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ECJ JURISPRUDENCE IN SPORT: INFLUENCE ON SPORT

Prof. Avv. Jacopo Tognon

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FREE MOVEMENT OF ATHLETES IN THE EU

The decisions of the 70s:

- 15 May 1974 *Walrave and Koch* > sporting activity is subject to Community law only insofar as it constitutes an economic activity within the meaning of Art. 2 of EC Treaty.

- 14 July 1976 *Donà* > incompatibility of a national discipline or practice, also issued by a sports organization that only reserves to nationals of a Member State the right to take part in football matches.

THE BOSMAN RULING

The Court of Justice has declared that:

Article. 48 (now 39) of the EC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer, citizen of a Member State, at the expiry of his contract with a club, can be employed by a society of another Member State only if it has paid to the former club a transfer, training or development fee (indemnity);

Article. 48 (now 39) of the EC Treaty precludes the application of rules laid down by sporting associations under which, in matches of the competitions they organize, football clubs may field a limited number of professional players who are nationals of other Member States;

The direct effect of Article. 48 (now 39) of the EC Treaty cannot be invoked for the support of claims relating to indemnities for transfer, training or promotion which, at the date of this sentence, have already been paid or are still payable in fulfilment of an obligation arising before that date, except for those who, before that date, have brought court proceedings or raised an equivalent claim under the applicable national law on the subject

EFFECTS OF THE BOSMAN SENTENCE

1) "Sporting effect": Abolition of the limits placed on the participation of foreign EU players > each society felt free to deploy "the best formation possible."

2) "Economic effect": Cancellation of training and promotion indemnity (or fee) > greater bargaining power for players at the end of the contract.

Compromise of the youth sectors> few clubs will no longer invest in young people if there is a risk of losing them on a free transfer.

A provocation: Free movement of the individual athlete and/or free movement of the club?

THE DECISIONS OF THE COURT OF THE NEW MILLENIUM

The sentence of 11 April 2000 on the **Deliège case**: the "Bosman" of the amateurs

- It reiterated that the EC Treaty can be invoked also in favour of amateurs because they can be considered service providers
- It reiterated the Sporting exception

The ***Lehtonen*** **case** (judgment of the Court of 13 April 2000)> federal regulations constitute obstacles to the free movement of workers

Barriers to the sporting aspect of performance that have an impact on economic treatment

The 2001 FIFA Regulations on the transfer of players and the agreement with European Commission of 5 March 2001

THE KOLPAK AND SIMUTENKOV CASES

The *Kolpak* case of 8 May 2003 and association agreements > non-discrimination for non-EU players is not equivalent to free movement (which is limited to players of the Community). The Court ruled in favour of Kolpak so that currently overseas players in some countries are called "Kolpak players"

The Simutenkov case of 12 April 2005 and the partnership agreements> confirms the principles repeatedly mentioned by the EC Court

THE NEW LEADING CASE: THE BERNARD SENTENCE

The *Bernard* ruling of 16 March 2010 represents, 15 years after Bosman, the new frontier of Community law: it again brings into question the possibility of granting compensation for training and preparation.
The Court says that a measure which hinders the free movement of workers can be accepted only if it pursues a **legitimate aim** compatible with the Treaty and is justified by **overriding reasons of general interest**.

Consequently: article. 45 TFEU does not preclude a scheme which, in order to achieve the objective of encouraging the recruitment and training of young players, guarantees an indemnity to companies that provided the training... on the condition that the scheme is suitable to ensure the attainment of the objective pursued and does not go beyond what is necessary to achieve it.

FREE MOVEMENT - Final considerations -

Sporting activity falls within the scope of Community law, because it constitutes an economic activity regardless of the formal qualification that a national body of Federation wants to give to it.

It is correct to say that the Treaty provisions apply to rules that provide for the payment of indemnities on transfer of players or that limit the number of players from other Member States.

Conversely, purely sporting rules do not fall within Community law (compositions of national teams and game rules)> but the principles have been mitigated by *Meca - Medina* and *Majcen* in 2006, which first questioned the sporting exception.

In any case, the possibility of invoking such a sports exception as regards the application of the principle of non-discrimination must be ruled out.

After Bernard the Court of Justice appears again to have gone back and does recognize a new area of non-application of Community law: the first statements of the principle of specificity?

COMPETITION AND SPORT: *MECA MEDINA* AND *PIAU*

- Tribunal case T-313/02, 30 September 2004:

According to the the Tribunal "the principles derived from jurisprudence, relating to the application to sporting rules of the Community law on free movement of workers and services, are equally valid regarding antitrust law. Consequently, if a sporting regulation does not relate to economic activies, and therefore **does not fall within the sphere of application of art. 39 and 49 TCE (now art. 45 and 56 TFUE), at the same time it does not relate to antitrust law.**

- Court case C-519/04P, 18 July 2006:

Therefore, given that to gurantee the execution of the restriction of doping sanctions are necessary, the effect of these on the free movement of athletes should be considered as inherent to the rules of antidoping. Thus, also when antidoping regulations must be considered as a **decision of associations of enterprises limiting the freedom of action of the parties**, it does not, in any case, necessarily constitute a restriction of competition incompatible with the free market according to art. 81 TCE, since it is justified by a legitimate **objective**

COMPETITION AND SPORT: *MECA MEDINA* AND *PIAU*

- Tribunal case T-193/02, 26 January 2005

According to the Tribunal, the FIFA regulation on football agents constitutes a decision of an association of enterprises according to art. 81, par. 1 TCE. However, the necessary conditions related to the agent's activities are characterized by the general national regulations and by the lack of a collective oragnization by the agents, so that the restrictions deriving from the obligatory nature of the license can be waived according to art. 81, par.3 TCE.

MECA MEDINA: DOUBLE EFFECT

No more purely sporting rules

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Exemption or exception

The non economic aspects of sports or those aspects carriyng economic effects but motivated by purely sporting interest, fell outside the reach of the Treaty prohibitions unless the rules were disproportionate and therefore not limited to their proper objectives

So-called Case by Case basis approach

White paper on sport 2007

Sporting rules subjected to EU law

If restrictive of fundamental freedoms or competition

They could be considered compatible by reason of the objectives pursued

THE DISCRIMINATIONS EFFECTS

- Sources: art. 18 TFUE (discrimination on grounds of nationality); art.45 TFUE (free movement of workers); Reg. n. 492/2011 (right of access to the labour market on non-discriminatory terms and also the right to equal treatment)

- **Direct discrimination**: is an overt form of differential treatment to be found in circumstances in which the migrant worker is treated less favourably than the national worker
- **Indirect discrimination:** is a less overt form of differential treatment and is also prohibited by article 45 and related secondary legislation

- Justifications: directly discriminatory measures can only be saved with reference to one of the express Treaty derogations of public policy, public security or public health

- The *Gebhard* Test (Case C-55/94): national measures are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty if:

1. they must be applied in a non-discriminatory manner;
2. they must be justified by imperative requirements in the general interest;
3. they must be suitable for securing the attainment of the objective which they pursue;
4. and they must not go beyond what is necessary in order to attain it

THE UEFA HOME GROWN PLAYERS AND THE NATIONAL RULES

- Considering the discrimination effects, which is the correct analysis of the UEFA HGP rule?
- The rule, as well known, considers that, in the list A of players in a competition, at least 8 out of 25 players must be locally trained players. The nationality is not important but at least half of the locally trained players must be club-trained (the others could be association trained players). The player, to obtain this status, is registered in the age between 15 and 21 for three seasons or 36 months with his current club or a club affiliated to the same association

- It is important to remember that UEFA's actions are subject to EU law! Even if the rule cannot be categorised as an inherent rule beacuse it does not derive from a need inherent in the organization of UEFA competition

- The HGP should constitute a restriction on a worker's free movement. It amounts to a possibile indirect discrimination: it deters a national of a member state from leaving his country of origin in order to engage in employment in a different Member State

- But….the justification presented by UEFA in support of the rule, namely that it promotes competitive balance and encourages the training and development of young players, must be accepted as legitimate

THE UEFA HOME GROWN PLAYERS AND THE NATIONAL RULES

- DO NOT FORGET THAT: even though the rule pursues these two legitimate aims, it still needs to satisfy the twin proportionality tests of suitability and necessity

- For the proportionality of the rule, it has to be said that in its current form it does not appear to be disproportionate to the modest benefits generated

- Before the rule can categorically be described as compatibile with EU free movement law, less restrictive alternatives should first be examined, particularly those that do not carry discriminatory effects and are not located within the labour market

- The judgment is….ongoing! But think positive! ☺ ☺

- For now, we can consider that is necessary in the analysis to explore: 1) whether the competitive balance improvements identified have beeen mantained or declined; 2) whether a closer connection between the rule and improvements in youth development can be identified; 3) whether less restrictive alternatives can deliver more substantial improvements to the 2 first points

THE CAS CASE 2012/A/2852

• The CAS case between Cluj + 2 v. RFF is an example of how this system works. The rule under scrutiny is partially different version of the UEFA HGP rule that we scrutinized before

• How is freedom of movement for workers covered in Community law?
• How does Community law apply to sport and how does the principle of freedom of movement apply to professional athletes?
• How are football's home-grown players' rules and nationality discrimination dealt with under Community law?

- The analysis starts as always from Walrawe, Donà, Deliège, Meca Medina and Bosma together with the White Paper on Sport 2007 and the Communication «Developing an European Dimension on Sport» 2011

- The HGP rules and quotas on the selection of football players are very sensitive matters, subject to continuos developments

THE CAS CASE 2012/A/2852

		FIFA 6 + 5 Rule	UEFA home-grown players' rule	FRF home-grown players' rule
1	Players registered on the match sheet		25	18
2	Players who can be fielded	11	11	11
3	Players who must be locally trained/eligible	6 (- 3 substitutes)	8	8
4	Players who do not need to be locally trained/eligible	5 (+ 3 substitutes)	17	10
5	Minimum number of locally trained/eligible players in the starting line-up	6	0	1 (1)
6	Minimum number of locally trained/eligible players fielded if the three substitutes are used	3 (2)	0 (2)	4 (1)
7	Percentage between 1 and 3		32%	44%
8	Percentage between 1 and 4		68%	56%
9	Percentage between 2 and 5	55%	0%	9%
10	Percentage between 2 and 6	27%	0%	36%

(1) According to the ROAF, 11 players can be fielded. A maximum of 18 players can be registered on the match sheet, amongst them 8 must be "*locally trained*". Hence, at least one locally trained player must be fielded in the starting line-up (11 – 10 = 1). If the 10 non-locally trained players are in the starting line-up, any substitute will inexorably be a locally trained player (1 + 3 = 4).

(2) It is here assumed that the substitutes are not eligible players.

THE CAS CASE 2012/A/2852

- 110. *It results from the above that the FRF home-grown players' rule goes far beyond the various limits set by the UEFA home-grown players' rule. Under such circumstances, the FRF cannot reasonably contend that the Challenged Decision does nothing more than implement at national level the concept developed by the UEFA.*

- 111. *The assessment whether a certain sporting rule is compatible with EU law requires a case-by-case analysis of the circumstances of each individual situation (See Commission White Paper on Sport, par 4.1; David Meca-Medina and Igor Majcen v Commission of the European Communities; case C-519/04). The burden of demonstrating that the FRF home-grown players' rule is acceptable falls obviously on the FRF, which has to establish that its rule is either expressly provided for in Community law (such as the public policy, public security, public health, public service – see article 45 TFEU; par. 2 of the introduction of Regulation (EU) No 492/2011) or meets the objective justifications identified by the ECJ. But even if that were so, application of this rule would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (for instance, Bosman v Royal Club Liégeois SA and UEFA, case no. C-415/93, par. 104; David Meca-Medina and Igor Majcen v Commission of the European Communities; case C-519/04). There must be no other measures available which can be less discriminating (Staff working document of 18 January 2011).*

THE CAS CASE 2012/A/2852

- 112. *Considering how hesitant and cautious the EU Commission is about the UEFA home-grown players' rule and in view of its reservations, any measure going above and further need a particularly convincing objective justification. In particular, the FRF has the burden to demonstrate that its home-grown players' rule is proportionate, is appropriate to achieve the objective and that there is no other measure less restrictive on freedom of movement. In the present proceedings, the FRF confined itself to extremely general considerations and in particular it failed to give any justification as to why the Challenged Decision must be considered as proportionate and as a suitable means, which does not go beyond what is necessary, even though it exceeds UEFA home-grown players' rule*.

113. *Under such circumstances and based on the foregoing considerations, the Panel finds that there are no grounds to consider that the discrimination resulting from the Challenged Decision is compatible with articles 18 and 45 TFEU, with the various provisions of the Regulation (EU) No 492/2011 as well as with article 5 of the Romanian labour law.*

THE TRANSFER OF PLAYERS UNDER EU LAW

- As quoted above, the CJEU has had the opportunity to review transfer rules and to examine the compatibility under EU law

- In particular: national requirements and contractual stability requirements (Bosman); transfer windows (Lehtonen); training compensation and youth development (Bernard)

- Bosman and the reform of the international transfer system: the very famous art. 17 of the FIFA RSTP! The main jurisprudence issue: the Webster case 2007/A/1298 and the Matuzalem case 2008/A/1519
- Challenging CAS awards under SFT: the grounds foreseen by art. 190 of the PILA

- The application of EU law: competition and free movement of law

THE TRANSFER OF PLAYERS UNDER EU LAW

- EU COMPETITION LAW (and the four questions): 1 an undertaking carrying out economic activity? 2. FIFA regulation restrict competition within the meaining of art. 101 TFEU? 3. Effect on trade? 4. Is possibile to apply exemption criteria?

- EU FREE MOVEMENT LAW: the nature of the restriction. The restrictive effects on a player are potentially numerous!

- And Meca Medina goes beyond Walrave: the Court effectively expunged the sporting excpetion by stating that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down

- Restriction justified by imperative requirements in the general interest and the proportionality test

THE CAS SYSTEM AND THE RULES OF EU

- THE EU LAW BEFORE THE CAS. As well known, art. 58 in the 2013 version states that the Panel applies in priority «the applicable regulations», the rules of the IFs, and subsidiarily the rules of law chosen by the parties or, in the absence of such a choice, the law of the country where the IFs issuing the challenged decision has its seat.
- CAS 2008/A/1485; TAS 2012/A/2862; CAS 2009/A/1788; CAS 2008/A/1644 EU free movement and anti-discrimination rules (together with the above mentioned CAS 2012/A/2852)

- The CAS has first applied EU Competition law in one of its most famous decisions: the ENIC award CAS 98/200
- THE CAS BEFORE EU LAW: the SFT hands-off approach and the national courts of the Member states counter attack!

THE CAS SYSTEM AND THE RULES OF EU

- An appeal of a CAS award based on EU law grounds has not chance to be upheld. The STF has confirmed recently that EU competition law (and in general EU law) does not pertain to international public policy in the sense of the Swiss legal orders
- On the other hand, there are two very important cases scrutinized by national courts in German: the Wilhelmshaven (OLG Bremen, 30 December 2014) and the Pechstein Case (OLG Munchen 15 January 2015)
  - In the first one, it was stated that a national or regional FA when enforcing a FIFA disciplinary sanction based on a CAS award, had to control the compatibility of the sanction and the award itself with mandatory national and international laws
  - In the second case, *inter alia,* was stated that the arbitration clause is invalid due to a lack of free consent on the part of the athlete
  - Attack to the heart of the CAS! Pechstein and Mutu are waiting for ECHR decision!! Which will be the future of arbitration sport system?

MEDIA RIGHTS TV SENTENCES

- Court case C-283/11 of 22 January 2013 on the subject of short news extracts.

- Court case C-403/08 and C-429/08, 4 October 2011 so-called **Murphy case,** in which the Court recognized the utilization of foreign decoders due to the nature of the events transmitted

- Court case C-201/11, 18 July 2013, *UEFA c. Commission*

- The sentence of the Court, rejecting the appeal, recognizes not only the correctness of the Commission's behaviour, but also the complete legitimacy of the prepared list of the States members, in this way sanctioning **the expansion of the right to information and the compression of the property right of the event organizer**, being the right to information which lies within the social role of sport.

MEDIA RIGHTS TV SENTENCES

- On the whole, therefore, the decisions of the European bodies (Tribunal and Court) are characterized for having expressly taking into consideration **sport** (or at least sporting events) as a **significant subject for the Treaty**, not only under the economic profile (related to the general discipline on the theme of fundamental freedoms and antitrust), but in relation to its **public interest**. Indeed, when interest in a sporting event concerns a plurality of individuals it thus becomes a matter of public interest, with the consequence of a **derogation or exception to the discipline of fundamental freedoms and competition.**

THANK YOU FOR YOUR ATTENTION

jacopo.tognon@unipd.it

jacopotognon@avvocatitognon.com