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Editorial: Competition Law in Leisure Markets

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According to a recent Eurobarometer survey carried out for the European Commission's competition services (DG Competition),¹ 74% of EU citizens consider that effective competition has a positive impact on them as a consumer. They mostly agree that competition between companies allows for more choice (86%), better prices (84%), and encourages innovation and economic growth (82%). These figures, which once again will make nice headlines in Commission publications and speeches, have not varied much since the first survey conducted in 2009. The headlines are unlikely to mention, however, that less than half of the respondents have knowledge of any competition-related decision. Where this is the case, only 38% think that the European Commission was responsible for a decision they know about.

While one may question the representativeness and accuracy of these surveys, the results do signal that the fruits of the decisional practice of competition agencies often go undetected by the general public. One of the ways to explain how individual decisions bring benefits that consumers can touch first-hand is to showcase certain high-profile cases that directly reach to the everyday lives of EU citizens. The communication of tangible examples of how consumers benefit from competition policy, and by extension the EU project, have far more persuasive force than superficial slogans about promoting consumer welfare. Competition enforcement in leisure markets, which provide services for consumers' leisure opportunities (e.g. live entertainment, digital leisure, sport, travel, eating and drinking), is particularly suitable for this. Probably most people have heard or read about the European *Microsoft* case or the on-going Google antitrust investigation, and competition disputes in the sports sector are bound to attract huge media interest. While technically not a competition case, the 1995 *Bosman* judgment is one of the few judgments delivered by the Court of Justice (CJ) that resonates in the mind of EU citizens.² Twenty years later, pending State aid investigations into football clubs such as Real Madrid and Barcelona easily satisfy editors' criteria for front-page news selection.

This issue of Competition Law Review contains five insightful and topical papers that explore the potential of robust competition control in different segments of the leisure industry, including professional sport (football and rugby), the Spanish spectacle of

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¹ TNS Opinion, Flash Eurobarometer 403 on citizen's perception about competition policy, March 2015, at http://ec.europa.eu/competition/publications/reports/surveys_en.html

² Case C-415/93 *Union Royale Belge des Sociétés de Football Association and others v. Bosman and others* [1995] ECR I-4921.

bullfighting, and digital leisure services. All papers were presented and discussed at the “Competition Law in Leisure Markets” workshop held in Madrid on 26 September 2014.

Sport and EU Competition Law: an uneasy relationship

The application of EU competition law to the sports sector is the result of fairly recent developments. In the field of antitrust, the issue gathered momentum in the mid-1990s. First, due to the growing commercialization of professional sport there emerged a need for the European Commission to examine certain sports-related activities that were not considered contentious in the past, such as the buying and selling of sports media rights. Second, the above-mentioned *Bosman* judgment and in particular the opinion of Advocate General Lenz (who applied the competition rules alongside the free movement rules) mapped the future relationship between EU (antitrust) law and sport.³ Before the judgment, the Commission had adopted only four decisions in the field of sport (concerning ticket sales, sports goods, and media rights).⁴ Four years after *Bosman*, a growing number of notifications and complaints prompted the Commission to open 60 sports-related antitrust cases.⁵

Faced with political pressure from the European Council and European Parliament, who expressed concern that EU (antitrust) law would not pay due regard to the specific characteristics of sport, the Commission was forced to piece together a sector-specific approach. Initially, the Commission attempted to make a distinction between “purely sporting” activities, that fall outside the scope of the antitrust rules, and economic activities generated by sport, which are subject to the antitrust rules.⁶ The increasing interdependence and overlap between these two levels of activity, however, made this distinction untenable. When the CJ for the first time applied the EU antitrust rules to a sporting rule in *Meca-Medina* (2006), it finally dismissed the notion of a “purely sporting” exception. It held that the mere qualification of a rule as “purely sporting” in nature is insufficient to remove it from the scope of the antitrust provisions.⁷ It thus

³ S. Weatherill, ‘Bosman Changed Everything: The Rise of EC Sports Law’, in M. Maduro and L. Azoulai (eds.) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, Oxford 2010).

⁴ Commission Decision 92/261/EEC of 18 March 1992 (IV/32.290 - Newitt/Dunlop Slazenger International and Others), [1992] OJ L 131/32; Commission Decision 94/987/EC of 21 December 1994 (IV/34.590 - Tertorn and Others), [1994] OJ L 378/45; Commission Decision 92/521/EEC of 27 October 1992 (IV/33.384 and IV/33.378 - Distribution of package tours during the 1990 World Cup), [1992] OJ L 326/31; Commission Decision 93/403/EEC of 11 June 1993 (IV/32.150 - EBU/Eurovision System), [1993] OJ L 179/23.

⁵ Jean-François Pons, ‘Sport and European Competition Policy’, address given at the Twenty-sixth Annual Conference on International Antitrust Law & Policy, New York, 14-15 October 1999.

⁶ Commission Preliminary guidelines on the application of the competition rules to sport (internal memo to the Commission), SEC (1999) 249; Commission Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework – The Helsinki Report on Sport, COM (1999) 644 final; Commission, ‘Commission debates application of its competition rules to sports’, 24 February 1999, Press Release IP/99/133; Commission, ‘Limits to the application of Treaty competition rules to sport: Commission gives clear signal’, 9 December 1999, Press release IP/99/965.

⁷ Case C-519/04 P *David Meca-Medina and Igor Majcen v. Commission* [2006] ECR I-6991, para 27.

became clear that also regulatory (organisational) aspects of sport must comply with the individual requirements of Articles 101 and 102 TFEU. For this purpose, the CJ identified the *Wouters* proportionality test as the appropriate method to give weight to the specific characteristics of sport: as long as an organisational sporting rule is inherent and proportional to a legitimate objective in the interest of sport, its restrictive effects are not caught by the prohibitions of Article 101(1) TFEU (and 102 TFEU).⁸

The analytical framework to examine the compatibility of rules relating to the organization of sport with the EU antitrust rules, as identified by the CJ in *Meca-Medina*, can hardly be considered as a blind application of the law. Nonetheless, UEFA (the Union of European Football Associations) and other sports organizations strongly opposed the judgment. They feared that sports policies and rules, which they consider to be part of their autonomous reserve, would now routinely be under attack from Brussels.⁹ Of course, Armageddon did not occur. During the last decade, the European Commission conducted not a single antitrust investigation in the field of sport.

In “The Striani’s challenge to UEFA Financial Fair Play: a new era after Bosman or just a washout?”, Stefano Bastianon is sceptical of the European Commission’s reluctance to scrutinize the regulatory aspects of sport under the antitrust rules. His article focuses on the complaint launched by Daniel Striani, a Belgian football players’ agent, against the UEFA Financial Fair Play regulations (FFP). In October 2014, the Commission dismissed the complaint on the ground that a national court could adequately safeguard the rights of the complainant. While various articles have been written on the compliance of FFP with EU antitrust law, this article contributes to the debate by raising pertinent questions about the Commission’s discretion in deciding whether or not to pursue a complaint. Commentators have pointed out that the Commission too readily presumes that private enforcement is a feasible alternative avenue for complainants – without carefully considering the legal and economic capacity of the complainant to initiate private action.¹⁰ In the case at hand, however, the complainant in fact brought a case to a Belgian court three months after filing his complaint with the Commission. Nevertheless, Bastianon argues that the Commission’s rejection decision was mainly informed by policy reasons: “the Commission did not want to handle the complaint simply to avoid any risk to assess as anti-competitive a rule it has always supported”. On numerous occasions, the Commission has indeed spoken out in favour of the principles underpinning FFP. The Commission even signed a dubious “cooperation agreement” with UEFA days before adopting its decision. In his assessment of FFP under Article 101 TFEU, the author puts forward compelling reasons to doubt that the break-even rule can be deemed compatible with EU antitrust law.

⁸ *Idem*, para. 42.

⁹ See e.g. Jonathan Hill, ‘The European Commission’s White Paper on Sport: a step backwards for specificity?’ (2009) 1 *International Journal of Sport Policy and Politics* 3, pp. 253-266.

¹⁰ See e.g. K. J. Cseres and J. Mendes, ‘Consumers’ access to EU competition law procedures: outer and inner limits’, 51 *Common Market Law Review* 2 (2014), p. 483-522.

Albeit largely overlooked by the academic literature, in recent years a series of interesting competition cases dealing with regulatory aspects of sport have been addressed at the national level. In comparison to the European Commission, National Competition Authorities (NCAs), and to a lesser extent national courts, have demonstrated greater readiness to subject sporting rules to competition control, notably in smaller sports such as motor sport, handball, horse racing, and bodybuilding.¹¹

In “Premiership Rugby Union: through the antitrust looking glass”, Beverly Williamson discusses a rare example of a competition law dispute being resolved by a sports disciplinary body. At the end of the 2011-2012 rugby season in England, the Rugby Football Union (RFU) refused to promote the winner of the RFU Championship, London Welsh Rugby Football Club (London Welsh), to the Premiership, i.e. the top level league. The RFU operates Minimum Standards Criteria, which require any club eligible for promotion to be the primary tenant at their home stadium. London Welsh did not have such a primacy of tenure and therefore could not promote. In an appeal against the RFU’s decision, they argued that the primacy of tenure requirement violated EU and UK competition law. The Appeal Tribunal found that the rule was disproportionate to the legitimate objectives it sought to achieve and thus declared it void. While the author is critical of the analysis conducted by the Tribunal, she concludes that it ultimately reached the right conclusion. The satisfactory resolution of this interesting case does not mean that all is fair in English rugby, however. Williamson examines another rule that affects the Premiership system of promotion and relegation, namely the mechanism for the distribution of the revenue from the sale of media rights. She argues that the share system operates like an anti-competitive cartel that entrenches the market power of the incumbent teams to the detriment of new entrants to the Premiership. The article therefore concludes that competition authorities should not shy away from subjecting regulatory aspects of sport, which often have significant economic consequences, to competition scrutiny.

It is undisputed that economic activity takes place at various levels in the sports sector by sports associations, clubs, and individual athletes (e.g. the sale of tickets, media rights, merchandising, and the conclusion of sponsorship agreements). The question whether the regulatory functions of national sports organizations constitute an economic activity for the purpose of EU competition law, however, is less straightforward. In various Member States national legislation delegates public or quasi-public functions to certain national sports federations.¹² It is therefore essential to verify whether these federations should be regarded as public authority when they adopt measures that fall within their delegated competence.

In “Entertainment made in Spain: competition in the bullfighting industry”, Francisco Marcos shows how complex the separation between public governance and private

¹¹ For discussion and references, see Ben Van Rompuy, ‘The role of EU competition law in tackling abuse of regulatory power by sports associations’ (2015) 22 *Maastricht Journal of European and Comparative Law* 2, pp. 174-204.

¹² R. Siekmann and J. Soek, ‘Models of sport governance within the European Union’, in J. A. F. Nafzinger and S. F. Ross (eds.) *Handbook on International Sports Law* (Edward Elgar, Cheltenham 2011).

(anti-competitive) behaviour can be. He explores the role of competition and market forces in the organization and commercial exploitation of bullfighting, one of the most typical entertainment activities in Spain. Spanish local authorities heavily regulate and supervise bullfighting spectacles, not only to preserve public order and safety but also to preserve its professional and artistic qualities. With great technical detail, the author illustrates how strict regulatory restraints heavily reduce competition in the markets involved – impeding market entry and innovation. Tensions between the different actors (promoters, breeders, bullfighters, owners of bullrings, etc.), however, do occasionally give rise to certain anti-competitive practices.

For decades, public authorities in all EU Member States have directly or indirectly financed sports organizations, sports infrastructure or individual clubs. For a long time, these public support measures have blissfully remained under the radar of EU State aid control. The European Commission has long maintained that there were not enough cases to formulate guidance on the application of EU State aid law in the sports sector.¹³ This position has now become untenable. In recent years, the number of complaints against alleged unlawful State aid to professional football clubs has been rising. Criticisms from the European Ombudsman further increased pressure on the Commission to deliberate about how the State aid rules should apply to (professional) sport.¹⁴ In 2013, the Commission opened more than a dozen high-profile formal investigations into aid measures granted to various top Spanish and Dutch football clubs, including Real Madrid and Barcelona.¹⁵ With the enactment of the new General Block Exemption Regulation¹⁶ and several formal decisions on e.g. Belgian, French, German, and Swedish State aid for the construction and renovation of football stadiums, the Commission developed a coherent set of principles for infrastructure funding. The most “difficult” cases are still pending, however. They concern land swaps/sale of State property (Spain, the Netherlands), tax advantages (Spain), and bank loans, guarantees or debt waivers (Spain, the Netherlands).

In “The Real Madrid Case: a State aid case (un)like any other?”, Oskar van Maren gives political and procedural reasons to explain why the European Commission refrained from addressing the issue of State aid to professional football up until 2013. After sketching this broader context, he analyses advantageous property transfers granted by the Council of Madrid to Real Madrid, which are currently the subject of a formal Commission investigation, under the EU State aid rules. On the basis of a wealth of factual details regarding the case, the author concludes that the transfers constitute unlawful State aid. If the Commission were to reach the same conclusion it would surely set a powerful precedent. After all, Real Madrid is one of the biggest football clubs in the world. According to the author, however, the participation of citizens in

¹³ Commission White Paper on Sport, COM (2007) 391 final, Annex I, p. 27.

¹⁴ European Ombudsman, Decision closing the inquiry into complaint 2521/2011/(MF)JF against the European Commission, 28 July 2014.

¹⁵ Commission, ‘State aid: Commission opens in-depth investigation into public funding of certain Spanish professional football clubs’, 18 December 2013, Press Release IP/13/1287.

¹⁶ Commission, Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L187/1.

the proceedings is what makes the case truly special. All the current football State aid investigations were initiated on the basis of complaints filed by dissatisfied citizens rather than competitors of the clubs. Moreover, in the Real Madrid case, a national court granted the complainants standing to invoke the standstill obligation and effectively blocked the further implementation of the aid measures until the Commission reaches its decision. This active role of citizens in State aid proceedings is a novel and inspiring development.

Google and digital leisure markets

The long-running antitrust investigation into Google's business practices, which is also still on the European Commission's desk, is yet another high-profile case (in the making) that is of direct concern to the vast majority of Europe's citizens and their leisure activities.

In "Google's anti-competitive and unfair practices in digital leisure markets", Anca D Chirita critically reflects on the use of negotiated commitments in the Google antitrust case as an attempt to regulate online commercial advertising. She argues that the proposed and renegotiated commitments that were on the table are ambiguous pronouncements on the law that fail to clearly address wider competition concerns that significantly affects generic users' concerns. Following a careful and valuable description and analysis of Google's business model and the complex facts underpinning the on-going investigation, she points out that the crux of the entire case is "the general public interest in ensuring that a privately-owned corporation does not successfully expand over so many tiny, inoffensive, and innovative markets in order to enjoy the monopolistic power over its users' personal data". The article explores various instruments that could capture Google's (future) conduct on the search-engine market, the market for online advertising services, and adjacent digital leisure markets: not only Article 102 TFEU but also unfair competition laws and the Electronic Commerce Directive. The author concludes that only a definitive finding of an abuse of a dominant position is suitable to restore effective competition in various secondary digital markets over which Google increasingly holds control.