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The Institutional Framework for Doing Sports Business: Principles of EU Competition Policy in Sports Markets

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Abstract

The competition rules and policy framework of the European Union represents an important institutional restriction for doing sports business. Driven by the courts, the 2007 overhaul of the approach and methodology has increased the scope of competition policy towards sports associations and clubs. Nowadays, virtually all activities of sports associations that govern and organize a sports discipline with business elements are subject to antitrust rules. This includes genuine sporting rules that are essential for a league, championship or tournament to come into existence. Of course, „real" business or commercial activities like ticket selling, marketing of broadcasting rights, etc. also have to comply with competition rules.

Regulatory activities of sports associations comply with European competition rules if they pursuit a legitimate objective, its restrictive effects are inherent to that objective and proportionate to it. This new approach offers important orientation for the strategy choice of sports associations, clubs and related enterprises. Since this assessment is done following a case-by-case approach, however, neither a blacklist of anticompetitive nor a whitelist of procompetitive sporting rules can be derived. Instead, conclusions can be drawn only from the existing case decisions – but, unfortunately, this leaves many aspects open. With respect to business activities, the focus of European competition policy is on centralized marketing arrangements bundling media rights. These constitute cartels and are viewed to be anticompetitive in nature. However, they may be exempted from the cartel prohibition on efficiency and consumer benefits considerations. Here, a detailed list of conditions exists that centralized marketing arrangements must comply with in order to be legal. Although this policy seems to be well-developed at first sight, a closer look at the decision practice reveals several open problems. Other areas of the buying and selling behavior of sports associations and related enterprises are considerably less well-developed and do not provide much orientation for business.

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1. Introduction

The increasing commercialization of sports has turned (at least) professional sports more and more into a business. With the increasing weight of economic activities in the context of sport, however, the sports 'industry' came under the jurisdiction of competition rules. Although many sports clubs and associations do not view themselves to be business companies, it has long been established in legal sciences that economic activities in the context of sport do fall within the scope of EC competition rules and law (*European Commission* 2007b: 63). This represents long-standing practice and is confirmed by the European Courts.[1] Similarly, the question whether individual athletes, sports clubs, national and international sports association are undertakings or enterprises in the sense of EC law has been comprehensively answered in the affirmative as soon as they pursue economic activities in the broadest sense and irrespective of any formal status of professional vs. amateur sports (*European Commission* 2007b: 66-67).

Competition rules shape the strategic behavior of sports clubs and associations when it comes to economic activities (in a broad understanding), defining what types of business behavior is allowed and what not. Thus, compliance with competition rules as a considerable part of the institutional framework for doing business represents an important element for and constraint on strategy development and choice. Therefore, it is relevant for sports business to understand the underlying principles and policy practices of European competition authorities, so that strategy and management can be shaped in compliance with competition rules. This requires specialized research because the sports sector differs significantly from other, more 'ordinary' industries (*Smith* & *Stewart* 2010; *Dietl* 2010) – and this is recognized by the relevant competition authorities in Europe. Consequently, the European Commission (EC) – in its Directorate-Generals Competition and Education & Culture – has developed a sector-specific interpretation and application of the general competition rules of the European Union. This policy also influences the policy of the National Competition Authorities (NCAs) that (i) directly apply EU law to national cases and (ii) are bringing the execution of national competition rules in line with EC policy through the European Competition Network (ECN) (*Budzinski* & *Christiansen* 2005).

Unlike the U.S., where antitrust policy in sport business represents a frequently discussed issue[2], there is comparatively little literature on competition policy interventions into sports markets in Europe. Furthermore, the existing discussion is predominantly driven by legal sciences and lacks a sports management perspective. This is particularly true with regard to 2007-overhaul of the sector-specific attitude to applying competition rules in sports.[3] The

[1] Relevant decisions date back to the 1970s and the famous Bosman judgment (1995) also plays an important role. See for the most recent confirmation the judgment of the CFI in the Meca-Medina case. Naturally, the same applies for other business rules under EC law such as the internal market and free movement rules.

[2] See *Mehra* & *Zuercher* 2006; *Pelnar* 2007; *DePasquale* 2009; *Kahn* 2009; *Keyte* & *Eckles* 2009; *Loptaka* 2009; *Winfree* 2009; *Zimbalist* 2009; *Feldman* 2010; *Grow* 2010; *Hovenkamp* 2010; *Rascher* 2010 for a selection of recent contributions.

[3] See *Robertson* 2002; *Papaloukas* 2005; *Santa Maria* 2005; *Weatherill* 2006, 2007; *Cygan* 2007a, 2007b; *Massey* 2007; *Szyszczak* 2007 for legal analyses, however, predominantly referring to the pre-2007 White Paper

paper systematically outlines the underlying principles and practices of EC competition policy in the sports sector, thus, providing important information and orientation for sports management (section 2). It illustrates this by discussing two major cases and its implications for sports business and points to open problems and some inconsistencies in the application of competition rules to sports (section 3). In doing so, the paper contributes to filling a gap in the sports management literature.

2. European Competition Rules for Sports Business

2.1 European Competition Rules and Case Overview

European competition policy in the broad sense consists of the competition provisions and policies on the community level (European competition policy in the narrow sense) and the ones on the level of the Member States (national competition policy). The community level provides rules for enterprise cooperation (cartel policy), abusive strategies of enterprises with a powerful market position (abuse control), mergers and acquisitions (merger control) and public subsidies for enterprises (state aid policy). Without going into detail,[4]

- cartel policy (Art. 101 TFEU[5]) generally prohibits any agreement between independent enterprises, especially the coordination of prices and quantities, the division of markets as well as discriminatory and boycott arrangements, unless the enterprise cooperation cumulatively fulfills five criteria: (i) increases efficiency of production or distribution, (ii) promotes technical or economic progress, (iii) allows consumers a fair share of the benefits, (iv) imposes no unnecessary restrictions on competition (= the benefits must be cartel-specific) and (v) does not eliminate competition in a substantial part of the products in question,

- abuse control (Art. 102 TFEU[6]) prohibits the abuse of a dominant position in any market,

- merger control (Art. 2 (2) ECMR[7]) prohibits mergers and acquisitions that lead to a significant impediment of effective competition, and

- state aid policy (Art. 107 ff. TFEU) generally prohibits distortive aids for enterprises by national or regional governments or governmental organizations.

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policy. To my best knowledge, the existing economic literature on European antitrust issues (see, inter alia, *Ross* 2003; *Budzinski* & *Satzer* 2010; *Syzmanski* 2010 and the literature cited therein; *Lyons* 2009) does not explicitly deal with the post-2007 EC competition policy.

[4] For a contemporary and comprehensive analysis see for instance *Bishop* & *Walker* (2010).

[5] Treaty oft he Functioning of the European Union (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF; retrieved 2010-12-06 at 16.01); formerly Art. 81 EC.

[6] Formerly Art. 82 EC.

[7] European Commission Merger Regulation (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF; retrieved 2010-12-06 at 16.17).

Out of these policy fields, only merger policy has not yet been a relevant problem in the sport sector. Therefore, there is no special Commission policy on sports mergers so far.[8] According to the Commission website[9], most cases have been handled under EU antitrust rules, which comprises cartel policy and abuse control. Thus, this article will accordingly focus on these policy areas.

The competition rules in the Member States can differ considerably from the community rules and – to put it very simplified[10] – apply to cases that are purely national or regional. If the community rules are applicable, however, national decisions must stand in line with European competition policy in the narrow sense. National cases do have some importance in the sports industry. However, due to the large variety in 27 Member States and due to space restrictions, this article cannot include them systematically. Thus, it will concentrate on European competition policy in the narrow sense.

The appendix provides an overview over the competition cases handled by the Commission. The early cases have often been based on internal market rules with the notable exceptions of the landmark Formula One case (see section 3.2) and centralized marketing cases (see section 3.3). Since the 2007 Meca-Medina ruling, however, virtually all areas of sports business have become directly subject to competition rules, including apparently genuine sporting activities like defining, developing and enforcing the regulatory framework of a sports discipline's major championships, leagues and tournaments (see sections 2.2 and 3.1). Although the sheer case number does not seem to be too overwhelming, the Commission, on its website, cites sports business as one among only 13 industries that deserve special antitrust attention.[11]

The antitrust cases within the sports sector can be classified into three categories:

(I) the internal regulation of sport (genuine sporting rules or the rules of the game),

(II) business practices (buying and selling behavior of sports enterprises, like ticketing arrangements, exclusivity contracts, etc), and

[8] The appendix lists the EU case history. Most of the hitherto mergers concerned private equity companies acquiring commercial rights holders of sports event. Only one concentration – the CVC-SLEC merger – raised anticompetitive concerns as so far it was about to merge the commercial rights of the biggest four-wheel motor racing world championship with the biggest two-wheel one. A divestiture commitment to sell the motor cycling rights solved the issue (*European Commission* 2006). Furthermore, mergers between sports clubs have not occurred frequently in a professional or business context so far (perhaps with the exception of the Superligaen, the Danish premier football league) and mergers between sports associations have merely occurred on a national level without community dimension so far. It is somewhat likely, however, that merger policy will gain importance in the sports sector with the ongoing commercialization of sports business.

[9] http://ec.europa.eu/competition/sectors/sports/overview_en.html; retrieved 2010-12-06 at 16.09).

[10] For a more comprehensive analysis of the complex competence delineation and allocation rules see for instance *Budzinski* (2006).

[11] See http://ec.europa.eu/competition/sectors/sports/overview_en.html.

(III) the sale of broadcasting rights[12] (in particular the practice of bundling and joint-selling of the rights and the centralized marketing of a league or a championship).

2.2 Principles of EU Competition Policy towards Sports Business

The principles of EU competition policy in sports markets have been outlined in the context of the 2007 White Paper on Sport (*European Commission* 2007a) by the accompanying staff paper on the background and context of the Commission policy in the sports sector (*European Commission* 2007b). Although this paper aims to provide guidance for sports business (addressing both sports associations and sports clubs) it does not constitute official competition policy guidelines (*European Commission* 2007b: 63), i.e. it does not possess a binding character for Commission decisions. Thus, it falls short of being a sports-specific interpretation of competition law and merely represents a policy notice. However, it can be expected that the Commission will actually practice according to the outlined concepts and procedures.

2.2.1. Taking Account of the Special Characteristics of Sport

The Commission acknowledges that sports business entails several special characteristics distinguishing this industry and the related markets from 'ordinary business' (*Lindström-Rossi* et al. 2005: 74-75; *Kienapfel* & *Stein* 2007: 6-7). Explicitly, four specificities of sport are enlisted (*ibid*.).

Firstly, the *interdependence between competing adversaries* refers to the basic sports economic insight that the competitors in any league or championship depend on each other in order to achieve a viable business. In stark contrast to 'ordinary' industries "where competition serves the purpose of eliminating inefficient firms from the market, sport clubs and athletes have a direct interest (..) in there being other clubs and athletes" (*Kienapfel* & *Stein* 2007: 6). Any league or championship requires a sufficient number of entries (competitors) for a sustainable existence.

Secondly, the need to *preserve the uncertainty of results* somewhat mixes two different principles. On the one hand, it includes the 'integrity of competition', a principle that is related to the absence of match-fixing, doping, etc. (*Lindström-Rossi* et al. 2005: 74). On the other hand, the 'uncertainty of outcome' principle (following the similarly named famous hypothesis from sports economics; *Neale* 1964), leads to the "requirement of a certain degree of equality or, in other words, competitive balance" (*Kienapfel* & *Stein* 2007: 6).[13] In contrast

[12] Systematically, the sale of broadcasting rights would belong to the selling behavior of sports enterprises and, thus, to the business practices category. However, due to the outstanding volumes and importance of this business for some sports, the Commission treats these cases as a separate category.

[13] Already the founding father of sports economics as a discipline, *Rottenberg* (1956: 242), claimed that the "nature of the industry is such that competitors must be of approximate equal 'size' if any are to be successful; this seems to be a unique attribute of professional competitive sports" as well as "no team can be successful unless its competitors also survive and prosper sufficiently so that the differences in the quality of the play among teams are not 'too great'". However, modern sports economic insight takes a more cautious approach: "It

to the basic interdependence between competitors, i.e. the existence of a sufficient number of competitors, competitive balance refers to a sufficient sporting and economic viability of the competitors in order to create a close and sustainable fight for wins and championships.

Thirdly, the *freedom of internal organization of sport associations* is highlighted. Sport is typically organized by a 'monopolistic pyramid structure', i.e. "a single national sport association per sport and Member State, which operates under the umbrella of a single European and a single worldwide federation" (*Kienapfel* & *Stein* 2007: 7). It is not completely clear, however, whether – by referring to the 'often required existence of *one* umbrella organization' – this specificity represents an analogue to the American notion of the 'single-entity cooperation', i.e. cooperative actions that are essential and indispensable for the pure (sporting) existence of a league or championship. If it is meant to highlight the *essential regulatory task of sports associations*, setting the rules of a game, then a more specific or narrower definition of the monopolistic bottleneck within the organization of sports business would be required. While both the concepts of the single-entity cooperation and the regulatory minimum tasks drive the conclusion of a monopoly of regulatory power in a given league or championship, these concepts do not automatically preclude the necessary absence of rival leagues or championships (under the same 'umbrella' or under different 'umbrellas'), for instance. The FIA case (section 3.2) provides ample indication of the problems of a lack of clarity in this issue.

Fourthly, *preserving the educational, public health, social, cultural and recreational functions of sport*, the 'principle of solidarity', represents a somewhat non-economic community objective. Furthermore, it remains rather unclear what concrete implications must be derived from the inclusion of this principle apart from sports 'requiring' a certain degree of arrangements which provide for redistribution of financial resources from professional to amateur and youth levels of sport (*Lindström-Rossi* et al. 2005: 75; *Kienapfel* & *Stein* 2007: 6-7).

2.2.2. Genuine Sporting Rules, Business Activities and Competitive Effects

From the special characteristics of sports, namely from the single-entity cooperation concept and the essential regulatory task of sports associations, it can be inferred that the activities of sports associations can be distinguished in setting and implementing *genuine sporting rules* and conducting business activities. Conceptually, genuine sporting rules would refer to the rules of the game, the schedule and structure of the championship and other activities (including the enforcement of the rules) that are *essential* to generate a sportingly viable league or championship. Examples include the length of the game, the number of players, the design of the off-side rule, sanctioning rule violators, etc. in European football. These activities can be viewed as being non-business in nature and *purely sporting*. In contrast,

is simply not the case that competitive balance is either necessary or sufficient to increase the popularity of a sport" (*Szymanski* 2006: 31).

activities like bundling and selling broadcasting rights, market a league or championship product, ticketing arrangements, contracts with equipment suppliers, etc. are not essential for a league or championship to come into existence and represent business activities. Following this distinction, a manifest policy consequence would be to apply (economic) competition rules only to business activities and generally exempt genuine sporting rules. In the times before the landmark Meca-Medina ruling of the European Court of Justice (ECJ) in 2006, the Commission and the European courts appear to have embraced this conceptual differentiation (*Lindström-Rossi* et al. 2005).

However, there is an obvious problem with the non-business character of genuine sporting rules. Sports associations can shape these rules with a view to increase the attractiveness of the sport in order to maximize fan numbers (and revenues) and, thus, pursue a business motivation with the design of the sporting rules, generating economic effects. While in some cases it might rather clear that a rule change or the introduction of a new rule serves the business interest rather than the sport, it is practically impossible to draw a strict delineation between genuine sporting rules and business activities.[14] The ECJ implicitly embraced this insight in Meca-Medina. Two professional long-distance swimmers challenged the anti-doping rules of the International Olympic Committee (IOC) under articles 81 and 82 EC (now 101 and 102 TFEU). By setting too low threshold for the relevant substances and handing out excessive penalties for violations, the IOC was alleged to restrict competition and abusing its monopoly power. While the ECJ rejected the complaint in question, it took the opportunity of this judgement to rule that there is no category of purely sporting rules that are *a priori* not subject to the application of competition rules. Instead, the court clarified that if the underlying sporting activity constitutes an economic activity (i.e. includes business elements), then the conditions for participation also fall within the scope of European competition rules.[15] As a consequence, the following three-step methodology to apply Articles 101 and 102 TFEU to sports business has been developed (*European Commission* 2007b: 65-69; *Kienapfel* & *Stein* 2007: 8).

Step 1: Are Articles 101 and 102 TFEU applicable to the sporting rule? This requires that (1a) the rule-setting sports association is either an undertaking or an association of undertakings, (1b) the rule in question either restricts competition (Art. 101 (1) TFEU) or constitutes an abuse of a dominant position (Art. 102 TFEU), and (1c) that trade between the Member States is affected.

Step 1 probably represents the easiest part of the assessment due to the special characteristics of sports business (see section 2.2.1). A governing sports association falls under the legal undertaking or enterprise concept (1a) as soon as the regulated sports discipline (or the regulated league, championship or tournament) includes business elements (some types of

[14] For instance, it is undoubtedly essential to define the length of a match (in football, etc.). However, making the match lasting longer or shorter, playing gross or net time or the number, frequency and scheduling of breaks might well be decided and shaped according to the attractiveness for television broadcasting and, thus, according to business interests. Think about the introduction of extra breaks for commercials, for instance.

[15] On Meca-Medina and its line of reasoning see *Weatherill* (2006, 2007), *European Commission* (2007b), *Kienapfel* & *Stein* (2007) and *Szyszczak* (2007).

money flows). Apart from very amateur sports, this will be the case for virtually all sports events, especially of course for premier-level sports as well as other professional and semi-professional sports. Virtually all rules defined and enforced by any sports association in its essential function as a regulatory, governing body will influence the comparative competitiveness of the participants, the conditions of participation or other elements of competition and, in this regard, (potentially) 'restrict' competition in one way or the other (1b). In this regard, sporting competition and economic competition are inextricably intertwined in sports business since the essential regulation of sports events inevitably influences their attractiveness and, thus, includes a business dimension. Due to the monopolistic pyramid structure of sports associations (see section 2.2.1), a dominant position should always be easy to establish.[16] Eventually, the geographic jurisdictional criterion (1c) determines the competence allocation between the Commission and the Member States.

Step 2: Does the sporting rule infringe Articles 101 and 102 TFEU? The sporting rule falls outside the prohibition of these provisions if (2a) the rule pursues a legitimate objective, *(2b) its restrictive effects are* inherent *in the pursuit of that objective, and (2c)* proportionate *to it.*

"[A]nticompetitive sporting rules which are inherent in the organisation and proper conduct of sport and proportionate do not infringe Articles 81 (1) or 82 EC (...)" (*European Commission* 2007b: 63). Legitimate objectives (2a) usually relate to the *organisation and proper conduct of competitive sport*. This may include (*European Commission* 2007b: 68) ensuring fair sport competitions with equal chances for all athletes, ensuring the uncertainty of results by the absence of match-fixing, the protection of the athletes' health, protecting the safety of the spectators, the encouragement of training of young athletes, ensuring of financial stability of sport clubs/teams, the rules of the game (ensuring uniform and consistent exercise of a given sport), etc. This list is not meant to be complete. It just provides some typical examples.

"The restrictions caused by a sporting rule must be inherent in the pursuit of its objective" (2b) (*European Commission* 2007b: 68). It remains rather unclear whether this condition is already satisfied if a sporting rule is *suited* to achieve the legitimate objective or whether it must be *necessary* to achieve the legitimate objective. The second variant would be the stricter one, demanding that without the sporting rule (or its intended change) the legitimate objective would be failed. In many cases, in particular when addressing rules changes, the 'new' rule may fail to be necessary to achieve the legitimate objective in the sense that the 'old' rule did so, too. However, the 'new' rule may improve the spectacle with the same degree of objective achievement. Still, this rules change would be considered an infringement under the 'necessary' interpretation of 'inherent'. In contrast, the first interpretation offers considerably more leeway for sports associations' business strategies since all rules 'suited' to achieve the legitimate objective do not infringe competition rules. From a business perspective, the 'suited' interpretation of 'inherent' might be advantageous because it is neutral to the historical chronology of sporting rules design whereas the 'necessary' interpretation tends to cement the 'original' rule.

[16] In the 'ordinary' industry, establishing the existence of a dominant position is a difficult and usually controversial task.

Eventually, the 'proportionate' condition (2c) demands the competition restriction by the sporting rule to be not more restrictive than necessary and applied in a transparent, objective and non-discriminatory manner.

Step 3: Does the rule fulfil the exemption conditions *of Article 101 (3) TFEU or does an* objective justification *make it compatible with Article 102 TFEU?*

As outlined in section 2.1, an infringement of Article 101 (1) TFEU can be exempted from prohibition if five criteria are fulfilled (see there). Likewise, an infringement of Article 102 TFEU can be compatible with competition if an objective justification exists. So, even if a sporting rule is not inherent in the organisation or proper conduct of sport, it can be compatible with competition rules if a balancing of procompetitive and anticompetitive effects (according to the respective criteria of Article 101 (3) TFEU) comes to the conclusion that the beneficial (procompetitive) effects outweigh the restrictive effects.

In line with the general trend in European competition policy, the Commission insists on a case-by-case analysis of each sporting rule in question. According to the Commission (*European Commission* 2007b: 69), it is neither possible to predetermine an exhaustive blacklist of anticompetitive sporting rules, nor to provide a whitelist of unproblematic sporting rules. The only source for this type of knowledge is previously decided cases and, naturally, they offer merely an accidental selection of rule types. The case-by-case approach offers the advantage of deciding each case on its own merits but the disadvantage of not providing much guidance for business behaviour.

2.2.3. Business Practices of Sports Clubs and Associations

Next to the internal regulation of sport and its intertwined business elements, there is an area where sports business conducts more 'ordinary' business behavior, namely buying and selling behavior. Here, competition rules generally apply in the 'normal' way, i.e. the special characteristics of sports usually do not play a role. Examples include the equipment buying behavior of individual sports clubs or their ticket selling practices as well as the competitive behavior of sports-related enterprises like equipment producers.[17]

So far, specific competition concerns have occurred in the context of sports events where the federation as the principal organizer has engaged in buying and selling behavior – namely the football world cups. More precisely, the ticketing arrangements for these events have been scrutinized and serve as the only source for principles in this area so far (*European Commission* 2007b: 89-92). Basically, two different competition problems have been identified: (a) discriminatory sales systems (territorial restrictions for the 1998 World Cup) and (b) exclusivity contracts (travel agency exclusivity for travel-ticket packages to the 1990 World Cup; credit card exclusivity for ticket payments in the 2004 Athens Olympic Games and the 2006 World Cup).

[17] Note that the sports-media interface is treated as a special issue in section 2.2.4.

Two principles can be inferred from these cases, namely (i) *non-discrimination* and (ii) *reasonable access* to tickets. In particular, the Commission insists that sufficient alternatives for access have to accompany any exclusive contract. For instance, credit card exclusivity requires the existence of either alternative payment methods (e.g. bank transfer) without dissuasive or prohibitive costs or alternative sales channels free of the exclusivity to one credit card company (e.g. exclusivity only for online sales; card freedom for over-the-counter sales).

Whether these principles will guide possible decisions on other types of exclusivity contracts and whether they are appropriate or sufficient in this regard remains open. Especially, the increasing role of advertisement exclusivity contracts in the context of Olympic Games and World Cups (including the ever-increasing scope of the exclusivity) might be viewed to trigger future investigations and cases.

2.2.4. The Special Issue of Broadcasting Rights

Sport media rights are viewed to be a special issue by the Commission (*European Commission* 2007b: 78-89; *Kienapfel* & *Stein* 2007: 10-13) because of two reasons. Firstly, due to the extraordinary price increases especially of TV broadcasting rights, they are viewed to be one of the main factors driving the economic growth of the sports sector. Secondly, sports broadcasting rights are viewed to be an important input to media markets. In particular for (pay) television markets, certain broadcasting rights represent a premium content that has a decisive influence on the competitiveness of a media company. Consequently, the concentration of valuable media rights in the hands of very few sports federations limits their availability and cause competitive concerns for sports and media markets (*Toft* 2006: 3).

A typical phenomenon in sports business is the centralized marketing of a league or championship by the governing or regulatory body, a sports association. Next to creating a common brand, this centralized marketing strategy typically includes the bundling of the broadcasting rights in the hands of the association and the sale of these rights on behalf of the original rights holders (the participants, hosts and promoter of the league or championship). Centralized marketing represents a type of joint-selling and constitutes a restriction of competition under Article 101 (1) TFEU, namely a cartel (*Toft* 2006: 4-6; *Kienapfel* & *Stein* 2007: 11). In a league, for instance, it prevents the individual clubs from competing for television deals, often sets a uniform price (price-fixing), often reduces the number of available rights in order to increase the price (artificial output reduction), leads to market foreclosure in media markets, and can hamper the development of certain sub-markets (e.g. new media markets in order to protect pay-TV revenues). Insofar, considerable harm to consumer welfare must be expected.

Next to the considerable anticompetitive effects of the centralized and bundled sale of broadcasting rights, the Commission also recognizes procompetitive efficiency effects, which

may potentially allow for an exemption according to Article 101 (3) TFEU. More precisely, the Commission identifies three types of benefits (*Kienapfel* & *Stein* 2007: 11-12):

- the creation of a single point of sale provides efficiencies by reducing transaction costs for clubs and media companies,
- the creation of a common brand is efficient as it increases recognition and distribution of the product, and
- the creation of a league product may increase its attractiveness for the fans (viewers) as the product is focused on the competition as a whole rather than the individual clubs participating in the competition.

The Commission has taken a skeptical position as to whether these benefits outweigh the anticompetitive effects. Following three case decisions, it has established the practice that it views the conditions of Article 101 (3) TFEU (see section 2.1) fulfilled if a couple of 'remedies' are implemented in the joint-selling arrangement (*Toft* 2006: 7-10; *European Commission* 2007b: 84-89):

- competitive tendering, i.e. a non-discriminatory and transparent competitive bidding process in order to give all potential buyers an opportunity to compete for the broadcasting rights,
- limitation of the duration of exclusive vertical contracts, i.e. employing a 'sun-setting mechanism', according to the current Commission practice in football the duration must not exceed three seasons,
- limitation of the scope of exclusive vertical contracts, i.e. unbundling media rights into several separate packages in order to prevent market foreclosure (sometimes combined with 'blind-selling'), for instance, exclusive football live rights currently must be separated in at least two balanced and meaningful packages,
- exclusion of conditional bidding,
- fall-back option, use obligation and parallel exploitation in order to remedy output restrictions; i.e. unused rights fall back to the individual clubs for parallel, competitive exploitation,
- exceptionally: 'no single buyer obligation' in case of already existing dominance of one television operator, and
- trustee supervision of the tender procedure.

Within the area of broadcasting rights, the competition policy of the Commission is comparatively advanced. The conditions for centralized marketing concepts to fulfill the exemption criteria from the cartel prohibition are outlined in a rather clear-cut and

unambiguous way, providing appropriate guidance for business strategies of sports associations.

3. The Practice of European Competition Policy in Sports Markets: Examples and Comments

After having laid out the principles of antitrust interventions into sports business in Europe in the preceding sections, the paper now addresses additional implications from some concrete case decisions. In doing so, it gets clearer how the principles work. However, the line of reasoning also reveals some ambiguities in the principles and its application. Section 3.1 provides examples of sporting rules that have been found to be pro- or anticompetitive in the case practice so far. Section 3.2 addresses the FIA case in some detail because it still is the landmark case regarding abuse of dominance by a sports association. Eventually, section 3.3 briefly addresses three critical issues in the competition regulation of centralized marketing arrangements.

3.1. Procompetitive and Anticompetitive Sporting Rules: Examples from the Case Practice

Drawing on the existing case practices (see Appendix I), an indicative list of sporting rules that are likely to stand in line with competition rules and comply with Articles 101 and 102 TFEU can be derived (*European Commission* 2007b: 70-73; *Kienapfel* & *Stein* 2007: 9). This list has to be viewed with some caution, however, since the assessment of a specific rule will depend on the concrete design and context under a case-by-case approach.

- *Entry Rules* (the Judo case): In order to manage the inherent limits to the number of participants in a tournament, championship or league, the competent sports associations needs to define selection criteria. As long as they are appropriate to the competition in question as well as non-arbitrary and non-discriminatory (e.g. following transparent performance criteria), entry-restricting rules are likely to meet the criteria legitimate objective, inherence and proportionality (see section 2.2.2).

- *'Home and Away' Rule* (Mouscron case): Leagues are often organized in home- and away-matches between clubs and defining a territorial restriction for 'home' is likely to stand in line with the Meca-Medina criteria.

- *Transfer Periods* (Lehtonen case): Restriction of the time period through which players are allowed to change clubs (transfer windows) may follow the legitimate objective to ensure the regularity of competitions (absence of 'artificial' game-to-game changes in the competitive strength of the teams by hiring and firing players). Inherence and proportionality sensitively depend on the concrete design of the transfer window.

- *Nationality Clauses for National Teams*: inherent to a meaningful competition between national teams.

- *Multiple Ownership Rules*: Rules preventing that two or more competitors in the same league, championship or tournament are owned or managed by the same company or person serve the legitimate objective to safeguard the uncertainty of outcome and the integrity of competition.

- *Anti-doping Rules* (Meca-Medina case): Legitimate objectives here may be the integrity of competition and the protection of the health of the participants. Inherence and proportionality may depend on the specific design and context.

In addition to these case related conclusions regarding procompetitive sporting rules, *Kienapfel* and *Stein* (2007: 9) refer to the "elementary rules of a sport (e.g. the rules fixing the length of matches or the number of players on the field)". However, the category 'elementary rules of the game' will be as difficult to unambiguously delineate as the 'purely sporting rule' concept discarded by the ECJ.

In contrast, the following rules and regulatory areas are viewed to be examples of rules typically involving serious competition concerns (*European Commission* 2007b: 73-76; *Kienapfel* & *Stein* 2007: 9-10):

- *Deterrence of Competition Rules* (the FIA case): Rules protecting commercial activities by sports associations from competition are typically anticompetitive (see also section 3.2).

- *Exclusive Internal Judiciary Systems* (inter alia, FIA and FIFA case). Rules excluding legal challenges of decisions by sports associations before ordinary courts typically violate European antitrust rules.

- *Transfer Payment Systems* (Bosman case): Payments for transfers of players may only be acceptable within narrow boundaries. In particular, mandatory transfer payments for out-of-contract players violate European competition and internal market rules.

- *Nationality Rules* (Bosman case): Outside national teams' tournaments, restrictions of participants on grounds of citizenship raise serious anticompetitive effects (and violate internal market rules if EU nationality is involved).

- *Restrictions of Professions Ancillary to Sport* (the Piau case). Restrictions for players' agents, for instance, must not be arbitrary, overly restrictive or otherwise anticompetitive. In the case in question, inter alia the requirement to deposit a bank guarantee in order to obtain an agent's license from FIFA was assessed to be anticompetitive.

Again, this list has to be dealt with caution since the assessment of a specific rule will depend on the concrete design and context under a case-by-case approach. Furthermore, the discussed rules represent only a small fraction of relevant rules in sports business.

3.2. Abuse of Regulatory Power: The FIA Case (1999 – 2003)

Although the FIA case was handled considerably before the 2007 revision of the Commission's competition policy towards sports business, it offers a couple of useful insights. The Fédération Internationale de l'Automobile (FIA) is the principal worldwide authority for motor racing. Its members are national motor racing associations. Next to being a 'governing' sports associations setting and governing sporting regulations, the FIA also engaged in commercial promotion activities. This was viewed to create a conflict of interests that sets incentives for the FIA to abuse its regulatory power in order to protect and increase the commercial rents from its self-promoted products and, thus, discriminate against and deter products under its authority that are promoted by independent agencies.

The Commission *prima facie* alleged the FIA to abuse its dominant position in the market for global motor racing series ('world championships') in four ways (*European Commission* 1999; *Cygan* 2007a: 80-86, 2007b: 1336-1341):

I. the FIA used its power to block series which compete with its own events,

II. the FIA has used this power to force a competing series out of the market,

III. the FIA used its power abusively to acquire all the television rights to international motor sports events, and

IV. FIA protect the Formula One (F1) Championship from competition by tying everything up that is needed to stage a rival championship.

Allegations (I) and (IV) deal with the issue of deterring competitive threats to flagship championships of FIA by tying up the essential factors for organizing and promoting a rival series. More precisely, it refers to FIA's contractual and licensing practices which usually included an exclusive commitment to the FIA series and threatened withdrawal of the participation right in FIA flagship championships in case of any engagement in rival series. For instance, contracts with circuit owners prevented circuits used for F1 Grand Prix races from being used for races that could compete with F1. The so-called *Concorde Agreement* (the basic contract constituting the F1 world championship) prevented F1 teams from participating in any rival series and contracts with broadcasters included significant fines in case they broadcasted anything deemed by FIA's commercial rights management to be a competitive threat. (II) refers to evidence that FIA abused its monopoly position as a regulator to force a competing promoter out of the market. The GTR organization had successfully promoted a sports car championship (*Gran Turismo*, GT), which – after driving them out of the market by denying access to circuits, drivers, teams, etc. – then was replaced by a similar

championship under FIA promotion (FIA GT Championship). Hence, the double role of FIA (and its associated companies) as a monopoly regulator and a competitor in the promoter market played an important role. Allegation (II) refers to a new FIA rule from 1995 claiming the television rights to all motor sports events under its authority. This implied that promoters competing with FIA (and its associated companies) were forced to assign the television rights to their competitor (which was also the regulatory monopolist). In economic terms, the allegations against FIA rested on (i) exclusive contracts including prohibitive sanctions with essential factors of production as well as (ii) leveraging the monopoly power from being the governing sports association into the promoter market. Both anticompetitive conducts constitute an abuse of dominance and a violation of European antitrust rules (in modern connotation Article 102 TFEU).

Furthermore, the Commission criticized the internal decision making and appeal procedures of FIA, in particular with respect to a lack of transparency. The exclusion of ordinary courts for appeals against FIA decisions was also downturned.

Eventually, and in order to heal the anticompetitive effects, the *European Commission* (2001b; *Cygan* 2007a: 86-88, 2007b: 1341-1343) established that FIA must

I. establish a complete separation of the commercial and regulatory functions in relation to the FIA Formula One World Championship and the FIA World Rally Championship;

II. improve transparency of decision making and appeals procedures and create greater accountability;

III. guarantee access to motor sport to any person meeting the relevant safety and fairness criteria;

IV. guarantee access to the international sporting calendar and ensure that no restriction is placed on access to external independent appeals;

V. modify the duration of free-to-air broadcasting contracts in relation to the FIA Formula One World Championship with a maximum duration of three years (reduced from five years).

Fundamentally, the Commission's remedies focus on two issues: (i) unbundling the tying in of all relevant factors necessary to organize a motor racing championship by breaking up the exclusivity contracts and by enjoining the related contractual penalties, and (ii) separating the regulatory management of the prime world championships from the commercial management in order to demotivate any conflict of interest.

Reducing the scope for discriminating exclusivity contracts represents a somewhat 'ordinary' limitation of the strategic options of enterprises with strong market dominance – like, for instance, in the famous Microsoft case – and as such is rather unproblematic. The new methodology (see section 2.2.2) would not have changed the assessment since this type of

long-run discriminating exclusivity contracts with prohibitive contractual penalties can hardly be viewed to be inherent to organizing a world championship in four-wheel motor racing. Next to violating the *inherence* principle, the massive restrictions of the strategic business freedom of circuit owners, teams, manufacturers and drivers additionally fails to respect the *proportionality* principle.

The more difficult part of the Commission's decision in this respect refers to the underlying objective of FIA's contractual policy. Does the prevention of a rival series represent a *legitimate* or an *illegitimate objective* for a governing sports association? In the FIA case, the Commission clearly views the deterrence of a rival series to the FIA Formula One World Championship to be anticompetitive (*Cygan* 2007a, 2007b) and, thus, implicitly to represent an illegitimate objective. However, Commission acknowledges that the specificities of sport include the acceptance of the 'monopolistic pyramid structure' of sports organization and the need for an umbrella cooperation of all participants in terms of regulation and the creation of a single-entity championship, league or tournament (see section 2.2.1). Furthermore, when assessing the competitive effects of centralized marketing, the Commission puts weight on the efficiency effects from having one single top-tier league, championship or tournament (see sections 2.2.4 and 3.3). Nowhere in the football cases, for instance, the Commission asks for opening up the structures for a rival championship, neither in terms of regulatory management nor in terms of commercial management. Unfortunately, the issue of the benefits and deficiencies of rival championships on the premium level of sports has not received much attention in the sports economics and management research literature. Four-wheel motor racing offers an illustrative example why such a research would warrant some effort. Probably in contrast to established ball sports disciplines, the question of what constitutes a rival series is not that obvious in motor racing. Does an open wheel single-seater cars world championship compete with a sports cars world championship? And the latter with a touring car world championship? Does the American-based but internationally expanding Indycar series (another open wheel single-seater format) represent a competitive threat to Formula One? What about sprint vs. endurance race formats? Do the feeder categories GP2, GP3, Renault World-Series, Formula Two, Formula 3 Euroseries, Auto GP, IndyLights, Formula Nippon, etc. compete with each other and belong to the same market? Interesting market definition issues surface that prevent a trivial answer to the legitimacy question of the association's objective of preventing a 'rival' series.[18]

This non-trivial issue leads over to the second prerogative of the Commission's intervention into motor racing, namely the separation of regulatory management and commercial management. For instance, *Cygan* (2007a: 89-92) remains skeptical whether the Commission's intervention has brought a substantial change in television rights policy. The Commission's obligations were implemented by (i) separating FIA (regulatory agency) and FOA (Formula One Administration Ltd.; commercial management) for the then-running

[18] The comparatively few treatments in sports economics and management highlight the benefits of a league or championship monopoly (inter alia, *Fort* & *Quirk* 1997; *Rascher* 2010: 29-34; cf. *Ross* 1995: 733-753) – but without exploring the difficult market definition issue that may emerge outside the usual football-baseball-basketball analyses.

Concorde Agreement (until 2008). Bernie Ecclestone, effectively controlling FOA (*European Commission* 2001a: 169/5), stepped down as a FIA Vice-President in order to dissolve the personal inter-linkage as well.[19] Furthermore, FIA and the Formula One Group (FOG; CEO: Bernie Ecclestone[20]), draw up a 100 year contract handing the commercial rights for the FIA Formula One World Championship exclusively to FOG from 2010-2110 (*European Commission* 2006: 3). This new construction was accepted by the Commission following a monitoring period (*European Commission* 2003b). According to *Cygan* (2007a, 2007b), the 'new' commercial rights holder basically continues the previous policies. In particular, the low revenue participation of teams and other stakeholders via the Concorde Agreement is continuing or has only very modestly improved. *Cygan* (2007a: 89-93) further conjectures that substantially nothing has changed regarding the common interest of regulatory authority (FIA) and commercial promoter (FOA/FOG) to prevent the establishment of a rival series to F1. Insofar, the separation of genuine sporting regulation and commercial management appears to be void in hindsight. *Cygan* (2007a: 91, 93) refers to the example of the 2006 manufacturers breakaway series threat, motivated predominantly by the low revenue shares from the commercial revenue of marketing F1. "It is no coincidence that, in March 2006, new safety regulations, improved provisions for revenue distribution between the teams and the sale of the commercial rights for 2008 onwards were all concluded at a time when FIA was seeking to avoid a competitor series being established. These arrangements will compose the new Concorde Agreement which the teams have signed in September 2006 to participate in Formula One beyond this date" (*Cygan* 2007a: 93). The breakaway controversy between the team organization FOTA (Formula One Teams Association) on the one side and FIA & FOG on the other side offers another prime example – and, again, the establishment of a rival series was successfully deterred.

From today's perspective, it appears to be somewhat doubtful whether the enforced separation of commercial management and governing authority stands in line with the post-2007 sports competition policy of the Commission. And even before that the Commission took a different stance with respect to European football where it confirmed a neutral position towards the organization of commercial management within or outside the regulatory sports associations (*Toft* 2006: 6-7). From a competition economics perspective, a 100 year contract handing the commercial rights monopoly to a private profit-oriented company might actually raise more competition concerns than a the conflict of interests that the Commission (probably ineffectively) tried to eliminate. It is certainly difficult to see why FOG should behave under more effective competitive pressure than FIA-FOA pre-2001. However, the influence of the share- and stakeholders of Formula One on the exploitation and utilization of the commercial rights revenues has considerably decreased.

[19] Bernie Ecclestone, nevertheless, became a member of the all-important FIA World Motor Sport Council as a 'team representative'.

[20] http://www.cvc.com/Content/EN/OurCompanies/CompanyDetails.aspx?PCID=737; retrieved 2010-12-12 at 15.31.

3.3. Centralized Marketing: the European Football Cases

There have been three cases so far where the Commission has dealt with the centralized marketing of sports media rights by football associations. The first one was the UEFA Champions League case in 2003, the second one the English Premier League case (2002 – 2004) and the third one the Bundesliga case in 2005. While the handling and the decision of these football-related cases demonstrate a coherent and comparably clear-cut policy (see section 2.2.4), three interesting issues surface at a closer look: (i) the economic reasoning of the efficiency effects, (ii) the comparison to the treatment of centralized marketing in other sports disciplines, and (iii) the coherence with exemplary decisions by Member State authorities. Due to space limitations, these aspects can only be sketched in the context of this paper. However, this suffices for demonstrating that the framework for media rights selling strategies of sports associations may not be so unambiguous as it appears on first sight (see section 2.2.4).

3.3.1. Economic Reasoning

The economic reasoning of the Commission regarding the efficiencies justifying an exemption of centralized marketing arrangements (following the conditions outlined in section 2.2.4) embraces one interesting line of argument and interestingly dismisses another one. The single-point-of-sale argument appears to embrace an unorthodox transaction cost concept at first sight. Indeed, having a monopoly supplier reduces transaction costs in the sense that costs of searching and selecting disappear. It would be a mistake in economic reasoning, however, to confuse 'minimum transaction costs' with 'efficiency'. Competition involves necessary transaction costs since it creates product and service diversity, allocative efficiencies as well as innovation and technological change. All these factors, however, *improve* consumer welfare despite the generated transaction costs – consumer welfare both in terms of lower prices and a consumer-preferences-driven evolution of the product and the related services. Thus, arguing that a single point of sale provides efficiencies due to the reduction of transaction costs is a nonsense argument from a competition economics perspective and a dangerous reasoning.

However, the Commission (*European Commission* 2007b: 83) argues a bit different. "The single point of sale enabled the acquisition of coverage for the whole UEFA Champions League season, allowing programming to be planned in advance. (…) [D]ue to the knock-out nature of the UEFA Champions League (…) a broadcaster could not know in advance which clubs would make it through to the end." A decentralized sale of broadcasting rights, thus, would imply that the value of individually sold broadcasting rights "would plummet if that club was eliminated" (see additionally *European Commission* 2003a: rec. 139-153). This reasoning emphasizes the knock-out character (cup system) of the UEFA Champions League (*European Commission* 2003a: rec. 145). And, indeed, the coverage of a whole cup is impossible to be sold in advance with a decentralized system since nobody knows in advance

who will survive the knock-out rounds.[21] However, two critical implications must be remarked. Firstly, this is true only for cup systems – and *not* for the English Premier League or the Bundesliga. Consequently, the efficiency reasoning would have to be different and 'weaker' for pure league systems than for such involving knock-out elements (cup systems, play-off elements, etc.). This is not reflected in the Commission's decision practice. Secondly, it is not clear why the complete coverage must be sold in advance of the season – and cannot be offered in sequences corresponding to the knock-out rounds. Selling all the rights in advance of the championship may follow a *legitimate objective* merely if it is *inherent* to create a common brand (insofar as this represents a legitimate objective). Then, however, the creation of an otherwise not available commonly-branded and coherent league product represents the efficiency effect and reference to single-point-of-sale or (strange) transaction-cost reasoning is not necessary since it does not add consumer welfare beyond the branding issue.

The economic reasoning of the Commission does not employ the competitive balance improvement reasoning as a justification for exempting centralized marketing arrangements under an Article 101 (3) TFEU assessment (*Kienapfel* & *Stein* 2007: 12).[22] This seems to be surprising at first sight since it belongs to the 'textbook wisdoms' of sports economics and management that striving for more competitive balance represents a legitimate task of any sports association (*Rottenberg* 1956; *Fort* & *Quirk* 1995; *Groot* 2008; *Fort* 2010: 155-199). Moreover, revenue-sharing may be a prime instrument in reducing competitive imbalance and centralized marketing arrangements offer avenues to distribute the centralized collected television revenues among the league participants in a way to promote competitive balance. In order to advocate the competitive balance defense, it is further necessary to point at the benefits for consumers (fans) due to a more balanced sporting competition.

The reluctance of the Commission to embrace the competitive balance defense as a justification for antitrust exemptions, on the other hand, corresponds to a growing skepticism in the sports-economics literature, casting doubt on the interrelation of 'more balance' and 'more attractiveness' (*Peeters* 2009; *Pawlowski* et al. 2010) as well as on the pro-balance incentive for league managers (*Szymanski* 2006) or even dismissing the competitive balance justification in total (*Mehra* & *Zuercher* 2006; *Massey* 2007). Still, given the comparatively considerable weight that U.S. antitrust authorities are putting behind the competitive balance defense, it seems surprising that it did not play a role in the Commission decisions.

3.3.2. Centralized Marketing in Different Sports Disciplines

Regarding the look beyond football, it is interesting, that the Commission accepted centralized marketing of broadcasting rights without considerable obligations (like competitive tendering, segmentation of rights, trustee supervision, etc.) in Formula One motor

[21] In addition, the *Commission* (2003a, rec. 146) claims that joint selling arrangements are necessary to allow for comprehensive highlights programs of match-days.

[22] "The Commission nevertheless considers that it is not necessary for the purpose of this procedure to consider the solidarity argument any further." (*European Commission* 2003a: rec. 167; see also rec. 164-167).

racing. This stands in sharp contrast to the football-related decisions – and although it can be reasoned that it simply was an older decision, it remains remarkable that the Commission did not take this matter on the agenda again in the light of the football decisions.

According to *Cygan* (2007a: 88), the Commission factually acknowledges with its decision that motor racing is different from football in the sense that motor sport viewers are interested in the chronological development of the championship throughout the season rather than in individual races. Regarding football, he conjectures the opposite, referring to the typical football fans' loyalty to one team. Thus, football fans are alleged to be less interested in the unfolding of the championship and more in single, isolated games. In other words, while the Formula One World Championship is viewed to be one single event (and not consisting of individual races as single events), a football league is viewed to consist of individual games as single events. Such a reasoning might have some appeal with a view to the European Champions League (albeit a bit stuck in the philosophy of the older European cups). However, it appears to be rather doubtful that the English Premier League or the German Bundesliga are less of an entity than the Formula One World Championship.[23]

Regarding the institutional framework for doing business, sports associations and its members should be aware that the clear guiding principles of section 2.2.4 appear to be applicable only for ball sports leagues and can not necessarily be transcribed to other sports disciplines or other types of championships and tournaments.

3.3.3. A Member State Curiosity?

Eventually, the 2008 Bundesliga centralized marketing 'case' of the German Federal Cartel Office (FCO) serves as illustrative example for another tendency in marketing- and management-relevant competition policy practices in Europe. It is, however, not a formal decision case. Instead, the German football league (DFL; Deutsche Fußball Liga) submitted the plans for its centralized marketing concept for the seasons 2009 onwards in advance for scrutiny to the FCO. The FCO objected the submitted model and laid out detailed conditions for a rule-conformal design (*Bundeskartellamt* 2208; *Heitzer* 2008). While most of the reasoning does not add to the preceding discussion of the Commission decisions, one aspect stands out. The FCO put a lot of emphasis behind the importance of offering comprehensive highlights programs of match-days (see also above footnote 20). A prompt comprehensive highlights program broadcasted via free TV is viewed to limit the prices that Pay TV can charge the fans for live broadcasting. Disestablishing this type of program would harm consumer welfare by (i) eliminating the choice between two different product variants (pay television live broadcasting vs. free television comprehensive highlights program with a sufficiently *small* time delay) and (ii) increasing prices for pay television costumers (*Heitzer* 2008: 4). The FCO concludes that giving consumers (fans) a fair share of the centralized marketing benefit requires the existence of free TV highlights programs broadcasted promptly

[23] Note also that historically the Formula One World Championship and its predecessors developed from the idea of combining the most important Grand Prix races of a year into a championship classification. In this regard, a Grand Prix is much more a single event than one football match.

after the matches have been played. This conclusion leads to detailed discussion of how to schedule the matches between Friday to Sunday and the possible time slots of the related free TV highlights programs for the first and second division of German professional football. Inter alia, the FCO demanded (i) the maintenance of a core match-day (on Saturday) and (ii) prompt highlights programs in free TV. For instance, the core match-day on Saturdays (at least five out of nine matches per match-day; 15.30 – 17.15 o'clock) must be available for such a free TV comprehensive highlights program before 20.00 o'clock because such a program during prime time (20.00 – 22.00 o'clock) is deemed to be unprofitable and a late night highlights program (after 22.00 o'clock) is assessed to be consumer-welfare harming (*Bundeskartellamt* 2008: 6-9; *Heitzer* 2008: 5-6).

Without going into an analysis of the economic sense of these requirements, the interesting thing is the degree of detail of the intervention by the FCO. At the end of the day, the FCO and the DFL – in detail – negotiated about the time slots for the matches, the allocation of the matches over the weekend and the timing of different types of television coverage. It can hardly be the task of a competition authority enforcing competition rules to engage in such a detail regulation of management issues. However, this – admittedly extreme – example stands in line with the tendency of competition policy in Europe to negotiate 'deals' with the norm addressees and reach consensual solutions (commitments, settlements and remedies). This tendency is favored by the case-by-case approach, i.e. departing from a rule-based policy and moving towards detail-assessments of each single case. While this may involve disadvantages for the enforcement power of competition policy (*Budzinski* 2010), it offers sports associations, clubs and related enterprises the option to reach favorable agreements with the competition authorities.

4. Conclusion

The competition rules and policy framework of the European Union represents an important institutional restriction for doing sports business. Driven by the courts, the 2007 overhaul of the approach and methodology has increased the scope of competition policy towards sports associations and clubs. Nowadays, virtually all activities of sports associations that govern and organize a sports discipline, which also includes business elements, are subject to antitrust rules. This includes genuine sporting rules that are essential for a league, championship or tournament to come into existence. Of course, 'real' business or commercial activities like ticket selling, marketing of broadcasting rights, etc. also have to comply with competition rules.

In summary, regulatory activities of sports associations comply with European competition rules if they pursuit a legitimate objective, its restrictive effects are inherent to that objective and proportionate to it (see section 2.2.2). This 'new' approach offers important orientation for the strategy choice of sports associations, clubs and related enterprises. Since this assessment is done following a case-by-case approach, however, neither a blacklist of anticompetitive sporting rules nor a whitelist of procompetitive ones can be derived. Instead,

conclusions can be drawn only from the existing case decisions (see section 3.1 and 3.2) – but, unfortunately, this leaves many aspects open for future decisions.

With respect to business activities, the focus of European competition policy is on centralized marketing arrangements bundling media rights. These constitute cartels and are viewed to be anticompetitive in nature. However, they may be exempted from the cartel prohibition on efficiency and consumer benefits considerations. Here, a detailed list of conditions exists that centralized marketing arrangements must comply with in order to be legal (see section 2.2.4). Although this policy seems to be well-developed at first sight, a closer look at the decision practice reveals several open problems (see section 3.3). Other areas of the buying and selling behavior of sports associations and related enterprises are considerably less well-developed and do not provide much orientation for business (see section 2.2.3).

Eventually, the increasing importance of competition rules and policy for sports business is not yet reflected in the academic literature. In particular, economic analyses of the compliance of different types of (more or less genuine) sporting rules with the EC's post-2007 assessment methodology as well as economic analyses focusing on other ('European') sports than football are lacking. Consequently, the existing research predominantly displays a legal-science focus.

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Appendix: List of EU Sports Cases

Case classification:

(I) the internal regulation of sport (genuine sporting rules or the rules of the game),

(II) business practices (buying and selling behavior of sports enterprises, like ticketing arrangements, exclusivity contracts, etc),

(III) the sale of broadcasting rights (in particular the practice of bundling and joint-selling of the rights and the centralized marketing of a league or a championship), and

(IV) mergers.

Case	Year	Sports	Type	Policy Area / Body	Decision
Walrave	1974	general	I, II	internal market rules / ECJ	(i) sports is subject to community law only if it constitutes a business activity, (ii) composition of national teams is not subject to nationality antidiscrimination rules
Donà-Mantero	1976	Football	I / exclusivity of national players in team sports	internal market rules / ECJ	prohibition
Eurovision	1989 - 1993	all	III / internal provisions on the acquisition, exchange and contractual access to sports programs	cartel policy; abuse control / Commission	clearance with obligations
World Cup 1990 Italy	1992	Football	II / package tours	abuse control / Commission	infringement; no fines

Tretorn Tennis Ball Suppliers	1994	Tennis	II / export ban on tennis balls	cartel policy / Commission	infringement; 640 000 ECU fines (geographical market division)
Bosman	1995	Football	I / transfer rules and payments; limitation to the number of foreign players	internal market rules, competition rules / ECJ	prohibition of (i) transfer fees for out-of-contract players, (ii) limit to the number of EU players[24]
FIFA Sports Goods	1995 - 2000	Football	I / standardization (technical specifications) of footballs and licensing of products	cartel policy, abuse control / Commission	clearance
Deliège	1996 - 2000	Judo	I / selection and participation rules	internal market rules, competition rules / ECJ	clearance (necessary for the functioning of the underlying championship)
Lehtonen	1996 – 2000	Basketball	I / transfer rules, esp. deadline for transfers (transfer windows)	internal market rules, competition rules / ECJ	allowed subject to conditions (only if necessary for the functioning of the underlying championship)
Danish Tennis Federation	1998	Tennis	II / sponsorship agreements between sports associations and sports goods suppliers	cartel policy, abuse control / Commission	clearance with commitments
World Cup 1998 France	1998 - 1999	Football	II / ticket sales arrangements	abuse control / Commission	prohibition; discriminatory practices (unfair conditions for non-French residents)
Mouscron Case	1999	Football	I / 'home and away' rule	internal market and competition rules / ECJ	clearance
FIA	1999 – 2001	Motor Racing	I, II, III / deterrence, rival series and	abuse control, cartel policy /	clearance with commitments;

[24] Confirmed in the Deutscher Handballbund (2003) and Simutenkov (2005) cases.

			promoters, marketing systems, commixture of sports rules and business practices	Commission	monitoring until 2003
UEFA Euro 2000	2000	Football	II / ticketing arrangements	abuse control / Commission	approval
UEFA Broadcasting Regulations	2000 - 2001	Football	III / blocking of live broadcasting; protecting attendance of lower-level (amateur) leagues	cartel policy / Commission	out of scope
UEFA Multiple Ownership	2000 - 2002	Football	I / prohibition of multiple ownership	cartel policy / Commission	out of scope (integrity of sporting competition)
UEFA Champions League	2001 - 2003	Football	III / joint-selling	cartel policy / Commission	clearance with commitments
Meca-Medina	2001 – 2006	Swimming; Olympic Games	I / anti-doping rules	abuse control, cartel policy, free movement / CFI, ECJ	clearance
FIFA Transfer Rules	2002	Football	I / transfer rules	internal market rules; abuse control / Commission	investigation closed after commitments
FAPL English Premier League	2002 - 2006	Football	III / joint-selling	cartel policy / Commission	clearance with commitments
Bayerische Landesbank / Formula One Group	2002, 2005	Motor Racing	IV / acquisition of commercial rights holder (initially together with JP Morgan Chase and Lehman Brothers)	merger control / Commission	clearance
Athens Olympic Games 2004	2003	Olympic Games	II / credit card exclusivity	abuse control / Commission	clearance with commitments
Bridgepoint / SVL / Holmes Place	2003	Fitness	IV / merger between fitness studio chains	merger control / Commission	clearance
Newscorp /	2003	Football	IV	merger control	sports

Telepíu (merger case involving SkyItalia)				/ Commission	broadcasting rights only one among many issues; main problem: insolvency-preventing merger
DFB German Bundesliga	2003 - 2005	Football	III / marketing system	cartel policy / Commission	clearance with commitments
Cinven / BC Funds / Fitness First	2003, 2005	Fitness	IV / acquisition of an international fitness studio chain (first by Cinven, later by BC Funds)	merger control / Commission	clearance
Sportfive / HSG / Stadion Frankfurt	2004	Sports Facilities	IV / merger between sports marketing and sports facility operating companies	merger control / Commission	clearance
FIA / Vega Tyres	2004	Motor Racing	I / tyres regulation; establishing of a single tyre supplier for karting series	abuse control / Commission	clearance
Piau	2005	Football	II / licensing rules for sports related services (here: players agents)	abuse control, cartel policy, internal market rules / Commission, CFI, ECJ	clearance after commitments (only objective and transparent licensing systems are allowed)
World Cup 2006 Germany	2005	Football	II / credit card exclusivity	abuse control / Commission	clearance with commitments
CVC / SLEC	2006	Motor Racing	IV / acquisition of FIA Formula One commercial rights holder	merger control / Commission	clearance with conditions and obligations
Bridgepoint / Dorna	2006	Motor Racing	IV / acquisition of the FIM MotoGP commercial rights holder	merger control / Commission	clearance
MOTOE	2008	Motor Cycling	II / business activities of non-profit organizations	abuse control / ECJ/	European competition rules are applicable; national rules cannot preclude

					this
Colony Capital / Morgan Stanley / Colfilm	2008	Football	IV / Colfilm is holding company of Paris Saint-Germain Football SA	merger control / Commission	clearance
French Tennis	2009	Tennis	I / anti-doping rules	abuse control / Commission	clearance
Daimler / IPIC / Brawn GP	2009	Motor Racing	IV / engine supplier of several teams acquires leading racing team	merger control / Commission	clearance
Olympique Lyon	2010	Football	I / transfer payments, compensation for young player education	Internal market rules / ECJ	prohibition if compensation is unrelated to actual costs of training

Sources: own compilation of data from http://ec.europa.eu/competition/sectors/sports/case_law.html and http://ec.europa.eu/competition/sectors/sports/decisions.html; retrieved 2011-01-24, 10:21.