



Sport and Competition Law

**Recent developments and unfinished
business**

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1. Introduction



- Modernization of EU antitrust enforcement in 
- Articles 101 TFEU (concerted practices) & 102 TFEU (abuse of dominant position)
 1. Procedural: decentralization since 2004
 2. More economic approach+
 3. New conception of the objectives



- Since late 1990s: *“Our aim is simple: to enhance economic efficiency and promote consumer welfare”*



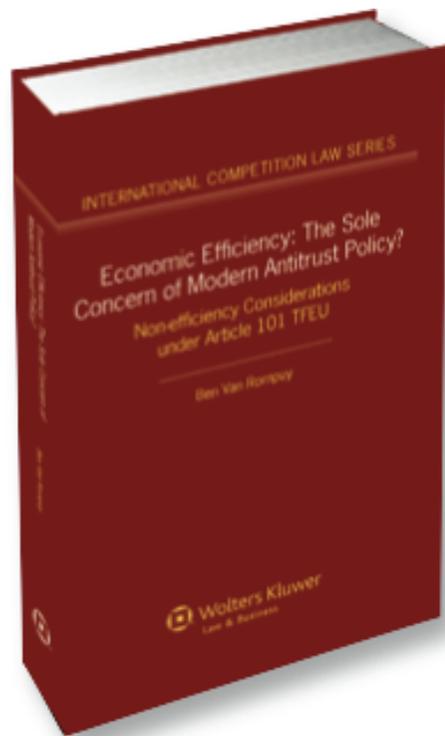
→ Scope and interpretation of Article 101 TFEU:

“goals pursued by other Treaty provisions can be taken into account to the extent they can be **subsumed** under the four conditions of Article 101 (3) TFEU”

= exit non-efficiency considerations?



- Commission's narrow interpretation of Article 101(3) TFEU does not put matter to rest:



Purist approach” ~~marginalizes~~
obfuscates the role of non-efficiency
considerations in the application of
Article 101 TFEU



2. EU competition law and sport: uneasy bedfellows



- Application EU (competition) law to sport
 - CJ: *Walrave* (1974), *Donà* (1976)
- Issue gathered momentum mid-1990s
 - Commercialization of sport
 - *Bosman* judgment (1995)
- Amsterdam Declaration (1997)
 - Social significance of sport
 - Particular characteristics of amateur sport



- Helsinki Report (1997)
 - “the sporting activity strictly speaking” >< “economic activities generated by that sporting activity”
- Nice Declaration (2001)
 - “(EU) must in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special”
- *Meca-Medina* judgment (2006)
 - Dismisses the notion of a “purely sporting” exception



- White Paper on Sport (2007): “strategic guidance”
 - Sporting rules: *Wouters* test
 - Revenue-generating activities related to sport: ??
e.g. legitimacy of joint selling media rights
- Lisbon Treaty: Article 165 TFEU
 - Sport as supporting EU competence
 - Direct EU action must take into account “*the specific nature of sport, its structures ... and its social and educational function*”



3. Decisional practice



- How to give weight to the specific characteristics of sport and its societal function under EU competition law?





UEFA Financial Fair Play rules

- White Paper on Sport (2007): “important outstanding legal issue”
- Communication (2011): *“The Commission welcomes the adoption of measures aimed at enhancing financial fair play in European football while recalling that such measures have to respect internal market and competition rules”*
- Joint statement 21 March 2012: “The objective (of preserving fair competition between football clubs) is consistent with the aims and objectives of EU policy in the field of state aid”



UEFA broadcasting regulations (1)

- 1989: Blocked hours
 - = restrictive effect on broadcasters' freedom to broadcast football events
 - = protecting stadium attendance and amateur participation in sport
- 2001: *“The Commission’s examination of the UEFA broadcasting rules takes into account those two conflicting interests” ... “is a good example of how to reconcile competition rules and the special characteristics of sport”*



UEFA broadcasting regulations (2)

- Actual decision:
- No appreciable effect on trade > ~~Article 101(1) TFEU~~

“Since the Commission has found that the broadcasting regulations have no appreciable effect on the broadcasting market, it is not necessary for the purpose of the Decision to substantiate whether and to what extent there is a negative impact on stadium attendance and amateur participation in the sport due to the televising of football”





Joint selling of sports media rights (1)

- Horizontal agreements that prevent clubs from individually competing in the sale of media rights;
 - Market foreclosure (downstream and neighboring markets)
 - Price-fixing
 - Output reductions
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- Financial solidarity justification: promotes and maintains a competitive balance
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- *UEFA Champions League (2003), DFB (2005), FAPL (2006)*



Joint selling of sports media rights (2)

- *UEFA Champions League* (2003)
- Article 101(1) TFEU
- Article 101(3) TFEU: objective efficiency gains
 - Single point of sale
 - Maintenance of a quality branded product
 - Football club's opportunities for individual sale of rights





Joint selling of sports media rights (3)

- Remedies:
 - Segmentation of rights in different packages
 - Reduction in exclusive right to sell (fallback option)
 - Offering of all media rights
 - Reduction in hold back for internet & mobile services
 - Contractual period max. 3 years
- No single buyer obligation





Joint selling of sports media rights (4)

- *UEFA Champions League* = “a balanced solution” between competing interests: allowing for more competition in the market “while safeguarding financial solidarity in the sport”
- Financial solidarity justification? Arguably taken into account, but:
 - “it is not necessary for the purpose of this procedure to consider the solidarity argument ... An exemption is justified because of the creation of a branded league product which is sold in packages via a single point of sale”



Joint selling of sports media rights (5)

- *DFB* and *FAPL* = “could only be exempted if the restrictions of competition were strictly necessary to ensure the legitimate goals pursued by the arrangements – for example solidarity between the clubs”
- But: commitment decisions





Joint buying of sports media rights (1)

- *EBU/Eurovision* (1993)
- Competition greatly restricted, if not eliminated
- Pro-competitive benefits: cost and distribution efficiencies; promotion development of single European broadcasting market; more varied and larger offer for consumers
- PSB v. commercial operators: different approach





Joint buying of sports media rights (2)

- GC: annulment of decision
 - indispensability EBU membership conditions
 - public mission obligation not substantiated



- *Eurovision* (2000): annulled as well
- 2007: case closed



3. Recent developments and challenges ahead



Joint selling of sports media rights

- Commission's remedies blueprint
 - Tender procedure: Germany (2012), Spain (2012), Poland (2007),
 - No single buyer obligation: Romania (2012), Belgium (2009)
 - Length of exclusivity: 3 years, but e.g. Netherlands, Hungary
 - Packages: Italy (Article 102 TFEU)
- Financial solidarity argument?



Consumer benefits?

- Trickle-down competition policy
- European Commission: *FAPL*



versus

- Bundeskartellamt (2009): Kirch deal; free-television highlights

but 2012: media rights: scenario 1 (first highlights on TV) or scenario 2 (first highlights on web-TV or mobile)



Joint buying of sports media rights

- Unfinished competition business
- *FAPL v. QC Leisure / Karen Murphy* (2011)



Cost control mechanisms

- Hard salary cap
- Soft salary cap
- Luxury tax



101(1) TFEU

Legitimate objective
Inherent
Proportional

HC, SC, LT
HC, LT
LT

- France: Code du Sport



4. Conclusions



- Sporting rules: clear methodological framework
- Revenue-generating aspects of sport: lack of methodological framework: need for guidance and transparency
- Rhetoric versus actual decisions





- Guidelines on Article 101 (3)
 - “goals pursued by other Treaty provisions”
 - “only under Article 101(3) TFEU”
 - only when economic efficiency benefits

Outside Article 101

Exclusion

Under Article 101(1)

Wouters test
Requirements not met

Under Article 101(3)

Additional justifications

Other

Remedies
Commitment decisions



Thank you for your attention

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