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Munich Regional Court I

Case no.: 1 HK 0 8126/16

In the legal dispute

1) **Fenerbahce Spor Kulübu** (Turkey), represented by its president Aziz Yildirim, Barbaros Mah. Dereboyu Cad. Batı Ataşehir, 34764 Istanbul, Turkey,
- Applicant -

2) **Maccabi Tel Aviv Basketball Club (1995) Ltd**., represented by its president Shimon Mizrahi, Hayarkon St. 293, 63504 Tel Aviv, Israel
- Applicant -

3) **Olympiacos SFP BSA**, represented by its president Panagiotis Angelopoulos, Ethnarchou Makariou 1 Av., 18547 Neo Faliro/Piraeus, Greece
- Applicant -

4) **Real Madrid Club de Fútbol**, represented by its president Florentino Perez, Av. Concha Espina 1, 28036 Madrid, Spain
- Applicant -

5) **Club Baloncesto Gran Canaria Claret**, represented by its president Miguel Angel Betancor, Cordoba, 31-A, 35016 Las Palmas de Gran Canaria, Spain
- Applicant -

6) **Kosarkaski Club Olimpjia Lubljana**, represented by its president Jani Moderndorfer, Vojkova Cesta 100, 1000 Ljubljana, Slovenia
- Applicant -

7) **Krepšinio Rytas VšĮ**, represented by its president Gedvydas Vainauskas, Ozo Str. 14A, 08200 Vilnius, Lithuania
- Applicant -

8) **Kosarkaski Club Cedevita**, represented by its president Mladen Veber, TRG Kresimir Cosic 11, 10000 Zagreb, Croatia
- Applicant -

9) **Grono Sportowa Spolka Akcjnä**, represented by its president Jerzy Kotarski, Szosa Kisielinska 22, 65-247 Zielona Góra, Poland
- Applicant -

10) **Balconesto Málaga S.A.D.**, represented by its president Eduardo Garciía López, Pavilion Los Guindos Avda, Gregorio Diego 44, 29004 Málaga, Spain
- Applicant -

11) **Jadranska Kosarkaska Asocijacija - Aba Liga j.t.d**., represented by its president Dragan Bokan, Prilaz Ivana Visina 7, Zagreb - Siget, Croatia
- Applicant -

12) **Asociación de Clubs de Baloncestro ("ACB")**, represented by its president Francisco Roca, c/lradier 37, 08017 Barcelona, Spain
- Applicant -

13) **Euroleague Properties S.A.**, 60 Grand Rue, 1660 Luxembourg, Luxembourg represented by Jordi Bertomeu, member of the management
- Applicant -

14) **Euroleague Commercial Asssets S.A.**, 7 rue Beaumont, 1219 Luxembourg, Luxembourg represented by Jordi Bertomeu, member of the management
- Applicant -

Counsel for Applicants 1-12:
Gleiss Lutz, Karl-Scharnagl-Ring 6, 80539 Munich, file ref.: PL/Wh 80096-16

Counsel for Applicants 13 and 14:
Gleiss Lutz, Karl-Scharnagl-Ring 6, 80539 Munich, file ref.: PL/Wh 60096-16/bro 003

versus

1. **FIBA EUROPE e.V**., represented by its Executive Director *(Vorstand)* Kamil Novak, Ismaninger Str. 21, 81675 Munich
- Respondent -

2. **Fédération Internationale de Basketball**, represented by its secretary general *(Generalsekretär)* Patrick Baumann, Route Suisse 5, 1295 Mies, Switzerland
- Respondent -

for antitrust law, cease and desist

the Munich Regional Court 1 - 1st Chamber for Commercial Matters - through the presiding Regional Court judge Waitzinger on 2 June 2016 hereby issues, without an oral hearing due to urgency pursuant to section 937(2) Code of Civil Procedure, the following

Order

1. by way of a **temporary injunction,** subject to an administrative fine of up to two hundred fifty thousand euro or imprisonment for up to six months for each infringement - imprisonment also in the event that the administrative fine cannot be raised, to be enforced on the managing director in the case of Respondent 1 and on the secretary general in the case of Respondent 2 -, the Respondents are

prohibited from

sanctioning or threatening to sanction, directly or indirectly, (i) the Applicants, (ii) other basketball clubs in the geographic area of Respondent 1, (iii) National Basketball Federations in the geographic area of Respondent 1, or (iv) national or supra-national basketball leagues in the geographic area of Respondent 1

because of a decision or intention on the part of the entities named in (i) to (iv) to co-operate with Applicant 14 and its subsidiaries;

in particular, the Respondents are prohibited from

a) excluding or threatening to exclude national basketball teams from participating in national team competitions organised by Respondent 1, in particular Eurobasket 2017, by implementing the binding decision communicated by letter of 15 April 2016 to all National Basketball Federations in the geographic area of Respondent 1, attached as Exhibits ASt 36, ASt 37, ASt 38 and ASt 39;

b) excluding or threatening to exclude national basketball teams from participating in national team competitions organised by Respondent 2, in particular the 2016 Olympic Games and the Olympic qualifying games from 4 to 10 July 2016, by implementing the binding decision communicated by letter of 15 April 2016 to all National Basketball Federations in the geographic area of Respondent 1, attached as Exhibits ASt 36, ASt 37, ASt 38 and ASt 39;

2. In all other respects, the application for issuance of an interim injunction is rejected.

3. The Respondents must collectively bear 4/5 of the costs of the dispute, and the Applicants collectively 1/5.

4. The value in dispute is set at EUR 1,000,000.

5. With the Order, the following must be served to Respondent 1:

Application of 13 May 2016,
Addition of parties of 20 May 2016
Pleading of 31 May 2016 (supplementary statement)
Court Order of 18 May 2016

Reasons:

I. Grounds for preliminary injunction

With the letters from Respondent 1 of 15 April 2016 with essentially the same wording (examples submitted as Exhibits ASt 36 to 39) to the National Basketball Federations (for example those of Italy, Slovenia, Greece and Spain), there is an urgent risk that European national teams will not be able to participate in the 2016 Olympic Games (5 to 21 August 2016), which begin with qualifications already on 4 July 2016, or in the 2017 Eurobasket. These sanctions against the national federations would also affect the clubs and leagues making this application (Applicants 1 to 12), since the national team players are recruited from the clubs. The imposition of sanctions against the national teams is meant to indirectly force the clubs to cancel their participation in competitions of the Euroleague, i.e. Applicants 13 and 14, in particular the “Eurocup” that will be held next year, or not agree to

participate in them in the first place. Since the clubs, leagues and organisers are already engaged in planning the Eurocup for the next season and above all are dependent on whether the sanctions are upheld - the timing of which is fixed by the participation in the Olympic Games -, absolute urgency exists for a decision on whether these sanctions and/or threat of such sanctions, which are actually supposed to convince the clubs to comply, are justified. For Applicants 13 and 14 this means whether sufficient clubs will even be available to them next season to make the organisation of a European competition appear commercially successful.

II. Claim for injunction

The cease and desist claim is based on section 33(1) Act Against Restraints of Competition in conjunction with Article 102 TFEU from the standpoint of abuse of a monopoly position.

1. The Applicants, as "affected persons" within the meaning of section 33(1) sentence 3 Act Against Restraints of Competition, have standing to sue. The group of affected persons for the cease and desist claim must be defined broadly, i.e. anyone who can be impaired by an infringement is an affected person (Bechtold, GWB, 7th ed., § 33 margin note 10 et seq; BGH of 28 June 2011, KZR 75/10- ORWI). This need not only be the directly affected person. The arguments presented by the Applicants on the de facto restriction of their freedom to pursue an economic activity - with regard to both the clubs and the organisers of the Euroleague/Eurocup competitions - make the occurrence of damage due to the pressure exerted on the national teams in the future appear conceivable.

2. The Respondents are undertakings within the meaning of antitrust law, Article 102 TFEU. Respondent 2 is the international basketball federation, with registered office in Switzerland, and is recognised by the IOC. Its members currently comprise 215 national federations. These members are organised in five zones. Respondent 1, with registered office in Munich, is responsible for the "Europe" zone, including Turkey and Israel. Under the supervision of Respondent 2 it is responsible for regulating basketball as a sport, its development and monitoring. It is additionally responsible for cross-border competitions of both the clubs and the national teams. Both of the Respondents economically exploit the competitions they organise, for example by selling television rights or acquiring sponsors, and thus are also economically active as undertakings.

3. The Respondents as monopolists in their territorial area have a market dominating position within the meaning of Article 102 TFEU. For competitions of the national teams, the "single place principle" applies. Respondent 2 is recognised by the IOC as the only organisation which has the authority to issue regulations in the area of basketball that are applicable worldwide and decide which team will be sent to the Olympic Games. The same applies for European competitions of the national teams.

4. The sanctions that are threatened and/or imposed in Respondent 1's letter of 15 April 2016 to certain National Federations represent an abuse of a market dominant position of Respondent 1, and indirectly by way of FIBA's organisational structure, of Respondent 2, the world federation, as well.

From 2004 to 2015, basketball clubs such as Applicants 1 to 10, as well as in certain countries leagues such as Applicants 11 and 12, participated in the competitions for top-level and second-level clubs (Euroleague and Eurocup), which were commercially organised by Applicants 13 and 14, without any objections from FIBA . The Respondents have attempted since 2015 to organise these competitions

themselves, namely as the "FIBA Basketball Champions League" and the "FIBA Europe Cup". Applicants 1 to 4 played in the premier competition *(Königsklasse)* of the Euroleague up to 2015, while Respondents ***[sic]*** 5 to 12 mostly played in the second level. They do not wish to switch to the new FIBA competitions from 2017 on, but would like to remain with the competitions of Applicants 13 and 14 and - if they qualify - contractually commit themselves to them.

Respondent 1 invokes, inter alia, Article 9.1 of FIBA's General Statutes as adopted in 2014, as well as Article 12 of these Statutes. According to these provisions, the National Federations are to be obliged to ensure at all times that their leagues, clubs and players participate only in international tournaments which are officially recognized by the National Federation and by FIBA. A failure to comply could lead to an intervention by the FIBA up to the imposition of sanctions. The same applies analogously for competitions such as the Olympic Games, with participants from various zones, according to Articles 3, 4 and 126 of FIBA's Internal Regulations.

With the letters from Respondent 1 of 15 April 2016 with essentially the same wording (examples submitted as Exhibits ASt 36 and 37) to the National Basketball Federations (for example those of Slovenia and Spain), they were informed *"that [your] Federation has [already] lost its right to participate in [...] Eurobasket 2017 and [...] a copy of this letter is being sent to FIBA, which is competent to take any decisions it deems necessary regarding worldwide events."*

This is substantiated with a decision of FIBA Europe's Board of 20 March 2016, that every national team will automatically lose the right to participate in a (men's) competition organised by FIBA Europe which supports "ECA's (=Euroleague's) illegal practices" by allowing their leagues or clubs to conclude agreements with ECA. The Respondents, for their part, are of the opinion that Applicants 13 and 14, which have organised the European Championships of the top clubs up to this point, are abusing their market power within the meaning of Article 102 TFEU.

With similar letters of 15 April 2016, National Federations such as those of Spain and Greece (submitted as Exhibits ASt 38 and ASt 39), whose clubs had not yet bindingly joined the Euroleague, were threatened with such an exclusion, setting a deadline of 20 April 2016 to subordinate themselves to FIBA's position.

Both Applicants 13 and the two Respondents have filed a complaint to the European Commission for violation of Articles 101 and 102 TFEU and this has not yet been decided (submitted as Exhibits ASt 27 and 124, as well as ASt 8 and 126 including FIBA's reply of 4 April 2016).

In the Respondents' response of 4 April 2016 (ASt 124) they declared to the European Commission in margin no. 46: "*The exploitative nature of the ECA complaint is also evidenced by the fact that sanctions have never been imposed on clubs or National Federations for violation of the Article 9.1 rule or its equivalents."*

However, such sanctions were imposed, respectively threatened, a few days later by letters of 15 April 2016.

Excluding or threatening to exclude the national teams by reference to the exclusivity clause under Article 9.1 of the Statutes, constitutes the abuse of a dominant position. It is "asymmetric" warfare. The National Federations with their national teams are prevented from taking part in the Olympic Games or European Championships - which is elementary for them - in order to pressurise them into persuading the clubs and players organised in the National Federations to forgo taking part in the

competition of a competing event, irrespective of the binding clarification of the legal issue of whether the ECA, for its part, abuses its market power by organising the club championships Eurocup and Euroleague.

Even if the exclusivity clauses under Articles 9.1 and 12 of the Statutes and the associated sanctions mechanism do not in themselves constitute an anticompetitive measure within the meaning of Article 101 TFEU, in this specific case there would be no justification for excluding a National Federation from Olympic Games or European championships in order to eliminate de facto one competitor (the only one) for club championships (Eurocup versus FIBA Europe Cup), where such competitor is unable to organise an economically viable competition on account of clubs compelled to refuse. No compulsory need of FIBA is in evidence as to why it should not await the outcome of the complaint proceedings before the European Commission that have just been initiated, where the question will be reviewed as to whether the ECA/Euroleague are abusing their market power pursuant to Article 102 TFEU. The entitlement to take part in Olympic Games should be decided for sports reasons. The decision of certain clubs to take part in a certain club competition has, in terms of sport, nothing whatsoever to do with a national team's participation in international competitions. Such association, namely the imposing of sanctions on third parties to enforce own interests in a different area, is a classic case of antitrust abuse within the meaning of Article 102 TFEU.

III. No right to publication - partial rejection of the application for an injunction

In addition to the cease and desist motion, the Applicants have also made the following motion for information and publication:

> *That the Respondents be ordered to inform (i) Applicants 1-12, and (ii) all National Basketball Federations in Respondent 1's zone by a binding written declaration, as well as (iii) the public by publishing a statement on the homepages of the websites www.fiba.com and www.fibaeurope.com by 3 June 2016 at the latest.*

c) that with immediate effect the basketball clubs in Respondent 1's zone are free to participate in the Eurocup competition that is not organised by the Respondents, without having to fear direct or indirect sanctions by the Respondents;

d) that with immediate effect the basketball leagues are free to permit the basketball clubs belonging to them to participate in the Eurocup competition that is not organised by the Respondents, or to select basketball clubs belonging to them to do so, without having to fear direct or indirect sanctions by the Respondents;

that with immediate effect the National Basketball Federations are free to permit the basketball clubs belonging to them to participate in the Eurocup competition that is not organised by the Respondents, or to select basketball clubs belonging to them to do so, without having to fear direct or indirect sanctions by the Respondents;

This application for publication and information by the Respondents, as a right of rectification pursuant to section 33 Act against Restraints of Competition, Article 102 TFEU, may be suited to removing any confusion caused among the interested public and within the associations and clubs. However, it is fundamentally not permitted to anticipate a decision on the main matter by way of preliminary injunction pursuant to section 940 German Code of Civil Procedure. Publication and information, as specifically requested by the Applicants, would hide the fact that what is at issue is

merely a temporary ruling in cursory proceedings to avoid harm that cannot be made good. The provision of such information by the Respondents is also not necessary for this purpose. It is within the discretion of the Applicant whether to make the injunction known as such.

IV. Jurisdiction of Munich Regional Court I

Munich Regional Court I is the competent court both locally and internationally.

As Respondent 1 has its business seat in Munich, Munich Regional Court I has local competence pursuant to section 17(1) German Code of Civil Procedure, Articles. 63, 4 Brussels I Regulation.

Article 1(1) of the Lugano Convention applies as regards Respondent 2. Both the Federal Republic of Germany and Switzerland have acceded to this Convention. Pursuant to Article 6(1) Lugano Convention, in proceedings against a number of defendants that involve the same matter and that it is expedient to hear together in order to avoid irreconcilable judgments, the proceedings may be heard in the place where one of the defendants is domiciled. In this case, this is Munich.

Instruction on legal remedies

An objection may be lodged against the decision. There is no deadline for the objection.

The objection must be lodged with

Munich Regional Court I
Prielmayerstraße 7
80335 Munich.

The objection must be submitted accompanied by pleadings by a lawyer.

A complaint may be lodged against the decision determining the value in dispute if the value of the object of the complaint exceeds EUR 200 or if the court has admitted the complaint.

The complaint must be lodged with

Munich Regional Court I
Prielmayerstraße 7
80335 Munich

within **six months**.

The deadline begins when the decision in the main matter comes into legal force or when the proceedings are otherwise complete. If the value in dispute is determined more than one month before the end of the six months' deadline, the complaint can be lodged within one month of delivery or formless notification of the determining order. In the event of formless notification, the order shall be deemed published on the third day after being dispatched by post.

The complaint shall be lodged in writing or by formal statement for the record of the registry of the specified court. It can also be stated for the record at the registry of any local court. The deadline is only met however if the record is received at the above specified court in good time. The involvement of a lawyer is not mandatory.

Signed

Waitzinger
Presiding judge at the Regional Court