guardian*, 6 July 2011.

⁴¹Ben Van Rompuy and Thomas Margoni, “Study on sports organisers' rights in the European Union” (2014) 135-145.