

“Case Law of the ECJ: *Deliège* and *Lehtonen*”

By Paul Harris
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The mid-April ECJ judgments in *Deliège* and *Lehtonen* both had the potential to provide further illumination of the application of EC competition rules to sport. Unfortunately, those opportunities were not taken, because the Court considered that insufficient detail and evidence of the factual background had been provided. Nonetheless, further interesting guidance is given on the application of the fundamental EC freedoms to provide services and to establish.

Deliège concerned a high-level, but ‘amateur’, Belgian judoka complaining that she had been refused selection by her national federation for an international tournament, participation in which was necessary for her to be selected by that federation for the Olympic Games. Her federation limited the participants in that tournament to a fixed number.

The ECJ held, principally, that provided that there was “a need inherent in the organisation of such a competition”, a national federation could limit the number of participants in that particular competition. Though strictly left for the national court to decide, the “need inherent” in this case was clearly that a tournament has to have a fixed number of participants, otherwise it is impossible properly to organise.

Of most importance, the ECJ stated that the national federation has a large measure of discretion (though still, ultimately, reviewable by the Court) in deciding whether or not there is a “need inherent”. Thus, “it falls to the bodies concerned, such as organisers of tournaments, sports federations or professional athlete’s associations, to lay down appropriate rules and to make their selections in accordance with them... [since it is they] which normally have the necessary knowledge and experience...”.

This aspect of the case cannot provide anything other than reassurance to national and international federations. It represents a backing away by the ECJ from direct interference in their internal affairs, particularly in relation to selection decisions.

Of further legal interest was the finding that, though *Deliège* was an ‘amateur’, nevertheless, her activities were capable of being ‘economic activities’ within the meaning of the Treaty (the question whether she did, in fact, conduct an economic activity was left to the national court). The potentially decisive factors were her personal commercial sponsorship, the sponsorship of competitions in which she took part, and the fact that such competitions generated commercial revenue, including from television.

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From the legal perspective, the most disappointing aspect of the judgment is that “need inherent” is insufficiently discussed and the reasoning is circular and specious. It amounts to saying that there must be a organisation-related need for the rule, and that need is that the rule is an inherent part of the organisation!

More practically, where exactly does the “need” have to lie? To take a topical example, could it not be said that there is a “need inherent” in national domestic football leagues to limit the number of foreign players, so as to enable the emergence of domestic talent, in part for use by the national team? Such a “need” is not inherent in any particular game, or any particular league or season, perhaps, but is it not a need inherent to the national sport as a whole, in the long run? And, are not the national federations the bodies with the “necessary knowledge and experience” to decide that question?

Also disappointing is that the selection rules in question had a clear impact on competition, particularly restricting the competition between judokas at the highest level. The Advocate-General, the Commission, and a number of other parties, had taken views on the need for proportionality and reasonableness in framing such rules. No guidance was forthcoming from the ECJ, nor were these two concepts even discussed in the context of the “need inherent”.

Lehtonen concerned the transfer into the Belgian league of a Finnish professional basketball player. In short, there were three different transfer deadline dates applicable in the Belgian league, one for inter-league transfers, one for inter-Europe transfers and one for transfers to/from elsewhere. The ECJ held that there was no justification for the differing deadlines, restricting as they did free movement of workers, in the absence of “objective reasons concerning only sport as such”. Though left for the national court to decide, no convincing reasons for the differences, whether sporting or otherwise, had been put forward.

Importantly, transfer deadlines themselves were not disapproved by the ECJ. It was considered legitimate for the federations to take measures that “did not go beyond what was necessary... to ensure the regularity of sporting competitions...”. Late transfers could adversely affect the “proper functioning of the championship as a whole” by altering the outcome of results at a late stage.

Again, a view on some of the competition issues was given by the Advocate-General and the Commission, but the ECJ declined to consider them.

Lehtonen is also of some comfort to national federations, in confirming that purely sporting matters are to be left to them. Going back to my previous example, though, does it go so far as to enable them to place a limit on the number of foreign nationals in a team? Can it be said, for example, that the development of good, domestic talent and the provision of a strong national team are “purely sporting matters”, and that they go to the “functioning of the championship as a whole”?

If the fundamental freedom of movement of workers can be limited by the transfer deadline for sporting reasons limited to a particular league (the Belgian league being particularly susceptible to impact by late transfers, because of its play-off system), then the fundamental freedom of absence from discrimination based on nationality might also be capable of being limited for sporting reasons, particularly when the ultimate goal (namely, the national team, which is obviously nationally discriminatory) is already protected as such by EC law. We await to see whether such a challenge will be forthcoming from the more disaffected Premiership clubs.

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