EU antitrust law and the private regulation of sport: current developments

Ben Van Rompuy | 86th GCLC Lunch Talk, Brussels, 24 November 2016
Discover the world at Leiden University

“purely sporting” exception? — Limited “purely sporting” exception? — “purely sporting” exception

Walrave Donà
‘70

Bosman
‘95

Meca-Medina
‘06
1. European decisional practice
• Formal decisions / investigation closed after negotiated amendments

• Commercial (4)

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>IV/34.590 – Tertorn and Others (1994)</td>
</tr>
<tr>
<td>Ticket sales</td>
<td>IV/33.384 and IV/33.378 – Package tours during the 1990 FIFA World Cup (1992)</td>
</tr>
<tr>
<td>Media rights</td>
<td>IV/32.150 – EBU/Eurovision system (1993)</td>
</tr>
</tbody>
</table>

• Regulatory (0)

• Speeches DG COMP officials (0)
• Formal decisions / investigation closed after negotiated amendments

• Commercial (9)

<table>
<thead>
<tr>
<th>Sports goods</th>
<th>COMP/33.055 and 35.759 – Danish Tennis Federation (1998)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>COMP/38.703 – Athens Olympic Games (2004)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>COMP/37.214 – German Bundesliga (2005)</td>
</tr>
</tbody>
</table>

• Regulatory (3)

|                     | COMP/35.163, 36.638, 36.776 – FIA/Formula One (2001) |
|                     | COMP/36.583 and 36.726 – International transfer of football players (2002) |
## 1996-2006 (Bosman effect)

### • Rejection of complaints

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>...</td>
</tr>
<tr>
<td>Regulatory</td>
<td>COMP/36.851 - 'Home and away from home' rule (UEFA) (1999)</td>
</tr>
<tr>
<td></td>
<td>...</td>
</tr>
</tbody>
</table>

### • Speeches DG COMP officials (19)
Discover the world at Leiden University

2007-today

• Formal decisions / investigation closed after negotiated amendments

• Commercial (o)

• Regulatory (o)

• Rejection of complaints

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>...</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>COMP/39.732 – FIA, Formula One engine regulations (2011)</td>
</tr>
<tr>
<td></td>
<td>...</td>
</tr>
</tbody>
</table>

• Speeches DG COMP officials (o)

Meca-Medina: CJEU has chosen “to potentially open the floodgates for legal claims in relation to sports rules” - Gianni Infantino, 2006
Recent surge of complaints

- Pending before European Commission (new unit):
  - International Skating Union Eligibility Rules
    - Mark Tuitert and Niels Kerstholt: June 2014-
  - FIFA TPO ban
    - Liga de Fútbol Profesional (LFP) and Liga Portuguesa de Futebol Profissional (LPFP): February 2015-
  - FIFA Transfer system
    - FIFPro: September 2015-
  - FIA (Formula One): redistribution revenues/governance
    - Sauber and Force India teams: September 2015-
  - FIBA (Basketball) reform of continental club competitions
    - Euroleague Commercial Assets: February 2016-
    - FIBA: March 2016-
2. Key issues to be addressed
I. Rules foreclosing access to the markets for the organisation and commercialisation of sports events
Exclusive right to approve and/or organise competitive events
“Loyalty clauses” prohibiting participation of (indirect) members in events other than those organised and promoted by the federation

Key question: are such restrictions genuinely designed to achieve legitimate objectives in the interest of sport and proportional to those objectives?

Lessons from existing decisional practice so far:
✓ Organisational principle of one governing body per sport not questioned
✓ Minimum standards for safety + compliance with doping regulations

Van Rompuy B. (2015), The role of EU competition law in tackling abuse of regulatory power by sports associations, Maastricht Journal of European and Comparative Law 22(2): 174-204 (available on SSRN)
National decisional practice

- Swedish NCA: Bodybuilding and Fitness Competitions [commitments 2014]
- Swedish NCA: Swedish Automobile Sports Federation [prohibition 2011]
  - Upheld by the Swedish Market Court (Case A 5/11, 2012)

- Irish NCA: Show Jumping Ireland [commitments 2011]
- Irish NCA: Irish Kennel Club [enforcement decision 2003]

- Italian NCA: Motorsport (Gargano Corse/ACI) [commitments 2009]
- Italian NCA: Italian Equestrian Federation [commitments 2008]
Pending

**European Commission: ISU Eligibility Rules [SO issued September 2016]**

Adoption of rules for ISU-approved Open International Competitions (October 2015)
Amendments to Eligibility Rules (June 2016)
- International competitions: must be approved by ISU and/or Members
- National competitions and non-competitive events: exclusively governed by Members, may not “unduly restrict their skaters to participate in non-competitive events”
- Introduction of scale of sanctions (but still lifetime ban if “jurisdiction of the ISU” is “endangered”)

**Belgian NCA: Fédération Equestre Internationale [provisional measures 2015]**

**European Commission: FIBA vs. Euroleague**

Discover the world at Leiden University

II. Forced arbitration
• Claudio Pechstein vs. International Skating Union
  • ECHR

**Key question:** independence of the Court of Arbitration for Sport (CAS)

• Exploitative abuse of a dominant position (102(a) TFEU)
• Unfair, but a competition law problem?

III.
Licensing conditions (financial stability)
• KBVB financial stability condition for professional football
  • Belgian NCA: White Star Woluwe Football CLUB / KBVB [provisional measures rejected 2016]

Key question: should the interpretation/enforcement of rules be considered when assessing their anti-competitiveness (or can rules be assessed in the abstract)?

• Open-ended rules + forced arbitration = way to evade the application of EU competition law?
• Arbitral award enforcing rule = attributable to the rule-making association = “decision”?
• **UEFA Financial Fair Play Regulations**
  - Belgium, Tribunal de premiere instance Bruxelles: Striani and fans/UEFA [lack of jurisdiction, 2015]


• **Spanish basketball club association (ACB): financial conditions for promotion to Liga ACB**
  - Spanish NCA: Club Baloncesto Tizona/ACB [SO issued April 2016]
Dr. Ben Van Rompuy
Assistant professor Competition Law | Leiden University
Visiting professor | Vrije Universiteit Brussel (VUB)

b.van.rompuy@law.leidenuniv.nl
@BenVanRompuy

Discover the world at Leiden University