Review of the Balance of Competences

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Introduction

The European Union (EU) must act within the limits of the powers conferred upon it by the Treaty. Since its inception in 1957, and until the entry into force of the Treaty on the Functioning of the European Union (TFEU) in December 2009, the EU did not possess a competence to operate a 'direct' sports policy. This did not, however, mean that sporting activity fell outside the scope of EU powers in other Treaty areas in which it did have a competence, most notably those governing freedom of movement for workers and competition law.[2] This situation attracted criticism from some sports bodies on the grounds that the specificity and autonomy of sport were being eroded by European laws that were never intended to be applied to sport. The judgments of the European Court in *Bosman* and *Meca-Medin*a attracted particular criticism.[3]

The connection between sporting rules and European law has been largely driven by the commercialisation of the sports sector. However, sport has not only become associated with internal market competences, it is also closely connected to a large number of other EU policy areas including, amongst others: public health policy; education, training and youth policy; equal opportunities and disabilities policy; employment policy; environmental policy; media policy; and cultural policy. The ability of the EU to address these issues through the vehicle of sport has however been constitutionally limited by the absence of a Treaty Article on sport. This has meant that EU action in sport has, historically, lacked status and coherence.

The adoption of Articles 6 and 165 TFEU (the legal basis for the sports competence) raised expectations that the EU would treat sport more sympathetically and it would be able to respond in a more coherent manner to a number of threats and challenges facing both modern sport and the Member States.

Recognising the Specificity and Autonomy of Sport

Evidence suggests that on the question of the sympathetic application of EU law to sport, Article 165 has changed little. Article 165(1) provides that "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function". Whilst it is true to say that this measure requires the EU to take account of the specific nature of sport in the "promotion of European sporting issues" in its actions governed by Article 165, it does not unequivocally establish that the EU *must* recognise the specific nature of sport in the

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[2] In Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405, paragraph 4, the European Court declared that sport is subject to European law "only in so far as it constitutes economic activity".
[3] Case C-415/93 *Union Royale Belge Sociétés de Football Association and others* v *Bosman and others* [1995] ECR I-4921 & *David Meca-Medina and Igor Macjen* v *Commission* (Case C-519/04 P) [2006] ECR I-6991.

exercise of other Treaty competences, such as those governing freedom of movement and competition policy. In other words, Article 165 does not appear to reach 'horizontally' into other Treaty competences. This situation can be contrasted with other Treaty competencies, such as environmental policy, in which a horizontal clause clearly exists. The suggestion that Article 165 insulates sport from internal market laws and therefore amounts to a legal exemption for sport under the Treaty must be rejected. To illustrate, in the sporting case of *Bernard*, the European Court considered the lawfulness of training compensation in professional football. The Court stated that:

> *"[i]n considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken …of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU*."[4]

From the above, it would appear that the Court favoured the orthodox approach of recognising the specific nature of sport when considering whether the restriction on free movement could be justified. Article 165 merely "corroborated" this view. The orthodox approach, has for many years, served the sports movement very well. The jurisprudence of the Court reveals that it is respectful of claims that sport possesses a 'special nature'. For example, in *Bosman* the Court found that,

> "*[i]n 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*".[5]

In *Lehtonen*, the Court accepted that a sportsman's free movement could be restricted through the use of a transfer window because,

> "*[l]ate transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole*".[6]

In *Deliège*, the Court refused to acknowledge that selection criteria in judo amounted to a restriction on the right to provide services on the grounds that such rules were "inherent in the conduct of an international high-level sports event" even if they in fact involved some restrictive criteria being adopted".[7] In *Meca-Medina*, a case much criticised by sports governing bodies, the Court in fact recognised as legitimate the need to "combat doping in order for competitive sport to be conducted fairly", to safeguard "equal chances for athletes, athletes' health", to ensure "the integrity and objectivity of competitive sport" and to protect

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[4] Case C-325/08, *Olympic Lyonnais v Bernard & Newcastle United* [2010], ECR I-02177, paragraph.40.
[5] Case 415/93 *Bosman*, paragraph 106.
[6] Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 54.
[7] Joined cases C-51/96 and C-191/97, *Deliège* v *Ligue francophone de Judo et disciplines Associeés Asb* [2000] ECR I-2549.

"ethical values in sport".[8] These cases pre-dated the entry into force of Article 165 and clearly demonstrate the long-standing willingness of the European Court to recognise the specific nature of sport whilst retaining vigilant interest to ensure that sporting measures that restrict freedom of movement or competition genuinely pursue legitimate objectives and in a proportionate manner.

Status and Coherence of EU Sports Policy

The scope for Article 165 to deliver greater status and coherence to EU actions in sport presents an even more nuanced picture. It has been suggested that many of the challenges facing modern sport, such as: match-fixing; money-laundering; problems connected with the activity of agents; poor governance; doping; child exploitation; and hooliganism can be addressed through co-ordinated measures at EU level. However, Article 165(4) specifically prohibits the harmonisation of national laws rendering that tool somewhat limited. Nevertheless, this does not preclude other harmonising provisions in the Treaty from being employed to achieve the same result. For example: Article 114 TFEU provides a general legal base for harmonising Member States' laws within the context of single market measures; Article 46 enables the EU to issue directives or make regulations setting out the measures required to bring about freedom of movement for workers; Article 83 can be used to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension; and Articles 153-155 can be utilised by social partners to agree a range of measures, including legislation, within the context of a social dialogue committee.

As a tool for tackling some of sports major threats, Article 165 is therefore limited, its legislative reach only extending to providing 'incentive measures'. However, within this scope, Article 165 does allow the EU institutions to fund studies, conferences, seminars, networks and best practice into these major threats and to adopt funding programmes in other areas of common concern such as: social inclusion; health promotion; education and training; volunteering; and the sustainable financing of sport. Until the entry into force of Article 165 TFEU, Member State political cooperation in these areas took place informally outside the formal Council structure. Individual Presidencies would frequently prioritise sport but discussion was restricted to informal meetings of EU Sport Ministers and EU Sport Directors and to *ad hoc* expert meetings on priority themes. Article 165 establishes a more formal and coherent rolling political agenda on these issues and strengthens channels through which the EU enters into dialogue with sports bodies. Article 165 also strengthens the EU's ability to act externally and enter into negotiations and commitments with third countries and international organisations to conclude international agreements.

Conclusion

Article 165 is an important evolutionary, rather than revolutionary, development. Its existence represents a success story for those sports governing bodies who wanted a

[8] Case C-519/04 P *David Meca-Medina and Igor Macjen* v *Commission* [2006] ECR I-6991.

provision in the European Treaty to counterbalance the perceived dominance of internal market values. However, Article 165 does not elevate sporting values to an equal or superior level to those internal market values. From this perspective, Article 165 will not significantly adjust the approach taken by the European Court and European Commission to sports cases. This situation is not, however, damaging to sport as the EU institutions have long been receptive to claims that sport has a special nature. There is also limited scope for Article 165 to be employed by the EU to tackle many of the major issues facing sport, or to tackle the sports related issues, such as health promotion, facing Member States. This is because Article 165 prohibits the harmonisation of national laws, although the Treaty does contain other harmonising provisions that could be employed. Nevertheless, Article 165 strengthens political co-operation between the Member States and contributes to a better shared understanding of the problems facing both sport and the Member States, and an awareness of potential solutions. Article 165 also contributes to greater mainstreaming of sporting issues within and between EU institutions and it also strengthens the EU's role in facilitating dialogue with sports bodies and international organisations.

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