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Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v. *Elliniko Dimosio*, Judgment of 1 July 2008, nyr.

1. Introduction

The marketing and internationalisation of sporting activities alongside ongoing European integration has put the relationship between the European Union and the sports world under strain. The *Bosman* case marked the start of an intense debate on an appropriate regulatory framework for this evolving relationship.[1] Still, the fact that a sporting context does not hinder the application of EC law forms part of the settled case law of the Court of Justice in the sphere of free movement. While the European Commission and several Advocates General have already regularly dealt with the application of EC competition rules to sport,[2] the Court of Justice recently tackled this issue, with the *Meca-Medina & Majcen* judgment as the most prominent example.[3] In *Meca-Medina & Majcen*, the Court unequivocally stated that a sporting activity cannot automatically be excluded from the scope of EC competition law without first determining whether the rules governing that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or abuse affects trade between Member States.[4] Although the Court in *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v. *Elliniko Dimosio* ("*MOTOE*") refers only briefly to the *Meca-Medina & Majcen* ruling – which was rendered by the Third Chamber –, the present case can be seen as an implicit endorsement of the latter. The fact that the Grand Chamber handled the *MOTOE* case underlines the importance of this approval, and the relationship between sport and EC (competition) law in general. Concurrently, this case presented an excellent opportunity to the Court to clarify the criteria guiding the application of EC competition law to sport.

2. Factual background

MOTOE is a non-profit-making motor sports association having the objective of organizing motorcycling events in Greece. In accordance with the Greek Road Traffic Code (Article 49), MOTOE's application for authorization to organize such competitions was forwarded by the competent minister to the Automobile and Touring Club of Greece (ELPA), a non-profit-making association representing the International Motorcycling Federation, so that it could give the consent required for authorization. Alongside its participation in the Greek State's authorization process, ELPA is involved in the organization of motor sports competitions. For this purpose, ELPA had created a National Motorcycle-Racing Committee (ETHAM) to which it entrusted the supervizion and organization of motorcycling events.

When MOTOE's application was tacitly rejected because the necessary consent by ELPA/ETHAM was not given, MOTOE appealed and questioned the dual role of ELPA. MOTOE submitted that Article 49 of the Greek Road Traffic Code was contrary, first, to the constitutional principle that administrative bodies must be impartial and, second, to Articles

[1] Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASLB* v. *Jean-Marc Bosman*, [1995] ECR I-4921. See also Weatherill, ""Fair play please!": Recent developments in the application of EC law to sport", CML Rev. (2003), 51-93.

[2] Vermeersch, "All's fair in sport and competition? The application of EC competition rules to sport", (2007) JCER, 238-254. On the application of EC competition rules to sport, see also Szyszczak, "Competition and sport", (2007) E.L.Rev., 95- 110.

[3] Case C-519/04 P, *Meca-Medina & Majcen* v. *Commission*, [2006] ECR I-6991. See also Case C-171/05 P, *Piau* v. *Commission*, [2006] ECR I-37.

[4] At paras. 30-33.

82 and 86(1) EC because it enabled ELPA to impose a monopoly on the organization of motorcycling competitions and to abuse that position. The referring Greek Court observed that ELPA's activities are not limited purely to sporting matters since it is involved in sponsorship, advertising and insurance contracts in the context of the organization of its own motorcycling events. Two more observations related to the absence of effective remedy under Greek law for applicants whose application has been rejected and the fact that ELPA's role in the authorization process is not subject to control or appraisal. Against this background, two preliminary questions were referred to the European Court of Justice. First, the referring Court raised the question of whether the activities of a non-profit-making association such as ELPA fall within the scope of Articles 82 and 86(1) EC. Should the answer be in the affirmative, the Greek Court wanted to ascertain whether a rule such as laid down in the Greek Road Traffic Code, is compatible with these Treaty provisions.[5]

3. Opinion of the Advocate General

Advocate General Kokott commenced her opinion by emphasising that both the political level and the Community Courts recognised more than once that sport is not generally excluded from the scope of EC law.[6] In her analysis of the first question, the Advocate General paid great attention to the concept of undertaking in Community competition law and its application in a sporting context. According to Advocate General Kokott, ELPA has the status of an undertaking because its activities are economic in nature in two ways.[7] First, in relation to the organization of motorcycling events, reference can be made to the fact that ELPA's services in this connection are requested and paid for by the participants or their clubs. Second, as regards the marketing of these events, the Advocate General specified that ELPA's services are used by sponsors, advertising partners and insurers and that these events can also be marketed through ticket sales or the sale of television broadcasting rights. The fact that ELPA is a non-profit-making organization, that its services relate to sport, or the fact that ELPA participates in the State's authorization process of motorcycling events does not alter the qualification as an undertaking.[8]

Further on, the Advocate General examined whether ELPA holds a dominant position on the market and whether trade between Member States could possibly be affected. In doing so, she identified two separate relevant product markets: the organization and the marketing of (motor)sports events.[9] Concerning the relevant geographic market, she recalled that the territory of a Member State, as *in casu* Greece, can be regarded as a substantial part of the common market.[10] According to Advocate General Kokott it can be assumed that ELPA holds a dominant position on these markets if ELPA were responsible for the organization of all or at least the vast majority of all motorcycling events in Greece. Although the Advocate General left it to the referring court to make the necessary factual findings in this respect, she started from this assumption in order to ascertain the (potential) effect on trade between Member States.[11] Even if the Advocate General left the final appreciation to the national court, she highlighted several indications of an appreciable effect on trade between Member States. She referred to the international context of sport activities and the fact that the specific situation of ELPA enables it to prevent other organizers from entering the Greek market.[12]

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[5] Judgment, para. 18.
[6] Opinion of A.G. Kokott, paras. 24-27.
[7] Id., paras. 33-36.
[8] Id., para.37.
[9] Id., paras. 55-56.
[10] Id., para. 57
[11] Id., para. 61.
[12] Id., paras. 66-67.

Likewise, the fact that ELPA's association rules provide that commercial advertising at motorcycling events require prior consent from ELPA or ETHAM, might discourage foreign organizers, sponsors, advertising partners and insurance undertakings from engaging in the Greek motorsport business.[13] The Advocate General countered the Greek Government's argument that the possible effects of any anti-competitive behaviour by ELPA on trade between Member States are totally insignificant because only a small number of motorcycling events with international participation are organized in Greece, both from a quantitative and a qualitative point of view. Quantitatively, obstructing the organization or marketing of only one or a few additional motorcycling events might impede the development of a larger market. In qualitative terms, the mere existence of a dominant market position extending over the entire territory of a Member State, may have the effect of reinforcing the partitioning of markets on a national basis whereby any abuse of ELPA's specific situation might contravene the objectives of the single market.

In her analysis of the second question, Advocate General Kokott stipulated that not every exercise of ELPA's right of co-decision in the State's authorization process can automatically be considered as an abuse of its dominant position.[14] She referred to objective reasons, such as safety concerns, the need for uniform rules and an overarching structure, why the authorization of motorcycling events can be refused.[15] However, the Advocate General came to the conclusion that the Greek legislation at stake violates Articles 86(1) and 82 EC because it creates a risk of abuse.[16] The risk that ELPA will abuse its dominant position in exercising its right of consent is particularly high because the Greek authorization process leads to a conflict of interest but also because ELPA's role in it is not subject to any restrictions, obligations or controls.[17]

4. Judgment of the Court

The Court of Justice confirmed the findings of Advocate General Kokott. Even if the Court considered both questions together, to a great extent it followed the same reasoning as the Advocate General. The Court classified ELPA as an undertaking and gave some guidance to the national judge to assess whether ELPA holds a dominant position. In doing so, the Court, unlike the Advocate General, did not explicitly identify two separate relevant product markets but referred to "two types of activities [that] are not interchangeable but are rather functionally complementary".[18] In answer to the concrete question of whether the Greek legislation infringes Articles 86(1) and 82 EC the Court recalled that "the mere creation or reinforcement of special or exclusive rights within the meaning of Article 86(1) EC is not in itself incompatible with Article 82 EC" and that "it is not necessary that any abuse should actually occur".[19] Thereupon, the Court stated that a Member State violates these Treaty provisions when it confers special or exclusive rights which give rise "to a risk of an abuse of a dominant position".[20] According to the Court, ELPA was placed at "an obvious advantage over its competitors".[21] This situation was accentuated by the fact that no consent is required

[13] Id., para. 68.
[14] Id., para. 89.
[15] Id., paras. 90-95.
[16] Id., para. 97.
[17] Id., paras. 97-99.
[18] Judgment, para. 33.
[19] Id., paras. 48-49.
[20] Id., para. 50.
[21] Id., para. 51.

for the authorization of ELPA's events and the lack of any restrictions, obligations or review of ELPA's role in the authorization process.[22]

5. Comment

5.1. The application of EC competition rules to sport - introductory comments

As Advocate General Kokott pointed out correctly, the understanding that sport is not by and large excluded from EC law is an important starting point for evaluating this case. In line with the *Meca-Medina & Majcen* judgment, the Court and the Advocate General structured their analysis along the three central elements of a traditional examination of Article 82 (together with Article 86(1)) EC – the concepts of undertaking, abuse of dominant position and effect on trade between Member States –, rather than holding any discourse on the specific features of sport and whether or not EC law applies. In addition, they tackled the question of whether the contested Greek legislation and the dual role of ELPA could be covered by the exceptions in Article 86(2) EC.

5.2. Sporting bodies as undertakings or associations of undertakings

Both the Advocate General and the Court consider whether the Greek motor sports association can be qualified as an undertaking with great care. As the concept of undertaking entails the first key element to assess whether EC competition law is applicable, this particular attention seems logical. However, it must be noted that this is not the first occasion where a sporting body has been held to be an undertaking or an association of undertakings for the purposes of these rules. Moreover, because the term undertaking was given a broad and a functional interpretation in the Court's case law,[23] it seems evident that sporting bodies can be caught,[24] especially when one takes into account the growing economic dimension of this sector. Already in 1992, in the case on the distribution of package tours during the 1990 World Cup, the Commission held that FIFA, the Italian football federation and the local organizing committee, carried on activities of an economic nature and consequently constituted undertakings within the meaning of Article 81 EC.[25] This was confirmed in several sporting cases. Regarding (football) clubs, the Commission confirmed this *inter alia* in *ENIC* because through their team the clubs supply "sporting entertainment by playing matches against other clubs, usually in the context of a championship. These events are made available against payment (admission fees and/or radio and television broadcasting rights, sponsorship, advertising, merchandising, etc.) on several markets".[26] This viewpoint was confirmed in the *Piau* case.[27] National sporting associations can be both undertakings and associations of undertakings. When these associations carry out economic activities themselves, for instance by selling broadcasting rights or by the commercial exploitation of a

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[22] Id., paras. 51-52.
[23] Case C-41/90, *Höfner* v. *Macrotron*, [1991] ECR I-1979, para. 21.
[24] Jones and Sufrin, *EC Competition Law*, 3th ed. (Oxford University Press, 2007), p. 130.
[25] Distribution of package tours during the 1990 World Cup, IV/33.384 and IV/33.378, O.J. 1992, L 326/31. The Commission came to the conclusion that the parties had infringed Article 81(1) EC for restrictive sales terms for tour packages and thus making it impossible for other tour operators and travel agencies to find other sources of supply. However, since it was the first time that the Commission had taken action on the distribution of tickets for a sporting event, and because the case involved complicating factors in view of safety aspects and because the infringement came to an end with the completion of the 1990 World Cup, the Commission decided not to impose a fine.
[26] COMP/37.806, para. 25.
[27] Case T-193/02, *Piau* v. *Commission*, [2005] ECR II-209, para. 69.

sport event, they are to be considered as undertakings.[28] In *Piau*, the Court of First Instance considered that the national football associations – "groupings of football clubs for which the practice of football is an economic activity" – constitute associations of undertakings.[29] The fact that these associations group both amateur and professional clubs does not alter this qualification.[30] In addition, international sporting associations can be both undertakings and associations of undertakings.[31] In the present case, the Advocate General and the Court focus rightly on the economic dimension of ELPA's activities in order to qualify ELPA as an undertaking.

5.3. Abuse of a dominant position in a sporting context

A second key question to address when analysing the applicability of Article 82 (together with Article 86) EC is whether the concrete undertaking holds a dominant position on the market and if so, whether it abuses that position. To that end, the relevant market(s), both from the point of view of the goods or services concerned and from the geographic point of view, must be defined first before the existence of a dominant position can be examined.

5.3.1. Relevant market

So far, the definition of the relevant market(s) received little attention in a sporting context. Regarding the relevant product (or service) market, a helpful indication was given by Advocate General Stix-Hackl writing extra-judicially in the *Balog* case.[32] When scrutinising the transfer rules, she indicated that there were three interconnected markets.[33] The first is the exploitation market where both clubs and associations act as undertakings and exploit their performances, by selling broadcasting rights for example. The second market is the contest market, "in which the typical product of professional sport is produced: the sporting contest".[34] The third market is the supply market where the clubs "sell" and "buy" players.[35] Although this analysis focused on the transfer rules in football, it seems that for the most part it can be transposed to other major (team) sports. Both in *Meca-Medina & Majcen* and in *Piau*, the Community judges did not elaborate on this. In *Meca-Medina & Majcen*, one might suggest that the contest market was at stake, although this was not explicitly stated. In *Piau*, the Court of First Instance mentioned that the rules in question affected the "market for the provision of services where the buyers are players and clubs and the sellers are agents".[36] Unfortunately, the Court did not grasp the present case to elaborate the concept of relevant product (or service) market in a sporting context. The Court indeed reiterates its settled case

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[28] Joint selling of the commercial rights of the UEFA Champions League, COMP/C.2-37.398, O.J. 2003, L 291/25, para. 106; IV/33.384 and IV/33.378, paras. 52-53; *Piau* v. *Commission*, above n. 27, para. 71.
[29] *Piau* v. *Commission*, above n. 27, para. 69.
[30] Id., para. 69.
[31] IV/33.384 and IV/33.378, above n. 25, para. 47; *Piau* v. *Commission*, above n. 27, para 72. At the same time, an international association can be an association of associations of undertakings. COMP/C.2-37.398, above n. 28, para. 106.
[32] On the day Advocate General Stickx-Hackl was expected to deliver her opinion on the case, the football world and the player came to a settlement and agreed to drop the case. However, she published her point of view in the aftermath of the *Balog* case. See Egger and Stix-Hackl, "Sports and Competition Law: A Never-ending Story?", E.C.L.R. (2002), 81-91. See also Case C-264/98, *Balog* v. *Royal Charleroi Sporting Club ASBL*, removed from the register on 2/4/01.
[33] Egger and Stix-Hackl, above n. 32, 86.
[34] Idem.
[35] Egger and Stix-Hackl, above n. 32, 87.
[36] *Piau* v. *Commission*, above n. 27, para. 112.

law[37] and thus indicates that the fact that sport has some particular features that might distinguish it from other economic sectors, does not mean that there cannot be a market. However, the Court refrains from explicitly identifying one or more concrete relevant product (or service) markets. Instead, the Court concisely refers to the two activities of ELPA: the organization and the commercial exploitation of motorcycling events, which it defines as “not interchangeable but […] rather functionally complementary”.[38] Whereas the Court clearly acknowledges that both activities are not identical, it seems hesitant to make a clear separation. It remains somewhat unclear why the Court prefers this rather blurred description to the finding of two separate relevant markets, as put forward by the Advocate General.[39] Admittedly, the commercial exploitation of sporting events is often related to the organization of it, but there is not necessarily a connection between both. This is not to say that the qualification that the activities are functionally complementary should be taken for the contention that there is only one market. It rather refers to the point that one market might have an influence on the other which is important in the analysis of dominance and of abuse. Regarding the relevant geographic market, both the Court and the Advocate General aptly refer to settled case law to affirm that the fact that while ELPA’s activities are confined to Greece – so that the territory of one Member State constitutes the geographically relevant market – this does not hinder the appreciation of whether ELPA is active on a substantial part of the common market.[40]

5.3.2. Abuse of dominant position versus the ‘practical monopoly position’ of sporting federations

5.3.2.1. The ‘practical monopoly position’ of sporting federations

According to the Court, the concept of a dominant position under Article 82 EC “[…] concerns a position of economic strength held by an undertaking, which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers”.[41] Moreover, “[…] an undertaking can be put in such a position when it is granted special or exclusive rights enabling it to determine whether and, as the case may be, in what conditions, other undertakings may have access to the relevant market and engage in their activities on that market”.[42] It should be noted that most sporting federations in Europe have a monopoly in their sport and can be considered dominant in the market of the organization of sporting activities for their particular sport. In practice, the European institutions have no major problems with this ‘practical monopoly position’. This was plainly illustrated by the 2000 Nice Declaration on sport, where the European Council declared that

“7. […] It recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organizations to organize and promote their particular sports […]. […] 9. These social functions entail special responsibilities for federations and provide the basis for the recognition of their competence in organizing

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[37] Judgment, para. 32, referring to Case 31/80, *L’Oréal*, [1980] ECR 3775, para. 25; Case 322/81, *Nederlandse Banden Industrie Michelin Industrie Michelin* v. *Commission*, [1983] ECR 3461, para. 37; and Case C-62/86 *AKZO* v. *Commission*, [1991] ECR I-3359, para. 51.

[38] Judgment, para. 33.

[39] Opinion of A.G. Kokott, para. 55.

[40] Judgment, paras. 34-35; Opinion of A.G. Kokott, para. 57.

[41] Judgment, para. 37, referring to Case 27/76, *United Brands and United Brands Continentaal* v. *Commission*, [1978] ECR 207, para. 10; Case 85/76, *Hoffmann-La Roche* v. *Commission*, [1979] ECR 461, para. 38; Case 322/81, *Nederlandse Banden Industrie Michelin Industrie Michelin* v. *Commission*, [1983] ECR 3461, para. 30.

[42] Id., para. 38.

competitions. 10. While taking account of developments in the world of sport, federations must continue to be the key feature of a form of organization providing a guarantee of sporting cohesion and participatory democracy".[43]

On the one hand, this is a clear recognition of the central role of sporting federations in the organization of their sport. On the other hand, this recognition is not unconditional. The sporting federations need to take into account national and European law and need to function in a democratic and transparent way whereby they can play a key role but are not endowed with an absolute monopoly position. The judgment in *MOTOE* does not alter this fundamental point of view because it only questions the concrete dual role of ELPA under the concrete circumstances and not the role of sporting federations in general.[44]

On the whole, ascertaining abuse of a dominant position is not evident in a sporting context. A rare example concerns the discriminatory arrangements relating to the sale of entry tickets for the 1998 World Cup in France, where the Commission ruled that the French organizing committee had infringed Article 82 EC.[45] Where regulation and organization vested in a single body leads to significant commercial conflicts of interest, Article 82 EC comes more clearly to the fore.[46] Thus, in the *FIA* case the Fédération Internationale d'Automobile was alleged to have abused its power by putting unnecessary (commercial) restrictions on promotors, circuit owners, vehicle manufacturers and drivers.[47] The Commission closed the file after the parties involved agreed to make some changes, the most prominent change being the limitation of FIA's future role to that of a sports regulator having no commercial interests in Formula One.[48] As the facts in *MOTOE* are not unsimilar to the *FIA* case, one might wonder whether the *MOTOE* judgment is a further endorsement of the requirement that regulatory and commercial power be strictly separated within the world of sport.

The answer is not straightforward. Whereas the Advocate General observes that "[…] the maintenance of effective competition and the ensuring of transparency require a clear separation between the entity that participates in the authorization by a public body of motorcycling events and, when appropriate, monitors them, on the one hand, and the undertakings that organize and market such events, on the other", the Court limits its findings to the peculiarities of this case. This does not give sporting federations a blank check. A general separation between all regulatory and commercial power in all circumstances might be excessive but at least two lessons may be drawn from the judgment in *MOTOE*. First, the case clearly confirms the willingness of the Court in *Meca-Medina & Majcen* to scrutinize sporting activities on their compliance with EC (competition) law. Second, where a sporting federation holds an exclusive right to designate the entities authorised to organize sporting events and to set the conditions under which these events are organized, this power should be

[43] Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, annexed to the Conclusions of the Nice European Council (7,8 and 9 December 2000), Bulletin EU, 12-2000.

[44] See also Weatherill, "Article 82 EC and sporting 'conflict of interest': the judgment in *MOTOE*", special addendum to ISLJ 2008/3-4, 1-11.

[45] Commission decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, Case IV/36.888 – 1998 Football World Cup, O.J. 2000, L 5/55. See also Weatherill, "0033149875354: Fining the Organizers of the 1998 Football World Cup", *E.C.L.R.* (2000), 275-282.

[46] Speech by Mr Mario Monti, Member of the European Commission, responsible for Competition, Competition and Sport the Rules of the game, SPEECH/01/84, 26 February 2001.

[47] Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163 – Notification of FIA Regulations, COMP/36.638 – Notification by Fia/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776 – GTR/FIA & others. O.J. 2001, C 169/5.

[48] Commission closes its investigation into Formula One and other four-wheel motor sports, IP/01/1523, 30 October 2001.

subject to “restrictions, obligations and review”.[49] This seems valid even if this right has not been conferred by the government.

5.3.2.2. Articles 82 and 86(1) EC and the concept of ‘conflict of interest’

Article 86(1) EC is infringed only in conjunction with another provision of the Treaty. In practice, it applies together with provisions that are addressed to Member States, such as the rules on free movement, and with the EC competition provisions that are addressed to undertakings.[50] The jurisprudence of the Court of Justice regarding the application of Article 86(1) EC in conjunction with Article 82 EC, and more precisely the link between the State measure and the breach of Article 82 EC by the undertaking, has been subject to strong variations.[51]

In assessing the concrete breach of Articles 82 and 86 EC, the Court in *MOTOE* applies a severe interpretation of the concept of abuse.[52] According to the Court, a Member State will infringe these provisions not only when the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position but also when the conferral of special or exclusive rights gives rise to a risk of an abuse of a dominant position.[53] Despite this broad definition, the Court seems not to diverge from its former case law.[54] The notion of “conflict of interest” is essential in this connection.[55] State measures that bundle regulatory functions and commercial activities can create a conflict of interest and are therefore contrary to Article 86 EC.[56] The Court in *MOTOE* does not explicitly mention the concept of “conflict of interest” but was clearly inspired by the analysis of the Advocate General on this point. Advocate General Kokott observed that ELPA not only has the legal means to prevent other service providers from entering the Greek market, “[…] but also an economic interest in limiting access to the market by its competitors to its own advantage”.[57] In this context, she referred to the *Raso* case, where the Court did mention a conflict of interest and stipulated that a national law did not merely grant a dock-work company the exclusive right to supply temporary labour to terminal concessionaires and to other undertakings authorized to operate in the port but also enabled it to compete with them on the market in dock services; […] by merely exercising its monopoly it will be able

> “[…] to distort in its favour the equal conditions of competition between the various operators on the market in dock-work services and it is led to abuse its monopoly by imposing on its competitors in the dock-work market unduly high costs for the supply of labour or by supplying them with labour less suited to the work to be done”.[58]

Whereas the Court in *MOTOE* does not mention the *Raso* case, it does refer to cases, such as *ERT* and *GB Inno BM*,[59] that have been qualified in legal doctrine as an application of the

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[49] Judgment, paras. 51-52.

[50] Bellamy & Child, *European Community Law of Competition*, 6th ed. (Oxford University Press, 2008), p. 1042.

[51] Hirsch, Montag and Säcker (Eds.), *Competition Law: European Community Practice and Procedure*, 1st ed. (Sweet & Maxwell, 2008), p. 1289. For a classification of the cases see Edward and Hoskins, “Article 90: Deregulation and EC Law. Reflections arising from the XVI FIDE Conference”, CML Rev. (1995), 157-186.

[52] See also Miettinen, “Policing the Boundaries between Regulation and Commercial Exploitation: Lessons from the *MOTOE* Case”, ISLJ (2008), 13-18.

[53] Judgment, paras. 49-50.

[54] Weatherill, above n. 44, 6. See also Edward and Hoskins, above n. 51.

[55] Jones and Sufrin, above n. 24, pp. 650-651; Whish, *Competition Law*, 6th ed. (Oxford University Press, 2008), p. 230.

[56] Jones and Sufrin, above n. 24, p. 638.

[57] Opinion of A.G. Kokott, para. 98.

[58] Case C-163/96, *Raso*, [1998] ECR I-533, paras. 28-32.

[59] Case C-260/89, *ERT* v. *Dimotiki*, [1991] ECR I-2925; Case C-18/88, *RTT* v. *GB Inno BM*, [1991] ECR I-5941.

"conflict of interest" concept.[60] In this respect, the Court emphasised that equality of opportunity between the various economic operators is essential to guarantee a system of undistorted competition.[61] Interestingly, the Court also made reference to *France* v. *Commission*, where the Court assumed an infringement of Article 28 EC.[62]

In a broader sporting context, the *FIA* case, where the Commission found a "conflict of interest" in that FIA used its regulatory powers to block the organization of races that competed with the events promoted or organized by FIA,[63] is a further example of the fact that the combination of regulatory and commercial power within the world of sport might be disputable under EC competition law. However, by insisting on the need for "restrictions, obligations or controls/review", both the Advocate General and the Court seem to suggest that sporting federations can 'escape' when they apply objective and non-discriminatory criteria, provided their decision-making is transparent and their decisions open for review.

5.4. Effect on Trade between Member States in a sporting context

A last element that needs to be considered when analysing the applicability of EC competition law concerns the effect of the rule or practice in question on trade between Member States. Again, this aspect has received little attention in sport related cases to date. However, the broad definition of this concept – a direct or indirect, actual or potential, influence on the pattern of trade between Member States suffices[64] – seems to pose little problem in the case of sport, a sector that is becoming increasingly international. In the present case, the Court confirmed that limiting the marketing of products to a single Member State is not sufficient to preclude the possibility that trade between Member States might be affected.[65] Such conduct might have the effect of reinforcing the partitioning of markets on a national basis, thereby upholding economic interpenetration.[66]

5.5. No services of general economic interest

In their search to escape from the application of EC (competition) law, sporting federations might find a way out in Article 86(2) EC which provides an exception to the competition rules for the proportionate pursuit of legitimate public interest goals by undertakings.[67] Whereas this possibility has never been put forward in a concrete case so far and whereas it seems rather unlikely that Member States would be willing to take legal action to entrust sporting organizations with these tasks or that sporting federations would be favourable to such a development,[68] it cannot be excluded that, at least in theory, the organization and marketing of sporting events can constitute a service of general economic interest. This can also be deduced from the Advocate's General statement that "[…] the question whether [the organization and marketing of motorcycling events by an association such as ELPA] constitute a service of general economic interest within the meaning of Article 86(2) EC, as the social significance

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[60] Jones and Sufrin, above n. 24, p. 650; Whish, above n. 55, p. 230.
[61] Judgment, para. 51.
[62] Idem; Case C-202/88, *France* v. *Commission*, [1991] ECR I-1223.
[63] Above n. 47.
[64] Case C-475/99, *Glöckner* v. *Landkries Südwestpfalz*, [2001] ECR I-8089, para. 48.
[65] Judgment, para. 42.
[66] Idem.
[67] On the debate on services of general economic interest, see Sauter, "Services of general economic interest and universal service in EU law", E.L.Rev. (2008), 167-193.
[68] Project commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament, "Professional Sport in the Internal Market", Project No IP/A/IMCO/ST/2005-004, September 2005, 82-83.

of sport might perhaps suggest, can be left unanswered". In fact, both the Court and the Advocate General leave the hypothetical question on the possibilities of this provision in relation to sport unanswered as they conclude that Article 86(2) EC is not applicable. Therefore, they make a distinction between the organization and exploitation of the motorcycling events – tasks which were not entrusted to ELPA through an act of public authority – and the power of consent in the authorization procedure – which stems from an act of public authority but lacks economic activity.[69] For the sake of completeness, Advocate General Kokott rightly observes that it is not clear how the preferential right conferred on ELPA is necessary in order for it to organize and market motorcycling events nor how the authorization procedure and the restrictions that go with it could be proportionate.[70]

6. Conclusion

The *MOTOE* judgment confirms that sport as an economic activity is subject to EC law. Concurrently, it confirms that a sporting context does not hinder the application of EC competition rules. On the basis of a traditional analysis of Articles 82 and 86 EC, the concrete finding that the Greek authorization process and the dual role of ELPA are contrary to EC law seems wholly correct. Somewhat remarkably, the Court, and to a lesser extent the Advocate General, barely mention the role of sporting federations, let alone the broader discussion on the relationship between sport and EC law, in their analysis. However, the fact that the Court vigorously restricts its findings to this case and seems even reluctant to elaborate on the role of sporting bodies, is not totally incomprehensible. Three elements can be mentioned in this respect. First, it was not necessary to incorporate these aspects in order to provide the national judge with an answer to his preliminary questions. It is indeed totally unclear how arguments related to the role of sporting federations or the specific features of sport could deter the finding that the disproportionate Greek rule infringes EC law. Second, experiences from the past, where 'incursions from Europe' have been heavily criticized by the sporting world and any statement on the specificities of sport or the role of sporting federations has been eagerly embraced to claim an autonomous status for sport, justify some form of caution. Third, the Court's vigilance is in line with the careful approach of the sport sector, and the role of the sporting federations in particular, by the European institutions in recent years. This is clearly illustrated by the Lisbon Treaty, where for the first time an admittedly limited legal basis for a European sports policy was inserted and, more importantly, the specific nature of sport was recognised only in relation to the Union's (future) sports policy.[71] A further example can be found in the Commission's 2007 White Paper on Sport.[72] Whereas the Commission in its Helsinki Report on sport (1998) had advocated the European Sports Model and the pyramid structure of the organization of sport in Europe,[73] it took a more pragmatic position in its White Paper observing that

"In view of the diversity and complexities of European sport structures it considers, however, that it is unrealistic to try to define a unified model of organization of sport in Europe. Moreover, economic and social developments that are common to the majority of the Member States (increasing commercialisation, challenges to public spending, increasing numbers of participants and stagnation in the number of voluntary workers) have resulted in new challenges for the organization of sport in

[69] Judgment, paras. 44-47; Opinion of A.G. Kokott, paras. 107-111.

[70] Opinion of A.G. Kokott, para. 109.

[71] Consolidated version of the Treaty on the functioning of the European Union, O.J. 2008, C 115/47. On the insertion of sport in the European Treaties, see Van den Bogaert and Vermeersch, "Sport and the EC Treaty: a tale of uneasy bedfellows?", E.L.Rev. (2006), 821-840.

[72] White Paper on sport, COM (2007) 391.

[73] Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework, COM (1999) 644.

Europe. The emergence of new stakeholders (participants outside the organized disciplines, professional sports clubs, etc.) is posing new questions as regards governance, democracy and representation of interests within the sport movement.”.[74]

The key functions of sporting federations are still acknowledged but their role is not absolute. Even if the Court in *MOTOE* does not explicitly elaborate upon this, nothing in the judgment seems to contradict this pragmatic statement.

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[74] White Paper on sport, above n. 72, 12.

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