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Compatibility of Selected ATP Rules with EU Economic Law

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1 Introduction

Sports governing bodies (SGBs) are normally entities in a position of regulatory monopolies that simultaneously occupy the dominant position on the organisational market for their sport. The conflict of interest created by such conflation of regulatory and commercial functions enables them to use their regulatory powers to protect their commercial dominance by imposing various market restrictions on actual and potential commercial rivals, players and investors. Unlike many other sports, the restrictive regulatory rules that govern professional tennis have never been tested under the European Union's competition and free movement laws. The reasons for this can be traced back to the culture of compliance resulting from the inadequate governance standards, including issues with representation, transparency and accountability. The same reasons are the likely culprit behind the adoption and maintenance of Association of Tennis Professionals (ATP) restrictions on the economic activity of some groups of stakeholders in the tennis industry. Such regulatory restrictions emanating from SGBs are not necessarily illegal in the EU law order: the analytical framework supplied by the *Meca-Medina* case in competition law,[1] and the functionally equivalent *Gebhard* case[2] concerning freedom of movement, can be utilised by private regulators to defend their prima facie illegal rules, rendering them compliant if they satisfy certain requirements. To benefit from these judicially constructed justifications, rules that impede economic

[1] *David Meca-Medina and Igor Majcen* v. *Commission*, Case C-519/04 P, EU:C:2006:492.
[2] *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, EU:C:1995:411.

activity must be intended for the attainment of legitimate objectives in the public interest, inherent in, and proportionate to those objectives.

This chapter will test two distinct ATP rules for their compliance with EU competition law and free movement as set out in the Treaty on the Functioning of the European Union (TFEU or the Treaty) and elaborated in the jurisprudence of the Court of Justice of the European Union (CJEU or the Court). They include rules and practices that restrict access to the market for tournament organisers and therefore hinder additional commercial opportunities for players, and discriminatory distribution of wild-card entries for the professional tennis tournaments. Before diving into the analysis, we will first address relevant governance issues to briefly explain the regulatory environment that enabled the adoption of the restrictive rules in the first place. The applicable legal framework and the main case law will then be detailed and lead into the discussion on the legality of the two selected ATP rules.

2 Good Governance Standards in Light of EU Law and Policy

Monopolistic private regulation stands in contrast to the competitive private regulation in which multiple private regulatory schemes compete for members on the basis of price and quality. Tennis belongs to neither of these categories. It is governed neither by a single global regulator, nor multiple regulators competing for members on the same segment of the market. As commented by Begović, 'global tennis governance resembles a network rather than a vertical-based organizational structure'.[3] The ATP, Women's Tennis Association (WTA) and the International Tennis Federation (ITF) have split the areas of regulatory competence and market among themselves, but closely cooperate on issues such as the international tennis calendar, ranking system and criteria concerning entry to tournaments. The European Council recognised the independence of SGBs and their right to organise themselves through appropriate associative structures in the way they see fit.[4] However, this right is not unfettered: in EU sports law and policy, it is conditional upon respect for law and principles of good governance, including transparency, democracy, accountability and proper representation of all affected

[3] For more details, see Chapter 8 of this volume.

[4] 'Declaration on the Specific Characteristics of Sport and Its Social Function in Europe, of which Account should be taken in Implementing Common Policies', Doc. 13948/00, Annex to the Presidency Conclusions, Nice (hereinafter, 'Nice Declaration').

stakeholders.[5] The European Union's emphasis is therefore not on the form of the organisational model, but on the standards of governance that exist within the chosen model in its internal dimension, and the respect for law in its external dimension.[6]

One of the very central aspects of any governance structure is the composition of its main decision-making boards. It is surprising that there are no (publicly available) rules specifying the composition, procedure and powers of the various ATP bodies. When it comes to tennis governance, the lack of transparency surrounding deliberations and agenda of the decision-making bodies makes any independent governance report, and therefore any criticism of the system, difficult. This may well be one of the reasons for the chronic lack of external scrutiny by the media and certainly explains why many players do not truly understand the tennis governance ecosystem and willingly accept the rules that might be working to their own detriment. The reference to their 'privilege' instead of right to participate and vote in the ATP, as enshrined in Rule 1.21 of the ATP Rulebook, is illustrative of the role they are assigned to play in the governance of their sport. In the ATP, while players are its most important stakeholders, they do not have a decisive influence. The ATP Players Advisory Council, which consists of nine current players, a coach and an alumni player, is given a consultative rather than a decision-making role.[7] This is seemingly compensated by the fact that the Council has the power to elect its representatives to the ATP Tour Board of Directors. The Board of Directors is composed of all-white male members. It consists of four player representatives and four tournament representatives, and in case of a voting tie between these two groups, the Chairman casts a decisive vote.[8] The current Chairman of the ATP, Andrea Gaudenzi, also serves on the Board of Directors of the ATP

[5] See Commission Staff Working Document, 'The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport', COM(2007) 391 final, para. 4.1, and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, 'Developing the European Dimension in Sport' COM(2011) 12 final (18 January 2011).

[6] Katarina Pijetlovic, 'The European Football Competition Model (under Stress)' in Robby Houben (ed.), *Research Handbook on the Law of Professional Football Clubs* (Edward Elgar, 2023), 66.

[7] See 'ATP Announces Player Advisory Council for 2024', available at: www.atptour.com/en/news/2024-player-advisory-council.

[8] Previously, there were three player representatives on the Board: a former tournament director, former executive and agent at IMG, and one former tennis player who worked as a tennis commentator. This entrenched the tournament dominance at the ATP.

Media (the global sales, broadcast production and distribution arm of the ATP World Tour rights) and the ATP Data Innovations. The latter is a joint venture between the ATP Tour and ATP Media initiated by Gaudenzi in his first term as ATP Chairman, to manage and commercialise data including betting, media and performance. This represents a glaring conflict of interest in favour of the tournaments under the aegis of the ATP Tour Board of Directors.

Finally, it must be noted that the top players, as well as players from Europe and North America, are overrepresented in the ATP Players Advisory Council, while other groups are significantly underrepresented. An alternative design idea for the governance of men's tennis is to separate the tournament and player representative bodies altogether and engage in collective negotiations between the two parties, with equally strong bargaining positions.[9]

Whereas the EU economic provisions do not directly address the internal structure of the undertakings, the external economic effects of the rules governing the internal dimension of private regulation are subject to competition law scrutiny.[10] The poor governance standards in either case usually produce unfair or badly designed regulatory measures that negatively affect the economic activity of some of its participants. Against this background, we will now turn to the organisational market and applicable TFEU provisions and jurisprudence before evaluating the compliance of the two selected ATP rules with the legal demands set out therein.

3 Access to the Organisational Market for Rival Tennis Tours under Competition Law

3.1 Blocking Rivals from Accessing the Organisational Market

The organisational market in sports is important in terms of economic opportunities for investors, athletes and organisers alike. It consists of the market for organisation of sporting events that is connected to the upstream market (i.e. the supply market composed of everything and

[9] The establishment of the Professional Tennis Players Association (PTPA) is a good first step towards such a structure – see www.ptpaplayers.com.

[10] The biased board structures contributed to the Court's finding of illegal restrictions in *API – Anonima Petroli Italiana SpA and Others* v. *Ministero delle Infrastrutture e dei Trasporti and Others*, Joined Cases C-184/13–C-187/13, C-194/13, C-195/13 and C-208/13, EU:C:2014:2147, against a transport regulator.

everyone required to stage the competition) and the downstream market (i.e. the market for the exploitation of sporting rights through the sales of broadcasting and media rights, sponsorship rights, ticketing and merchandising).[11] It is worth emphasising that only the services of top-ranked athletes are not substitutable – they belong to a segment of the service market with a very low degree of cross-elasticity. The governing bodies that fulfil a dual function of being both regulators and organisers of competitions are in a position to block the entry of rivals to the organisational market by adopting a number of restrictive regulatory measures.

There are essentially three discernible methods.[12] One method is to make an entry to the market conditional upon obtaining the prior approval of the governing body.[13] Such approval is usually very difficult to obtain on paper or in practice, and even the mere existence of an improperly designed prior authorisation system can discourage any potential competitor from applying. The second method is to adopt the restrictions intended to block a competitor from accessing the supply market. Restrictive regulatory measures can be addressed to players and officials, threatening them with severe sanctions (such as fines or suspensions) if they join any unapproved alternative competition, which is usually enough to dissuade them from participating.[14] There is not much that SGBs can legally do if the alternative competition is organised in accordance with law and does not endanger any legitimate sporting objective of public interest, so this method may be viewed as a safety net for SGBs designed to block any 'rebel' organisers who decide to ignore the prior authorisation requirement. SGBs have control over uniform international ranking systems and point awards, and any competition that is not integrated into that system will face additional difficulties in attracting athletes. Finally, blocking access to the exploitation market can be achieved in many ways, chiefly by using both regulatory and commercial power. Governing bodies usually set the international calendar and

[11] Alexander Egger and Christine Stix-Hackl, 'Sports and Competition Law: A Never-Ending Story?' (2002) 23 Eur Comp L Rev 81–91, at 85.

[12] Katarina Pijetlovic, 'European Model of Sport: Alternative Structures' in Jack Anderson, Richard Parrish and Borja Garcia (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar, 2018), 332–4.

[13] For an illustration, see *European Super League* v. *SL* v. *Fédération internationale de football association (FIFA) and Union of European Football Associations (UEFA)*, Case C-222/21, EU:C:2023:1011, discussed below.

[14] For an illustration, see *International Skating Union* v. *European Commission*, Case C-124/21 P, EU:C:2023:1012, discussed below.

are in a position to reserve attractive venues and broadcasting slots for their own competition. In the *FIA* case,[15] the regulator prohibited promoters from using circuits for races that presented a competitive threat to Formula One, and broadcasters were subjected to a fine in the amount of 50 per cent of their agreement if they aired a rival race.

3.2 Applicable EU Legal Framework

When private regulators engage in market-blocking practices, this necessarily raises legal concerns from the point of view of EU competition law, in particular Articles 101 and 102 of the TFEU on the prohibition of cartels and abuse of dominant market position, respectively. Any agreement between two or more undertakings[16] can be caught within the scope of the prohibition of Article 101(1) of the TFEU if it affects trade between EU Member States and has 'as its object or effect the prevention, restriction or distortion of competition' on the market. The concept of undertaking is interpreted broadly and includes sports associations such as the ITF and ATP. In addition to agreements, unilateral decisions and practices of the undertakings are also included in the scope of Article 101(1) of the TFEU to prevent them from evading competition rules on account of the form (i.e. a collective structure) in which they coordinate their conduct in the market.[17] Article 102 of the TFEU that prohibits abuse of dominant position on the market is aimed at the unilateral conduct of dominant undertakings. Sports associations not only commercially dominate the organisational market, but also control entry to it via their private regulatory powers. The conflict of interest brought about by such conflation of regulatory and commercial powers is not per se illegal under EU law; rather, there exist specific legal parameters under which such regulatory power can be exercised.

The formation of cartels and abuses of dominant position that constitute prima facie breaches of competition law may escape the designation of illegal restrictions on economic activity if they satisfy the conditions of

[15] Notice published pursuant to Art. 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 and Others (2001/C 169/03).

[16] Defined as any entity engaged in economic activity, regardless of its legal status and the way in which it is financed. See *Höfner and Elser* v. *Macotron GmbH*, Case C-41/90, EU:C:1991:161, at para. 21.

[17] Opinion of Mr Advocate General Léger delivered on 10 July 2001 in *Wouters and Others* v. *Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2001:390.

the *Meca-Medina* test. Accordingly, any prima facie cartel or abusive measure will not breach competition law if it is adopted to attain a legitimate objective in the public interest (as opposed to private commercial interests); is inherent in the pursuit of the said objective; and is proportionate (i.e. it is capable of attaining the said objective and there are no less restrictive means available).[18] The legitimate objectives of sporting rules are usually perceived as necessary for the 'organisation and proper conduct of competitive sport',[19] such as the protection of athletes' health, the safety of spectators and participants, training and recruitment of young players, integrity of sport (e.g. match-fixing), ensuring a uniform and consistent exercise of a given sport, providing equal opportunities for all athletes, etc. The broad *Meca-Medina* test was applied to the rules of sports associations that control access to the organisational market in the judgments rendered in *European Super League* (*ESL*) and *International Skating Union* (*ISU*) in December 2023 by the CJEU. Prior to these two cases, the matter was addressed at EU level[20] only by the largely outdated EU Commission's *FIA* decision,[21] adopted prior to *Meca-Medina*, and the Court's ruling in the *MOTOE* case, decided under Article 106 of the TFEU, in conjunction with Article 102.

In *MOTOE*, the Court elaborated on the governance standards expected of SGBs that operate a prior authorisation system and simultaneously participate as undertakings on the organisational market. Because such conflict of interest allows private regulatory monopolies in sport to 'distort competition by favouring events which they organise or those in whose organisation it participates',[22] the Court's presumption was against the intent of SGBs in their role as market gatekeepers. In other words, the conflated regulatory and commercial functions afford a high degree of probability that SGBs will use their regulatory power to favour own events by, for instance, imposing discriminatory licensing terms, blocking third parties from access to the organisational market or

[18] *Meca-Medina*, at para. 42.

[19] Commission Communication, 'Developing the European Dimension in Sport', at para. 4.2; and Commission Decision of 8 December 2017 in *International Skating Union's Eligibility Rules (ISU)*, Case AT.40208, (2017) 8240 final.

[20] At the Member State level there were relevant decisions by national courts and competition authorities in pursuit of the enforcement of TFEU, Arts 101 and 102.

[21] While the restrictions identified in *FIA* remain relevant today, it is outdated for administrative remedies and justification purposes and will not be addressed further.

[22] *Motosykletistiki Omospondia Ellados NPID (MOTOE)* v. *Elliniko Dimosio*, Case C-49/07, EU:C:2008:376, at paras 51–2.

rendering such access commercially unattractive. The Court's presumption here is sound: empirical evidence strongly suggests that in the conflict of interest between safeguarding public interests and private commercial interests, commercial considerations will ultimately shape the actions of private regulators.[23] The *MOTOE* judgment therefore placed emphasis on procedural safeguards in the exercise of SGBs' gatekeeping functions, highlighting that the power of prior control must be made subject to 'restrictions, obligations and review'. A risk of abuse of regulatory power created by the conflation of regulatory and commercial functions will only be accepted insofar as SGBs are subjected to an appropriate standard of control.

ISU[24] involved two Dutch professional speed skaters who launched a challenge against the ISU eligibility rules.[25] The rules provided that skating or officiating in a non-authorised event rendered a person ineligible to participate in ISU activities and competitions up to a maximum period of one's lifetime, including the ISU Congress, the ISU events (such as the ISU World Cup and the ISU Speed Skating Championship), Olympic Winter Games, and other competitions, exhibitions and tours within the purview of the ISU. The threat of lifetime bans was enough to dissuade complainants and all other skaters from participating in alternative Icederby competitions that offered attractive financial packages and other benefits. Unable to secure skaters' services, Icederby was forced to abandon the organisation of its competitions.[26] Following the legal challenge before the EU Commission by the speed skaters, the ISU revised its rules to impose a sliding scale of sanctions, but the changes were cosmetic and inadequate to address competition concerns.

Not surprisingly, the ISU lost the case. In applying the *Meca-Medina* test, a series of legitimate objectives were put forth by the ISU, including protecting the integrity of speed skating from the risks associated with betting, the protection of health and safety in an inherently dangerous sport, the protection of the good functioning of the international calendar and the protection of uniform rules of sport. However, the specific content of the ISU eligibility rules backed up by severe sanctions

[23] Tim Bartley, *Rules without Rights: Land, Labor, and Private Authority in the Global Economy* (Oxford University Press, 2018).

[24] The *ISU* complaint was first filed before the EU Commission (administrative enforcer), the decision of which was appealed before the General Court (lower EU-level court) before finally being appealed in the CJEU ('the Court' – the supreme EU court).

[25] ISU General Regulations (2014), Rule 102(2)(c).

[26] *ISU*, Case AT.40208, at paras 67–9.

predestined them to fail the inherency requirement for the purposes of the *Meca-Medina* test. Even if they had been deemed inherent, the penalties imposed on skaters, including a five-year ban, were bound to fail for being 'manifestly disproportionate', particularly in light of the short careers of professional skaters.[27]

After the Court's judgments in *MOTOE* and *ISU*, the results of the European Super League (ESL)[28] legal challenge against UEFA were largely predictable. Article 49 of UEFA's Statutes[29] endowed UEFA with the sole jurisdiction to organise and abolish cross-border competitions in Europe, while all other competitions required its prior approval. The dispute ensued when UEFA refused to authorise a semi-closed ESL competition and threatened the participating clubs with bans from their lucrative domestic competitions. This threat was sufficient to block the ESL project.[30] UEFA's status as a regulatory body with power to exercise gatekeeping functions at the entry point to the organisational market in European football was confirmed by the Court as legitimate. The idea of leaving the public interests in the hands of private commercial entities, such as ESL, that have no responsibility over the sport was never seriously entertained by the Court – managing SGBs' conflict of interest by imposing the proper standards of governance in the exercise of their regulatory/gatekeeping functions was always the preferred option. In *ISU*, the General Court confirmed that the licensing requirements imposed by SGBs through a prior authorisation system must be clearly defined, non-discriminatory, objective, transparent, verifiable, reviewable and proportionate, and must be capable of ensuring effective access to the relevant market for the organisers of alternative events.[31] In *MOTOE*, the Court insisted that a system of undistorted competition can be guaranteed only if equality of opportunity is secured between all economic operators on the market.[32]

[27] *International Skating Union* v. *European Commission (ISU)*, Case T-93/18, EU:T:2020:610, at paras 92–3.

[28] *ESL*.

[29] UEFA Statutes (2024), available at: https://documents.uefa.com/v/u/07zyuoc_69TV_sHbFYvA2w.

[30] Even though other reasons were publicly advanced by the clubs ('we listened to our fans'), it was UEFA's threats and UK government interference that made the difference. Fan-based official opposition to ESL was publicly known prior to the ESL short-lived breakaway attempt.

[31] *ISU*, Case T-93/18, at paras 88, 118 and 129. See also *Ordem dos Técnicos Oficiais de Contas*, Case C-1/12, EU:C:2013:127, at para. 99.

[32] *MOTOE*, at para. 51.

The principles set out in this line of jurisprudence were confirmed and applied in the *ESL* case. Accordingly, UEFA was criticised for not having a procedural and substantive framework for its system of prior control, and for enforcing Article 49 of its Statutes through equally unpredictable and arbitrary sanctions, which rendered the system incompatible with EU competition law requirements. Apart from the obligation in Article 49 to obtain UEFA's prior approval, no guidance was provided to third-party organisers on how to submit the application; how many months in advance it should be submitted; what requirements should the aspiring third-party organisers fulfil to get the approval; what the sanctions for non-compliance are; and many others. Properly developed frameworks with a clear and complete set of rules serve as a safeguard that should, at least in theory, eliminate the risk of abuse of dominant position and arbitrary decisions. A notable novelty of the *ESL* judgment was confining the scope of the *Meca-Medina* justification and making it available only for those rules that restrict competition 'by effect'. For more severe 'by object' restrictions under Article 101 of the TFEU and equivalent rules which 'by their very nature' breach Article 102, only economic efficiency defence is available to SGBs. This is the category in which the Court placed UEFA's inadequately designed prior authorisation system and therefore limited the defences available to economic efficiency arguments.[33]

3.3 Rules 1.07, 1.14 and 8.05A(2)(e) of the ATP Rulebook

After briefly discussing the applicable legal parameters in EU competition law, it is not difficult to discern a number of potential legal issues in the manner that the ATP controls the organisational market in men's professional tennis. Rules 1.07 and 1.14 of the ATP Rulebook[34] are ostensibly designed with the purpose of protecting the commercial value involved in the ATP's own competitions by making it impossible for an alternative tour to appear on the market. Rule 1.07C designates top 30 players in the ATP rankings as 'commitment players'. The commitment for these players relates to obligatory participation in all of nine ATP Tour Masters 1000 tournaments, at least four ATP Tour 500 tournaments, one of which must be entered following the US Open,

[33] *ESL*, at paras 183–8.

[34] See 2024 ATP Official Rulebook, available at: www.itftennis.com/media/11553/2024-rulebook-atp.pdf.

and the Nitto ATP Finals (applicable only for top 8 players).[35] It is further clarified that the Monte Carlo Masters 1000 will be included in the minimum requirements for the ATP 500 category for commitment purposes. Should a player fail to comply with these commitments, he or she is labelled as not 'being in good standing with the ATP' under Rule 10.7F, which carries a wide range of sanctions, reprimands and lost benefits. This includes ineligibility to participate as a main draw entry in the following ATP season, loss of retirement programme benefits and 'the privilege to actively participate, including voting, in ATP governance'.[36] In practice, Rule 1.07 obliges the commitment players to enter at least twelve ATP tournaments, and top 8 players must also enter Nitto ATP Finals. Players are also obliged to play four Grand Slam tournaments that are integrated in the ATP tournament calendar and ranking system. Additionally, they might represent their country in the Davis Cup, which is also integrated in the ATP system. Depending on one's success in individual and Davis Cup events, a player may end up playing in up to twenty different events in one season that take up to twenty-seven weeks in the annual calendar.

The ATP Board of Directors' strategic '30-year plan' (adopted in 2021 and rebranded as 'OneVision') consolidated the existing market dominance and exclusivity of the ATP Tour events, increased the ATP calendar footprint by expanding the ATP Masters 1000 events and further tied in the services of the top players.[37] Preparations specific for the mandatory tournaments, which often involve playing other ATP tournaments, travelling and early arrivals to tournaments to get adjusted to the surface, time zone and weather conditions, must be factored into this formula. It adds about five to six extra weeks to the schedule of a top 30 player, amounting to up to thirty-four weeks. Tennis has a short four-week off-season. Such a schedule effectively requires a playing/participating time of thirty-eight weeks out of a fifty-one-week year. Top 10-ranked players usually play around twenty-one or twenty-two tournaments per season

[35] Rule 1.07D.

[36] Provided by a combination of Rule 1.21B and Rule 1.07F.

[37] The architect of the plan was Andrea Gaudenzi in his role of Director of ATP Media, right before he became Chairman of the ATP Tour. The players were not properly consulted and informed – see Samuel Gill, 'Statement PTPA/Djokovic: 'We Are Not Saying 30 Year Plan or ATP Is Bad, We Just Want More Clarity', Tennisuptodate.com (25 June 2021), available at: https://tennisuptodate.com/tennis-news/statement-ptpadjokovic-we-are-not-saying-30-year-plan-or-atp-is-bad-we-just-want-more-clarity.

on average[38] and prefer to mentally rest, practice and spend time with family for the remaining thirteen weeks of the year, rather than travel and compete. Tennis is extremely demanding not just in terms of its physicality, but also because tournaments are spread all over the globe, time zones and ATP Tour competition calendar. Some players in the top 30 will play a few more tournaments, but these will normally be ATP 500 or ATP 250 category events as no other alternatives are normally available.[39]

The remaining thirteen weeks of the year are subject to further restrictions and leave little space for the rival individual competitions, let alone a viable alternative tour.

Rule 1.14(1)B, explicitly designated as 'restrictions', provides a combination of temporal and geographical limitations that additionally prevent the participation of commitment players in alternative events:

- during the weeks of nine ATP Tour 1000 events, 13 ATP Tour 500 events, and ATP Nitto Finals;
- within 30 days before or after any of the above-listed tournaments, and during any of the 38 ATP Tour 250 tournaments, if the alternative event is located either within 100 miles/160 kilometres, or within the same market area of the city of any of the ATP tournaments (as determined by the ATP CEO).

Infringement of these rules carries penalties described as 'Major Offense Conduct Contrary to the Integrity of the Game' set out in Rule 8.05A(2)(e). Accordingly, a player is liable to a fine of up to US$250,000 and/or a suspension from play in the ATP Tour or ATP Challenger Tour tournaments for a period of up to three years.

3.4 Legality of the Rules 1.07, 1.14 and 8.05A(2)(e) and Reinforcing Practices under EU Competition Law

3.4.1 Restrictions

The ATP is highly likely a dominant undertaking[40] in the market for the organisation of professional tennis competitions. It has the largest calendar and broadcasting footprint; purchases players' services for more than

[38] As per information accessed on 31 March 2024, available at: www.atptour.com/en/rankings/singles.

[39] Ultimate Tennis Showdown (UTC) started during the Covid-19 pandemic as an exhibition that is not integrated into the ATP ranking or calendar. It stages only three events per season, each lasting only two to three days. It is not a competitive threat to the ATP Tour. For UTS tournaments, see www.uts.live.

[40] Regardless of the revenue distribution in which the ATP is second to the Grand Slams.

half a season; holds a monopoly over ranking points and the annual tennis calendar; and possesses regulatory powers. The Grand Slams and the ITF use the ATP system for entry and seeding – in return, the ATP includes their tournaments in its calendar, awards ATP ranking points for their tournaments and agrees not to organise events that could conflict with them.[41] This arrangement between the long-established entities could be classified as a horizontal supply-and-market-sharing cartel under Article 101(1) of the TFEU that limits investments, markets and development of the sport. The OneVision plan on the ATP website confirms the relationship between these entities and stipulates that 'at times, we find ourselves competing rather than collaborating' before highlighting the need for a shared governance and operating model, aggregation of media and data rights, and working together towards a shared vision.[42] The ATP, Grand Slams and ITF can also be viewed as undertakings that are in a collectively dominant position on the market for organisation of professional men's tennis events (where they collectively hold a monopoly) and purchasing players' services (where they collectively amount to monopsony).

Regardless of the precise form in which the restrictions were adopted, Rules 1.07 and 1.14, as enforced by sanctions under Rule 8.05A(2)(e), and reinforced by tournament licensing practices, and arrangements with Grand Slams and the ITF, reserve many big markets and geographic areas in the world exclusively for the ATP Tour, leaving only insufficient space in the calendar and geographic markets for staging an individual event in which organisers may hope for the participation of some of the top 30 players. Access to this group of players is important for the commercial viability and success of any alternative venture. Hence, there is no doubt that the combination of those ATP rules and practices constitute prima facie restrictions on the players' economic opportunities, investments and third-party organisers. Counterintuitively, it is less of a restriction for the financially well-off top 30 players to whom the commitment rules are specifically addressed, than for the lower-ranked players who are free to play in any alternative tournament or tour. But without the top 30 players, it is difficult to stage a financially viable alternative for lower-ranked players, as there are no opportunities for investments, innovation or market development outside the established structures. Only around 100 or 150 top male players in the world, out of

[41] See Chapter 8 of this volume.
[42] Available at: https://onevision.atptour.com/onevision/phase-two.

thousands playing in ATP Tour, ATP Challenger Tour and ITF-level tennis, can earn a living from their profession. Occupying an empty space in the calendar and staging an exhibition that is neither included in the ATP calendar nor given ranking points will not attract the interest of the top 30 tennis players unless the investors are ready to incur significant losses by offering attractive appearance fees and prize money. This might happen on a one-off basis, but will not create an alternative tour, or sufficient number of individual competitions to provide options on a regular basis. Even if it did, the top 30 players would still be obliged to participate in ATP and Grand Slam events for most of the year.

A standard way to enter the market for the organisation of professional men's tennis tournaments is to obtain a licence for one of the ATP tournaments that is already integrated into the ATP calendar and assigned classification and ranking points. Instead of competing with the ATP Tour, aspiring entrants can become a part of it. No transparent and objective licensing requirements or procedures have been clearly specified as required by the *ISU* and *ESL* judgments, and there is no system of 'restrictions, obligations and review' in case of rejection as required by *MOTOE*. Moreover, the ATP's OneVision plan has granted thirty-year licences and category protection to ATP 1000 Masters tournaments, and fifteen years to ATP 500 tournaments. This extremely lengthy period is coupled by three related restrictions:

- the contractual promise to licence-holders to restrict the number of licences for both categories;[43]
- a prohibition on participation fees and the introduction of a maximum level of prize money that tournaments can offer, which amounts to a hard-core price-fixing cartel[44] and prevents intra-brand competition; and
- an exclusivity protection for ATP Masters 1000 events that no other ATP Tour competition will be staged at the same time.[45]

Thus, players who are not qualified for the ATP 1000 Masters tournaments by virtue of their ranking, or as wild-card entries, do not have any Tour-level competition for the duration of the Masters event. For

[43] See George Patten, 'Grading Each Potential New Masters 1000 Venue', Lob & Smash (24 February 2024), available at: https://lobandsmash.com/posts/grading-each-potential-new-masters-1000-venue.

[44] ATP Regulations (2024), Exhibit J.

[45] *Super Slam Ltd* v. *ATP Tour Inc.*, Complaint filed in Delaware District Court dated 15 July 2021.

example, in the 2024 ATP Tour calendar, there are only two Masters tournaments scheduled in March. The ATP envisaged one additional ATP 1000 Masters (on grass) and up to three ATP 500 category tournaments to be added in the future, but did not specify the procedure or substantive rules by which they should be selected – the decision is left entirely to the discretion of the ATP. The idea of an ATP Super Tour is currently on the table, whereby the Grand Slam and ATP 1000 events overshadow other categories of tournaments.

While each of the identified restrictions should be subject to a separate legal evaluation, they reinforce one another, provide overall context in which they operate, and generate a cumulative foreclosure effect on the market for the organisation of tournaments and provision of players' services.

3.4.2 Legitimate Objectives and Proportionality

Whether the restrictions created by the described rules and practices can be classified as 'object' or 'effect' restrictions will not be the subject of discussion here. It is presumed that they restrict competition by effect and that the *Meca-Medina* justification framework applies. Under that framework, the ATP can mount arguments fitting the broad justification of 'organisation and proper conduct of competitive sport'. Specifically, for a good functioning of the ATP Masters 1000 events, it might be necessary to secure the participation of the best players in the world to preserve the sporting value and qualitative status of the ATP Masters events, and to afford them a certain degree of exclusivity. The establishment of a uniform international calendar and preventing overlaps between events are certainly in the public interest and fall within the regulatory competence of sports governing bodies.[46] As held by the Advocate General in *MOTOE*: 'It may make sense to prevent clashes between competitions so that both sportspersons and spectators can participate in as many such events as possible.'[47] However, by insisting on calendar exclusivity, the ATP blocks all players not eligible for Masters tournaments from the international calendar for the duration of ninety days per season, with this being a disproportionate restriction on their participation in the market as service providers.[48] With specific reference to the ATP 250 tournament, if played elsewhere in the world, it would not

[46] *ISU*, at para. 219.
[47] Opinion of AG Kokott in *MOTOE*, delivered on 6 March 2008, at para. 94.
[48] The claim can also be made under Art. 56 of the TFEU on the freedom to provide services.

present a competitive threat to the Masters 1000 on the exploitation market, apart from perhaps domestic broadcasting rights, which are negligible. An overlap in the calendar would not matter for any legitimate sporting or commercial purpose. Moreover, even without Rules 1.07, 1.14 and 8.05A(2)(e), ATP Masters-level tournaments can be expected to attract most of the top 30 players on the basis of their prize money and ranking points. They already possess the status of superior tournaments by their very classification, and there are no other tournaments for the players to enter when Masters events are staged. With this in mind, Rules 1.07 and 1.14 appear unnecessary, while their enforcement by Rule 8.05A (2)(e) providing for a possible three-year ineligibility ban and US$250,000 fine is disproportionate even with regard to participation in any future exhibition outside the ATP calendar.

The ATP can argue that long-term licences for ATP 500 and 1000 categories encourage investments and improvement of its flagship competitions and contribute to the organisers' financial stability. A counterargument could be persuasively made that while propping up these competitions, it discourages investments by ATP 250 organisers because they cannot be upgraded to the higher category for a very long period of time. Also, the length of the protection for the licence-holders is manifestly disproportionate. In general, vertical agreements that exceed five years are considered disproportionate for most types of investments – considering the position of the parties to the agreement and the overall market set up in the case at hand, it is certain that the length of licences would fail to satisfy the proportionality limb of the *Meca-Medina* test. In sports broadcasting cases, the EU Commission considered three years of exclusivity as an upper limit,[49] following which the new tender should be published with open, transparent, objective and non-discriminatory criteria. Consequently, the duration of licences should be no longer than five years, while the exclusivity afforded to ATP Masters 1000 tournament organisers should be made less exclusive.

Limits on the maximum prize money per category of tournament and a prohibition on participation fees might well be intended to protect the hierarchy between the different categories. Players would possibly choose to participate in ATP 250s if offered higher financial rewards than ATP 500 tournaments. A requirement that ATP 250 tournaments do not exceed a certain threshold of prize money ensures good

[49] See Commission Decisions in COMP/37.398, UEFA Champions League, OJ 2003 L291/25; Case COMP/C-2/38.173, Joint Selling of Media Rights to the FA Premier League, OJ C 2006/868 final; and Decision COMP/C.2/37.214, Joint selling of the media rights to the German Bundesliga, OJ 2005 L134/46.

functioning of ATP 500 events and is thus reasonable. However, there seems to be no reason why the maximum prize money limit should also apply to ATP 500 events. ATP Masters 1000 events are unlikely to be affected even if mandatory top 30 participation and exclusivity are removed from the equation. As stated above, due to the ranking points awarded, top players would likely choose on their own to participate in most Masters events to the exclusion of other tournaments staged at the same time. Any limitation on prize money for reasons linked to protecting the good functioning of the ATP Tour should be limited to ATP 250 events.

Setting a limit on the number of ATP 1000 Masters and ATP 500 tournaments does not appear unusual or unreasonable – all sports have different categories of competitions, and it would dilute the value and quality of the flagship tournaments and the whole tour if licences were issued in unlimited numbers. This argument could work if the ATP reviews the process of awarding licences and creates a procedural framework for clearly defined, non-discriminatory, objective, transparent, verifiable, reviewable and proportionate criteria. Additionally, a need for mainstreaming is apparent from the inconsistent Masters tournament lengths and number of participants. The status of the Monte Carlo tournament is confusing as it is Masters 1000 in name, but ATP 500 in quality – and commitment players are exempted from obligatory participation, but can use it for one of the four obligatory ATP 500s. In the *ESL* case, had UEFA's threat of sanctions against the alternative league taken place within the properly designed procedural framework and contained detailed substantive rules designed according to *ISU* and *MOTOE* criteria, it would have likely been found to be compatible with EU law. The lack of procedural framework for otherwise legitimate ATP rules could therefore prove fatal if challenged.

4 Wild Cards under the Lens of Article 56 of the TFEU on the Freedom to Provide Services

4.1 Wild Cards in Tennis

According to Rule 7.12 of the ATP Rulebook, wild cards are players who have not qualified for a tournament, but are nevertheless awarded entry to the main draw. Because invitations to wild cards are extended 'at the sole discretion of the tournament', the issue of discrimination between players of different nationalities in the implementation of Rule 7.12 could have

been easily foreseen.[50] Tournaments have generally drafted policies on wild-card entries to enable the participation of star players returning from injuries, young (mostly local) talents and local players who have not earned their place in the draw on the basis of objective ranking-based criteria. This often prevents the participation in important tournaments of more deserving players. The ITF has an equivalent provision, namely, Rule V(I),[51] and Grand Slam tournaments are subject to Rule Z(2)(b) on wild cards.[52] The French Tennis Federation policy awards most of the wild cards for the Roland-Garros entries specifically to players from France.[53] Likewise, the US Open and Australian Open also issue most of their wild-card entries to local players. Within the framework of the agreement that the French Tennis Federation has with the US Tennis Association (USTA) and Tennis Australia, one ATP and one WTA player from the United States and Australia are to be awarded a wild card for the main Roland-Garros draw. The favour is returned by Tennis Australia and USTA when they organise their Grand Slam tournaments.[54] ATP tournaments of various categories, many of them in the European Union, implement a similar system of preference for local players. It is therefore no surprise that the highest number of wild-card entries in the history of tennis were awarded to Andy Murray from the United Kingdom (fifty-four WCs).[55] The highest number of wild-card entries up until the age of 25 were awarded to three players from the United States: Ryan Harrison (thirty-four WCs), followed by Donald Young (twenty-seven WCs) and Jack Sock (twenty-two WCs), which is far above the average number of wild-card invitations extended to players from other countries. Players from France and Australia also received a disproportionate number of wild-card invitations before the

[50] See e.g. the Lawn Tennis Association wild-card policy 2024, stipulating that wild cards are a privilege for British players, available at: www.lta.org.uk/48ceb8/siteassets/pro-players/lta-wild-card-policy-2024.pdf.

[51] ITF World Tennis Tour Men's and Women's Regulations 2024, available at: www.itftennis.com/media/11861/2024-wtt-regulations.pdf.

[52] Official Grand Slam Rulebook 2024, available at: www.itftennis.com/media/11558/grand-slam-rule-book-2024-f3.pdf.

[53] See Roland-Garros News Item, 'RG 2020 Wild Cards: How Does It Work' (27 November 2019).

[54] According to Lev Akabas, 'Slam Wild-Cards Serve as a Lifeline – If You're French, Aussi, or a Yank', Sportico (29 August 2023): 'the reciprocal wild card agreement is primarily a strategy to provide their own players with money and experience, not necessarily to produce likely winners. In the three non-Wimbledon majors, out of more than 100 reciprocal wild cards in the past decade, none have advanced past the third round.'

[55] Zlatko Vodenicharov, 'Andy Murray Breaks Record as He Receives Unexpected Wildcard for 2023 Qatar Open', Tennis Infinity (19 February 2023).

age of 25.[56] In 2023, the US Open reported that out of forty-three American players in the main draw of the 2023 US Open, eleven received wild cards.[57] In other words, players from Grand Slam organising countries that also host some other big tennis tournaments top the wild-card charts. All big tournaments are organised in markets of several countries to the exclusion of others. Hence, ATP Rule 7.12 and equivalent Grand Slam and ITF rules enable discrimination between players on the basis of nationality as they delegate the selection of wild cards to the discretion of the tournament organisers, instead of employing objective criteria based solely on players' ranking.[58] Wild cards cannot make 'a journeyman into a superstar', but they can boost a player from, for example, the top 200 to the top 100. For tour players, this can make a substantial difference.[59]

4.2 *Legal Evaluation of Wild Cards under Article 56 of the TFEU*

In *Deliège*, decided under Article 56 of the TFEU on freedom to provide services, the CJEU analysed the legality of selection rules which limited the number of participants in high-level international competitions.[60] Deliège was a judoka who failed to achieve the necessary qualification criteria and was not selected by her country to participate in high-level international tournaments. The Court here first considered the limitation on a number of participants as 'inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted'.[61] However, the Court also implied that any such limitations must be proportionate and emphasised that the adoption of one system over another 'must be based on objective criteria unconnected with the personal circumstances of the athletes' – in other

[56] See Tennis Abstract statistics, available at: https://tennisabstract.com/reports/wildCardRecipients.html.

[57] US Open News Item, 'Who Are the Americans Who Received 2023 US Open Wild Cards?' (27 August 2023).

[58] This could include, for example, awarding a tournament wild-card entry to talented young players based on their worldwide ranking.

[59] Jeff Sackman, 'Tennis Abstract' (25 March 2018), available at: www.tennisabstract.com/blog/category/wild-cards.

[60] *Christelle Deliège* v. *Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée*, Joined Cases C-51/96 and C-191/97 [2000] ECR I-2549.

[61] Ibid., at para. 64.

words, it must be non-discriminatory.[62] It is therefore important to note that selection rules allowing nationality-based discrimination, such as Rule 7.12 of the ATP Rulebook, cannot benefit from the *Deliège* exception. Had the issue been about national tennis federations selecting their players for representation in international competitions (such as the Davis Cup or the Olympic Games), the exception to nationality-based discrimination laid down in *Walrave* and *Donà*[63] would become applicable and there would be no need to seek further legal guidance.

The proper legal test for Rule 7.12 lies in the functional equivalency of the *Meca-Medina* test under competition law; a standard objective justification framework set out by the Court in *Gebhard*[64] and made famous in the sporting context by the *Bosman* case.[65] It provides that only proportionate restrictions (on freedom to provide services in case of wild cards) pursuing a legitimate aim compatible with the TFEU and justified by pressing reasons of public interest are compatible with free movement provisions.[66] While giving a chance to compete at a higher level to young tennis talents could be seen as beneficial to encourage them to practise and propel them into high-level tennis (legitimate aim in the public interest), it is hard to find any legitimate justification for favouring local players (direct discrimination is, by default, disproportionate). The fact that local spectators want to see their own players is not convincing. In *Bosman*, the arguments that clubs should have a quota on foreign players to enable the public to identify with their favourite teams and to ensure that they effectively represented their countries when taking part in cross-border club competitions did not persuade the Court.[67] Tennis tournaments are visited by people from all around the globe, and the worldwide audience tunes in to watch tennis on TV channels and various other media platforms. It is also unconvincing to argue that organisers of the tournaments should have a right to offer an advantage to their own players. National associations from countries across the globe invest in their youth and help develop talents who later go on to participate in Grand Slam, ITF and ATP

[62] Ibid., at para. 65.

[63] *Walrave and Koch* v. *Union Cycliste Internationale and Others*, Case 36/74, ECLI:EU:C:1974:140; and *Gaetano Donà* v. *Mario Mantero*, Case 13/76, EU:C:1976:115.

[64] *Gebhard*, at para. 37.

[65] *Union Royale Belge Sociétés de Football Association ASBL* v. *Jean-Marc Bosman, Royal club liégeois SA* v. *Jean-Marc Bosman and Others and Union des Associations Européennes de Football (UEFA)* v. *Jean-Marc Bosman*, Case C-415/93, ECLI:EU:C:1995/463.

[66] Competition and free movement laws can be applied simultaneously, and conclusions are identical under the *Meca-Medina* and *Gebhard* tests.

[67] *Bosman*, at paras 121–37.

tournaments. They are the sole reason those tournaments exist. Several national associations from big markets that profit from their countries' organisation of the most important tennis tournaments do not even share their revenues with global tennis, and the system of vertical or horizontal solidarity is weak in tennis. Players from privileged countries in the tennis world[68] already reap the benefits of this ecosystem because their associations, which are involved in the organisation of the biggest tournaments, receive significant funds from those tournaments that are made up of foreign players who are the products of investments of foreign tennis associations. This means better infrastructure, funds to travel to tournaments in junior and professional tours, paid coaches, better sponsorship opportunities, etc. Players from many other countries are facing tougher career trajectories and reduced career prospects, and there is no equality of opportunity. The wild-card system thus appears to be a part of a broader arrangement that favours tournament-organising countries/national associations, which in turn favours local players in multiple ways.

5 Recapitulation

The key legal concerns regarding the organisation of sporting competitions and provision of professional player services usually stem from the governance structures in which SGBs, with or without a small segment consisting of top contestants, dominate the decision-making process. The rules that emerge from such process are usually heavily tilted in favour of their dominant members. Within the ATP structures, it appears that players – particularly those ranked outside the top 100, as well as players outside Europe and North America – are not properly represented. Without the ability to represent one's interests in the governance scheme, there is no ability to improve one's position in the tennis ecosystem. It has been suggested that the two rules discussed in this chapter merely reflect those broader governance issues. Not many professional players would agree to have a wild-card system left to the discretion of tournament organisers, as it inherently enables discrimination. Likewise, most professional players would welcome an opportunity to participate in the alternative tournaments that offer better financial incentives and benefits, especially if they were integrated into the ATP

[68] On its website, the ITF refers to the USTA, Tennis Australia, French National Federation and the All England Lawn Tennis & Croquet Club and Lawn Tennis Association as '[f]our of the ITF's leading National Associations'. Available at: www.itftennis.com/en/itf-tours/grand-slam-tournaments.

ranking point system, or have a sufficient number of ATP tournaments throughout the year that compete on prize money. The legal criteria laid down in *ESL*, *ISU* and *MOTOE* apply to all SGBs, including the ATP, when it comes to blocking an entry to the organisational market. These cases carry a clear signal from the CJEU that performing regulatory functions by non-public entities entails responsibilities to comply with law and implement good governance standards in terms of the practices, substantive rules and procedural regulations they adopt. Prioritising private commercial goals over public interests, discriminating between players or treating them unfairly might eventually produce a system-changing lawsuit. The best chance for any private regulator to remain unchallenged is to make a genuine effort to improve accountability, transparency, democracy and equal representation of all affected stakeholders on their decision-making boards.