



**Arbitration CAS 2009/A/1788 UMMC Ekaterinburg v. FIBA Europe e. V., award of 29 October 2009**

Panel: Mr Mark Hovell (United Kingdom), President; Mr Michele Bernasconi (Switzerland); Prof. Martin Schimke (Germany)

*Basketball*

*Validity of rules governing the eligibility of clubs for the final stage of a competition*

*Application of non-discrimination EC law principles to Russian cases involving economic activities in the EU*

*Difference between the original request and the request to the CAS*

*Limited applicability of EC law to sports issues of non-economic interests*

*Power of self-regulation of sports authorities for questions related to sport*

*Justification for cases of actual or indirect discrimination*

1. According to the European Court of Justice, the non-discrimination clause in the Communities – Russia Partnership Agreement means that a sporting regulation imposing a quota on non-EU players cannot be applied to Russian nationals legally employed in the EU. This case is authority that non-discrimination EC Law principles may also apply to Russian cases involving economic activities in the European Union
2. A difference between the Appellant's request to the previous instance and the request to the CAS does not in principle affect the admissibility of the appeal, but more the scope of any award that the Panel may deliver.
3. Art. 12 EC Treaty forbids any discrimination whatsoever based on nationality. At the same time, however, it has been held that the prohibition on discrimination does not affect *“the composition of sports teams, in particular national teams”* and will not apply where the rule in question is motivated *“for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only”*.
4. Sports bodies enjoy a wide margin of discretion with regard to the design of sporting formats for the competitions that they organise and, in particular, to ensure that international competitions retain an international character. EU Law does not put into question the power of self-management or self-regulation of sports authorities for questions related to the specific nature of sport. When adopting the rule, the sports' governing body exercises its legitimate right of self-regulation and even if the rule does have certain economic consequences this is not sufficient to call it into question under EC Law.
5. The European Court of Justice allows a justification in the case of actual or indirect discrimination. This is all the more so in the case of assessments made pursuant to



**the rules of associations. Selection rules applied by a sports federation to authorise the participation of professional or semi-professional athletes in an international sport competition inevitably limit the number of participants. Such a limitation does not in itself restrict the freedom to provide services, if it derives from an inherent need in the organisation of the event in question and is not discriminatory. It is therefore necessary to ask what are the objectives, the alternatives, the context and the necessity, of the rules in question.**

Basketball Club UMMC Ekaterinburg (“the Appellant” or UMMC) is a Russian women’s basketball club in the Sverdlovsk region of Russia.

SPARTAK Moscow Region (“the Second Appellant” or “SPARTAK”) is a Russian basketball club in the Moscow region of Russia. The Appellant and the second Appellant are hereinafter referred to as “the Appellants”.

FIBA Europe e. V. (“the Respondent” or “FIBA Europe”) is the association, based in Munich, Germany, responsible for, *inter alia*, organising and running the Euro League Women basketball tournament (ELW).

In the 2007/8 basketball season, the Appellants took part in the ELW.

The ELW is governed by the Respondent in accordance with the FIBA Europe Regulations Governing the ELW (“the ELW Regulations”).

The ELW Regulations for that season contained certain rules (Art 17.1, Note 1 and Art 18.3) which are designed to ensure that the final of the ELW will be played between clubs from two different countries (the “Elimination Rules”).

The Elimination Rules provide for the elimination of clubs in the quarter final play offs and in the final 4, as follows:

*According to Art. 17.1, Note 1 of the ELW Regulations, if there are 3 or 4 clubs of the same nation in the quarter final play offs and they are not scheduled to play each other according to the regular playing mode, they are forced to play each other in order to eliminate each other.*

*Furthermore, according to Art. 18.3, if 2 clubs from the same nation qualify for the final 4, those 2 clubs are forced to play each other in the semi final in order to eliminate each other.*

The Appellants appealed to the Respondent’s Appeals Commission inviting it “to suggest to the Competition Commission of FIBA Europe as soon as possible and in any event not later than January 31 2009, to delete or at least not to apply the provisions 17.1 Note 1 and 18.3 Note 2 of the Euro League Women Regulations 2008”.



The Respondent's Appeals Commission by judgment dated 5 February 2009 adjudicated that "... *Art. 17.1 Note 1 and 18.3 Note 2 of the Euro League Women Regulations 2008 of FIBA Europe, concerning the method to decide about the pairings for the quarter final of Euro League Women is not discriminatory and do not violate the Olympic Charter, so the appeal has to be dismissed*".

In addition, the Appeals Commission of the Respondent concluded its judgment of 5 February 2009 by deciding that the ELW Regulations were valid and ordering the Appellants to pay the costs of that proceeding ("the Decision"). The Decision was notified to the Appellants on 6 February 2009.

On 20 February 2009, the Appellants jointly appealed against the Decision before the Court of Arbitration for Sport (CAS). They challenged the Decision, submitting the following request for relief:

- "(1) That the Decision of February 5, 2009 be annulled and Respondent be ordered not to apply Elimination Rules in the current and/or future Euro League Competitions (as for instance the Art. 17.1 Note 1 and Art. 18.3 of the current ELW Regulations).*
- (2) That the Respondent be ordered to bear all the costs and expenses for the Arbitration proceedings (including fees of the arbitrators, costs of witnesses and interpreters and administrative costs and expenses) for both (i) the current appeal proceedings before the CAS and (ii) the former appeal proceedings before Respondent's Appeals Commission.*
- (3) That the Respondent be ordered to bear all the costs and expenses for the legal representation of Appellants for both (i) the current appeal proceedings before the CAS and (ii) the former appeal proceedings before Respondent's Appeals Commission.*
- (4) That any prayers for relief by Respondent be dismissed".*

On 23 March 2009, the Appellants filed their appeal brief, containing a statement of the facts and legal arguments accompanied by supporting documents and in particular a copy of the ELW Regulations. In the said appeal brief the prayers for relief, as set out above were repeated, save for (1) which changed to:

- "(1) That the Decision of February 5, 2009 by the Respondent's Appeals Commission be annulled and Respondent be ordered not to apply Elimination Rules in the current and/or future Euro League Competitions (as for instance the Art. 17.1 Note 1 and Art. 18.3 of the current ELW Regulations)".*

On 14 April 2009, FIBA Europe filed its answer, with the following requests for relief:

- "(1) The Appeal is rejected.*
- (2) The Appellant has to bear the costs of the appeals procedure and the Respondent's legal fees and other costs related to the present appeal".*

In addition, the Respondent attached a letter from the second Appellant to its answer, declaring it would retract its appeal from the CAS.

By fax letter of 27 April 2009, the Second Appellants' representatives informed the CAS Court Office that "*SPARTAK answered that it indeed lost interest in the proceeding, that it would however refuse to give*



*any explanation for its sudden change of mind. Thus, the Tribunal is herewith informed that SPARTAK withdraws from the proceedings".* The Appellants representatives attached to their fax of 27 April 2009 a fax dated 27 March 2009 from the Second Appellant to their representatives and UMMC stating that *"By this document we would like to inform you that Spartak Moscow Region is withdrawing from arbitration case CAS 2009/A/1788 UMMCC Ekaterinburg & Spartak Moscow Region v/ FIBA EUROPE ..."*.

The procedure then proceeded as *CAS 2009/A/1788 UMMC Ekaterinburg v. FIBA EUROPE*.

On 19 May 2009, upon the direction of the Panel, the Appellant filed a second statement or submission to the CAS. It again changed its initial prayer for relief:

*"(1) That the Decision of February 5, 2009 by the Respondent's Appeals Commission be annulled and that the Respondent be ordered not to apply Elimination Rules in the future Euro League Competition".*

The CAS by way of letter dated 20 May 2009 acknowledged receipt of the Appellant's second submissions and invited the Respondent to submit a second written statement.

On 2 June 2009, the FIBA Europe filed a subsequent submission, in rebuttal to the Appellant's own second submission.

The parties have since the date of the second round of submissions continued to correspond with the CAS Court Office and it has been noted that the Appellant has complaint again to the Appeals Committee of the Respondent in relation to its 2009/10 Season ELW Regulations, which contain the Elimination Rules once again. It has also been noted that that appeal has been stayed pending this decision. Pursuant to Art. R56 of the Code of Sports-Related Arbitration ("the Code"), the Panel has not relied upon or taken into account anything contained within this correspondence.

## LAW

### CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from paragraph 144.3.11 of Chapter XVII of the Respondent's Regulations dated May 2008 ("FIBA Europe Regulations") and Art. R47 of the Code. It is further confirmed by the order of procedure duly signed by the parties.
2. It follows that the CAS has jurisdiction to decide on the present dispute.



### Applicable law

3. Art. R58 of the Code provides the following:

*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

4. The “*applicable regulations*” in this case are the FIBA Europe Regulations. Moreover, the parties agree that the dispute be decided according to the law of the domicile of the Respondent. FIBA Europe having its registered office in Munich, the Panel accordingly holds that the issues to be determined in the present matter must be interpreted in accordance with German Law.
5. The parties do not however agree on the application of European Community Law (“EC Law”).
6. The Appellant refers to the facts that the Respondent is the organiser, director and rule maker of the ELW; with its seat in Munich, Germany, a Member State of the European Union; and that the participating clubs are professional clubs with “*significant economic interests*”, as such the “*Respondent’s activities in organising and ruling the ELW ... constitutes an economic activity within the meaning of Art. 2 EC Treaty*”. The Appellant also refers to the Communities-Russia Partnership Agreement.
7. The Respondent, on the other hand, states that EC Law is not applicable, as the Appellant is Russian and “*Russia is not a member of the European Union and ... Russian legal entities are not entitled to the rights claimed by the Appellants under the European Treaties*”.
8. The Panel agrees that EC Law is applicable to economic activities carried out in whole or in part within the European Union and is relevant to consider the issues to be determined in this matter. The Panel also notes that there is some case law of the European Court of Justice (in particular, case *C-265/03 Simutenkov*) where it was held that the non-discrimination clause in the Communities – Russia Partnership Agreement meant that a sporting regulation imposing a quota on non-EU players could not be applied to Russian nationals legally employed in the EU. This case is authority that non-discrimination EC Law principles may also apply to Russian Cases involving economic activities in the European Union and in the circumstances, the Panel holds it appropriate within the meaning of R58 of the Code to apply EC Law in the present matter, if needed, in particular Art. 81 and 82 EC Treaty.



## Admissibility

9. The appeal was filed within the deadline provided by the FIBA Europe Statutes and as stated in the decision of the Appeals Commission of FIBA Europe. It complied with all other requirements of Art. R48 of the Code.
10. However, the Respondent has challenged the admissibility of the appeal *per se*, on three grounds:
  - (a) *“the Appellants do not pursue an appeal against a decision of FIBA Europe”* and that the Appellant’s request within its appeal to the CAS is *“completely different from their initial request before FIBA Europe”*.
  - (b) *“the Appellants do not have a legal interest in pursuing their appeal any further”*.
  - (c) The Appellant *“committed”* itself *“out of court to no longer pursue their appeal”*.
11. Reviewing each of these three grounds in turn:

- (a) The Respondent, in part B 1 of its answer goes to great detail as to why its Appeals Commission need not have heard the Appellant’s appeal to that body. Whilst the Panel notes those points, nevertheless it is undisputed that the Appeals Commission decided to hear that appeal and to issue the Decision, which is undeniably intended to produce legal effects (on this and on the notion of an appealable decision, see *inter alia* CAS 2004/A/659, CAS 2005/A/899, CAS 2005/A/944, and CAS 2008/A/1633); it also contains the direction to the Appellant to lodge any appeal against that decision to the CAS, which it has duly done. As such the Panel determines there is a valid decision to appeal to CAS against.

The Panel notes the difference between the Appellant requesting the Appeals Commission to *“make suggestions to the Competitions Commission”* compared with its request in this appeal that the CAS *“declares certain provisions of the ELW Regulations for the season 2008/2009 as invalid”*. However the Panel does not believe that this affects the admissibility of the appeal, but more the scope of any award that the Panel may deliver. In addition, it is obvious that the FIBA Europe’s Appeals Commission itself considered the possibility of rejecting the original petition (*“to suggest to the legal commission of FIBA”*) as inadmissible, particularly based on its own lack of jurisdiction or on the inadmissibility of the request (see in particular II 2 of the decision). If the FIBA Europe’s Appeals Commission, despite having made a point of this, emphasizes that it wishes to decide on the merits and – as in the current matter – virtually opens proceedings to judicially review the validity of certain legislation/regulations with the right to appeal to the CAS, then it and the Respondent must abide by this or must be held accountable for this or must submit themselves to this ruling / decision. It is therefore appropriate and cannot be complained of on procedural grounds if the Appellant abides by this and now petitions for a finding of invalidity of the rules at issue here.

- (b) Whilst the Appellant has not requested within its appeal to the CAS any financial compensation nor any attempt to alter the outcome of the ELW competition for the



2008/2009 season, the Appellant has a Decision against it which it seeks to overturn and part of the Decision is the award of costs against it. The Panel has determined that the Appellant does have a legal interest to pursue.

- (c) The Respondent has exhibited (as R15 to the answer) a faxed letter from the Appellant to the Respondent dated 27 February 2009 which states the following:

*“[The Appellant] makes a step of a good-will and stops the process against FIBA-Europe in the Court of Arbitration for Sports ...”.*

The Appellant has put forward the explanation that this was a genuine attempt to negotiate an out of court settlement and that the Appellant’s layman’s use of the word “*stop*” should be read as the legal word “*stay*”.

12. Having reviewed all the evidence submitted and, in particular, the fax, the Panel agrees that this was an attempt to settle the issues, which should not now be held against their ability to proceed with the appeal, such settlement talks having ended.
13. It follows that the appeal is admissible.

### **No hearing**

14. Art. R57 (2) of the Code provides that the Panel may – after consulting the parties – decide not to hold a hearing if it deems itself sufficiently well informed. The Panel advised the parties in the order of procedure that it may render its award on the basis of the parties written submissions. The issue in relation to this matter was extensively debated between the parties in their written submissions and the Panel therefore deemed itself sufficiently informed to decide the case without holding a hearing.

### **Merits of the dispute**

#### *A. General*

15. The Appellant, in its submissions, effectively puts forward two main arguments, firstly the ELW Regulations are discriminatory; and secondly, that they are in breach of EC Law.
16. More specifically, the discrimination is “*a violation of the Olympic Charter, the FIBA General Statutes 2006-2010 and the FIBA Internal Regulations 2008*”. Further the ELW Regulations violate Art. 12, 81 and 82 EC Treaty, i.e. they are discriminatory, distort competition and are an abuse of a dominant position.
17. The Appellant argues there is no justification for the discrimination or for the breach EC Law.



18. The Respondent denies there is any discrimination and that any breaches of EC Law are necessary and any affects are proportionate, in its aim to meet its objective of widening the appeal of Women's basketball in and around Europe by ensuring the final of the ELW competition is always played between clubs from two different countries.
19. In determining these issues, the Panel has to decide the following:
  - (a) are the Olympic Charter, the FIBA General Statutes 2006-2010 and the FIBA Internal Regulations 2008 applicable and relevant here?
  - (b) are the various tests under EC Law met?
  - (c) has there been discrimination under the Charter, these Regulations or Statutes, or under Art. 12 EC Treaty?
  - (d) could Art. 81 and/or 82 EC Treaty be seen to have been breached?
  - (e) if so, then, applying the test in the Judgement of the Court of European Union of July 18 2007, in the matter of Meca-Medina [C-519/04] (referred to as "Meca-Medina Judgment"), what are the objectives behind the Elimination Rules?
  - (f) are there any alternatives?
  - (g) what is the context behind the Elimination Rules?
  - (h) is the affect proportionate to attaining the stated objectives?
  - (i) are the Elimination Rules necessary?
20. Thereby, the Panel will in the following assess separately for each of the possible breaches put forward (discrimination, distortion of competition and abuse of a dominant position, see above para. 39), which legal provisions/grounds are generally applicable, and, furthermore, whether their preconditions are fulfilled.

*B. Specific*

a) Discrimination

21. With regard to the Olympic Charter, the FIBA General Statutes and the FIBA Internal Regulations (together the "General Regulations"):

It has not been disputed by the Respondent that it is bound by and must follow these General Regulations;

Within those General Regulations there are numerous regulations opposed to discrimination: It is the 5th Fundamental Principle of Olympism that "*any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement*"; FIBA's General Statutes (Chapter 1, Art. 1.3) state "*FIBA shall maintain absolute political and religious neutrality and shall not tolerate any form of discrimination, racial or otherwise*"; and in FIBA's Internal Regulations (2008 edition, C 1.1.3) it states "*There shall be no discrimination between participants on the basis of race ... or other grounds*".



In Chapter 1, Art. 3 b) of the Respondent's Bye-Laws, it agrees to "*abide by the FIBA General Statutes and Internal Regulations*" and, whilst there may be less of a direct link between the Respondent's own constitution and the Olympic Charter, the Panel agrees there are clear anti-discriminatory rules and regulations that the Respondent has to follow.

22. With regard to EC Law:

The Panel has stated above that EC Law is applicable and has to be considered in this matter if needed; however, the Panel has to determine whether the specific tests within the Articles of EC Law advanced by the Appellant apply specifically to the Respondent and its Elimination Rules.

Art. 12 EC Treaty forbids any discrimination whatsoever based on nationality. This specific expression of the general principle of equality has also been described as one of the guiding themes of the whole Treaty (cf. LENZ/BORCHHARDT (Hrsg.), EU- und EG-Vertrag, 2006, Art.12 EGV, Rn 1). At the same time, however, it has been held that the prohibition on discrimination does not affect "*the composition of sports teams, in particular national teams*" (Case 36/74 Walrave v Union Cycliste Internationale [1974] ECR 1405) and will not apply where the rule in question is motivated "*for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only*" (Case 13/76 Dona v Mantero [1076] ECR 1333).

In light of the above, the Panel considers that the main question before it is whether there has been any unjustified discrimination, either under EC law or the General Regulations.

Despite the different wording of the FIBA Statutes and Regulations with regards to the provisions on discrimination ("otherwise" and "other grounds") the Panel assumes that the FIBA did not intend to grant a broader protection than national or EC provisions on discrimination.

In this respect, the Panel has noted that sports bodies enjoy a wide margin of discretion with regard to the design of sporting formats for the competitions that they organise and, in particular, to ensure that international competitions retain an international character. A pertinent example was seen in the Mouscron case (Mouscron case, Commission Decision adopted on 3 December 1997) concerning the core organisational format of a sporting competition ("home and away" rule, in the case of international club competitions). In that case, the European Commission confirmed that matters relating to sports competition formats fall outside the scope of EU Law.

This was because the "home and away" rule was part of the national geographical organisation of football in Europe which is not called into question by European Community law and therefore fell within the legitimate scope of discretion of the sports governing body. In that case, requiring a club to play its "home" fixture at a ground located within the territorial boundary of its own national association could not be considered an abuse of UEFA's regulatory powers (Commission press release IP/99/965 of 09/12/1999). In the same case, it was pointed out that EU Law did not put into question the power of self-management or self-regulation of sports authorities for questions related to the specific nature of sport (Mouscron, cit., para. 17). Reference was made to the Opinion of Advocate General Cosmas in the



Deliège case (C-51-96 & C-19/97 (2009) ECR-I-2549), where he had stated that “*the right of self regulation in sport is [...] protected by Community law*” (Deliège, cit., opinion of AG Cosmas, para. 87). It was held that, when adopting the rule, the sports governing body had exercised its legitimate right of self-regulation and even if the rule did have certain economic consequences this was not sufficient to call it into question under EC Law (Mouscron, cit. para. 20).

It also follows that the European Court of Justice (ECJ) allows, within the scope of application of the EC Treaty, a justification in the case of actual or indirect discrimination (see EPINEY A., in: CALLIESS/RUFFERT, *Das Verfassungsrecht der Europäischen Union*, 2007, Art. 12, Rn. 38). This must be allowed even more so in the case of assessments made pursuant to the rules of associations. This arises primarily from the freedom and wide margin of autonomy of associations to establish their own rules and structures, a right which in many legal traditions derives from respective national constitutions and was largely upheld by the ECJ for this reason (see judgement of the Court of First Instance in case T-313/02 Meca-Medina/Majcen with references to case law of the ECJ). In this respect, reference may also be made, again, to the Deliège case, in which the ECJ confirmed that selection rules applied by a judoka federation to authorise the participation of professional or semi-professional athletes in an international sport competition inevitably limit the number of participants. The ECJ found that such a limitation does not in itself restrict the freedom to provide services, if it derives from an inherent need in the organisation of the event in question and is not discriminatory (Deliège, *supra*, para. 62, 64 and 69). Moreover, while the ECJ in Deliège did not apply Art. 81 and 82 EC Treaty, it is likely that the rule in question would also meet the Meca Medina test for Art. 81(1) and 82 EC Treaty as its effects would be inherent in the pursuance of a legitimate objective (proper organisation of the sport event according to certain selection rules) and would not be disproportionate (see discussion further below). It is therefore necessary to ask what are the objectives, the alternatives, the context and the necessity, of the FIBA Rules.

23. The objectives behind the ELW Elimination Rules:

The Appellant points to the Decision and to the Single Judge’s comments that the “*rules only intend to allow the participation of a major number of clubs from different countries ...*” or the “*internationality of the competition*” as the Appellant puts it.

However, the Respondent states that the objective is “*that the final of the ELW must be played between teams of two different countries*”. This is the objective the Panel accepts.

24. Alternatives to the ELW Elimination Rules:

Whilst the Appellant has stated there could be alternatives, none have been forthcoming. The Respondent does suggest there are other means to attain the same objective, but these do appear to distort the competition even further.

The Appellant refers to other sports, in particular football and the UEFA Champions League. The Panel notes that there are “seedings” (albeit built up by club’s previous performances and National Associations’ coefficients), clubs from the same countries are kept apart at earlier rounds and that the final can be, and has been, contested by clubs from the same country. The context behind the objective is considered below, but the Appellant claims that this



alternative model, which would allow clubs from the same country to contest the final, does not reduce the attractiveness of the competition for clubs or spectators.

The Panel accepts the Respondent's view here, that men's football and women's basketball (and in particular the respective sportive competitions) are not comparable and agrees that the alternatives suggested could lead to further distortion, in aiming to achieve the stated objective.

25. The context behind the ELW Elimination Rules:

In the answer, the Respondent has set out in great detail the history of the Elimination Rules, which has not been challenged by the Appellant. The Panel notes in particular:

- (a) These rules have been in existence for many years, at least since the Respondent has existed and copies of the rules since 2004/5 season were exhibited to the answer;
- (b) All rule changes go through the General Assembly, the Competitions Committee and the Board of the Respondent;
- (c) The National Federations affiliated to the Respondent can put forward their representatives to these different bodies and seek to influence the rule making;
- (d) The Russian Federation, which represents the interests of the Appellant, proposed changes to the ELW Competition in 2006/7 season to allow countries to enter up to 4, not 3, clubs to the ELW Competition;
- (e) Those changes were properly considered and part of the consideration was the extension of the Elimination Rules, to maintain the stated objective;
- (f) Since then other motions proposed by the Russian Federation to remove the Elimination Rules have been properly debated and considered by the Respondent;
- (g) The Respondent has stated the objective results in more teams from more different National Federations participating in the Competition;
- (h) The stated objective stops the Competition becoming an extension of one country's own league; and
- (i) The Respondent claims that this objective works for its sport and has also achieved greater interest from spectators.

The Appellant has advanced a mathematical argument which it believes demonstrates the Elimination Rules reduce the "internationality" of the Competition, as opposed to increase it. The Panel, however, notes the stated objective is to ensure teams from different countries contest the final. As such, forcing teams from the same country to play each other will reduce the number of international matches.

26. Is the effect proportionate to attaining the stated objectives?

The Panel has noted the Appellant's submissions regarding the loss of home field advantage, the loss of certain revenues and the loss of chance of perhaps being a losing finalist, as opposed to coming third.



However, the Panel notes the context behind the Elimination Rules and how the pursuit of the stated objective is clearly desired by all other National Federations (as when FIBA Europe considered the Russian Federation's latest motion, it was rejected by all but Russia) and for this sport, believes the effects are proportionate to the achievement of the stated objective.

27. Are the Elimination Rules necessary?

Taking all the above into consideration and the particular nature of a sport that is striving to increase participation and support internationality, the Panel determines that the Elimination Rules are also necessary, which, finally, means that even if the rules in dispute were indirectly discriminatory, they are, in any case, justified.

b) Competition law

28. The European competition legislation does not allow for an unlimited, general or specific exception in the case of the entire area of sports (see Meca-Medina Judgement Rn. 27 f.)

29. Rather, what also must be clarified is whether the factual requirements of the relevant Art. 81/82 EC Treaty are fulfilled.

30. Art. 81 and/or 82 EC Treaty:

Art. 81(1) EC Treaty prohibits *"all agreements between undertakings, decisions 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 ..."*.

Art. 82 EC Treaty prohibits *"any abuse by one or more undertaking of a dominant position within the common market or in a substantial part of it ..."*.

Is the Respondent "an Undertaking"? Whilst the Respondent states in its answer that *"FIBA Europe cannot be considered as an undertaking or a group of undertakings"*, it does not go any further with its arguments here.

Under EC Law an "Undertaking" is not actually defined, but in the ECJ judgement in Klaus Hofner and Fritz Elser v Macroton GmbH (case C-41/90, page I-01979) it is stated *"It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed ..."*.

31. Is the Respondent carrying out an "economic activity"?

Again, in EC Law there is no definition of an "Economic Activity" however, ECJ judgement in Firma Ambulanz Glockner v Landkreis Sudwestpfalz (case C-475/99, page I-8089) it is stated *"Any activity consisting in offering goods or services on a given market is an economic activity"*.

The Appellant points to the facts that the Respondent *"organizes, directs and rules the ELW and awards broadcasting and transmission rights for the ELW. The participating clubs in the ELW are professional entities ... with significant economic interests"*.



The Panel notes that following the ECJ's decision in the above cases and in the Meca-Medina Judgement, it is clear that bodies such as the Respondent are normally now deemed undertakings and seen to be carrying out economic activities and as such, their rules and regulations are subject to examination under EC Law.

32. The Appellant argues that the ELW Elimination Rules bind the participating clubs, which are undertakings themselves, and distort the ELW Competition, as they *"result in unequal terms for the access to the Semi-Final and the Final and thus in a distortion of the competition for such access"*. The Appellant continues *"the distortion caused by the Elimination Rules directly affects the competitive structure of the European Union. The various Clubs participating in the ELW are of different European Countries"*.
33. The Respondent argues there is no distortion, as the participating clubs still play the same number of games, as there is a third place play off, but in the main focuses its arguments on justification of possible discrimination, which is considered below.
34. With regard to Art. 82 EC Treaty, the Appellant argues that *"as sole provider of women's basketball competition in Europe, [the] Respondent has certainly a dominant position within the common market .... The Elimination Rules are a market condition set by an undertaking with a dominant position ..."*.
35. The Respondent points out that there are other competitions in Europe for women's basketball, such as the Central European League and the Baltic League.
36. Art. 81 EC Treaty is aimed at prohibiting collusive, anti-competitive agreements or decisions between or affecting more than one undertaking and Art. 82 EC Treaty more at prohibiting monopolistic behaviour by one undertaking.
37. The Panel believes that the Elimination Rules could be seen to affect other undertakings and to distort the ELW competition and competition between these undertakings. Whilst the number of games may be the same, each club's aim is to win the ELW Competition, and to alter the draw at the late stages can lead to distortion. The Panel also feels the Respondent is in a position to set the ELW Regulations, which the participating clubs have to follow. Whilst the Respondent's decision making committees are elected from the National Federations it represents, once constituted they are in a dominant position to the clubs participating in the ELW. Further, whilst there are other competitions, this appears to be the main one on the European stage. The article does not prohibit an undertaking being in a dominant position, only the abuse of that position. The Panel notes that the Respondent should not allow its rules to impair genuine undistorted competition in the common market, which it feels the Elimination Regulations could be seen to do. As such, the Panel believe Art. 81 and 82 EC Treaty are relevant to this matter.

(a) Art. 81 EC Treaty

38. The Panel notes that, according to the Meca-Medina Judgment, a sports organizational rule may be subject to the following test, namely: *"the compatibility of rules with the Community rules"*



*cannot be assessed in abstract. Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Art. 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives ... and proportionate to them”.*

39. The context in which the decision of the Respondent was taken or produces its effects and in particular its objectives were held by the Panel in detail already under paras 24 and 25 above. Reference is made to the Panel’s findings. Furthermore, in the context of Art. 81 (1) EC Treaty the Panel emphasizes that a certain restriction on competition is inherent in the pursuit of internationality of women’s basketball, because internationality can only be preserved, if the supremacy of one nation can be avoided. However, as discussed in detail in para. 26 above, these restrictive effects must be considered as proportionate in the light of Respondent’s stated objective.
40. Apart from these findings, the Panel considers the neutrality of the restriction at hand with regard to competition. The ECJ held agreements to be neutral in the light of Art. 81 (1) EC Treaty, which do contain mere side-arrangements required for the achievement of a main purpose, which is neutral in the context of competition. (SUMMERER TH., in: Praxishandbuch Sportrecht, S.632, Rn. 188) Again, this exception requires a proportionate measure in comparison to its effect. (SCHWARZE/HETZEL, Der Sport im Lichte des europäischen Wettbewerbsrechts, EuR 2005 Heft 5). The proportionateness of the Elimination Rules has been held by the Panel under para. 26 above. Furthermore, the main purpose of the ELW rules is the provision of an orderly framework for the European Women’s Basketball organised by the Respondent. This main purpose includes as a matter of fact the safeguarding of Respondent’s economic interests, which is required for the survival of European Women’s Basketball organised by Respondent and for the fulfillment of its objectives. Thus, the ELW rule in question which aims at preserving internationality in the sport serves as an auxiliary measure for the pursuit of the main purpose, which is neutral with regard to competition.
41. Finally, when weighing the interests of Appellant and Respondent the Panel notes that preserving the internationality of the tournament serves as an advantage for the Appellant as well, which benefits from the attractiveness of the tournament and the sport in general resulting in financial profits.
42. The applicability of this exception in the case in question, however, does not have to be decided by the Panel. In any case, the possible restriction on competition is justified under Art. 81 (3) EC Treaty. It provides that the restrictions of Art. 81 (1) EC Treaty are not applicable to resolutions of associations of undertakings, which contribute to the promotion of the economic progress, while allowing consumers a fair share of the resulting benefit and without imposing restrictions on the partaking undertakings which are not essential for the realisation of these aims.



43. The possible restriction, as outlined in detail above under paras 24 to 26, aims at preserving the character of competition and provides for this purpose a measure which is adequate, required and proportionate.  
  
(b) Art. 82 EC Treaty
44. Art. 82 EC Treaty requires the abuse of a monopolistic position. Whether an abuse can be held in the case in question, must not be decided, because again, a possible abuse can be justified by objective reasons including the particularities of sports to the extent the measure taken is adequate, required and proportionate (HEERMANN P.W., Anwendung des europäischen Kartellrechts im Bereich des Sports, WuW 2009, 489, 497).
45. The Panel has already elucidated these issues in detail above.
46. Finally, also the opinion has been expressed amongst legal scholars to apply the above-mentioned test taken from the Meca-Medina Judgment in relation to Art. 81 (1) EC-Treaty to Art. 82 EC-Treaty as well (HEERMANN P.W., Anwendung des europäischen Kartellrechts im Bereich des Sports, WuW 2009, 489, 498). This test, however, has been applied by the Panel in the context of Art. 81 (1) EC Treaty and decided in favour of Respondent.
47. In conclusion, the Panel dismisses the Appellant's appeal.

#### **The Court of Arbitration for Sport rules:**

1. The appeal filed on 20 February 2009 by Basketball Club SPARTAK Moscow was withdrawn on 27 April 2009.
2. The appeal filed on 20 February 2009 by Basketball Club UMMC Ekaterinburg is dismissed.
3. The decision of the FIBA Europe's Appeal Commission of 5 February 2009, is upheld.
4. (...)
5. (...)
6. All other motions or prayers for relief are dismissed.