Application of EC antitrust rules in the sport sector: an update

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This article concerns the application of EC antitrust rules to the regulatory aspects of sport and sports activities, excluding broadcasting of sports events and distribution of sports goods. It provides an overview of the way in which the Commission applies Articles 81 and 82 of the EC Treaty to the sport sector in the light of existing jurisprudence and the Commission’s decision-making practice.

1. Recent Court rulings

Recently, two interesting decisions were taken by the Court of First Instance (‘CFI’) in the field of sport. Since these decisions are subject to appeals, it remains to be seen what final position the European Court of Justice (‘ECJ’) will take in these cases.

1.1. Anti-doping rules in swimming

The Meca-Medina (1) judgment was the first one where the CFI has stated that EC competition rules are applicable to sport. Sport cases previously decided by the CFI and ECJ all concerned the application of the EC Treaty provisions on the economic freedoms, such as free movement of persons or services.

In Meca-Medina two professional long distance swimmers had brought an action before the CFI, challenging the rejection decision concerning their complaint filed with the Commission in May 2001. (2) In their complaint to the Commission, the sportsmen challenged the compatibility of the anti-doping rules adopted by the International Olympic Committee (‘IOC’) and implemented by the swimming governing body FINA (‘Fédération Internationale de Natation Amateur’), with Articles 81 and 82 of the EC Treaty. In particular, they contended that the definition of doping, the thresholds for defining the presence of a banned substance as doping and recourse to the Court of Arbitration for Sport (CAS) restrict competition and swimmers’ freedom to provide services. The Commission rejected the complaint stating, inter alia, that anti-doping rules were not caught by Articles 81 and 82 of the EC Treaty.

The CFI from the outset stated that even though the case-law on sport so far concerned the application of the provisions on free movement of persons and services, the same principles are valid also for the application of EC competition rules to sport. The CFI reiterated that EC Treaty rules are applicable to sport only in so far as it constitutes an economic activity. The anti-doping rules did not pursue any economic objective, but was intended to preserve the spirit of fair play, a cardinal rule of sport. This objective of the anti-doping rules was said to be ‘purely social’. In addition, these rules aim at protecting the health of athletes. These considerations put the anti-doping regulations out of reach of the limitations imposed by the provisions on competition. However, the CFI stated that although pure sporting rules cannot be caught by the Treaty provisions, it is true only in so far as those rules are not discriminatory and excessive. (3) Rules that discriminate or are excessive do not achieve their proper objective. However, this was not the case here.

1.2. Football players’ agents

In the Piau case (4), the CFI upheld another Commission decision which concerned a complaint by Mr Piau against FIFA (‘Fédération Internationale de Football Association’) which the Commission had rejected. The case concerned FIFA rules governing the profession of football agents (in professional football, players may conclude contracts with the clubs through their agents). A contract in such case is valid only if the agent involved has a licence for his practice issued by the national football association, following the rules adopted by FIFA. In order to become a licensed agent, a person had to pass an interview, have an impeccable reputation, and deposit a bank guarantee worth approximately €136,000 (200,000 Swiss francs). Mr Piau challenged the rules, arguing that they imposed a restriction on free competition with regard to services, and alleging that the rules (1) See par. 49 and 54-55.
restricted access to the profession by imposing obscure examination procedures, requiring a bank guarantee, and imposing sanctions.

On the basis of the complaint, the Commission initiated an investigation, in the course of which FIFA amended its rules by removing the most restrictive limitations (deposit was substituted by liability insurance, interview was replaced with a multiple-choice test, etc.). Since the initial concerns of the Commission were removed in that the amended rules were objective and transparent, the complaint was rejected for lack of Community interest, and the decision subsequently appealed to the CFI.

It was not questioned whether football clubs could be seen as undertakings within the meaning of EC competition rules, as the economic nature of their activities is rather evident. The CFI, however, accepted as well that as a grouping of clubs, national football associations are associations of undertakings in terms of Article 81 of the EC Treaty. Besides this, the associations carry out certain economic activities on their own, such as the sale of broadcasting rights or collecting revenues from sporting events, which, according to the CFI makes them ‘undertakings’ within the meaning of Article 81 just like the clubs. This in turn makes FIFA, a grouping and emanation of national football associations, subject to Article 81 of the EC Treaty as an association of undertakings. (1)

As opposed to Mecca-Medina where anti-doping rules were seen by the CFI as purely sporting rules and hence falling outside of the scope of application of the Treaty provisions, FIFA rules concerned were considered to regulate an ‘economic activity involving the provision of services’. The aim of a football agent is to introduce for a fee a player to a club or clubs to each other with a view of employment, which clearly does not pursue a purely sporting interest. In addition, as FIFA was not conferred the authority to adopt such rules in the general interest of sport by any public authority (2), the regulations under scrutiny do not fall within the scope of the freedom of internal organisation which is enjoyed by sports associations in general. The CFI questioned the legitimacy of FIFA’s right to regulate the profession of football agents, a profession which is not specific to sport and which is of unequivocally economic nature, in general. However, further analysis was set aside as the CFI stated that the players’ agent profession needs to be supervised by some authority, which, due to the absence of national laws in this respect and internal self-regulation among the agents does not otherwise exist. The CFI upheld the Commission’s conclusion that the rules in question did not produce anti-competitive effects, as the most restrictive rules have been modified by FIFA. The CFI also agreed with the Commission that, even if such anti-competitive effects existed, they could benefit from the exemption under Article 81(3) of the EC Treaty.

Finally, in respect of Article 82 of the EC Treaty, the Commission decision stipulated that FIFA did not hold a dominant position in the market for players’ agents’ services. However, the CFI considered that FIFA, as the emanation of the national associations and the clubs — the actual buyers of the services of players’ agents — did operate on this market through its members, and that it held a dominant position. The CFI stated that an abuse could not be established, relying essentially on the same arguments as those used in relation to Article 81(3) of the EC Treaty. The CFI thus agreed with the conclusion in the Commission’s decision according to which there was no infringement of Article 82 of the EC Treaty.

2. Existing jurisprudence on the application of EC law in the sport sector

Most decisions by the European courts have been based on EC law concerning the free movement of workers. Already in the 1970’s, the Court of Justice ruled in Walrave and Donà (3) that sport was subject to Community law where it constituted an economic activity. This has been confirmed by the Court on several occasions later on.

The Bosman (4) ruling has played a significant role in guiding the Commission in its development of competition in the sports sector. This ruling confirmed that sport is subject to all relevant EC Treaty provisions as regards the economic activities it generates, and that those provisions could be applied on the basis of general principles taking into account certain special characteristics of the sector. In particular, the Court recognised as legitimate the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results, and of encouraging the recruitment and training of young players. The Court also reaffirmed that the free movement of workers provision does not apply to rules of a non-economic nature which exclude, for sporting reasons, foreign players from certain football

(1) Id., see par. 72.
(2) Which would be the case e.g. in the regulation of the profession of lawyers by the national bar association.
matches, such as those between national teams of different countries, provided always that the restrictions concerned remained limited to their proper objectives (1).

In Lehtonen (2), the Court considered that the setting of deadlines for transfers of (basketball) players may meet the objective of ensuring the regularity of sporting competitions. In order to be justified, this type of rules defined by sporting organisations may not go beyond what is necessary to achieve the legitimate aim pursued. In this case, this was the proper functioning of the championship as a whole.

The Court confirmed in Deliège (3) that the selection rules applied by a federation to authorise the participation of professional or semi-professional athletes in an international sports competition inevitably limit the number of participants. Such a limitation does not in itself restrict the freedom to provide services, if it derives from an inherent need in the organisation of the event in question.

It follows from these cases that EC law does not prohibit, in principle, sporting bodies from setting the framework for the way in which the sport is organised and practiced, even if this would have some secondary effects on the freedom of economic actors.

3. Application of EC competition law in the sport sector

3.1. General principles

As explained by the CFI in Meca-Medina, referred to above, EC competition law is applicable to economic activities generated by sport. In applying competition rules to sport-related economic activities, the Commission follows a number of general principles, which are described below.

Taking account of the special characteristics of sport

For the purposes of applying EC competition law, sports federations, clubs etc. are considered as undertakings only to the extent that they are carrying out economic activities. This is not different from other sectors. However, when these sport-

ing entities are engaged in economic activities, the Commission, in its assessment of the scope of application of EC competition rules, has taken into account notably the following factors:

• interdependence between sporting adversaries, which is a feature that is different from other industry or service sectors;
• the need to maintain a balance between the sporting adversaries (the so-called principle of solidarity);
• the need to preserve uncertainty as to results; and
• the degree of equality in sporting competitions; such as. certain rules in professional football, which aim at ensuring that smaller clubs are rewarded for their investment in training.

The Lehtonen case referred to above is a good example where the Court took account of this type of factors, e.g. the need to ensure the integrity of competitions. When assessing such rules, the Commission tends to look whether they are proportionate to the objectives pursued. Hence, the Commission considers that these rules are likely to fall outside Article 81(1) of the EC Treaty or likely to be exempted under Article 81(3) provided they do not go beyond what is strictly necessary to achieve that objective.

Applying the EC competition rules in a manner which does not question the regulatory authority of sporting organisations vis-à-vis genuine ‘sporting rules’

Traditionally, a single federation exists to regulate a given sport and usually the international federation is officially recognised by the IOC. Regulations and rules drawn up by sports federations which lay down rules without which a sport could not exist, i.e. rules which are inherent to a sport or which are necessary for its organisation or for the organisation of competitions, should not, in principle, be subject to the application of EC competition rules. Such genuine sporting rules that are applied in an objective, transparent and non-discriminatory manner do not constitute restrictions of competition. This approach is in line with the judgement in the Deliège case, referred to above.

Preserving the social and cultural functions of sport

The draft Treaty on establishing a Constitution for Europe includes an article on sport according to which the European Union recognises the specific nature of sport and its social and educational function (Article III-282, section 5). This is already affirmed in the Declarations on sport annexed to the Treaties of Amsterdam and Nice, preceded by

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(1) The following two cases concern the extension of the Bosman jurisprudence as regards the application of the non-discrimination principle to competitions between clubs: C-438/00 Deutscher Handballbund eV v Maros Kolpak [2003] ECR I-04135 and C-265/03 Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol [OJ C 132/9 of 28 May 2005].
the Commission’s ‘Helsinki Report on Sport’ (1). The Commission therefore considers it appropriate to apply the competition rules in a way which preserves the essential social and cultural benefits of sport. In this context, certain exemption from the competition rules may, under certain circumstances, be justified if necessary to retain those benefits, e.g. arrangements which provide for a redistribution of financial resources to, for example, amateur levels of sport.

3.2. Decisions of the Commission

The cases where the Commission has applied Articles 81 and 82 of the EC Treaty in the sport sector can broadly be divided into two main areas: rules and regulations adopted by sporting federations on the one hand, and ticketing arrangements for major sports events on the other:

3.2.1. Regulation of sport

The principles indicated above have been applied by the Commission in assessing alleged restrictions of competition in the sport sector, as demonstrated by several decisions:

Multiple ownership of sporting clubs

In June 2002, the Commission closed its investigation concerning the rules of the Union of European Football Associations (‘UEFA’) which prevented a company or individual from directly or indirectly controlling more than one of the clubs participating in a UEFA club competition (2). This case was initiated following a complaint which the Commission rejected. After careful analysis, the Commission concluded that although this UEFA rule was theoretically caught by the prohibition under Article 81(1) of the EC Treaty, it could be justified by the need to guarantee the integrity of sporting competition. The purpose of the UEFA multi-ownership rule was not to distort competition, but to guarantee the integrity of the competitions it organised, and in any case the limitation on the freedom of action of clubs and investors which the rule entailed did not extend beyond what was necessary to ensure the legitimate aim of preserving uncertainty of the results in the interest of the public. It follows from this decision that a rule may fall outside the scope of competition rules despite possible negative business effects, provided the rule is proportionate to the objectives pursued and is applied in a non-discriminatory way.

‘Home and away’ rule

The Commission adopted a decision in ‘the Mouscron case’ (3) rejecting a complaint against UEFA concerning the UEFA Cup rule whereby each club must play its home match at its own ground. According to the Commission, this is a sports rule that does not fall within the scope of EC competition rules.

Some other important cases that were investigated by the Commission under EC competition rules ended in settlements with the parties, i.e. without formal decisions:

Formula One and other four-wheel motor sports

After several years of investigation of the Fédération Internationale d’Automobile (‘FIA’) and the companies involved in Formula One and other international motor racing series, the Commission closed the case after having reached a settlement in 2001 (4). This settlement was the result of lengthy discussions following the Statement of Objections that the Commission addressed to FIA in 1999 (5). In particular, the settlement provided that FIA would:

- limit its role to that of a sports regulator without influence over the commercial exploitation of the sport and thus removing any conflict of interest; and
- guarantee access to motor sport to any racing organisation that meets the requisite safety criteria and to no longer prevent teams and circuit owners to participate in other races.

The Commission’s monitoring of the compliance by FIA/Formula 1 with the conditions of the settlement ended officially in October 2003 (6).

International transfer of football players

Following long discussions with the FIFA and UEFA, the Commission closed its investigations of the rules governing international transfers of football players (‘transfer rules’) in 2002 (7). The investigation was triggered by several complaints concerning the (1997) transfer rules, which were also subject of a Statement of Objections sent to FIFA in 1998. This led to discussions between the Commission and the parties, which were finalised in 2001 and formalised in an exchange of letters between the President of FIFA, Mr Blatter and Commissioner Monti. FIFA committed itself to modify its transfer rules on the basis of certain principles. Following the entry

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(2) IP/02/942 of 27 June 2002.
into force of the modified transfer rules in 2001, some complaints were withdrawn and the Commission rejected the remaining two (these two rejections of complaints were not appealed to the Court).

The main principles agreed upon during the discussions with FIFA and UEFA were:

- Measures to support the training of players, e.g. through training compensation for young players and a solidarity mechanism in order to redistribute a significant proportion of income to professional and amateur clubs involved in the training of a player;
- Establishing a transfer period per season;
- Specification of contractual arrangements between players and clubs, e.g. regulating duration of contracts and specifying when breaches of contracts are possible (including sanctions);
- Setting up of an arbitration body (dispute settlement system) with equal representatives of players and clubs; and
- Clarifying that arbitration is voluntary and does not prevent recourse to national courts.

It may be noted that FIFA has recently modified again its transfer rules, which entered into force in July 2005.

3.2.2. Ticketing arrangements for sports events

Another aspect of the sport sector which the Commission has looked into is ticketing arrangements for major sports events. Though mostly the same issues arise here as in ticketing arrangements for other events, there are some specificities in sports events which are mainly related to security and supporter segregation.

In assessing ticketing arrangements, the Commission has taken as its guiding principle that these arrangements should ensure that all consumers in the EEA have reasonable access to entry tickets. Particular attention has therefore been paid to territorial restrictions on ticket sales — taking into account the security issue —, package deals, hospitality arrangements and price restrictions. As far as package deals are concerned, accommodation and travel can be offered with tickets but access to tickets should not be made conditional on the purchase of other services. In addition, retail prices for the tickets should be published separately from the prices for all related travel and accommodation charges. Finally, with regard to minimum prices for tickets, ticket distributors who do not act as agents but bear their own financial risk, should be allowed to sell tickets at a price below their face value.

Credit card exclusivity

The Commission has also examined credit card exclusivity arrangements in two cases: the VISA exclusivity for ticket sales via Internet for the Athens Olympic Games in 2004, and the MasterCard exclusivity for direct sales by the German Football Association (DFB) of tickets for the World Cup 2006.

Athens Olympic Games

In the Athens Olympic Games, tickets ordered via the Internet directly from the organising committee (ATHOC) could only be paid for with VISA cards. DG Competition services took the view that this exclusivity did not constitute an infringement of Articles 81 or 82 if consumers had reasonable access to tickets via alternative sales channels that did not require payment with VISA card. Such an alternative supply channel for the general public was available in that tickets could be bought from any National Olympic Committee in the European Economic Area (EEA). Extensive market testing by the Commission confirmed that other payment methods were accepted in those sales channels. Where market testing proved that access to tickets was difficult, ATHOC agreed to make changes essentially by considerably improving the information to consumers on all options for the purchase of tickets and by intervening with the National Olympic Committees. The steps taken by ATHOC were considered satisfactory and the Commission did not receive any complaints on this issue. The case was subsequently closed without a decision.

Football World Cup 2006

This case was triggered by a complaint from a UK consumer organisation ‘Which?’ in March 2005 against FIFA, the German Football Association (DFB) and MasterCard. When assessing the MasterCard exclusivity arrangements for tickets intended for the general public for the World Cup 2006, DG Competition followed the same guiding principle as in the Olympic Games case,
i.e. there should be reasonable access to tickets for all consumers in the EEA. In this respect it is worth noting that there are considerable differences between the two events. As opposed to the Olympic Games, the demand for the World Cup tickets intended for the general public as usual greatly exceeds the supply. Moreover, while most tickets for the World Cup are sold directly by the organising committee DFB, only half of the tickets for the Athens Olympic Games were sold by ATHOC, the other half was sold by the National Olympic Committees.

Direct ticket sales by DFB for the World Cup 2006 could be paid for with MasterCard credit card, direct debit from a German bank account or international (cross-border) bank transfer. However, in the latter case, there were allegedly significant costs for consumers particularly in countries outside the Eurozone, such as the UK. In light of the enormous demand for tickets and the importance of direct sales by DFB, DG Competition services were of the opinion that there needed to be a viable alternative to the direct sales by DFB to ensure reasonable access to tickets for the World Cup 2006 for those consumers who do not possess a MasterCard product. This alternative could take the form of (i) other payment forms for direct sales by DFB (i.e. more than one credit cards and/or bank transfers without dissuasive additional costs for the consumers) or (ii) other sales channels for which there is no credit card exclusivity.

Following discussions with DG Competition services, FIFA, DFB and MasterCard introduced changes in the ticket sale arrangements whereby more payment methods were accepted as of the Second Ticket Sales Phase which began on 2 May 2005. Fans based in non-Eurozone countries in the EEA could now pay for tickets by making a domestic bank transfer in their local currency. This added another payment method to the three payment methods that were already available. Consumers were informed of these modified arrangements and of the different ways of obtaining tickets on the web-site of the event. FIFA and DFB also took the initiative to make the enhanced payment arrangements available retroactively for the tickets sold during First Ticket Sales Phase, thus providing a consumer friendly and cost effective payment method for all ticket purchasers. In the light of these changes, the complaint was withdrawn and the case has been closed without a decision.¹

4. Conclusion

After the peak of cases at the end of the 1990’s triggered by the Bosman ruling, the number of sports cases brought to the Commission under EC anti-trust rules has stabilised. Most anti-trust cases at present are complaints against rules or practices of international sports federations. In addition to their regulatory functions, these federations are often active in the market for the organisation of sporting events as well, either by laying down rules which member associations or clubs are required to follow, or by organising events directly themselves. With the increasing commercialisation and growth in the economic dimension of sport, it has become more difficult to distinguish between genuine sporting rules and those rules and/or practices which generate economic activities. While the existence of a single federation overseeing both regulatory and organisational aspects of a sport is common in Europe, it should be borne in mind that other scenarios can also be envisaged.

Since the modernisation of the EC anti-trust enforcement rules in May 2004, which abolished the system of notifications, undertakings, including sporting bodies — in as far as they exercise economic activities (e.g. ticketing arrangements for sports events) — need to ensure for themselves that they comply with EC competition rules. The existing jurisprudence and decisions of the Commission in the field of sport provide useful guidance in this respect. Also, post-modernisation with the direct application of Articles 81 and 82 of the EC Treaty by national courts and national competition authorities, gives the Commission the opportunity to mainly concentrate on cases which bring added value in comparison with the national competition authorities or private enforcement in national courts. These would mainly be cases which would give the opportunity further to clarify the distinction between economic activities generated by sport and genuine sporting rules (i.e. non-economic matters). Also, the Commission will continue to promote private action before courts where this is the most appropriate tool to solve conflicts between clubs / players / sporting federations.

The challenge lies in ensuring free and fair competition while, at the same time, taking into account the specific characteristics of the sport sector. In any event, the assessment whether a given rule or practice infringes the EC competition rules can only be made on a case-by-case basis.

¹ IP/05/519 of 2 May 2005.