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Competition Law and the Specificity of Sport

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Sport is generally subject to EU competition rules

Pre-Meca-Medina:

- Case-law focusing on free movement of workers and freedom to provide services
 - *Walrave-Koch* (Case 36/74):
 - “the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty” (para.4)
 - However, the prohibition of discrimination based on nationality “does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity” (para.8)
 - *Donà* (Case 13/76)
 - restrictions are permitted if based on “reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only”
 - *Bosman* (Case C-415/93)
- Legal and factual evolution in the lead-up to *Meca-Medina*
 - Gradual sophistication of the applicable legal test
 - Increasing commercialization of sport

Meca-Medina (Case T-313/02):

- Competition and internal market rules are applicable to sport
 - No blanket exception for sport – rejects as irrelevant the notion of “purely sporting rules” for the purposes of applying EU competition law
 - Even if the rule in question is of a sporting nature and, as such, has nothing to do with an economic activity *per se*, this does not mean that the activity governed by that rule or the body which lays it down is shielded from competition law.
- The key elements of the legal test inspired by *Wouters*, where the ECJ followed a similar test in the context of restrictions imposed by the Dutch Bar

Meca-Medina's reasonable necessity and proportionality test

- In assessing the compatibility of a sporting rule with Article 101(1) (and Article 102 TFEU) account must be taken of:
 - (i) the overall context in which the rule was adopted or the decision was taken or produces its effects, and more specifically, of its objectives;
 - (ii) whether the restrictive effects are inherent in the pursuit of the objectives; and
 - (iii) are proportionate to them.

“For the purposes of application of [Article 101(1)] to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (...) and are proportionate to them.” (para. 42)

- No infringement of Article 101(1) or 102 TFEU if a sport association's restrictive practices and/or conduct have a legitimate objective and are inherent and proportionate to the objective.
- Article 101(3) TFEU applicable to restrictions that do not meet the *Meca-Medina* test.
- It is against this legal background that the specificities of sport may be taken into account.

The specificity of sport – Recognized in the Treaty

- The specificity of sports has been acknowledged by the EU Courts and the other European institutions in a number of rulings, declarations, reports, and papers on sports and European law.
- This recognition of the specific nature of sport has been constitutionalized by the 2009 Treaty of Lisbon in the second paragraph of Article 165(1) and in the seventh paragraph of Article 165(2) TFEU:
 - *“The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.”*
 - *“Union action shall be aimed at [...] developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.”*

The specificity of sport – Pre-Lisbon Treaty (I)

- European Commission’s Helsinki Report (1999): *“The regulations of sporting organisations drawing up rules without which a sport could not exist, or which are necessary for its **organisation** or for the **organisation of competitions**, might not be subject to the competition rules. The rules inherent to sport are, first and foremost, the **“rules of the game”**. Also there is a likely exemption from competition rules for measures aiming at “objectives designed to maintain a **balance** between clubs, while preserving a degree of **equality of opportunity** and the **uncertainty of the result**, and to **encourage the recruitment and training of young players**.”*
- Declaration on Sport annexed to the Treaty of Nice (2001): aimed at *“**safeguarding current sports structures and maintaining the social function** of sport within the Community framework”*
 - The EU must *“take account of the **social, educational and cultural functions inherent in sport and making it special**, in order that the **code of ethics** and the **solidarity** essential to the preservation of its social role may be respected and nurtured”*. Also, the council called for the preservation of *“**cohesion** and ties of **solidarity** binding the practice of sports at every level, **fair competition** and both the **moral and material interests** and the **physical integrity** of those involved in the practice of sport, especially minors, may be preserved.”*
- European Parliament resolution of March 29, 2007 on the future of professional football in Europe: *“The European Parliament [...] Points out the importance of the **inter-linked national pyramid structures** of European football, which nurture **grassroots talent and competition** because **national leagues and competitions** are also the route to **European competitions**, and a proper **balance** needs to be struck **between the national foundation of the game and the European level** to enable football leagues and associations to co-operate efficiently.”*

The specificity of sport – Pre-Lisbon Treaty (II)

- Prior to the Treaty of Lisbon, the Commission appeared to take a more rule-focused approach to the application of competition law to sport as reflected in the 2007 Commission White Paper.
- Commission’s White Paper on Sports (2007): The specificity of sports has two dimensions:
 - *“Specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure **uncertainty concerning outcomes** and to preserve a **competitive balance** between clubs taking part in the same competition.”* (Section 4.1)
 - *“Specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a **pyramid structure** of competitions from grassroots to elite level and organised **solidarity** mechanisms between the different levels and operators, the organisation of sport on a national basis, and the **principle of a single federation per sport**.”* (Section 4.1)

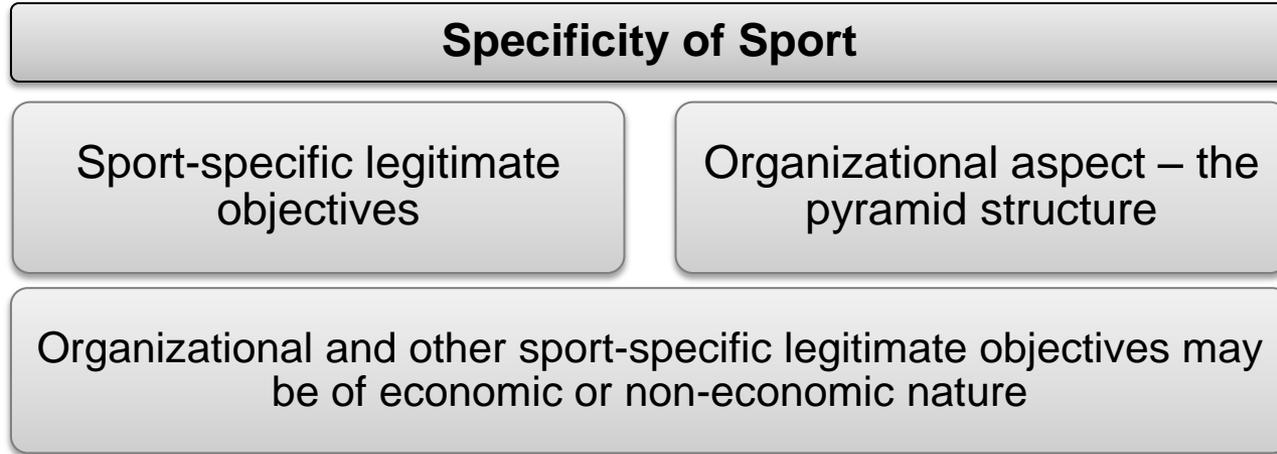
The specificity of sport – Pre-Lisbon Treaty (III)

- Staff Working Document Accompanying the Commission’s White Paper on Sports (2007):
 - *“The following types of rules constitute examples of organisational sporting rules that – based on their legitimate objectives – are likely not to breach Articles 81 EC and/or 82 EC provided the restrictions contained in such rules are inherent and proportionate to the objectives pursued:*
 - *“Rules of the game” (e.g., the rules fixing the length of matches or the number of players on the field);*
 - *Rules concerning selection criteria for sport competitions;*
 - *“At home and away from home” rules;*
 - *Rules preventing multiple ownership in club competitions;*
 - *Rules concerning the composition of national teams;*
 - *Anti-doping rules;*
 - *Rules concerning transfer periods (“transfer windows”).*
 - *The following rules represent a higher likelihood of problems concerning compliance with Articles 81 EC and/or 82 EC , although some of them could be justified under certain conditions under Article 81(3) or Article 82 EC:*
 - *Rules protecting sports associations from competition.*
 - *Rules excluding legal challenges of decisions by sports associations before national courts if the denial of access to ordinary courts facilitates anti-competitive agreements or conduct.*
 - *Rules concerning nationality clauses for sport clubs/teams.*
 - *Rules regulating the transfer of athletes between clubs (except transfer windows).*
 - *Rules regulating professions ancillary to sport (e.g. football players’ agents).”*

The specificity of sport – Post-Lisbon Treaty

- Following the Lisbon Treaty, the Commission seems to take a more functional (objective-oriented) approach to the competition law assessment of specific rules:
 - The Commission’s 2011 Communication on “Developing the European Dimension in Sport”
 - *“The specific nature of sport, (...) encompasses all the characteristics that make sport special, such as for instance the **interdependence** between competing adversaries or **the pyramid structure** of open competitions (...)*
 - *Legitimate objectives pursued by sport organisations may relate, for example, to the **fairness** of sporting competitions, the **uncertainty of results**, the **protection of athletes’ health**, the **promotion of the recruitment and training of young athletes**, **financial stability** of sport clubs/teams or a uniform and consistent exercise of a given sport (the “**rules of the game**”).”*

Sport-specific legitimate objectives that may justify restrictions under TFEU



- Rules and conduct that pursue the following objectives are considered legitimate and are likely not to breach EU competition rules provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued:
 - Competitive balance, uncertainty, fairness, and openness (including the need to ensure financial stability)
 - Promotion of youth training, protection of the athlete's health and safety (including anti-doping), prevention of racism and xenophobia
 - Functioning event calendars
 - Uniform rules of the sport
 - Integrity of sport/prevention of gambling and betting
 - Release of players to the national team
 - Principle of solidarity

Specificity of sport must be taken into account in competition law assessment

- Case C-325/08 *Olympique Lyonnais SASP* (2010)

“In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken, as the Advocate General states in points 30 and 47 of her Opinion, of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU.” (para. 40)

- Commission’s 2011 Communication on “Developing the European Dimension in Sport”

“The concept of the specific nature of sport is taken into account when assessing whether sporting rules comply with the requirements of EU law (fundamental rights, free movement, prohibition of discrimination, competition, etc.).”

Legitimate objective – Competitive balance, uncertainty, fairness, and openness (I)

- **Article 165(2) TFEU** provides that “*Union action shall be aimed at [...] developing the European dimension in sport, by promoting fairness and openness in sporting competitions.*”
- **ECJ in Case C-415/93 *Bosman* (1995)**: “*In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results [...] must be accepted as legitimate.*”
- **ECJ in Case C-176/96 *Lehtonen* (2000)** held that transfer windows rules aim to prevent the substantial change in strength of one team during the course of a season “*calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.*”

Legitimate objective – Competitive balance, uncertainty, fairness, and openness (II)

- **Commission’s *Mouscron* case (1999)**: a ‘home and away match’ rule was found indispensable for the organization of national and international competitions in view of ensuring equality of chances between clubs.
- **Commission’s case COMP/C.2-37.398 – *UEFA Champions League* decision (2003)** in which “*The Commission understands that it is desirable to maintain a certain balance among the football clubs playing in a league because it creates better and more exciting football matches*” and “*The Commission recognises that a cross-subsidization of funds from richer to poorer may help achieve this.*”
- **Commission’s Case 37806 – *ENIC* (2002)**: the UEFA rules preventing clubs directly or indirectly controlled by the same entity from participating in the same club competition were necessary to guarantee the integrity of the competitions organized by UEFA and protect the uncertainty of the results.

Legitimate objective – Promotion of youth training, protection of the athlete’s health and safety (including anti-doping), prevention of racism and xenophobia

- **Case T-313/02 Meca-Medina (2004):** *“It is appropriate to point out that, while it is true that high-level sport has become, to a great extent, an economic activity, the campaign against doping does not pursue any economic objective. It is intended to preserve, first, the spirit of fair play, without which sport, be it amateur or professional, is no longer sport. That purely social objective is sufficient to justify the campaign against doping. Secondly, since doping products are not without their negative physiological effects, that campaign is intended to safeguard the health of athletes. Thus, the prohibition of doping, as a particular expression of the requirement of fair play, forms part of the cardinal rule of sport.”* (para. 44)
- **Case C-325/08 Olympique Lyonnais (2010):** *“small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport”* (para. 44)

Legitimate objective – Functioning event calendars

- **The Commission’s Case IV/27.492 SMM & T’s decision (1983):** The Commission authorized an agreement between the members of the British Society of Motor Manufacturers and Traders Ltd (“SMM & T”) that coordinated the motor vehicle exhibitions and prioritized the Society’s exhibitions over those organized by third parties. The Commission justified the agreement because it ensured that exhibitions of motor products are organized by SMM & T “*at such intervals and in such a manner as to ensure the most effective and high-prestige presentation of the widest possible range of the motor industry’s products to potential customers, the general public and the media.*”
- Also in the **Case COMP/36.638 FIA Commitments (2001)**, the Commission accepted that “*Where two applications are received for the same date in the calendar and the Calendar Commission determines that it would be contrary to the interests of the sport to grant both and where no negotiated solution is possible, the event which has a longer history of holding its event on the day in question shall take precedence.*”
- **AG Kokott in the Case C-49/07 MOTOE (2008):** “*It is in the interests of the sportspersons participating in the event, but also of the spectators and the public in general, that the individual competitions in a particular sport are incorporated into an overarching framework so that, for example, a specific timetable can be followed. It may make sense to prevent clashes between competitions so that both sportspersons and spectators can participate in as many such events as possible.*”

Legitimate objective – Uniform rules of the sport

- **The Commission’s 1999 Helsinki Report on Sport:** *“Practices which do not come under the competition rules. The regulations of sporting organisations drawing up rules without which a sport could not exist, or which are necessary for its organisation or for the organisation of competitions, might not be subject to the competition rules. The rules inherent to sport are, first and foremost, the “rules of the game”. The aim of these rules is not to distort competition.”* (Section 4.2.1.1)
- **Commission White Paper on Sport (2007):** *“there are organisational sporting rules that – based on their legitimate objectives – are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued. Examples of such rules would be “rules of the game” (e.g. rules fixing the length of matches or the number of players on the field), rules concerning selection criteria for sport competitions, “at home and away from home” rules, rules preventing multiple ownership in club competitions, rules concerning the composition of national teams, anti-doping rules and rules concerning transfer periods.”* (Section 4.1)
- **AG Kokott in Case C-49/07 MOTOE (2008):** *“It is in the interests of the sportspersons concerned, but also of the spectators and the public in general, that, for each sport, rules that are as uniform as possible apply and are observed so as to ensure that competitions are conducted in a regulated and fair manner. This applies not only to the frequently discussed anti-doping rules, but also to the ordinary rules of sport.*

Legitimate objective – Integrity of sport / Prevention of gambling and betting

- **The ECJ in Case C-42/07 *Liga Portuguesa de Futebol Profissional* (2009):**
 - *“the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increasing its profits. It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings [provision of gambling services across borders] may be regarded as justified by the objective of combating fraud and crime.”* (paras.71-72)
- **The Commission’s Communication ‘Towards a comprehensive European framework for online gambling’ (2012):**
 - *“Betting related match fixing is a specific type of fraud that goes against the interests of sport organisations, sportspeople, players (consumers) and regulated gambling operators. Match fixing runs contrary to the principle of fairness in sporting competitions, which is one of the objectives of EU action in the field of sport (Article 165 TFEU). Addressing the issue requires concerted and coordinated efforts from public authorities, sport organisations and gambling operators. A number of regulatory (gambling licensing conditions, statutes of sport federations) and self-regulatory mechanisms (codes of conduct) are in place in the EU as well as educational campaigns, conflict of interest rules, bet monitoring systems and alert tools (whistle blowing, hot lines etc.). Cooperation between stakeholders exists but is limited in scope. There is a clear need for more cooperation between betting operators, sport bodies and competent authorities including gambling regulators, both at national and international level.”*

Legitimate objective – Release of players to the national team

- **The Commission’s 1999 Helsinki Report on Sport:**

- *“The level of sporting organisations. [...] In order to clarify the legal environment of sport, it is also necessary for the federations to make an effort to define their missions and statutes more precisely. The pyramid structure of the organisation of sport in Europe gives sporting federations a practical "monopoly". The existence of several federations in one discipline would risk causing major conflicts. Indeed, the organisation of national championships and the selection of national athletes and national teams for international competitions often require the existence of one umbrella organisation bringing together all the sports associations and competitors of one discipline.”* (Section 4.2.3)

- **Commission’s 2007 White Paper on Sport:**

- *“national teams play an essential role not only in terms of identity but also to secure solidarity with grassroots sport, and therefore deserve to be supported”* (Section 4.2)
- *“the Commission’s Consultation Conference “EU & Sport: matching expectations” (29-30 June 2006)[102] stressed (i) the importance of national teams and competitions between these teams”* (Commission White Paper on Sport – Staff Working Document, Section 4.1)

Legitimate objective – Principle of solidarity

- **Commission’s investigation into FIFA’s transfer regulations (Case IV/36583 SETCA-FGTB/FIFA) (2001):**
 - FIFA’s commitment included creation of solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs.

- **The Commission’s decision on Joint selling of the commercial rights of the UEFA Champions League (2003):**
 - *“The Commission understands that it is desirable to maintain a certain balance among the football clubs playing in a league because it creates better and more exciting football matches, which could be reflected in/translate into better media rights. The same applies to the education and supply of new players, as the players are a fundamental element of the whole venture. The Commission recognises that a cross-subsidisation of funds from richer to poorer may help achieve this. The Commission is therefore in favour of the financial solidarity principle, which was also endorsed by the European Council declaration on sport in Nice in December 2000.”*

- **German Triathlon (2012):**
 - A regional triathlon organization did not authorise private triathlon sports events if they had not paid the required fee. A private organiser claimed that the organization had abused its dominant position by excluding the private organizer from the market. The Higher Regional Court of Dusseldorf ruled that the triathlon association was charging fees in exchange for benefits to private organizers of triathlon competitions, and that the fee charged was not disproportionate to the actual benefits. It therefore concluded that the triathlon association did not infringe EU or German antitrust law.

Organizational aspect of the specificity of sport – the pyramid structure

The pyramid structure of competitions from grassroots to elite level is central to achieving sport-specific objectives:

- **Commission’s 2011 Communication on “Developing the European Dimension in Sport”:**
 - *“The specific nature of sport, (...) encompasses all the characteristics that make sport special, such as for instance the **interdependence** between competing adversaries or **the pyramid structure** of open competitions (...).”*
 - *“**Specificity of the sport structure** encompasses the **principle of a single federation per sport**”*

- **Commission’s White Paper on Sport (2007):**
 - *“**Specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level**”*

- **Declaration on Sport annexed to the Treaty of Nice (2001):**
 - *“**Role of sports federations.** [...] The European Council [...] notes that **sports federations have a central role** in ensuring the essential **solidarity** between the various levels of sporting practice, from recreational to top-level sport, which co-exist there; they provide the possibility of **access** to sports for the public at large, human and financial support for **amateur sports**, promotion of **equal access** to every level of sporting activity for men and women alike, **youth training, health protection** and measures to **combat doping**, acts of **violence** and racist or xenophobic occurrences. [...] These social functions entail **special responsibilities for federations** and provide the basis for the recognition of their **competence in organising competitions**. [...] While taking account of developments in the world of sport, **federations must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy.**”*

Federations may prohibit (and impose sanctions for) participation in events that frustrate these legitimate objectives

- The regulatory function of sports federations may be compatible with the organization of sport events.
- The central role of sport federations in the protection of the specific characteristics of sports (and pursuing the sport-specific legitimate objectives) may justify restrictions in the licensing of other sports events.
- There are several examples of such prohibitions:
 - **ECJ in Case C-49/07 MOTOE (2008)** explicitly recognized the federation’s powers to authorize alternative sports events if such power is “*subject to restrictions, obligations and review.*”
 - **In *Show Jumping Ireland (2012)*** where the Irish Competition Authority accepted a rule change that allowed Show Jumping Ireland to penalize athletes entering unaffiliated events that “*has not provided SJI with evidence of adequate insurance.*”
 - More generally the **ECJ in Case C-250/92 Gøttrup-Klim (1994)** ruled that regulations of an association that prohibit its members from joining competing associations does not necessarily infringe Article 101(1) TFEU where “*such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers.*”



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