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**Master of European Affairs programme,
Law**

Master thesis

by

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The new German competition law
under the Council Regulation(EC)
No. 1/2003 with special regard to
the field of sport

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Spring 2005

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1 Summary

The thesis deals with competition law and sport and is insofar divided into three sections.

First, the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty comes into view. This regulation was set into force on 1 May 2004 and replaced the former regulation 17/62. The main change is not the substance of the competition law, but the procedure and the allocation of responsibility for applying it. Some of the key aspects of the new system are the decentralisation of EC competition law and simultaneous application of EU and national law by national authorities. The up to now existing basic compulsory registration and license duty for competition-limiting agreements is transferred in a system of legal exception. The result of the reforms introduced by Regulation 1/2003 is thus the abolition of the notification system and the increase of the Commission's powers with respect to the infringement procedure. The reorganization at EU level has of course considerable consequences on the national laws of competition-limiting agreements. To this background the German competition law must be assessed.

Thus the possible changes in the German competition law (Gesetz gegen Wettbewerbsbeschränkungen, GWB) are explained in the second part of the thesis. After a general introduction of how the German legislator wants to adapt the change in the European system (here §§ 1, 22, 23 GWB), with coming into force of the Regulation 1/2003, the amendments in the European law require changes of special regulations for certain economic areas existing up to now in the GWB. Therefore a very special norm in the German competition law regulating the central marketing of television rights for sport events arranged by sports organizations (§ 31 GWB) comes into view and is to be questioned.

This leads to the third section of the thesis: the relationship between sport and competition law. Here the judgement of the ECJ needs to be assessed, also the meaning of sport in the main European Treaties. Three cases are to be mentioned: The first judgment in this respect was *Walrave and Koch* from 1974, the next important case *Donà ./ Mantero* was decided in 1976. These two judgments created the basis for further decisions of the ECJ and the most famous following case was without doubt *Bosman*. The latter is explained detailed. Using the argumentation of the ECJ and also by means of the new system introduced by Regulation 1/2003, the fore mentioned area exception given in § 31 GWB of the German law is checked.

Finally, the consequence of the analysis is presented: There is no reason to keep § 31 GWB, in fact to maintain this rule would violate European law. The special characteristics of sport can also be reached in a competitive system and they are not suitable to justify an exception area.

2 Preface

To my dear friend Jonny 6 who was the best player of our common Swedish year, but just if you believe the local girls. Thanks for a great time and all the best for your studies in good old Berlin. I also want to thank the amazing Annika for her help and advices during the last months. It is true that I would not have survived the dark winter without you and our coffee breaks.

Last but not least a special thanks goes to my tutor Henrik Norinder who supported my work with interest, enthusiasm and a perfect German. Sport frei !

3 Abbreviations

AcP	Archiv für die civilistische Praxis
Art.	Article, Articles
BB	Betriebsberater
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BT-Drucks.	Bundestags Drucksache
EuGH	Europäischer Gerichtshof
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FS	Festschrift
GWB	Gesetz gegen Wettbewerbsbeschränkungen
JuS	Juristische Schulung
NJW	Neue Juristische Wochenschrift
p.	page
SpurT	Sport und Recht
UWG	Gesetz gegen unlauteren Wettbewerb
WuW	Wirtschaft und Wettbewerb
ZHR	Zeitschrift für Handels- und Wirtschaftsrecht

4 Introduction

Purpose of the thesis

Antitrust legislation has certain fields of exceptions to allow anti-competitive conducts in special sectors and grant therefore an exception in principle.

The pros and cons of these granted exceptions have to be discussed again facing the setting into force of the new Council Regulation 1/2003. The Regulation does not only cause a change in system, it also contains new provisions on how to apply European and national competition law. Not surprisingly, such a radical reform raises a number of questions of interpretation and as to how the new rules will work in practice.

To this background the thesis deals with Competition Law and tries to examine the link between the European guidelines, here the Regulation 1/2003, and the German Cartel Law. Therefore the fore mentioned Regulation is presented with special regard to its main changes from the competition rules under the former Regulation 17/62.

In a second step the consequences of the German legislator must be examined. Again, the expected main changes in the National Cartel Law (Gesetz gegen Wettbewerbsbeschränkungen, GWB) following the Regulation 1/2003 are presented. The thesis deals insofar just with the first part of the GWB, §§ 1 – 31. The following chapters of this law include special national rules, for instance agreements on jurisdiction, and must not be regarded.

Finally the field of sport comes into view. The German Competition Law contains a very special paragraph (§ 31 GWB) of how to handle this section under cartel law. In this context the question arises, if the German law needs

to be changed. The thesis examines some important European judgments and goes into the reasons for the German exceptions. In the end it should be clear why the German legislation needs insofar a change adapting the Regulation 1/2003.

The methods used in the analysis are the traditional legal methods combined with extra comparative studies in European and national German law.

5 About the Council Regulation (EC) No. 1/ 2003

5.1 Introduction to the new Regulation

The European Commission in 1999, in order to adjust community competition law to the enlargement of the European Union, adopted a “White Paper”¹ on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty, which culminated in the adoption of the new Council Regulation No. 1/2003, entered into force on 1 May 2004, on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.

Regulation 1/2003 replaces the Council Regulation number 17 which, come into effect in 1962, established the procedures for the enforcement of

¹ There is a voluminous literature on the White Paper, which contains all shades of opinion. J. Nazerali and D. Cowan, *Modernising the Enforcement of EU Competition Rules – Can the Commission Claim to be Preaching to the Converted?*, ECLR 1999, 442, R. Wesseling, *The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options*, ECLR 1999, 420, C.-D. Ehlermann, *The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 CMLRev. 537 (2000), A. Schaub, *Modernisation of EC Competition Law: Reform of Regulation No. 17*, in B. HAWK (ED.), *FORDHAM UNIVERSITY 2000* at chapter 10.. I. Forrester, *Modernisation of EC Competition Law*, id at ..., chapter 12, M. Siragusa, *A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules*, id. at chapter 15, R. Wish and B. Suffin, *Community Competition Law: Notification and Exemption–Goodbye to All That*, in D. HAYTON (ED.), *LAW’S FUTURE(S): BRITISH LEGAL DEVELOPMENTS IN THE 21ST CENTURY*, chapter 8 (Hart, 2000), D. Gerber, *Modernising European Competition Law: A Developmental Perspective*, ECLR 2001, 122, p. Kingston, *A New Division of Responsibilities in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call*, ECLR 2001, 340, M. Monti, *European Competition Law for the 21st Century*, in B. HAWK (ED.), *FORDHAM UNIVERSITY, 2001*, chapter 15, W. Wils, *The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission’s Proposal for a New Council Regulation Replacing Regulation No. 17*, id. at chapter 18.

European Community (EC) antitrust law in Articles 81 and 82 EC Treaty.² The fundamental change introduced by the new Regulation is not the substance of the competition law, but the procedure and the allocation of responsibility for applying it.³ Some of the key aspects of the system introduced by the Regulation are the decentralisation of EC competition law and simultaneous application of EU and national law by national authorities, shown below.⁴

It follows from the foregoing that the goals of Regulation 1/2003 are a more effective and efficient enforcement of EC antitrust law and simplified administration; a uniform application of EC antitrust law throughout the European Union and also reduced administrative costs and less costs and burdens on undertakings. The modernisation is also taking into consideration the interests of consumers which can be secured through effective competition in the common market.⁵

5.2 Articles 81 and 82 of the EC-Treaty

Effective competition within the community is considered necessary for an effective market. Articles 81 and 82 of the EC Treaty are expressly

² In addition, the Commission has published various guidelines and notices (together ‘the Guidelines’) to assist in the interpretation and application of Regulation 1/2003, as well as a regulation that establishes formal rules for dealing with procedural matters:

Commission Regulation relating to Proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Procedural Regulation);

Guidelines on the effect on trade concept in Articles 81 and 82 (Jurisdictional Guidelines);

Guidelines on the application of Article 81(3) (Article 81(3) Guidelines);

Notice on co-operation between the Commission and national courts (National Courts Cooperation Notice);

Notice on co-operation within the network of competition authorities (Cooperation Notice);

Notice on informal guidance relating to novel questions; Notice on the handling of complaints by the Commission (Complaints Notice).

³ A New Dawn for EU Competition Enforcement.

⁴ Ibid.

⁵ Commission finalises modernisation of the EU antitrust enforcement rules, IP/04/411.

concerned with practices that have, or may have, an adverse affect on competition. In particular, Article 81 EC addresses those practices relating to coordination between entities.

Thus Article 81 of the Treaty prohibits, under specific circumstances, all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 81 (2) EC declares such agreements or decisions to be void. According to Article 81 (3) EC, there might be an exemption for agreements, decision or concerted practices.

Article 82 EC is concerned with the dominance of entities and regards abuses of dominant positions by one or more undertakings within the common market.

5.3 Former competition rules under Regulation 17/62

The former Regulation 17/62 provided the direct effect of the prohibition rule of Articles 81 and 82 EC. Therefore any agreements, decisions and concerted practices which were similar to the ones included in Article 81(1) EC were automatically prohibited and thus void, a prior decision declaring them in breach of competition law not being necessary. The same rule was applied to abuses of dominant position in the market within the meaning of Article 82 EC.

Undertakings which entered into agreements and concerted practices capable of restricting, preventing or distorting competition were required to notify them to the Commission, which had the power to grant exemptions under Article 81(3) EC.

Therefore the framework prior to the new Council Regulation was characterized by a centralized system where the Commission had the sole power to grant individual exemptions under Article 81(3) EC.

The centralized notification system ensured that competition rules were applied coherently throughout the Community. This system was adequate to a Community with 6 Member States, but it seems not to work in a Community enlarged to 25, because the Commission does not have the resource to deal with notifications coming from 25 Member States. The Commission very often receives notification of cases that do not constitute a real threat to the competition within the common market, and this situation has prevented it from taking care of the “big” infringements of competition rules. Therefore the Commission pointed out basically two reasons for adopting new rules in Community competition law:

- 1) The Commission monopoly on the application of Article 81 (3) EC was an obstacle to the effective application of rules by national competition authorities and courts and therefore the notification system was not anymore an effective mean for the protection of competition.
- 2) Companies had to bear high compliance costs and could not enforce their agreements without notifying them to the Commission even if they fulfilled the requirements of Article 81(3) EC. This system affected most of all medium-sized enterprises for which the cost of notification represented an excessive burden compared with that brought to the larger undertakings.

Against this background the Commission concluded that it was necessary to replace the system of Regulation 17/62.

5.4 The main changes - Characteristics of the

new Council Regulation (EC) No. 1/2003

The new Council Regulation (EC) No. 1/2003 brings fundamental changes in the application of European competition law. First, Article 81(3) of the EC-Treaty becomes directly applicable, enabling national competition authorities and national courts to apply Article 81 and 82 of the EC-Treaty in their entirety, including paragraph 3 of Article 81. Second, the powers of investigation for the Commission have been increased. Finally, the new Council Regulation establishes a new mechanism of cooperation between the Commission and the competition authorities of the Member States.

Council Regulation No. 1/2003 contains 38 recitals and 11 chapters with a total of 45 articles (10 of which are transitional provisions). It expressly repeals existing procedural instruments of Regulation 17/62 and Regulation 141/62. It substantially replaces, but does not repeal, the transport sector regulations of Regulation 1017/68 (road, rail and inland waterways), Regulation 4056/86 (maritime transport) and Regulation 3975/87 (air transport). It makes minor amendments to other related regulations.

The main impetus behind the reform is to devolve some of the Commission's current enforcement responsibilities to national courts and national competition authorities by allowing them to apply Article 81 EC in its entirety on the one hand, and to undertakings and their legal advisers on the other hand. This will result in the decentralization of the enforcement of Articles 81 and 82 EC and is to be achieved through the following main changes:

- Notifications to the Commission under Article 81 EC will be abolished; instead, Article 81 (3) EC will apply automatically to exempt from Article 81 (1) EC all agreements falling within its scope, without the need for an official decision to be adopted by the Commission or any other authority (system of legal exception, Article 1);
- Additionally, the enforcement system will be decentralized, increasing the responsibility of national courts and competition authorities for the

enforcement of Articles 81 and 82 EC (decentralized enforcement, Articles 4 – 6);

- National competition authorities and courts must apply Articles 81 and 82 EC, in addition to national law when an agreement or practice affects trade between Member States (Article 3);
- The uniform application of EC competition law will be ensured by rules governing the relationship between Articles 81 and 82 EC and national competition rules (Article 3), the burden of proof (Article 2), conflicts (Article 16) together with provisions on cooperation between national competition authorities and courts and the Commission (Articles 11 – 15).

Furthermore, the Commission will have increased powers of investigation, including the power to enter private homes, to interview individuals and record their statements and to seal premises and documents as well as the power to impose more substantial fines (Chapters V and VI of the Regulation).

The result of the reforms introduced by Regulation 1/2003 is thus the abolition of the notification system and the increase of the Commission's powers with respect to the infringement procedure.

6 German competition law

6.1 Introduction

6.1.1 Background of German competition law (GWB)

The priority purpose of the 7th novella of the German law against restraints of trade (Gesetz gegen Wettbewerbsbeschränkungen - GWB) is the adjustment of the national cartel law to the European law. Another important purpose is the preservation and strengthening of the principle of competition.⁶

On the 4th March, 2003 the German Federal Ministry of economy and work published the draft of the 7th GWB-novella and gave to the involved economic sections as well as to the federal states (“Bundesländer”) the opportunity for giving a statement. Later, on the 18th December, 2003 the German Federal Ministry of economy and work published the adviser's draft for the novella and gave again to the involved federal states and the affected organizations/ associations the opportunity for additional statements. Besides, the essential destination of the novella, the adaptation of the German competition law to the new European competition law, was supported nearly unanimously.⁷ The adaptation is still not set into force.

6.1.2 Occasion and purposes of the GWB

Occasion of this amendment of the GWB is the passing of the Regulation (EC) No. 1/2003 from the 16th December, 2002 by the Council of the European Union for the realization of rules of competition laid down in Articles 81 and 82 EC. As mentioned above this regulation already came into force on the 1st May, 2004.

⁶ Begründung des Gesetzentwurfs, p. 1.

⁷ Begründung des Gesetzentwurfs, p. 1.

The up to now existing basic compulsory registration and license duty for competition-limiting agreements is transferred in a system of legal exception. Competition-limiting agreements count accordingly automatically as released (legal), if they fulfil the exemption requirements of Art. 81 (3) EC. At the same time the precedence of the European law concerning the admissibility of competition-limiting agreements, decisions of company unions and coordinated behaviour in the sense of Article 81 (1) EC becomes considerably extended.

The reorganization at EU level has considerable consequences on the German law of competition-limiting agreements. Numerous company arrangements have consequences on interstate commerce and, hence, are to assess after Article 81 EC. From now on independent meaning will come up to the German competition law concerning agreements only in cases which have purely local or regional consequences and show no interstate relevance. On the other hand, the merger control and abuse supervision in the GWB remain untouched from this.

The regulations for company co-operations in the GWB are adapted to the new concept of European competition law. As in the European law, the legal application becomes simplified. This means a larger free space for companies, but also a higher own responsibility arises from it.

The adjustment to the European law also contains the processing of vertical restraints of trade.⁸ According to European law (Article 81 EC) the vertical agreements, which limit the competition (distribution connections) just as horizontal agreements, are subject to a prohibition with legal exception. In the previous GWB the so-called "capacity connections" (for prices and conditions) were forbidden; other distribution connections are basically permitted, but, however, are subject to an abuse supervision. Indeed, the previous German system is competition-politically legal and leads also to

⁸ Begründung des Gesetzentwurfs, p. 2.

practical and adequate results. Nevertheless, in view of the advanced precedence of the European law the European model is basically taken over in future for vertical restraints of trade to preserve the unit of competition law. In the reorganization, also horizontal and vertical agreements which have no interstate consequences and thus are subject only to German law, are included.

To avoid a different treatment of small and middle-sized companies - often to their costs -, local and regional cases are not treated differently as those with cross-border effects. Only in some cases it is right to maintain specific regulations in the German competition law.⁹

The unconditional precedence of European competition law does not apply to the abuse supervision of single-sided competition-limiting behaviour. Hence, these cases can be regulated differently in the German law than in Article 82 EC. This possibility is used furthermore in the German law. Indeed, the regulations of abuse supervision about market-dominating companies in § 19 GWB are to a great extent compatible with Article 82 EC, but also contain special regulations beyond it, in particular concerning the refusal of the access to essential facilities (§ 19 IV No. 4 GWB). These regulations have a considerable meaning in practice, above all, in the area of net-industries.

The regulations about the ban of abuse-behaviour towards economically dependent small and middle-sized companies (§ 20 GWB) fulfil an important competition-political and middle class-political function. This counts in particular to the ban of the "sales under cost price". These regulations, which have no correspondence in Article 82 EC, hence, remain maintained.

⁹ Begründung des Gesetzentwurfs, p. 2.

The European Commission and the national competition authorities will narrowly cooperate from now on with the purpose of an effectual enforcement of the competition law within a "network". Hence, procedure regulations and investigation competence in the GWB are adapted to the reorganizations in the Regulation 1/2003. This is necessary, so that the cooperation of cartel authorities with other authorities of the European network can function without any problems.

In addition, the novella contains changed regulations for printing companies. The reason for this is the economically difficult situation in which the printing branch is. The new regulations should offer, above all, the possibility to the companies to widen their economic basis, and thus save the survival of the varied German press scenery. In the area of merger controls some procedure-juridical changes are planned. On the other hand there is no need for an adaptation of material regulations of merger control in total. On account of and to what extent after the passing of the Regulation (EC) No. 139/2004 from the 20th January, 2004 about the control of mergers an advancement of the German law is indicated, but can be decided only at a later time.

6.2 Changes – Adapting the Regulation 1/2003

6.2.1 Outlines of the amendment

In view of the ban of competition-limiting agreements and the exceptions to this ban, two options to the national legislator remain on reason of the advanced precedence of the European competition law (see Article 3 Regulation 1/2003): for agreements with interstate meaning exists the possibility to apply either only European law, or to intend the parallel application of European and national law (in this case national law may not deviate from the European law in the end).

In cases of agreements without cross border effects, the national legislator is free and can decide in his own sovereignty whether it is necessary that the national law follows the European model.

In the GWB-novella the possibility of parallel application of the regulations in the GWB is planned for agreements with interstate consequences beside the European competition law, that is compellingly to be applied. An essential reason for this is the lacking conceptual sharpness of the intergovernmental clause after Article 81 EC. Its definition, in particular by the jurisdiction of the European Court of Justice, follows widen and interpreted points of view.¹⁰ Accordingly, interference of interstate trade is already given when it can be foreseen with the help of a totality of objective, juridical or actual circumstances with enough probability that the agreement may have an influence direct or indirect, actual or potential on the pattern of goods between Member States.¹¹

Thus the intergovernmental clause would draw no sharp line between the applicability of the European competition law and the area which is still left only to the national competition law. The parallel application of European and national law on agreements with intergovernmental relation makes sure that in particular in cases of doubt of the applicability of European or national competition law ("grey area") the legality of the official decisions is not questioned, provided that national and European competition law lead to identical results.¹²

For agreements without interstate consequences the largest acquisition of the European law is prescribed. Only in this way an undesirable division of the German competition law in two parts (in European regulations for cases with intergovernmental relation and divergent national regulations for cases without intergovernmental relation) can be avoided. Such a division in two

¹⁰ Begründung des Gesetzentwurfs, p. 3.

¹¹ See ECJ; judgment of the 12/11/1980, "L'Oréal", Slg. In 1980, 3775, 3791.

¹² Begründung des Gesetzentwurfs, p. 4.

parts would be hardly useable, on the one hand, because of the conceptual unsharpness of the intergovernmental clause. However, it is also not properly. To avoid a different treatment of small and middle-sized companies compared with large-scale enterprises, local and regional circumstances should not be treated differently than those with cross-border consequences. Only in a few exceptional cases it can be justified to maintain specific regulations in the German competition law.

This follows the example of many Member States which have already taken over the European law in their valid law in all or in part; other Member States will do this while adapting the Regulation 1/2003. Thus a nearly identical law for the area of competition-limiting agreements originates in Europe. Such uniform regulations in the European competition law and in the competition law of 25 Member States are necessary in view of the requirements for an integrated single market. Furthermore, the creation of that “level playing field” is connected with considerable advantages for the companies.

Therefore, the German economy supports the change of the system, even if the German law becomes more strictly, for example in cases with vertical agreements. Here again, the principles of the European competition law are taken into consideration when interpreting § 1 GWB, also if they were already contained in this paragraph up to now, like the definition of company and company unions or the significant signs of a prevention, restriction or corruption of competition.

This legal consequence is confirmed by the principle of the “application friendly to Europe” in § 23 GWB in accordance with the new Regulation. It also includes announcements and guidelines of the Commission. Such indications on how to interpret Article 81 I EC can be found in the guidelines to horizontal agreements (ABl. C 3 of the 1/6/2001; p. 2) or to vertical agreements (ABl. C 291 of the 10/13/2000; p. 1) just as in special regulations of specific sectors. Scales for the administrative practise of the

Commission regarding the application of Article 81 I EC also contain the announcement of the Commission about agreements of low meaning (so-called “de minimis announcement”, ABl. C 368 from the 22.12.2001; p. 13) which installs in particular quantitative criteria for the perception of a restraint of trade.

With coming into force of the Regulation 1/2003, the amendments in the European law require changes of special regulations for certain economic areas existing up to now in the GWB. After Article 3 of the Regulation 1/2003, since the 1st May, 2004 German cartel authorities and courts must apply European law compellingly to circumstances which can affect interstate trade directly. The European ban on cartels in Article 81 EC knows no lawful exception areas suitable to the GWB specific regulations.

Because of the duty to the application and the precedence of the European law an adaptation seems to be necessary in the area of interstate consequences by abolition of special rules. In view of the wide interpretation of the concept of „interstate consequences“ by the ECJ and the Commission almost the complete sector of existing special areas in the GWB is touched. Therefore, the special rules for copyright utilization companies (§ 30 GWB) and for the central marketing of television right for sports events arranged by sports organizations (§ 31 GWB) are to be questioned. Only the exception for the agricultural sector can remain without any discussion (see also EC-Treaty in combination with the appropriate regulations (in particular Regulation 26/62)).¹³

To uphold the necessary unit of the legal system, exception areas are also restricted where an application area of national cartel law would be conceivable on account of purely internal-state active agreements. As far as similar special regulations are cancelled, the general regulations in §§ 1 to 4 GWB as well as the interpretation rule § 23 GWB apply from now particular

¹³ Begründung des Gesetzentwurfs, p. 21.

in cases without interstate consequences. The discontinuation of existing special rules does not signify automatically the inadmissibility of agreements capable of exemption. Now it is rather to be assessed by using the general rules, whether the requirements in § 2 GWB, that corresponds to the legal exception stated in Article 81 (3) EC, are fulfilled.

6.2.2 Single changes

6.2.2.1 § 1 GWB

Up to now § 1 GWB contained the ban of competition-limiting horizontal agreements. By the novella the regulation is spread also on competition-limiting vertical agreements. Thus § 1 GWB is in its core corresponding to Art. 81 EC.¹⁴

Hence, the requirements of § 1 GWB, as for example the definition of company or company unions or the characteristics of a prevention, restriction or corruption of competition, are to be understood and applied in the light of Article 81 (1) EC and the European jurisdiction (see also § 23 GWB). This also counts for competition-limiting agreements or behaviour which are not suitable to affect trade between Member States. § 1 GWB is a lawful ban. Hence, agreements and behaviour which offend against the ban of § 1 GWB without fulfilling one exemption according to the GWB (in particular one of the exemptions found in §§ 2 and 3 GWB) are void. Once more, this corresponds to the European law (here Article 81 (2) EC).

6.2.2.2 § 2 GWB

§ 2 I GWB takes over the exemption requirements of Article 81 (3) EC. As within the scope of the ban norm § 1 GWB, the exemption requirements also apply if a competition-limiting agreement or behaviour is not suitable to affect trade between Member States. Further, § 2 I GWB makes clear that

¹⁴ Begründung des Gesetzentwurfs, p. 41.

agreements or behaviour for the purposes of § 1 GWB are released „ex-lege“ (by law) from the ban if they fulfil the exemption requirements of § 2 I GWB. A previous constitutive exemption decision of a cartel authority is no more necessary.¹⁵

§ 2 II GWB determines in the "way of dynamic reference" that with the application of § 2 I GWB the block exemption regulations of the council or the Commission must be applied accordingly. The block exemption regulations apply anyway to agreements or behaviour which are suitable to affect interstate trade on grounds of European law. Anyhow a reference to the contents of the block exemption regulations in this respect is properly, because they render more precisely the parallel applicable (see Article 3 I Regulation 1/2003) exemption found in the new § 2 I GWB.

For agreements or behaviour without interstate consequences the application of block exemption regulations is spread with constitutive effect on these agreements and behaviour. As an alternative to a dynamic reference a legal authorization in favour of the Federal Ministry of economy and job comes into view, but there is no need apparent for this.¹⁶ With the discharge of new block exemption regulations about technology transfer arrangements in the 4/27/2004 the circle is closed down in principle. Essential changes are not to be expected in the foreseeable future. Because the present block exemption regulations can be taken over in the German law without any problems, no problems are to be expected by possible changes of block exemption regulations.

Like in the European law (Article 2 Regulation 1/2003) the burden of proof for the fact that the exemption requirements of § 2 GWB are given, lies basically at the company or the company union which appeals to it.

¹⁵ Begründung des Gesetzentwurfs, p. 42.

¹⁶ Begründung des Gesetzentwurfs, p. 42.

6.2.2.3 Background of §§ 22 and 23 GWB

The abolition of the regulations about the recommendation ban (§ 22 GWB) and the recommended retail price for brand goods (§ 23 GWB) also corresponds to the adjustment to the European competition law.¹⁷ The EC law contains no general recommendation ban and thus also no exception from it. In this respect Art. 81 EC is the sole scale to measure recommendations. An acquisition of the European-juridical assessment of recommendations also for such cases which are not intergovernmental relevant is connected with the cancellation of §§ 22 and 23 GWB. Hence, in future is to be checked whether recommendations - according to the legal practises developed in EC law - fall under the ban norm § 1 GWB. As far as this is the case, the rules of § 2 GWB apply in principle to the exemption ability of recommendations. If there is not exceptionally a special regulation in a block exemption regulation or in the GWB (e.g. § 3 GWB), it is by means of the general criteria in § 2 I GWB or in Art. 81 (3) EC to check whether the requirements for an exemption of the recommendation are fulfilled.

6.2.2.4 About the new § 22 GWB

§ 22 GWB in the novella regulates the relation between national and European competition law. It corresponds basically to Article 3 Regulation 1/2003. At the same time it uses the in Article 3 Regulation 1/2003 planned possibility to regulate the application of the national law parallel to the European law.

§ 22 I GWB refers to the rules in Art. 3 I 1 Regulation 1/2003, so that in case of competition-limiting agreements, decisions or behaviour for the purposes of Article. 81 (1) EC always European competition law is to be applied.¹⁸

¹⁷ Begründung des Gesetzentwurfs, p. 45.

However, Art. 3 I 1 Regulation 1/2003 leaves the possibility to the national legislator, to keep national competition law applicable also on agreements and behaviour in the sense of Article 81 (1) EC. Nevertheless, in these cases the national competition law can only be applied parallel and together with Article 81 EC. After § 22 I GWB the application of the German competition law in intergovernmental relevant cases is not obligatorily, but leaves its application optional. Therefore the cartel authorities have an option in cases of competition-limiting agreements, decisions and behaviour in the sense of Article 81 (1) EC. They can apply either only the European competition law or, in addition, also the regulations of the GWB. However, in this latter case they have to apply, in addition, always European competition law if the agreements, decisions or behaviour are intergovernmental relevant. With it the precedence of the European law (see § 22 II GWB) should be guaranteed on the one hand. On the other hand, it should be reached that these cases, also if insofar parallel national law is applied, can be set into the network of the European competition authorities.

§ 22 II GWB corresponds to the precedence regulation of Article 3 II 1 Regulation 1/2003. Accordingly competition-limiting agreements, decisions and behaviour which are intergovernmental relevant and are not prohibited after Article 81 (1) EC or released after Article 81 (3) 3 EC, are also not forbidden according to the rules of the GWB.

The precedence is extended to the competition-juridical assessment of all agreements, decisions of company unions and on each other coordinated behaviour with interstate consequences. The cases in which no "perceptible" restraint of trade for the purposes of the European law is given are also registered.

The precedence regulation of Article 3 II 1 Regulation 1/2003 does not count to the application of more austere national competition law to single-

¹⁸ Begründung des Gesetzentwurfs, p. 46.

sided restraints of trade (Article 3 II 2 Regulation 1/2003). In Germany, this concerns in particular the application of the regulations about abuse supervision.¹⁹ Accordingly it is clarified that the regulations of the second section of the first part of the precedence regulation remain untouched. Among them also falls in particular - in comparison to Article 82 EC - the further abuse supervision towards market-strong companies (planned § 20 GWB). This also corresponds to the consideration reason 8 in the Regulation 1/2003.

Article 3 II Regulation 1/2003 registers after its text not the precedence of more austere European law compared with milder national competition law. Nevertheless, this precedence is accepted in the jurisdiction of the European courts; it remains untouched from the regulations in Article 3 II Regulation 1/2003. This is expressly clarified by § 22 II 3 GWB. In particular, after the jurisdiction the precedence of the community-right requires that national legal regulations which affect communal regulations may not be applied by all national courts and organs including the administrative authorities, no matter which regulation is older (see judgment of the European court of law from the 9th September, 2003 - legal case C-198 / 01 - „Consortio Industrie Fiammiferi“). Because the cartel authorities and courts are in future obliged to apply European competition law to all intergovernmental relevant circumstances, the precedence of the European competition law asserts itself in the end also towards milder German law.

§ 22 III GWB refers to the rules set in Article 3 I 2 Regulation 1/2003. According to this, in cases of prohibited behaviour after Art. 82 EC, the cartel authorities and courts have to apply the regulations of the GWB and also Art. 82 EC. The “application-command” (German: "Anwendungsbefehl") of § 22 III GWB concerns therefore behaviours which are relevant, on the one hand, intergovernmental and fulfil at the same time the ban requirements of Article 82 EC. Like in § 22 I GWB the application of the

¹⁹ Begründung des Gesetzentwurfs, p. 46.

German competition law is possible in cases with intergovernmental relevant action, but is not prescribed. In this case authorities and courts can either exercise Article 82 EC or, in addition, also the regulations of the GWB. There is not a precedence regulation for single-sided actions. Therefore § 22 III 3 GWB clarifies that according to Article 3 II 2 Regulation 1/2003 the application of more austere rules than in Art. 82 EC remains untouched.

According to Article 3 III Regulation 1/2003 the rules of § 22 I - III GWB do not apply basically if the German Federal Cartel Office or a legal remedy's court exercises norms of merger control. In these cases exists in particular no obligation of parallel application of the European competition law.²⁰ § 22 I - III GWB also do not apply to regulations which have predominantly a different destination than Articles 81 and 82 EC. In Germany, particularly the rules of the law "against unfair competition" (Gesetz gegen unlauteren Wettbewerb, UWG) fall within this scope.

6.2.2.5 § 23 GWB

After § 23 GWB the principles of the European competition law are the basis for the application of §§ 1 to 4 and 19 GWB. By interpreting these principles, the constant jurisprudence of the European Court of first instance and the European Court of Justice in Luxembourg just as the strengthened administrative practice of the Commission, which also finds itself in its announcements and guidelines, are to be taken into consideration beside the text of the lawful regulations.²¹

§ 23 GWB affects in particular such restraints of trade which fall only under the internal-state law. However, § 23 GWB do not lead to an immediate normative obligation to the decision practice of the European institutions. Furthermore, from the European competition law divergent lawful

²⁰ Begründung des Gesetzentwurfs, p. 47.

²¹ Begründung des Gesetzentwurfs, p. 47.

regulations in the GWB prevail the interpretation rule of § 23 GWB (e.g., § 3, § 19 II-IV GWB).

7 Sport

7.1 Introduction: sport and competition law

Competition is a general phenomenon which appears in nearly every area of life. In all cases it is about the enforcement against others what becomes particularly clear in the field of sport: here, the purpose is „higher, quicker, more“.

In the cartel law, however, it is only about the economic competition, thus the rivalry around participation chances in the market.²² In Germany the normative basis for this is found in the law against restraints of trade (Gesetz gegen Wettbewerbsbeschränkungen, GWB²³) whose purpose is to prevent the self-restriction of economic freedom of action.

The GWB in the version from 1st August, 1998 contains in the first section some cartel-juridical exceptions, which permit competition-limiting behavioural for certain industries and take away these areas from the competition principle partially.

Thus § 31 GWB contains a special regulation for a subsection of sport. Therefore § 1 GWB is not applicable to the central marketing of rights in the television broadcast of according to the statutes carried out sport-competitions. From the beginning, this regulation was controversially discussed and it seems necessary to check the authorization of the fore-mentioned cartel-juridical exceptions. The discussion about For and Against of special areas is now to be seen in a different light with the coming into force of the new European cartel procedure Regulation 1/2003²⁴. A basic

²² See Rittner, AcP 188, p. 107 u. 131.

²³ „Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26. August 1998 (BGBl. I p. 2546)“.

²⁴ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

system change (the switch to a directly applicable exception system) occurs through the Regulation 1/2003. As shown above, the Regulation also contains new explicit rules about the application of European and national competition law.

This European-juridical conditions change the scope of application of exceptions from the GWB, also in view of the area of sport. The cartel law deals only with a partial aspect of sport.²⁵ Indeed, it exists a kind of innocence supposition to the sport, public utility is basically given.²⁶ On the other hand, a “club” like Manchester United plc has an annual turnover of 129.6 £m²⁷ and for the professional sportsmen the sport is their economic existence basis. The solution of legal issues specific for sport can raise special problems because of the approved social function of the sport, in particular, if and to what extent a privilege can efficiently exist in this area, which contradicts the general-valid law.²⁸

To this background at first the European jurisdiction should be examined with the help of some cases dealing with cartel-juridical treatment of the sport. Then the specific peculiarities of the German law are explained, in particular the problematic § 31 GWB. In conclusion the consequences of the Regulation 1/2003 to this special area should be assessed to answer the question, whether the German competition law can keep the exception in § 31 GWB.

²⁵ To problems of defining see Holzke, *Der Begriff des Sports im deutschen und europäischen Recht*, p. 31f., 151ff.

²⁶ See Madl, *Der Sportverein als Unternehmen*, p. 37.

²⁷ See <http://ir.manutd.com/manutd/findata>, also Mauer/Schmalhofer in Sigloch/Klimmer, *Unternehmen Profifußball*, p. 24ff.

²⁸ See Vieweg *JuS* 83, p. 825f.

7.2 Sport in the judgment of the ECJ

7.2.1 Adoption of the sport

The word "sport" is found neither in the EC nor in the EU-Treaty. However, a statement which stresses the social meaning of the sport is added to the Treaty of Amsterdam.²⁹ A more extensive statement is found in the appendix to the Treaty of Nice³⁰, which one can understand as an important step for the adoption of sport in the Treaties or in an European constitution. Nevertheless, final statements have no juridical binding character. They are at most suitable as an interpretation help according to Article 31 II of the Vienna Convention on the Law of Treaties.

The sport has found more attention in the jurisdiction of the European court of Justice. The first judgment in this respect is *Walrave and Koch*.³¹

Both Dutchmen were two of the best pacemakers in "Medium-Distance world cycling championships behind motorcycles". Their job is to go with motor cycles in front of bicycle race drivers, in their lee the bicycle race drivers ("stayer") reaches up to 100 km/h. The rules of the *Association Union Cycliste internationale* (UCI) prescribed since 1973, that pacemaker and stayer have the same nationality.

The affected persons held this regulation for incompatible with EC law. In his final application, general advocate *Warner* pointed out the fact that this judgment will get „general importance in the area of professional sport“.³² He should be right. The ECJ decided, that the sport, in so far as it is part of the economic life in the sense of Art. 2 EC, falls under EC law. In particular

²⁹ See Declaration No. 29 to sport.

³⁰ See http://sport.austria.gv.at/internat/in_05_06.htm.

³¹ Rs. 36/74 *Walrave u. Koch* ./ UCI, Slg. 1974, p. 1405ff.

³² See Slg. 1974, p. 1423.

the rules set by associations/ federations/ organizations are also checkable in this respect.³³

In the following case *Donà ./ Mantero*³⁴, Advocate-General *Trabucchi* explained the double meaning of the judgment which accepts, on the one hand, the value of the sport, but clarifies at the same time, however, the applicability of the Treaties in any case of professional sport.³⁵

Donà should look for *Mantero*, the president of an Italian football club named FC Rovigo, for abroad footballer. When the representative found such players, the president refused to take the offers in consideration and to pay *Donà* his expenses. He referred to the statutes of the Italian football association, which basically allowed only Italians to play. *Donà* had the view, this regulation offends against Articles 39 and 49 EC. The ECJ confirmed his view already given in *Walrave ./ Koch* and made clear, that it only would accept such regulations of sports federations, that are set for non-economical reasons and concern the sport as such, possibly the matches between national teams.³⁶ This seems reasonable, because in such cases the players are not acting as employees.

Both judgments show clearly, that the ECJ do not want to exclude the sport from the application of the Treaties by using Article 2 EC, but that also parts of sport can be subsumed under the rules of the Treaties.

³³ See Slg. 1974, p. 1418 ff.

³⁴ Rs. 13/76 *Donà ./ Mantero*, Slg. 1976, p. 1333ff.

³⁵ See Slg. 1976, p. 1344.

³⁶ See Slg. 1976, p. 1340.

7.2.2 Cartel-juridical judgement of the sport in the “Bosman”- case

The fore-mentioned judgments created the basis for further decisions of the ECJ. The most famous following case is without doubt *Bosman*.³⁷

The Belgian soccer player *Jean-Marc Bosman* had already had his best time.³⁸ His club RCL Lüttich offered him a new contract in 1990, but however, wanted to pay him instead of approx. 120,000 BFR up to now only 30,000 BFR. *Bosman* refused to sign this contract. His employer placed him with a transfer fee of 11,743,000 BFR on the transfer list. Nevertheless, *Bosman* had already found a new club, named US Dünkirchen. The new club was willing to pay approx. 90,000 BFR to him and, in addition, the due reparation fee at the rate of 1,200,000 BFR. US Dünkirchen agreed with the RCL Lüttich on a transfer fee of 4,800,000 BFR. However, the contracts fell under the resolving condition of a transfer certificate of the Belgian football association. Nevertheless, this certificate was missing, because RCL Lüttich did not apply for it at the association. Besides, the club allowed to exclude *Bosman* for the rest of the current season.

To this background several legal disputes developed.³⁹ In the end, the case came to the Cour d'appel Liège, that wanted the transfer rules and foreign clauses to be checked on their compatibility with Art. 39, 81 and 82 EC by the ECJ.

The ECJ could handle the case with the help of its former jurisdiction regarding Article 39 EC and, hence, did not come to the cartel law. To the

³⁷ Rs. C-415/93 *Bosman*, Slg. I 1995, p. 4921ff.; „Ich glaube, dass mein Name für immer in die Geschichte des Fußballs eingehen wird (I believe that my name will stand forever in the books of football-history)“, after Dinkelmeier, Das „Bosman“-Urteil, Vorblatt.

³⁸ At least in the opinion of van Miert, Markt, Macht, Wettbewerb, p. 168; indeed, *Bosman* was only 26 years old.

³⁹ About the different proceedings see Slg. I 1995, p. 4946f.

background of *Walrave./Koch* and *Donà./Mantero*, the German government failed with its attempt to deny the economic character of football and to draw a parallel to culture in the sense of Art. 151 EC.⁴⁰ Rightly it is pointed out, above all, to the fact, that Article 151 EC contains no area exception, but only supporting measures.⁴¹

Advocate-General *Carl Otto Lenz* whom the ECJ also followed in his furthergoing argumentation still showed his points in his final application to Article 81 (1) and 82 EC. Associations and federations are at first doubtless companies or company unions, because they carry out an economic activity and it does not depend on a profit achievement intention.⁴² Whether the installed regulations are those of unions (d.i. the federation) or those between companies (d.i. the association), is not important, because both forms are included in Article 81 (1) EC.⁴³ Also the intergovernmental conflict is quite obviously given in case of foreign clauses, also if it concerns merely changing the club within a Member State.⁴⁴

The UEFA argued with a kind of rate-contractual "labour exemption", because it concerns a "veiled rate conflict".⁴⁵ It was already doubtful in this respect, whether the configuration of employer-employee relationships falls within the European cartel law.⁴⁶ Nevertheless, the ECJ has now clarified, that Art. 81 EC is basically not applicable to rate contracts.⁴⁷ However, in the *Bosman* - case there were horizontal agreements between the clubs, so that this question did not have to be decided. Also the attempt to rest on the approved protection of the organization autonomy remained fruitless,

⁴⁰ See Slg. I 1995, p. 5063, and also Palme, JZ 1996, p. 240; furthermore Häberle, FS Thieme, p. 51f.

⁴¹ See Weiß, Spurt 1998, p. 97.

⁴² See Slg. I 1995, p. 5027 with more material.

⁴³ See Slg. I 1995, p. 5028, also Fleischer, WuW 1996, p. 475. As far as the association itself acts economically it must be treated like a company.

⁴⁴ See Krogmann, Sport und Europarecht, p. 34; Fleischer, WuW 1996, p. 475.

⁴⁵ See Slg. I 1995, p. 5034; same Fischer, EuZW 2002, p. 97.

⁴⁶ In the German cartel law it is recognized that § 1 GWB does not apply, see Rieble, Arbeitsmarkt und Wettbewerb, Rn. 457ff.; Huber/Baums in Frankfurter Kommentar, § 1 GWB Rn. 381; different opinion by Emmerich, Kartellrecht, p. 16.

because the court looked at the disputable rules neither as an exercise nor as an unavoidable consequence of this freedom.⁴⁸

It was more difficult to answer the question, whether the competition between the clubs is limited or not. Here, a collision problem really exists: competition should be protected against restrictions by those from whose market participation the competition originates.⁴⁹ The UEFA referred in this connection to the so-called *rule of reason*. According to this rule the ban on cartels is to be limited in this respect when in case of an evaluating consideration of the competitive advantages and disadvantages of an agreement only immoderate ("undue") restrictions are illegal.⁵⁰ But these principles are not transferable on the European competition law.⁵¹ On the one hand, sec. 1 Sherman Act contains no exemption of the ban on cartels according to Article 81 (3) EC, so that another way for a restriction had to be found. On the other hand it is to be taken into consideration that the task of the European competition law is above all the creation of a European single market.⁵² Consequently the situations in both economic areas are only restrictedly comparable with each other. Thus the ECJ has never designated its considerations to the adaptable application of Article 81 (1) EC as *rule of reason*.⁵³

Anyhow the ECJ has repeatedly limited the application of Article 81 (1) EC in evaluating consideration.⁵⁴ It takes the concept of the functioning competition ("workable competition") as a basis.⁵⁵ The restrictions which are competition-opening or competition-stimulating ("ancillary restraints" or

⁴⁷ See Slg. I 1999, p. 5882 (Albany).

⁴⁸ See Slg. I 1995, p. 5065. More critical regarding the reasoning Trommer, *Transferregelungen im Profisport*, p. 69f.

⁴⁹ See Mestmäcker, *Das Prinzip der rule of reason*, p. 21.

⁵⁰ See *Standard Oil of New Jersey v US* 221 US 1 (1911).

⁵¹ See the argumentation of Advocate-General *Lenz*, Slg. I 1995, p. 5031f.

⁵² See Zäch, *Wettbewerbsrecht der Europäischen Union*, p. 29.

⁵³ See Fritzsche, *ZHR* 160 (1996), p. 49f.

⁵⁴ See Rs. 56/65 *Société Technique Minière ./.* *Maschinenbau Ulm* Slg. 1966, p. 305; Rs. 26/76 *Metro* Slg. 1977, p. 1905f. ; Rs. 161/84 *Pronuptia* Slg. 1986, p. 385; Rs. C-234/89 *Delimitis ./.* *Henninger Bräu* Slg. 1992, p. 987.

German: Immanenztheorie) should not fall under Article 81 (1) EC.⁵⁶ Advocate-General *Lenz* also refers to such cases and explains, that only indispensable restraints of competition do not fall under Article 81 (1) EC.⁵⁷ The “market development doctrine” (German: Markterschließungsdoktrin)⁵⁸ seems to be applicable basically in the area of League football.⁵⁹ Certain agreements between the clubs are necessary, the league sport is a kind of "joint venture", a "super-coalition".⁶⁰

Hence, it is accepted in general, that the agreements, which are objectively necessary to keep the sport functioning, do not violate cartel law.⁶¹ In case of the transfer rules similar principles as in view of Article 39 EC apply. In this context the UEFA brought forward that it wants to maintain a financial and sporty balance between the clubs and also protect the search for new talents. These purposes are recognized by the ECJ as legitimate.⁶² However, the transfer rules do not appear to be inevitably for the reaching of this purpose. As a possible alternative, the Advocate-General mentioned a system of rearrangement. According to his view this solution seems to be especially right for the specific features of the competitive situation in case.⁶³ Furthermore, after his opinion, the system does not complicate the search for new talents.⁶⁴ The Advocate-General also recognized the rightly expected increase of the player's salaries⁶⁵ which results from the improved

⁵⁵ See Rs. 26/76 Metro Slg. 1977, p. 1905.

⁵⁶ See Rs. 161/84 Pronuptia Slg. 1986, p. 381 ; Wish/Sufrin, Competition Law, p. 210.

⁵⁷ See Slg. I 1995, p. 5033.

⁵⁸ More critical Fritzsche, ZHR 160 (1996), p. 41.

⁵⁹ See Slg. I 1995, p. 5017f.

⁶⁰ See Fleischer WuW 1996, p. 476.

⁶¹ See Deselaers WuW 1998, p. 947.

⁶² See Slg. I 1995, p. 5071f.

⁶³ Bericht der EU-Kommission an den Europäischen Rat im Hinblick auf die Erhaltung der derzeitigen Sportstrukturen und die Wahrung der sozialen Funktion des Sports im Gemeinschaftsrahmen vom 10. Dezember 1999; KOM (1999) 644, Punkt 4.2.1.3.

⁶⁴ COMP/37.398 – UEFA Champions League.

⁶⁵ COMP/38.173 - PO/The Football Association Premier League Limited.

negotiating position of the players, indeed, he did not judge the relevant interests of the clubs, however, as worth to protect.⁶⁶

Finally, *Lenz* took position to Article 82 EC. In the opinion of the Commission, which the Advocate-General joined, the assessment of the market-dominating position depends on the position of the clubs, because the employment of the players is not organized by the football associations. Thus only a collective control by the clubs within the association would come into consideration. The insofar demanded economic link is already given according to the rules mentioned above regarding the market development doctrine.

Indeed, *Lenz* did not judge the players as a competitor, buyer or consumer of the clubs, so that merely the competition between the clubs is affected and thus Article 82 EC is not appropriate.

Consequently the final application of the Advocate-General was:

“I therefore consider that the questions put by the Cour d'Appel, Liège, should be answered as follows:

1. Article 48 of the EC Treaty is to be interpreted as prohibiting

(a) a football club from being able to demand and receive payment of a sum of money when one of its players whose contract has expired is engaged by another club;

(b) the access of players who are nationals of another Member State to the club competitions organized by the national and international associations from being restricted.

2. Article 85 of the EC Treaty is to be interpreted as precluding agreements between clubs and decisions of sports associations whose content is as described at 1(a) or 1(b) above.”

⁶⁶ COMP/36.988 und COMP/37.214.

7.3 Sport under German competition law

7.3.1 § 31 GWB

The German cartel law was quite early concerned with questions of sport. Already in 1961 the German Federal Cartel Office ("Bundeskartellamt") had declared that the concept of defining a company in § 1 GWB can also register sports organizations.⁶⁷ Here, above all, the area exception given in § 31 GWB comes into view.

According to § 31 GWB, the fore-mentioned § 1 GWB is not applicable to the central marketing of rights in the television broadcast of according to the statutes organized sporty competitions by sport associations, which are, in fulfilment of their sociopolitical responsibility, also obliged to support the youth and amateur sport and take into account this obligation by an adequate participating in the income from the central marketing of television rights. Consequently, this regulation concerns an essential part of cases which are linked with the sport, namely the marketing of television⁶⁸ rights in sporty events.

The exception found in § 31 GWB was pasted into the law with the 6th GWB novella. This happened in reaction to the prohibition of the central marketing of football-transmission rights in the UEFA-cup home matches of German league clubs by the German football association ("Deutscher Fußball Bund, DFB"). The prohibition was disposed by the German Federal Cartel Office⁶⁹ and had been confirmed by the Federal Supreme Court⁷⁰.

The German football association was entitled sole on account of an advisory board decision to close contracts about television broadcasts and

⁶⁷ See BKartA BB 1961, p. 657f. („Berufsboxer“).

⁶⁸ About the definition Mahler, Spurt 2001, p. 8, Fn. 2.

⁶⁹ Bundeskartellamt, Beschlüsse vom 2. September 1994, B 6 - 105/02, B 6 - 60/94.

⁷⁰ BGH, Beschluss vom 11. Dezember 1997, KVR 7/96, WuW/E DE-R 17.

broadcastings of federal league and cup games. The statutes of the UEFA contained a similar regulation. Before this regulation came into force in 1989, the clubs sold the television broadcast rights independently. Since 1992 the German Football Association assigned the television rights for the UEFA cup and in the European cup of the cup-winners as a package for 5 years to two companies, which then sold the rights again. The enforcement of this contract was prohibited by the German Federal Cartel Office in September 1994⁷¹ according to §§ 1, 37a (now § 32) GWB and, furthermore, the Federal Cartel Office refused a permission⁷² at the same time. The complaint was rejected by the court.⁷³ The Federal Supreme Court (Bundesgerichtshof in Zivilsachen, BGH) did not grant to the appeal. It clarified, that the German Football Association must be seen as a union of companies in the sense of § 1 GWB, because its members, the clubs, are companies.⁷⁴

From determining meaning was meanwhile the question who is the genuine owner of the marketing rights. Since if the association gives away its own rights, there would be no restraint of trade in this respect. If one judges, however, the clubs as owner of the marketing rights, there would be a competition between them, which would be limited by a central marketing done by the association as a syndicate. The Federal Supreme Court defines the organizer of a sport competition as a person, who carries the enterprise risk, i.e. who is responsible for the organizational and financial regard of the event.⁷⁵ Here, the clubs are those which produce the essential economic performances for the marketing and do the organization.⁷⁶ The Federal Supreme Court designates the clubs, hence, as „natural market

⁷¹ See WuW/E BKartA 2682.

⁷² See WuW/E BKartA 2696.

⁷³ See WuW/E OLG 5565.

⁷⁴ See BGH NJW 1998, p. 757f.; even earlier BGHZ 101, 100 („Inter Mailand-Spiel“); see also Spurt 1997, p. 168; WuW/E BGH 1315.

⁷⁵ See BGH NJW 1970, 2060 („Bubi Scholz“); BGHZ 39, 354ff. („Vortragsabend“).

⁷⁶ See BGH NJW 1998, p. 758.

participants“.⁷⁷ The clubs are therefore the organizers and thus also the owners of the transmission rights.⁷⁸ Anyhow, the Federal Supreme Court sees it as possible that also the association owns a part of the organizer's rights. Indeed, this does not apply already if the association perceives merely functions of coordination. Because this was the case with the German Football Association, the Federal Supreme Court did not go any deeper into this question.⁷⁹ Nevertheless, the Federal Supreme Court explains in an *obiter dictum* that a marketing of an own right absolutely comes into view, provided that it was the association who has brought the competition into life and has taken over the management for years.⁸⁰

To this background the introduction of § 31 GWB was discussed controversially from the beginning. The supporter of this exception appealed in particular to the fact that by the decisions of the Federal Cartel Office and the Federal Supreme Court the financial compensation between the clubs in the league is endangered and with it a considerable financial loss of the clubs, which do not stand in the centre of the spectator's interest, is to be feared.⁸¹ Also the sociopolitical and social tasks, particularly in the youth sport, amateurism and mass sport and the herewith necessary financial compensation (German: “Solidarausgleich”) within the sport associations were asserted.⁸² However, in its statement the EU-Commission strictly refused the introduction of the exception.⁸³

⁷⁷ To the question if the BGH introduces insofar a new definiton of organizer, see Heermann, Spurt 1999, p. 13f.

⁷⁸ See WuW/E BGH 2634 („Sportübertragung“).

⁷⁹ Sole the UEFA would come into view, but it was not involved here, see BGH NJW 1998, p. 758 f.

⁸⁰ See also Westerholt, ZIP 1996, p. 265.

⁸¹ Entwurf der Bundesregierung zur 6. GWB Novelle, BT-Drucks. 13/9720, Anhang 2: Stellungnahme des Bundesrates.

⁸² Empfehlung des Sportausschusses vom 1. April 1998, BT-Drucks. 13/10633.

⁸³ Schreiben der EU-Kommission an den Vorsitzenden des Ausschusses für Wirtschaft des Deutschen Bundestages mit Stellungnahme der Generaldirektion Wettbewerb zur Anhörung „6. Kartellnovelle“ am 30. März 1998. Siehe zum Gesetzgebungsverfahren auch Parlasca, Wirkungen von Sportkartellen: Das Beispiel zentraler Vermarktung von TV-Rechten, p. 83 ff.

Despite this, the German Football Association kept the central marketing of television broadcast in § 31 GWB. After the EU Commission had started a procedure against Germany relating to the central marketing of television broadcast of league football matches in Germany, the German Football Association asked the Commission to register the central marketing according to Article 4 I of Regulation 17/62 from the 6th February 1962 in conjunction with Article 81 (3) EC.

7.3.2 The EU - Law

Standard in the EU law before coming into force of the Regulation 1/2003

In the European law there are no regulations which exclude the sport from the application of competition law. Nevertheless, in the European politics and legal practise sport takes a certain special position which arises from the special characteristic features and functions of the sport.⁸⁴ The so-called Helsinki report of the EU Commission, for instance, tells about sport that with the application of competition rules on the sport its specific features must be taken into consideration.⁸⁵ The ECJ ascertains in its judgment in the *Bosman* - case:

“In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.”⁸⁶

⁸⁴ The Commission has already published numerous documents about sport and competition, see insofar http://europa.eu.int/comm/sport/key_files/comp/a_comp_en.html.

⁸⁵ Bericht der EU-Kommission an den Europäischen Rat im Hinblick auf die Erhaltung der derzeitigen Sportstrukturen und die Wahrung der sozialen Funktion des Sports im Gemeinschaftsrahmen vom 10. Dezember 1999; KOM(1999) 644, p. 8.

⁸⁶ EuGH, Urteil vom 15. Dezember 1995, Rs. C-415/93 „Bosman“, Slg. 1995; I-4921, Rz. 106.

Nevertheless, after the jurisdiction of the ECJ the sport falls, by recognition of its special characteristic features, under the competition law of the Community as far as an economic activity of Art. 2 EC is concerned.⁸⁷ The EU Commission appeals in the Helsinki report about Sport to the *Bosman*-judgment and the legitimacy of the special destinations of sport. Hence, in the opinion of the EU Commission, agreements between professional clubs or decisions of their associations, which support these destinations, could be excluded from the rules of competition. Regarding possible exceptions for the collective sales of transmission rights, the advantages for the consumers would have to be taken into consideration as well as the propriety of the restraints of competition in view of the aimed legitimate destination.

To possible exemptions of agreements about the central marketing of television broadcast rights for sport events after Article 81 (3) 3 EC, the EU Commission only gave general statements and reserved itself the draft of guidelines on this subject up to the conclusion of the first pending procedures. In three cases (UEFA Champions League, premier league and German Football Association) an exemption was asked, here to exempt the central marketing of football transmission rights. Up to now the EU Commission has given one exemption in the UEFA Champions League case, however, similar decisions are to be expected for both remaining cases.

In the decision from the 23rd July, 2003 in the Champions League case, the EU Commission affirmed the restraint of competition in sense of Article 81 (1) EC, but saw, differently from the German Federal Cartel Office in its

⁸⁷ See EuGH, Urteil vom 12. Dezember 1974, Rs. 36/74 „Walrave vs. Union Cycliste Internationale“, Slg. 1974, 1405, Rz. 4; Urteil vom 14. Juli 1976, Rs. 13/76 „Donà vs. Mantero“, Slg. 1976, 1333, Rz. 12; Urteil vom 15. Dezember 1995, Rs. C-415/93, „Bosman“, Slg. 1995, I-4921, Rz. 73; Urteil vom 11. April 2000, verb. Rs. C-51/96 „Christelle Delière vs. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union Européenne de judo“ und „Francois Pacquée“, Slg. 2000, 2549, Rz. 41-42; Urteil vom 13. April 2000, Rs. C-176/96 „Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL

statement to this case, all four criteria of Article 81 (3) EC as fulfilled. Against the original registration, the agreements were changed in that way, that several legal packages instead of just one are offered. Thus it should be reached, that the restraints of competition at the television markets are reduced by retention of the advantages accepted by the EU Commission. Regarding the improvement of the production of goods, the EU Commission basically appeals on the reduction of transaction costs by the creation of a "single point of sale". Furthermore the Commission states advantages by the development and maintenance of the brand „Champions League“. On the other hand, the EU Commission did not use the sociopolitical destinations of the sport and the argument of the "Solidarausgleich" for the grounds of the exemption.

To summarize, EU-competition law is fully applicable on the area of sport, as far as an economic activity is concerned. If the intergovernmental clause is fulfilled, which is regularly to affirm in international sport competitions - like in the fore-mentioned cases Champions League and German Football Association - European law will be applicable in future also by the national competition authorities.

vs . Fédération royale belge des sociétés de basket-ball ASBL“, Slg. 2000, 2681, Rz. 32-33.

8 Summary and conclusion: The new standard - Consequences of Regulation 1/2003

With coming into force of the Regulation 1/2003, the special exceptions for certain economic areas existing up to now in the GWB need to be changed.

As shown above, after Art. 3 Regulation 1/2003 the German cartel authorities and courts must apply European competition law to all circumstances which can affect interstate trade directly and compellingly since the 1st May, 2004. The European ban on cartels in Article 81 EC knows no lawful exceptions suitable to the special regulations in the GWB. Because of the duty to the application and the precedence of the European law an adaptation is necessary in the area of the interstate consequences by abolition of special rules. In view of the wide interpretation of the concept of „interstate consequences“ by the ECJ and the Commission almost the whole range of existing special areas is concerned.

Therefore, the special rule for the central marketing of television rights for sport events, § 31 GWB, must be abolished.

Moreover the necessity arises from the precedence of the European law, strengthened by Article 3 of Regulation 1/2003. Because in the European law no special regulation for the area of sports exists, there is no authorization for an independent national exception. After the wide interpretation of the concept of the interstate consequences by the decision practise of the European courts and the practise of the Commission, the marketing of television rights has regularly interstate consequences. Thus the applicability of European law in these cases is not questionable.

National exceptions, which do not correspond to European competition law, therefore run dry in these cases to a great extent.

The central marketing of rights in the television broadcast of according to the statutes carried out sport competitions, organized by sport associations, which are in fulfilment of their sociopolitical responsibility also obliged to promote the youth sport and amateurism and take this obligation into account by an adequate participating in the income from the central marketing of these television rights, are not questioned by the cancellation of the exception regulation in § 31 GWB and the future application of the European competition law.

In the European politics and legal practise, the sport has a certain special position which arises from the special characteristic features and functions of the sport. With the application of the competition rules of the EC Treaty on the sport its specific features must be taken into consideration. The from the European council in Nice accepted statement about the special characteristics of sport emphasizes the necessity to take into consideration the social, pedagogic and cultural functions which are especially typical for the sport.

The protocol declaration (29) to the Treaty of Amsterdam, which stresses the cooperation of sports organizations, underlines once more the social meaning of the sport and the promotion of the amateurism. The rules, which are compellingly necessary for the existence of a sport and the organization of competitions and which are applied objectively clear and not discriminating, do not fall under the rules of competition after the jurisdiction of the European courts and the legal application practise of the Commission. The Commission accepts in its decision practise also the necessity to promote the training of young players, as a legitimate destination of rules. If these rules stand in an adequate relation to the destination, they do not fall under Article 81 EC or are exempt after Article 81 (3) EC.

In the case "UEFA Champions League", the European Commission has determined the principles for the evaluation ("benchmark test") of the central marketing. According to this, the central marketing is basically permitted, if certain conditions are fulfilled. Thus, e.g., the rights are to be split in packages and graduated rights are to be given to the own marketing of the clubs. For the central marketing of the German Football Association-federal league matches the Commission has finally made a similar decision.⁸⁸ Now these principles are to be applied also in other cases with interstate consequences. Thus the earlier - up to 6th GWB novella - stricter view of the German Federal Cartel Office, which was confirmed by the Federal Supreme Court, is no more decisively.

In cases without interstate consequences, the principles developed by the Commission are applying according to §§ 1 following and § 23 GWB. Hence, the central marketing is allowed with the same restrictions, provided that a divergent assessment is not needed because of the specific features of the circumstances. To the background of today's market situation it is doubtful, whether a central marketing of transmission rights, that has supply-sided and demand-sided no cross-border effect in the sense of Article 81 I EC, generally is a perceptible restraint of trade for the purposes of § 1 GWB. Besides, the possibilities of the clubs to carry out an own marketing economically sensibly, are to be taken into consideration as well as the rather locally delimited interest of the buyer of such rights and the small interest in the whole marketing proceeds.

To the backup of the financial compensation between the clubs of different leagues the creation of a competition-juridical exception area was not necessary. The sociopolitical destinations connected with the sport in the youth, amateur and mass sport are not endangered by the application of the rules of competition. The fore-mentioned special characteristics of sport can

also be reached in a competitive system. They are not suitable to justify an exception area. The EU Commission, which refuses the introduction of a general exception in the matter of sport, sees the exemption of the central marketing of sport transmission rights after Art. 81 (3) EC under certain conditions as justified. This corresponds to the interests of the sport associations. Thus there is no reason to keep § 31 GWB.

⁸⁸ Decision by the Commission on the 19th January, 2005 about the central marketing of TV-rights for the German League („Bundesliga“), see IP/05/62.

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10 German competition law (GWB) – Extract

§ 1 Kartellverbot

Vereinbarungen zwischen miteinander im Wettbewerb stehenden Unternehmen, Beschlüsse von Unternehmensvereinigungen und aufeinander abgestimmte Verhaltensweisen, die eine Verhinderung, Einschränkung oder Verfälschung des Wettbewerbs bezwecken oder bewirken, sind verboten.

§ 2 Freigestellte Vereinbarungen

(1) Vom Verbot des § 1 freigestellt sind Vereinbarungen zwischen Unternehmen, Beschlüsse von Unternehmensvereinigungen oder aufeinander abgestimmte Verhaltensweisen, die unter angemessener Beteiligung der Verbraucher an dem entstehenden Gewinn zur Verbesserung der Warenerzeugung oder -verteilung oder zur Förderung des technischen oder wirtschaftlichen Fortschritts beitragen, ohne dass den beteiligten Unternehmen

1. Beschränkungen auferlegt werden, die für die Verwirklichung dieser Ziele nicht unerlässlich sind oder
2. Möglichkeiten eröffnet werden, für einen wesentlichen Teil der betreffenden Waren den Wettbewerb auszuschalten.

(2) Bei der Anwendung von Absatz 1 gelten die Verordnungen des Rates oder der Kommission der Europäischen Gemeinschaft über die Anwendung von Artikel 81 Abs. 3 des Vertrages zur Gründung der Europäischen Gemeinschaft auf bestimmte Gruppen von Vereinbarungen, Beschlüsse von Unternehmensvereinigungen und aufeinander abgestimmte Verhaltensweisen (Gruppenfreistellungsverordnungen) entsprechend. Dies gilt auch, soweit die dort genannten Vereinbarungen, Beschlüsse und Verhaltensweisen nicht geeignet sind, den Handel zwischen den Mitgliedstaaten der Europäischen Gemeinschaft zu beeinträchtigen.

§ 3 Mittelstandskartelle

Vereinbarungen zwischen miteinander im Wettbewerb stehenden Unternehmen und Beschlüsse von Unternehmensvereinigungen, die die Rationalisierung wirtschaftlicher Vorgänge durch zwischenbetriebliche Zusammenarbeit zum Gegenstand haben, erfüllen die Voraussetzungen des § 2 Abs. 1, wenn

1. dadurch der Wettbewerb auf dem Markt nicht wesentlich beeinträchtigt wird und
2. die Vereinbarung oder der Beschluss dazu dient, die Wettbewerbsfähigkeit kleiner oder mittlerer Unternehmen zu verbessern.

§ 22 Verhältnis dieses Gesetzes zu den Artikeln 81 und 82 des Vertrages zur Gründung der Europäischen Gemeinschaft

(1) Auf Vereinbarungen zwischen Unternehmen, Beschlüsse von Unternehmensvereinigungen und aufeinander abgestimmte Verhaltensweisen im Sinne des Artikels 81 Abs. 1 des Vertrages zur Gründung der Europäischen Gemeinschaft, die den Handel zwischen den Mitgliedstaaten der Europäischen Gemeinschaft im Sinne dieser Bestimmung beeinträchtigen können, können auch die Vorschriften dieses Gesetzes angewandt werden. Ist dies der Fall, ist daneben gemäß Artikel 3 Abs. 1 Satz 1 der Verordnung (EG) Nr. 1/2003 des Rates vom 16. Dezember 2002 zur Durchführung der in den Artikeln 81 und 82 des Vertrages niedergelegten Wettbewerbsregeln (ABl. EG 2003 Nr. L 1 S.1) auch Artikel 81 des Vertrages zur Gründung der Europäischen Gemeinschaft anzuwenden.

(2) Die Anwendung der Vorschriften dieses Gesetzes darf gemäß Artikel 3 Abs. 2 Satz 1 der Verordnung (EG) Nr. 1/2003 nicht zum Verbot von Vereinbarungen zwischen Unternehmen, Beschlüssen von Unternehmensvereinigungen und aufeinander abgestimmten Verhaltensweisen führen, welche den Handel zwischen den Mitgliedstaaten der Europäischen Gemeinschaft zu beeinträchtigen geeignet sind, aber den Wettbewerb im Sinne des Artikels 81 Abs. 1 des Vertrages zur Gründung der Europäischen Gemeinschaft nicht beschränken oder die Bedingungen des Artikels 81 Abs. 3 des Vertrages zur Gründung der Europäischen Gemeinschaft erfüllen oder durch eine Verordnung zur Anwendung des Artikels 81 Abs. 3 des Vertrages zur Gründung der Europäischen Gemeinschaft erfasst sind. Die Vorschriften des Zweiten Abschnitts bleiben unberührt. In anderen Fällen richtet sich der Vorrang von Artikel 81 des Vertrages zur Gründung der Europäischen Gemeinschaft nach dem insoweit maßgeblichen europäischen Gemeinschaftsrecht.

(3) Auf Handlungen, die einen nach Artikel 82 des Vertrages zur Gründung der Europäischen Gemeinschaft verbotenen Missbrauch darstellen, können auch die Vorschriften dieses Gesetzes angewandt werden. Ist dies der Fall, ist daneben gemäß Artikel 3 Abs. 1 Satz 2 der Verordnung (EG) Nr. 1/2003 auch Artikel 82 des Vertrages zur Gründung der Europäischen Gemeinschaft anzuwenden. Die Anwendung weitergehender Vorschriften dieses Gesetzes bleibt unberührt.

(4) Die Absätze 1 bis 3 gelten unbeschadet des europäischen Gemeinschaftsrechts nicht, soweit die Vorschriften über die Zusammenschlusskontrolle angewendet werden. Vorschriften, die überwiegend ein von

den Artikeln 81 und 82 des Vertrages zur Gründung der Europäischen Gemeinschaft abweichendes Ziel verfolgen, bleiben von den Vorschriften dieses Abschnitts unberührt.

§ 23 Europafreundliche Anwendung

Die Grundsätze des europäischen Wettbewerbsrechts sind bei der Anwendung der §§ 1 bis 4 und 19 maßgeblich zugrundezulegen, soweit hierzu nicht in diesem Gesetz besondere Regelungen enthalten sind.“

§ 31 Sport

§ 1 findet keine Anwendung auf die zentrale Vermarktung von Rechten an der Fernsehübertragung satzungsgemäß durchgeführter sportlicher Wettbewerbe durch Sportverbände, die in Erfüllung ihrer gesellschaftspolitischen Verantwortung auch der Förderung des Jugend- und Amateursports verpflichtet sind und dieser Verpflichtung durch eine angemessene Teilhabe an den Einnahmen aus der zentralen Vermarktung dieser Fernsehrechte Rechnung tragen.