

Procedural Requirements for state-entrusted special powers- how must the regulators be regulated?

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Relevance of state intervention

- Free movement provisions – Articles 18, 39, 43, 49, 56 EC
 - *Walrave* collective regulators. *Heylens* case study.
 - *Angonese* private parties
 - Prechal and De Vries (2009): Frontier at purely private power
- Competition provisions- Articles 81 & 82
 - Distinction between undertakings and exercise of public law powers
- Prohibition of anticompetitive state action and aids: Articles 86 and 87
 - State action prohibited, but SGEI powers 86(2)

State intervention and competition law: the *MOTOE* case

- Case C-49/07 *MOTOE* (Grand Chamber)
 - Grand Chamber confirms sport is subject to competition law just as other sectors
 - ECJ Avoids considering the notion of ‘abuse’ of a dominant position
 - Avoids considering whether the organisation of events is a SGEI under Article 86(2) EC
 - Judgment based on Article 86(1) and 82 together (Member state liability for causing a situation that is liable to lead to abuse).

MOTOE: facts and context

- Greek law granted ELPA (as International Motorcycling Federation national representative) right to consent to competitions.
- Consent required adherence to ELPA rules. These granted unequal conditions in favour of ELPA (sponsorship, calendar fixtures, etc.)
- A competing organisation, MOTOE, sought but did not receive consent from ETHEAM, a motorcycle-racing committee created by ELPA.
- Both *MOTOE* and *ELPA* are non-profit organisations.

MOTOE: Questions referred

- Do Articles 82 and 86 apply to a legal person such as ELPA where it engages in economic activity?
- Is the Greek law granting powers of consent compatible with Articles 82 and 86 if the power of consent is not ‘subject to restrictions, obligations and review’?

Treaty framework

- Article 82 prohibits ‘abuses of a dominant position’
- Article 86(1): MSs may not enact nor maintain any measure contrary to competition law where it grants special rights to undertakings
- Article 86(2): undertakings providing SGEI are subject to competition law in so far as this does not obstruct performance of duty.
- Grant of rights not abusive *per se*?

What constitutes abuse?

- Dominant position when undertakings can determine whether other undertakings may have access to the relevant market (para 38).
- ECJ avoids considering abuse.
- AG Kokott: co-decision not always abuse (pt93)
 - objectively justified (safety, competitive equality)
 - Public interest in coherent timetabling
 - Compliance with international rules not abuse if they are compatible with competition law
 - Arbitrary refusal in ELPA's commercial interest is abuse (pt 96)

Article 86(2) claims dismissed

- Special regulatory powers were ‘entrusted’, but the economic activities (marketing, organisation of events) were not ‘entrusted’.
- Because not ‘entrusted’, no need to examine whether these are SGEI.
- Conclusion- SGEI always requires express conferral of powers.

What is the standard for a grant of powers that breaches Article 86(1)?

- If Article 86(1) is not *per se* breached by a grant of exclusive rights, then what type of abuse must occur?
- ECJ sees unequal competition between authorising agency and others as problematic
- More importantly, ECJ considers risk of abuse to cause breach of Article 86(1), therefore powers require 'restrictions, obligations and review'
- Compare AG Kokott- maintenance of effective competition requires a clear separation between authorising public body and undertakings organising and marketing the events

Abuse needs not be proven

- A state power enabling this will always be contrary to Article 86(1) if it causes an undertaking to be, even hypothetically, 'led to abuse its dominant position' or 'led to commit such abuses'. No abuse must be proven. (para 49)
- Article 86(1) infringed also if exclusive rights 'give rise to a risk of abuse'

Competing rationales in *MOTOE* for why 'risk' of abuse is enough

- Competition is always distorted when a market actor has the power of determining whether competitors can act on the market (para 51). full separation of commercial and public regulatory powers required.
- Power of consent without 'restrictions, obligations and review' could lead to favouring regulator's events (para 52). regulating the regulator is enough, even where it engages in economic activity.

Two interpretations

- Interventionist interpretation:
 - Full separation must always exist between state-entrusted regulatory powers and economic activities. Conflicts of interest constitute sufficient risk of abuse to cause grant of powers to be contrary to Article 86(1). AG Kokott, and paragraph 51 ECJ.
- Less interventionist interpretation:
 - ‘restrictions, obligations and review’ permit regulatory body to carry out commercial functions. grant of powers to be contrary to Article 86(1). para 52 ECJ
- How far must ‘restrictions, obligations and review’ constitute an *effective* separation of powers?

What may amount to adequate 'restrictions, obligations and review'

- AG Kokott: Undistorted competition requires 'equality of opportunity'. Therefore regulators must be subject to similar rules when they organise events. (point 100)
- Expert advice from authorities can be appropriate, but 'a clear separation' between regulation and participation is required (points 101-2).

‘Restrictions, obligations and review’ (pt 103 AG Kokott)

- Objective, non-discriminatory authorisation criteria
- Must be possible to obtain authorisation without the consent of a competitor where that competitor refuses consent
- Effective legal remedies must be available against the decision (appeal). [Greek government disputes referring court’s finding that no remedies are available]
- Interim measures must be available

Separation of regulatory and commercial functions

- If 'restrictions, obligations and review' require active supervision all bodies that have delegated state powers, is there any regulatory efficiency in delegating state powers?
- Does changing the legal form from a power of veto to a power of consultation substantially diminish the requirement to separate commercial and regulatory powers?
- Does separating regulatory and commercial powers mean sports governing bodies can no longer be funded by direct profits from economic sporting activities?

Practical effects of State-entrusted powers

- Irrelevance of unsettled state of FM law regarding private parties
- Directives not dependent on transposition (notification requirements, for example, and professional standards/qualifications)
- Escape from competition law- but only to the extent necessary for those powers. State may be liable, but not the company under statutory obligations

Reasons to avoid state intervention

- Clearly defined public obligations
- Potential for direct control of body.
Sporting autonomy?
- Not necessarily a defence beyond performance of specific state tasks
- Liability in relation to unimplemented directives

Standards of review?

- Proportionality of restrictions.
- Other general principles.
- From principles to rules?