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More documents related to this discussion can be found at
www.oecd.org/daf/competition/competition-and-professional-sports.htm.

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1. Introduction

1. The Call for Contributions of 24 July (COMP/2023.098) for this roundtable notes several specificities of the professional sports industry, such as the industry's special link with social and cultural life and the distinctive governance model of sports organizations, that call for a specific approach towards the application of competition law to the industry. In the case law of the European Court of Justice, that need for a specific approach has long been recognized in the *Meca-Medina* case law, which provides an avenue to recognize, evaluate and balance sports-specific aspects within the context of an application of the European law competition rules.¹

2. German case practice – in the form of public enforcement by the Bundeskartellamt, but also in the form of various civil court decisions up to the level of the Federal Court of Justice (Bundesgerichtshof) – has in recent years started to more frequently apply the *Meca-Medina* case law. On the public enforcement side, the Bundeskartellamt has considered sports specific aspects first in the *IOC* case, concerning Olympic athletes' advertising opportunities, and subsequently in the *50+1* case, concerning the governance structure of German football clubs, the latter of which being an ongoing procedure. On the private enforcement side, perhaps the most significant consideration of sports specific aspects in German civil law litigation concerns the attempts made by football associations to regulate the activities of football player agents. Such attempts form the factual substance of recent referrals by German courts, including the Federal Court of Justice, to the European Court of Justice that seek guidance on the interpretation of the *Meca-Medina* exemption.

2. IOC case on athletes' advertising opportunities

3. In 2017 the Bundeskartellamt initiated administrative proceedings for suspected abuse of a dominant position against the German Olympic Sports Confederation (DOSB) and the International Olympic Committee (IOC) concerning certain advertising restrictions on athletes set down in the Olympic Charter. In 2019, the Bundeskartellamt issued a decision to make binding certain commitments made by DOSB and IOC regarding the restrictions, and closed the proceedings.²

4. Athletes nominated for the Olympic Games must undertake towards the DOSB and the IOC to observe the Olympic Charter in order to be admitted to the Olympic Games. Pursuant to Rule 40 No. 3 of the Olympic Charter, no athlete participating in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the games and several days before and after the games. This advertising restriction comprises all marketing and social media activities and applies during the so-called "frozen period", starting nine days before the opening of the Olympic

¹ The Background Note contains a detailed description of the factual details of and the methodology employed by the European Court of Justice in the *Meca-Medina* case (p. 17).

² Bundeskartellamt, Decision of 25 February 2019 in Case B2-26/17, English convenience translation available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B2-26-17.pdf?__blob=publicationFile&v=2.

Games and continuing until three days after the closing ceremony. Accompanying DOSB guidelines provided that exceptions had to be applied for three months before the event, and that the advertising campaign involving the athlete had to be ongoing already and could not contain any Olympic or Olympic-related terms.

5. According to the Bundeskartellamt's preliminary assessment, the DOSB and the IOC have a dominant position on the market for organizing and marketing the Olympic Games. In applying the *Meca-Medina* case law, the Bundeskartellamt considered that the advertising restrictions were subject to European competition law as they concerned an economic activity, namely the advertising involving athletes participating in the Olympic Games. It also considered that advertising restrictions on participating athletes can pursue a legitimate sports specific objective by preventing so-called ambush marketing conducted by advertisers that are not part of the official Olympic sponsorship programs, because the funding by official Olympic sponsors contributes to ensuring that the Olympic Games can be held on a regular basis. However, the Bundeskartellamt deemed the advertising restrictions arising from Rule 40 of the Olympic Charter as too far-reaching and thus preliminarily assessed that their application constituted abusive conduct under German and European competition law. For that assessment it took account in particular of the case law of the German Federal Court of Justice regarding the German "Olympiaschutzgesetz" (Act on the Protection of the Olympic Emblem and the Olympic Names), which sets limits to the interpretation of the property rights that the IOC and the DOSB may claim with regard to the Olympic Games.

6. The commitments made binding on the DOSB and the IOC to address the preliminary concerns identified by the Bundeskartellamt included:

- Advertising activities by athletes to take place during the Olympic Games no longer have to be notified to and cleared by the DOSB beforehand.
- New advertising activities starting during the Games are now admissible, as are messages of greeting and congratulations.
- The catalogue of terminology not allowed in advertising becomes considerably smaller and, unlike before, conclusive. Advertising may now make use of terms like "medal", "gold", "silver", "bronze", "winter games" or "summer games".
- Certain competition and non-competition pictures showing the athletes during the Olympic Games may now be used in advertising, in particular those not showing Olympic symbols.
- Athletes are allowed to use social media more freely during the Olympic Games and may share some content combined with messages of greeting or thanks to their sponsor.
- Sporting sanctions may no longer be applied in case of disputes concerning the admissibility of advertising measures, and sports arbitration courts lose their jurisdiction to decide on such. Instead, cases can be taken to ordinary civil courts.

3. 50+1 case on governance model of Bundesliga football clubs

7. In an ongoing procedure, the Bundeskartellamt investigates whether the so-called 50+1 rule included in the statutes of DFL, the association organizing the top German football competitions, Bundesliga and 2. Bundesliga, is in line with German and European competition law. DFL has requested a decision by the Bundeskartellamt saying that there are no grounds for action regarding the rule.

8. The 50+1 rule laid down in the statutes of DFL pertains to the governance of football clubs participating in the Bundesliga and the 2. Bundesliga. It stipulates that if a club's professional soccer division is outsourced into a capital company, the not-for-profit parent club has to retain the majority of the voting rights in that company (basic rule). However, the statutes also contain a rule according to which the executive committee of DFL can grant an exemption to the basic rule if an investor has substantially supported the parent club's football activities for a continuous period of more than 20 years (benefactor exemption).

9. In a preliminary assessment communicated to DFL in 2021,³ the Bundeskartellamt considered that the basic rule constitutes a restriction of competition, but when assessed in isolation can potentially escape the prohibition of restrictions of competition under the *Meca-Medina* exemption because of the policy objectives it pursues. In that context, the Bundeskartellamt considered that a *Meca-Medina* exemption may not only apply in case a rule has the objective of furthering certain aspects of the sports competition itself, but also if it serves certain ethical or social objectives. In that regard, the 50+1 rule can be viewed as enabling the public at large to co-determine a club's affairs by becoming a member of the not-for-profit parent club, and hence to participate in Bundesliga activity beyond their role as consumers. Additionally, the rule can be viewed as contributing to strike an even balance in the sports competition taking place in the Bundesliga and 2. Bundesliga, as it prevents individual clubs from securing more funding by giving up control over their professional soccer division to investors as compared to clubs which maintain their members' power of influence.

10. However, according to the Bundeskartellamt's preliminary assessment, the basic rule appears disproportionate once the basic rule is assessed, as is necessary, in combination with the benefactor exemption. It considered that by allowing a benefactor exemption the controlling influence of the not-for-profit parent club in the Bundesliga participants affected will be eliminated and the sports activity detached from the club model. Clubs would risk losing key characteristics such as membership participation in the clubs and transparency for members. Club football and an even balance in competition, which are DFL's objectives in retaining the rule, will no longer be uniformly assured in all football clubs. This also results in a competitive disadvantage for those clubs which do not benefit from the exemption. Membership-owned and investor-financed clubs compete alongside one another. This raises doubts as to whether the overall rule is suitable for organizing fair competition between clubs. If some clubs have better possibilities to secure equity funding than others, this is more likely to distort competition rather than create an even balance in sports competition.

11. DFL has in the meantime offered commitments to dispel the Bundeskartellamt's competition law concerns.⁴ The commitments include the removal of the benefactor exemption from its statutes, while the basic 50+1 rule is maintained. The three clubs benefiting from an existing benefactor exemption would be allowed to maintain their exemptions under certain conditions. The conditions aim to provide a comparable degree

³ Bundeskartellamt Press Release of 31 May 2021, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2021/31_05_2021_50plus1.html.

⁴ Bundeskartellamt Press Release of 8 March 2023, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/08_03_2023_DFL.html?nn=3591568.

of member participation in the exempted clubs and more balanced competitive conditions between clubs that benefit from an exemption and those that do not.

4. Civil litigation concerning football player agent regulation

12. The German football association DFB and the international football association FIFA have in recent years issued regulations concerning the activities of football player agents. These regulations are the subject of civil litigation in German courts, which has recently led to requests to the European Court of Justice to clarify the boundaries set by European competition law to such regulations.

13. Pending before the Federal Court of Justice is a lawsuit brought by a football player agent concerning a regulation issued by DFB. The regulation imposes various duties on player agents, in particular to (i) register with DFB, (ii) submit to various regulations issued by domestic and international football associations, (iii) submit disputes to sports tribunals, and (iv) disclose fees paid to agents to DFB. It also includes a prohibition on agents to receive transaction fees in particular situations, e. g. where a mediated player transaction concerns a player of minor age.

14. The Federal Court of Justice has stayed the proceedings and referred to the European Court of Justice two questions:⁵ First, it asks whether the *Meca-Medina* exemption is in principle applicable to a regulation issued by a sports association concerning transactions involving undertakings which are not members of the association and a market that is upstream to the market on which the association itself is active. Second, and provided the first question is answered in the affirmative, the Court asks whether the *Meca-Medina* exemption is applicable to the whole regulation, or whether it is possible to differentiate the exemption's applicability according to the specific contents of the regulation, depending for example on the closeness of individual rules in the regulation to the association's sports activities. In the reasons provided for the referral, the Court notes that the regulation leads to restrictions of competition on the market for player agent services, and that the referred questions on the exemption therefore appear essential for the ultimate decision of the case.

15. Separately, player agents have also launched civil proceedings before German courts concerning a subsequent regulation issued by FIFA. The FIFA regulation contains a number of rules that appear to go further in restricting agents' activities than the domestic regulation issued by DFB. Perhaps most noteworthy, it includes a prohibition on clubs and agents to agree on agent fees in excess of a cap calculated as a percentage of the transfer fee or the annual remuneration of the transferred player. It also includes a prohibition to represent different parties to a player transaction, with the exception of the simultaneous representation of the engaging club and the player. In case of such simultaneous representation, the engaging club is prohibited from paying more than half of the agent fee. Moreover, the regulation prohibits agents from contacting players that are contractually bound by exclusivity clauses to another agent, and contains various other prohibitions and duties concerning agents' behavior.

16. One lawsuit concerning the FIFA regulation has been launched by a player agent before the District Court of Mainz. The District Court has stayed proceedings and referred to the European Court of Justice the question whether various rules included in the FIFA

⁵ Case KZR 71/21, Decision of 13 June 2023, available at <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=32ad2c5e990aa6d0429fa9eba5a8d008&Seite=13&nr=134028&pos=410&anz=74392>.

regulation, including those summarized above, are compatible with Articles 101 and 102 TFEU.⁶ In the reasons provided for the referral, the District Court notes the central role of the applicability and extent of the *Meca-Medina* exemption for assessing the legality of the various rules contained in the FIFA regulation. In its view, the European Court of Justice has not yet clearly indicated whether the exemption is limited to rules of a “purely sporting” nature or can also be applied to other rules set by sports associations that have economic effects. Also, regarding the regulation’s objectives as claimed by FIFA, the Court raises the question whether the *Meca-Medina* exemption is inherently limited to the pursuit of certain sports related objectives, meaning that other objectives remain reserved to state legislature. In that context, the Court also ponders whether a sports association can claim a margin of discretion when assessing the necessity of a certain regulation to pursue a given objective.

17. Parallel proceedings concerning the FIFA regulation are pending at the District Courts of Frankfurt/Main⁷ and Dortmund. The District Court of Dortmund has issued a preliminary injunction against the implementation of the FIFA regulation in Germany.⁸ It identifies the rules summarized above as “by object” restrictions of competition under Article 101 TFEU, and considers that they are not a “purely sporting” regulation and hence not suitable for exemption under the *Meca-Medina* case law. It also considers that even if the rules were suitable for exemption in principle, they would fail to pass the actual implementation of the *Meca-Medina* test. FIFA has launched an appeal against the preliminary injunction before the Higher Regional Court of Düsseldorf.

⁶ Landgericht Mainz, Case 9 O 129/21, Decision of 30 March 2023, available at <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=274366&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=18440910>.

⁷ Landgericht Frankfurt a. M., Case 2-06 O 32/21.

⁸ Landgericht Dortmund, Case 8 O 1/23 (Kart), Judgment of 24 May 2023, available at https://www.justiz.nrw.de/nrwe/lgs/dortmund/lg_dortmund/j2023/8_O_1_23_Kart_Beschluss_20230817.html.