

Sports and competition law: the case of the salary cap in New Zealand rugby union

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Abstract The legal environment of professional sports in Europe has been recently complemented by regulations adopted by sports federations and professional leagues aiming at preserving fairness in sports competitions and/or the economic viability of this sector (like the salary cap put in place in French professional rugby union from the 2010–2011 season and the UEFA’s financial fair play regulations). No formal decisions have been taken so far by the European Commission and the French competition authority on the compliance of salary cap regulations or other similar regulation tools with competition rules. Given this context, the decisions of the New Zealand’s competition authority (“Commerce Commission”) dealt with in this article are interesting as they relate to the salary cap put in place as from 2006 by the New Zealand Rugby Football Union in the domestic inter-provincial rugby competition. More particularly, the Commerce Commission’s first decision, dated 2 June 2006, is highly interesting as the Commerce Commission carried out an in-depth legal and economic analysis to authorise the entry into effect of the salary cap pursuant to competition rules

applicable in New Zealand. While these decisions should be analysed under the specific sporting and legal background of New Zealand, it is interesting to investigate what could be their practical and legal impact in Europe.

Keywords Sport · Rugby · Salary cap · Competition rules · Anticompetitive agreements

1 Introduction

The legal environment of professional sports in Europe has been recently complemented by regulations adopted by sports federations and professional leagues aiming at preserving fairness in sports competitions and/or the economic viability of this sector. In France, the rugby union professional league (“Ligue Nationale de Rugby” or “LNR”) has been a pioneer in putting in place, as from the 2010–2011 season, measures that limit how much money rugby teams may spend on player salaries (so-called “salary cap”).¹ Another current issue is the compliance of the financial fair play rules set up by the Union

¹ Buy (2009) p. 11 – For the rules applicable to the 2013/2014 season, see the Regulation of the LNR’s “*Direction Nationale d’Aide et de Contrôle de Gestion*” or “*DNACG*” (“*National Directorate for Support and Management Control*”), Annex 3 entitled “*Règlement relatif aux sommes et avantages dus aux « joueurs »*” (“*Regulation on the amounts and benefits due to players*”). Article L.131-16 of the French sports code has clearly established the possibility for sports federations to adopt such systems. This article has been introduced by the law no. 2012-158, dated 1st February 2012, aimed at enhancing ethics in sports and athletes’ rights. It states that sports federations’ regulations “*may contain provisions relating to the minimum number of home grown players in teams participating to competitions and to the maximum amount, relative or absolute, of the total remuneration paid to players by each company or association*”. Regarding the labor law aspects of salary cap schemes, see Colonna and Renaux-Personnic (2012) p. 27.

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of European Football Associations (UEFA) with European Union law, including competition rules.²

European competition rules on anticompetitive agreements³ and abuse of dominant position⁴ have already been applied to practices related to the commercial exploitation of sports events⁵ and regulations adopted by sports federations to define the conditions for access to competitions.⁶ However, no formal decision has been rendered so far by the European Commission and the French competition authority on salary cap regulations⁷ or other financial regulation tools having as a declared objective to protect the economic viability of a sport or of its actors. Similarly,

no formal decision has yet been rendered by these authorities in relation with rugby.⁸

Given this context, the decisions of the New Zealand's competition authority ("Commerce Commission", hereafter the "Commission") dealt with in this article are interesting as they relate to the salary cap put in place as from 2006 by the New Zealand Rugby Football Union (hereafter the "NZRU") in the domestic inter-provincial rugby competition ("National Provincial Championship", hereafter the "NPC")⁹.

More particularly, the Commission's first decision, dated 2 June 2006,¹⁰ is highly interesting as the Commission carried out an in-depth legal and economic analysis¹¹ to authorise the entry into effect of the salary cap pursuant to competition rules applicable in New Zealand.

The NZRU completed in June 2004 a comprehensive study of the status of rugby competitions in New Zealand. This review highlighted a trend towards increasing expenditure, which was considered unsustainable in the long term in the absence of new revenue sources or cost reductions. It also concluded that the NPC first division was not a competitively balanced competition. This imbalance was seen by the NZRU as threatening (i) the fan base, (ii) revenues derived from the sale of broadcasting and sponsorship rights and (iii) as leading potentially to less competitive Super Rugby and All Blacks performances. The NZRU reached the conclusion that unless appropriate regulation mechanisms were put in place, the trend towards an uneven NPC competition, lower interest

² Forti (2013) p. 25 – Lindholm (2010) p. 189f.

³ Article 101 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 81 of the Treaty establishing the European Community (EC Treaty)): article 101(1) of the TFEU 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 internal market; article 101(3) TFEU provides that article 101(1) may be declared inapplicable in the case of agreements that fulfil four conditions: (a) they contribute to improving the production or distribution of goods or services or promoting technical or economic progress, (b) while allowing consumers a fair share of the resulting benefit, and do not: (c) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (d) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

⁴ Article 102 of the TFEU (formerly Article 82 of the EC Treaty).

⁵ Rizzo (2012): e.g. ticket sales arrangements, sponsorship agreements, contracts for the supply of sporting goods and the sale of sports media rights.

⁶ Same reference: e.g. multiple ownership rule according to which an individual or a company cannot control more than one of the clubs participating in a competition, anti-doping rules and selection procedures for participation in international tournaments. For an overview by the services of the European Commission's Directorate-General for Competition of its decisional practice regarding the regulatory aspects of sports, see Lindström-Rossi et al. (2005) p. 72.

⁷ See the European Commission's White Paper on Sport of 11 July 2007 (COM 2007) 391 final, Annex I "Sport and EU Competition Rules": "2.3 Main pending and undecided issues - There are currently a number of important outstanding legal issues relating to the application of Articles 81 and 82 EC to sport, in particular football. The three subjects which have attracted considerable attention recently concern (i) FIFA's release of players' rules, (ii) UEFA's home grown players' rules and (iii) the idea of introducing salary caps in professional football. No formal decisions have been taken on these issues so far by the Community courts or the Commission. Therefore, this document cannot at this stage, provide a definite or exhaustive legal analysis of the problems involved or establish whether these rules would violate Articles 81 or 82 EC".

⁸ Except for the decision of the French competition authority ("Autorité de la concurrence") no. 12-D-28 dated 12 December 2012 relating to a complaint filed by the French rugby federation ("Fédération Française de Rugby" or "FFR"). This decision concerned the litigation between the FFR and the operator of the "Stade de France" (the "Consortium Stade de France") regarding the conditions offered by the latter for the use of this stadium and for selling advertising spaces and sponsorship agreements.

⁹ The NPC is the intermediate competition between the amateur practice of rugby by New Zealand's clubs and the championship between professional teams from South Africa, Australia and New Zealand ("Super Rugby"). It is split into a professional competition between 14 provincial unions (now called "ITM Cup") and an amateur competition between 12 provincial unions (now called "Heartland Championship").

¹⁰ "Commerce Commission, Decision n°580, Determination pursuant to the Commerce Act 1986 in the matter of an Application for the authorisation of a restrictive trade practice. The Application is made by the New Zealand Rugby Football Union Incorporated".

¹¹ The following elements illustrate that: (i) this decision is 218 pages; (ii) the Commission received submissions from many interested third parties: NPC broadcasters (SKY TV, Canwest/Media Works), the most important sponsor of this competition (Air New Zealand), and nine provincial unions; (iii) for purposes of its analysis, the Commission performed a thorough review of the economic literature dedicated abroad to professional team sports as well as studies having examined the factors influencing spectators' and viewers' interest for a competition.

and decreasing revenues would continue and even accelerate.¹²

Having examined the intervention tools used in professional sports leagues overseas (e.g. draft systems for the hiring of players or revenue sharing mechanisms), the NZRU proposed introducing a salary cap¹³ along with more flexible rules on the transfer of players.¹⁴ By letter dated 9 November 2005, the NZRU applied to the Commission for authorisation to enter into these arrangements.

As a preliminary remark, competition rules in trade and commerce in New Zealand are set out in the *Commerce Act* 1986 and provide for:

- the prohibition of agreements that have the purpose or have the effect or likely effect of substantially lessening competition in a market for goods or services¹⁵;
- the power of the Commission to authorise an anticompetitive agreement when it considers that its benefit for the public would outweigh the lessening in competition resulting therefrom¹⁶; such authorisation being granted if needed for a limited period and/or subject to certain conditions.¹⁷

¹² This analysis relied on the modification of the NPC structure made by the NZRU in June 2005. A new two-tiered domestic competition replaced the then existing three-tiered division competition, with five unions, previously in the old second division, being added to the new first division. The NZRU feared that the fewer resources and less talent of these five unions would exacerbate the existing sporting imbalance of the first division.

¹³ The NZRU negotiated with the trade union representing professional rugby players the introduction of salary cap provisions into a collective employment agreement signed on 1st November 2005. These clauses set out the general principles of the salary cap, namely a cap to all salary payments paid by each provincial union to players set at NZ\$2 million for the first year (€1.2 million as of 13 November 2013), and subsequently the previous year's cap plus a consumer price index adjustment.

¹⁴ This relaxation took the form of draft new NZRU's regulations ("*Player Movement Regulations*") providing for (i) the widening of the transfer window from 2 to 34 weeks, (ii) a maximum transfer fee for transfers from second division unions to first division unions and (iii) the removal of transfer fees for moves between first division unions.

¹⁵ Section 27 of the *Commerce Act* prohibits in general terms agreements containing a provision that has the purpose or has or is likely to have the effect of substantially lessening competition in a market. Section 30 provides that agreements shall be deemed to have the purpose or to have the effect of substantially lessening competition if they contain a provision that has the purpose or has the effect of fixing, controlling or maintaining the price for goods or services. Section 29 prohibits agreements entered into between competitors that have the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, any particular person, or class of persons, by all or any of the parties to the contract.

¹⁶ Section 61(6).

¹⁷ Section 61(2).

2 Applicability of competition rules

The relevant provisions of the *Commerce Act* define prohibited agreements with reference to a lessening of competition in a market for "services". The definition of "services" set out in the *Commerce Act* excludes specifically the performance of work under a contract of service¹⁸ (i.e. employment contracts). Therefore, the Commission examined whether the subject matter of the measures notified, namely the work performed by rugby players, can be qualified as "services" within the meaning of that term in the *Commerce Act*.

The Commission approached this issue by considering the employment status of participating players:

- The Commission considered that the playing of rugby by employee players, as a service provided to an employer pursuant to a contract of service, does not constitute the provision of a "service" in terms of the *Act*.

The Commission concluded that the *Commerce Act* did not apply to the extent that the measures notified might affect competition in the playing of rugby by employees.

- Although the NZRU had expressed a strong preference to employ all players on a contract of service basis, the Commission noted the presence, in the collective employment agreement setting out the salary cap, of a clause providing for the possibility to hire players as independent contractors.

The Commission thus considered that some current or future players might be engaged under this clause and perform their work pursuant to a contract for service, rather than a contract of service.

The Commission concluded that the *Commerce Act* did apply because the measures notified were likely to affect in the future, competition in the playing of rugby by independent contractors.

3 Definition of the relevant markets

Having concluded that competition rules were applicable to the mechanisms notified by the NZRU, the Commission has then identified and defined the two following relevant services markets as likely to be affected by these measures:

- The market related to the provision and acquisition of premier¹⁹ rugby union players' services in New Zealand, in which players compete with each other to

¹⁸ Section 2(1).

¹⁹ Namely, participating in the NPC first division or any higher level of competition such as the Super Rugby.

supply their services to provincial unions and provincial unions compete with each other to acquire them. The Commission concluded that from the demand point of view neither players from other sporting codes (including rugby league players) nor rugby union players from lower competitions were acceptable substitutes given the specific skills required at this competition level.

- The market related to the provision and acquisition of sports entertainment services in New Zealand. The Commission noted that rugby union entertainment entails commercial relationships between the NZRU or the provincial unions, on one hand, and spectators or business companies, on the other. Then the Commission identified evidence (i.e. a 10 March 1994 report produced by the Boston Consulting Group and more recent market research²⁰) showing that a large part of the New Zealand fans view other forms of sporting entertainment as substitutes to rugby union. Rugby union would thus compete with other sporting codes, which would be taken into account by the NZRU and provincial unions when scheduling rugby matches and pricing spectator tickets.

4 Competition analysis

The Commission then analysed whether the conditions of prohibited practices were fulfilled in this case. As a first step, it considered that both the collective employment agreement providing for the salary cap and the draft regulations setting out new transfer rules were arrangements under the Commerce Act. The Commission thus examined whether the salary cap and the draft new transfer rules (factual) had the purpose or would have the likely effect of lessening competition in the relevant markets, compared with the situation where these arrangements would not come into effect (counterfactual).

4.1 Impact on the market for premier rugby union players' services

4.1.1 Salary cap

Purpose The Commission considered that the salary cap would lessen the competitive ability of the wealthiest provincial unions by capping the total amount of remuneration they might otherwise offer without such provisions (and

accordingly by constraining both the quality and quantity of player services they might otherwise acquire).

Effects During the investigation undertaken by the Commission, several provincial unions had confirmed that their payroll would exceed the salary cap should it come into force. Therefore, they would need to implement actions during the transfer period to comply with it (player loans, decrease in the number of recruitments or in the remuneration offered with players' numbers unchanged). Other provincial unions stated that they would not be constrained immediately by the salary cap, since the level of their financial resources already limited their ability to acquire players. However, they hoped to be able to increase in the future their financial resources, in particular through the sale of players in foreign championships, so that they would progressively get closer to the cap. The Commission saw the strategy of these provincial unions, consisting in offering lower wages to the replacement players to stay within the limits of the salary cap, as an illustration of its concrete effects on the competitive process in this market.

The Commission also recalled that competition rules not only prohibit agreements between competitors fixing prices at a given level, but also those limiting the ability of economic stakeholders to determine freely the prices of their products or services.

In the present case, the salary cap set out a ceiling to the provincial unions' total player payrolls and accordingly did not fix the level of individual salaries paid to players. However, the Commission was of the opinion that provincial unions would probably take into account the existence of this ceiling when elaborating their recruitment strategy and negotiating with players. Therefore, it considered that the salary cap might give rise de facto to two situations where certain players would be paid less than they otherwise would in the absence of the salary cap: the situation where the transfer of a player to a provincial union willing to offer a higher remuneration would be made impossible, because this transfer would exceed the salary cap; and the one where a player would be forced to move to another provincial union offering a lesser remuneration, because the transferor union could not extend his contract without exceeding the salary cap.

On the basis of these elements, the Commission concluded that the salary cap not only had the purpose but also the likely effect of lessening competition in this market.

4.1.2 New player transfer rules

At the time when the salary cap has been notified by the NZRU to the Commission, the regulations in force established maximum transfer fees to ensure that provincial unions would not unduly restrict player movement by demanding unreasonably high transfer fees.

²⁰ The Commission's decision refers to a research conducted by Colmar Brunton (*Understanding New Zealand Sports Fans and their Relationship with Rugby*, 2005).

The main feature of the new transfer rules notified by the NZRU was the removal of fees for transfers between NPC first division unions, thus keeping maximum transfer fees only for transfers from second division unions to first division ones. Therefore, these new rules limited the circumstances where transfer fees had to be paid compared to the then existing situation.

The Commission noted that the purpose of transfer fees was to compensate provincial unions for the costs engaged in developing players and to provide an incentive for them to continue to invest in this development. Therefore the Commission was concerned that the removal of fees in the case of transfers between first division unions might undermine the quality of New Zealand rugby in general. However, the evidence collected by the Commission showed that if the transfer fees were a significant income source for second divisions unions and a strong incentive for them to invest in player development, this was not the case for first division unions.

The Commission also considered that in circumstances where the salary cap would be in effect and would help release players for a more even distribution of talent, it would be counterproductive to maintain a mechanism in place that might inhibit player mobility, by adding a cost element to the transfer price. For example, one interviewed provincial union stated that on two occasions, it had to withdraw from negotiations due to the overall cost of the transfer when combining the transfer fee with the market price for a particular player.

However, the Commission identified a potential link between the transfer fee and the level of salary for individual players, as provincial unions were likely to factor the fee into the budget dedicated to a transfer. Thus, notwithstanding the fact that capping the fees for transfers from the second division to the first division did not result in fixing the level of prices or even a price floor, this mechanism was seen as having the likely effect to reduce the level of salaries paid to transferring players by some provincial unions.

The Commission thus concluded that these provisions interfered with the free determination of the prices for premier player services and therefore had the likely effect to lessen competition.

4.2 Impact on the market for sports entertainment services

On this market, the Commission first noted that rugby competed with a growing number of other sporting codes. It was therefore of the opinion that the notified measures would need to have a negative impact not only on a particular or several unions taken individually, but on the attractiveness of rugby as a whole, before it could be considered that competition would be lessened significantly.

Moreover, the Commission has considered that the likely effect of the salary cap, in terms of diminishing the performances of the constrained unions, would be counterbalanced by an improved performance of the unconstrained teams: the latter were larger in number and at least some of them had the financial ability to acquire quality players released by the former. Accordingly, the salary cap would not negatively impact the entertainment provided by the NPC competition and rugby union in general.

On this basis, the Commission concluded that the salary cap neither had the purpose nor the effect of lessening significantly competition on the market for sports entertainment services.

5 Balancing of detriments and benefits

Having concluded that the measures notified by the NZRU would be likely to result in a lessening of competition on a relevant market, the Commission has finally examined whether the detriments flowing from these arrangements, taken as a whole, would be counterbalanced by enough benefits for the public of New Zealand.

In order to understand what would be the likely impact of a salary cap, the Commission modelled the economic functioning of a market dealing with the demand of professional sports unions having unequal financial resources and the offer of players having unequal talent.²¹ This analysis showed that in theory a salary cap may lead to two main effects: (i) a reduction of the average remuneration of players and (ii) a more balanced distribution of talented players between unions having high financial resources and those having less resources.

Based on that observation, the Commission has balanced the detriments and benefits for the public of New Zealand identified as likely to result from the implementation of the salary cap, trying to quantify them to the extent possible. The Commission has dedicated very long developments to this exercise in its decision, a summary of which is proposed under the form of the table in “[Appendix](#)”. As the outcome of this balancing exercise, the Commission concluded, on the balance of probabilities, that the salary cap would result in a net benefit for the public of New Zealand in the order of NZ\$2.3 million (€1.4 million) and thus granted an authorisation to the NZRU in its decision dated 2 June 2006.

The most notable aspect of this exercise is the assessment made by the Commission of the strength of the claimed causal link between the salary cap and a number of alleged benefits for the public of New Zealand. This

²¹ The model used by the Commission was based on two economic studies: Fort and Quirk (1995) p. 1265–1299. Kesenne (2000) p. 422–430.

argument was based on two successive cause-and-effect links: a salary cap would result in good players being more evenly shared between NPC first division teams and accordingly in a more balanced competition (Sect. 5.1); a more balanced competition would generate greater public enjoyment (Sect. 5.2).

5.1 Causal link between the salary cap and a more balanced NPC competition

The economic model used by the Commission had confirmed that one of the potential effects of a salary cap is to distribute more evenly talented players between teams, provided it is effective and strictly applied. Precisely, the Commission identified the following aspects as likely to limit the effectiveness of the NZRU's proposed system:

- The definition of the forms of remuneration and non-pecuniary benefits included in (or excluded from) the cap might leave several possibilities for the wealthy unions to increase legitimate payments to players.²² The Commission also noted that the effectiveness of the salary cap would require to increase the monetary fines set by the NZRU, and even add other types of penalties (including forfeiture of competition points), as provided for by the salary cap regulations in force in Australian rugby (“hardness of the cap”).
- The fixed level of the cap would constrain initially few provincial unions and its impact would increase over time only slightly (“constraint provided by the cap”).
- Whilst the salary cap may place pressure on the wealthiest unions to release players, there was no mechanism foreseen to raise at the same time the

²² More particularly, the NZRU's proposed salary cap provided that remuneration paid by provincial unions to players pursuant to a “*Genuine Employment or Player Agreement*” was to be excluded from the cap. This kind of agreements was intended to cover, among other things, fixed team performance bonuses or payments for promotional appearances or speaking engagements. The Commission's concern was that what might fall under this category was so broad that there might be scope for the abuse of this exemption. In its submissions, the NZRU argued that audit processes and valuation methodologies would be implemented to ensure that the remuneration paid under this category would represent fair market value. The NZRU also confirmed that its intention was to capture within the cap only rugby-related payments, and not to cap or restrain payments made by the unions for the use of players' image rights in promoting local rugby or the employment of players as coaches. More generally, the Commission also observed that it is difficult in practice to frame rules of sufficient comprehensiveness to cover all possible eventualities.

resources of the least wealthy unions²³ (“revenue disparity”).

- The most talented players hope to be selected to play not only in an NPC provincial union, but also in a Super Rugby one and in the All Blacks, due to the higher prestige attached to these teams and more lucrative salaries. Some of these players might thus be willing to accept a reduction in their provincial competition salaries to remain with a wealthy union that maximises their exposure to selectors (because of the quality of the other players) rather than moving to a less wealthy union. This might allow wealthy unions to retain their best talent while staying within the limits of the salary cap restrictions and notwithstanding the pressure put by this system so that they release players (“multiple income stream incentives”).
- The complementarities between players' skills would have an impact on individual player's productivity. Therefore the salary cap might well lead to a more balanced NPC competition, but potentially to the detriment of some players' skills development when they are forced to join a less complementary squad (“team-specific talent”).

According to the Commission these limitations created uncertainties as to the capacity of the NZRU's proposed salary cap to create a more balanced NPC competition and accordingly the direct public benefits alleged by the NZRU. The Commission considered that this first causal link in any case was weaker than argued by the NZRU. It was thus justified treating conservatively the alleged benefits when quantifying them.

5.2 Causal link between a more balanced NPC competition and a greater public enjoyment

The economic literature examined by the Commission, especially in the USA, argued that one of the factors impacting the demand for viewing professional team sports is the uncertainty of the outcome of individual games (known as the “uncertainty of outcome hypothesis”).

The Commission observed that if the testing of this hypothesis had been the subject of many economic studies,

²³ Part of the economic literature reviewed by the Commission argued that to be fully effective, a salary cap system needs to ensure that low revenue-generating teams raise their spending to the level of the cap (Szymanski 2003 p. 1172). Moreover, the Commission has observed that caps in North American professional sports leagues have often taken the form of a revenue-sharing payroll cap, which would produce much less inequality between the teams in a league than the salary cap proposed by the NZRU: (i) the eligible revenues of the league as a whole are determined, (ii) a proportion of that is allotted to salaries and (iii) the resulting figure is then divided by the number of teams to derive the “cap”. Each team can spend no more than this figure on player remuneration, and not less than a fixed percentage of this figure.

both overseas and in New Zealand (although very few of them were focused on rugby union), their results were mixed and therefore this material evidence was far from being conclusive. Accordingly, the Commission felt it was prudent to examine the available evidence on rugby union in New Zealand:

- Live spectator demand: two economic studies had examined in New Zealand the effect of match and within-season uncertainty on attendances (one at Super rugby matches and the other at NPC rugby matches) and found very little evidence that uncertainty of outcome had any effect as it was argued by the NZRU.

The Commission also undertook its own economic study to better investigate the relationship between inter-seasonal uncertainty and attendance during NPC matches. This work showed that whilst, as seasonal outcomes become more certain (as winning across seasons become more persistent), crowd attendances are predicted to fall, the results were not statistically significant. Other factors, such as ticket prices and the historical record of a union being a semi-finalist, were more significant in explaining demand.

- Television audience demand: the Commission first noted that apparently only one published study work had examined the link between the uncertainty of outcome in professional team sports and television viewership.²⁴ That study found that uncertainty did increase television audiences, but only with a moderate effect.

The Commission conducted its own economic study on whether the uncertainty of outcome influences television audiences. This showed that none of the uncertainty of outcome variables was statistically significant in explaining the variation in television demand. However, one of the key findings of this work was that match quality, measured on the number of Super rugby players involved in a contest, did raise viewer ratings. According to the Commission, this suggested that player redistribution policies, such as a salary cap, may well increase the viewer demand for matches, not because of a more even competition, but rather because of an increase in the average quality of matches.

On the basis of these elements, the Commission has eventually recognised that the following benefits might flow directly from the NZRU's proposed salary cap:

- (i) an increase in the NPC's attractiveness for live spectators, whose effects however had to be quantified conservatively; (ii) an increase in the NPC's attractiveness for television spectators, not because of a more even competition, but because of an increase in the quality of matches; and accordingly (iii) higher financial resources for the NZRU and provincial unions derived from broadcasting revenues, sponsorship, merchandising and royalties.

6 Conditions

To be satisfied that in all circumstances the salary cap would result in a net benefit for the public of New Zealand, the Commission imposed the following conditions on the NZRU:

- The salary cap was seen by the Commission as creating incentives for the provincial unions to circumvent the cap or increase legitimate payments outside the cap, more particularly given that only a few of them would be initially constrained by the cap. Accordingly, it imposed the obligation on the NZRU to implement effective audit, monitoring and enforcement mechanisms, as otherwise the potential benefits of the salary cap could be placed at risk;
- The Commission also underlined that unless there was clarity about how to determine whether a particular form of remuneration or benefit is to be included in or excluded from the salary cap, the provincial unions might avoid the system. Therefore it imposed the obligations on the NZRU to draft relevant regulations so that (i) all remuneration or other financial or non-financial benefits received by players in connection with the provision of playing services to a provincial union are included (and accordingly so that these elements are excluded when they are not connected with the provision of playing services); (ii) all non-financial benefits are accorded a financial value that reflects a fair market value.
- Finally, the Commission recognised that the NZRU's proposed salary cap was new and therefore untested in practice. Moreover, there were uncertainties around the materialisation and quantification of the anticipated public benefits. For these reasons, the Commission found it necessary (i) to impose the obligation on the NZRU to commission an independent review of the salary cap starting as of the fourth anniversary of the authorisation and (ii) to limit the period of time of the authorisation to 6 years from the date of the granting.

²⁴ Forrest et al. (2005) p. 641–661. This study focused on the English football *Premier League*.

7 Epilogue²⁵: revocation of the authorisation granted to the salary cap

The factual elements on which the Commission's 2006 decision was based, to conclude that competition rules were applicable to the notified measures, were formalistic (presence in the collective employment agreement setting out the salary cap of a clause providing for the possible hiring of players as independent contractors) and thin (only one player had been engaged in practice under the independent contractor option at the time when the Commission examined this case).

This probably did not escape the NZRU's pragmatism, since the collective employment agreement has been amended, as from 2009, to remove the possibility that players may be hired by provincial unions otherwise than under employment contracts.

Having received an NZRU's request in that sense, the Commission has eventually considered in a third and ultimate decision, dated 31 March 2011,²⁶ that the salary cap did no longer fall within the scope of application of competition rules because of this deletion. It concluded that this change of circumstances should lead to the revocation of its decision dated 2 June 2006.

8 Conclusion

The specific sporting and legal context of New Zealand explains the existence of the Commission's decisions and the thorough economic analysis carried out in the one dated 2 June 2006.

Rugby union is New Zealand's national sport and constitutes in particular an important element of its image abroad. This helps to understand for example the

²⁵ For the sake of completeness, it must be added that before this epilogue, the Commission has authorised, in a decision dated 11 May 2007 (*Commerce Commission, Decision no. 601, Determination pursuant to the Commerce Act 1986 in the matter of an Application made by the New Zealand Rugby Union (NZRU) to vary the authorisation granted in decision 580*), the change to the salary cap rules made by the NZRU due to the unavailability of some players participating in an All Blacks' conditioning program and the 2007 rugby World Cup. According to the NZRU, it was necessary to relax the salary cap rules to take into account the additional costs incurred by NPC provincial unions to recruit and remunerate replacing players. Provincial unions were authorised to apply certain fixed discounts for the purposes of calculating the salary cap aggregate. The Commission carried out a new balancing exercise to take into account this change in circumstances and came to the conclusion that it would produce a slightly higher net public benefit than the one quantified in its decision dated 2 June 2006.

²⁶ *Commerce Commission, Decision n°721, Determination pursuant to the Commerce Act 1986 in the matter of the revocation of the authorization granted to the New Zealand Rugby Union Incorporated in Decision 580*.

arguments put forward by the NZRU in its notification of the salary cap regarding the public benefits it was expected to produce indirectly on the All Blacks' performances and accordingly on the New Zealand's economy.

From a legal point of view, it should first be noted that the prior authorisation system laid down in New Zealand's law²⁷ and used by the NZRU in the present case no longer exists in European law since the Regulation no. 1/2003²⁸ entered into force on 1st May 2004. Within the European sphere, such an analysis could thus be performed only ex post.

As regards the substantive rules on competition, the structure of the provisions applicable in New Zealand regarding anticompetitive agreements is similar to that of article 101 TFEU (prohibition principle/possibility of exemption).²⁹ But their implementation appears to differ at least in two aspects:

- The European Commission³⁰ and jurisdictions³¹ have established a rule of reason within the analytical framework set out in article 101(1) TFEU, to take

²⁷ Section 58 of the Commerce Act.

²⁸ Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty, Official Journal of the European Union (OJEU) L 1/25 of 4.1.2003.

²⁹ This similarity is illustrated by point 11 of the European Commission's Guidelines on the application of article 101(3) of the TFEU (OJEU C 101/97, 27/04/2004): *"The assessment under Article 101 thus consists of two parts. The first step is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential anti-competitive effects. The second step, which only becomes relevant when an agreement is found to be restrictive of competition, is to determine the pro-competitive benefits produced by that agreement and to assess whether these pro-competitive effects outweigh the anti-competitive effects. The balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3)"*.

³⁰ European Commission's press release dated 27 juin 2002, IP/02/942: in June 2002, the European Commission has closed an investigation into the UEFA's multi-ownership rule according to which a company or individual cannot directly or indirectly control more than one of the clubs participating in a UEFA competition. The Commission has come to the conclusion that although these rules might theoretically be caught by the prohibition provided for in article 81 of the EC Treaty, their purpose was not to distort competition but to guarantee the integrity of competitions. Moreover, according to the Commission, the limitation of the freedom of action of clubs and investors which the rule entailed did not go beyond what was necessary to ensure its legitimate aim, i.e. to protect the uncertainty of the results in the interest of the public.

³¹ Court of Justice of the European Union, 18 July 2006, case C-519/04 P, *Medina D. et Majcen I. c/Commission*, concerning anti-doping rules.

account of the specificities of sport.³² It is considered that even if a sports federation or professional league's regulation could theoretically be caught by the prohibition principle set in this text, when it is likely to have an adverse impact on the parameters of competition, it may fall outside its scope if it is necessary and proportionate to achieve a legitimate objective.

However, in this case, the Commission did not analyse the NZRU's proposed salary cap only through such a rule of reason, but based on a weighing up of its apparent detriments and benefits, similar to the one set out in article 101(3) TFEU and requiring a thorough economic analysis.

- The analytical framework that must be applied by the Commission, by virtue of the Commerce Act, with a view to balancing detriments and benefits of an anticompetitive agreement, appears to be broader than the one provided for in article 101(3) TFEU: if detriments must be identified exclusively on the market(s) directly affected by an agreement, benefits may be looked at on other markets.³³ The European Commission also recognises that benefits may be identified on other markets than those where adverse effects are likely to occur, but only under certain conditions.³⁴ Thus, even if a competition authority in Europe were to examine the compatibility of a salary cap with European competition law, and would carry out a thorough economic analysis to this end, it is not sure that the analysis conducted would be the same than the one performed by the Commission in its decision dated 2 June 2006.

³² Point 47 of the above-mentioned European Commission's communication (see footnote 29) is a good illustration of how this rule of reason is specific to the sport sector: "Any claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded". The European Commission thus recalls that in general for all economic sectors to which competition rules apply, the argument that a restrictive agreement would have the purpose of ensuring fair conditions of competition on a market is not grounded.

³³ See point 541 of the decision dated 2 June 2006, in which the Commission cited the case law that imposed this analytical framework (Goodman Fielder/Wattie Industriels (1987) 1 NZBLC (Com) 104,108): "It is important to note that the detriments may only be found in the market or markets where competition is lessened, whereas benefits may arise both in those and in any other markets".

³⁴ See point 43 of the above-mentioned Commission's communication: "The assessment under Article 101(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. (...). However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same".

These decisions should therefore be analysed under the specific background of New Zealand. Still, it is interesting to investigate what could be their practical and legal impact in Europe. Three remarks can be made:

- Firstly, professional sports leagues having already implemented or considering implementing a salary cap may view these elements as supporting the economic interest of this kind of system.

These decisions also constitute precedents that tend to indicate that a salary cap regulation might well be considered to comply with European competition law, even after a thorough economic analysis as the one required under article 101(3) TFEU.

In this respect it can be noted that the European Commission has already recognised that the protection of a competition's integrity and of the uncertainty of outcome were legitimate interests. Regulations adopted by sports federations and professional leagues may thus fall outside the scope of article 101(1) TFEU if they are necessary and proportionate to meet these objectives.³⁵

Thus, the assessment of a salary cap regulation under European competition rules could well be carried out exclusively on the basis of article 101(1) TFEU and not after a detailed economic analysis as the one performed in the New Zealand's case.

- Secondly, in addition to the comparative elements that are provided by salary cap regulations already implemented by other federations or leagues, in France or abroad, the persons involved in the elaboration and application of this kind of system may find in these decisions food for thoughts.

For example, under the current French legislative framework,³⁶ the salary cap put in place by the LNR only provides for pecuniary sanctions.³⁷ The

³⁵ See footnote 30.

³⁶ See the interview with Mr. Paul Goze, President of the LNR, Midi Olympique dated 18 August 2013: "For the moment the legislative framework does not allow us to use other forms of punishment, for example sporting sanctions. (...). But this should change quickly with the upcoming new sport law, which will be passed probably in the first half of 2014. This law should allow us to sanction offending clubs via the forfeiture of competition points. That seems to me to have a much more deterrent effect" ("Pour l'instant le cadre législatif ne nous permet pas de punir autrement, par des sanctions sportives par exemple. (...). Mais cela devrait très vite changer avec la loi sur le sport, probablement votée dans le premier semestre de 2014. Elle devrait nous permettre alors de sanctionner les clubs fautifs par des retraits de points au classement. Ce qui me semble beaucoup plus dissuasif").

³⁷ Article 9 of the "Règlement relatif aux sommes et avantages dus aux «joueurs»" ("Regulation on the amounts and benefits due to «players»"). This article also provides that the registration of a professional player's contract and/or an amendment can be refused if that contract and/or amendment would have the effect of exceeding the cap applicable for a season.

Commission's observation made in its decision dated 2 June 2006 regarding the necessity of supplementing financial penalties with other forms of sanctions—to increase the probabilities that the salary cap will produce enough positive effects—may support arguments in favour of adopting legislative measures to this end.

- Thirdly and finally, one may question whether and how these decisions contribute to the debate on the compatibility of UEFA's financial fair play regulations with European competition rules.

At the very least, they illustrate that this kind of mechanism may, in practice, be analysed not only through a rule of reason on the basis of article 101(1) TFEU, but also through the conditions for exemption set out in article 101(3) TFEU.

Moreover, even if this kind of mechanism were examined through a rule of reason, this would require in any case to identify the legitimate objectives pursued³⁸ and (i) the necessity (i.e. a causal link) and (ii) proportionality of these mechanisms to achieve these objectives:

- On the first point, the Commission's decision dated 2 June 2006 shows that the existence of a causal link between the mechanism in question and the stated legitimate objectives is not obvious and thus requires a minimum of investigation.
- On the second point, the observations made in these decisions regarding the nature and definition of the benefits to be included in or excluded from the salary cap shows that the outlines of a regulation should be taken into account when assessing its compatibility with competition rules. In the present case, UEFA's financial fair play regulations are based on the main idea that football clubs' expenditures should not exceed their revenues. Like the salary cap considered by the Commission, these regulations raise the question of the nature and definition of the expenditures and revenues that must be taken into account to check whether this balance has been respected. Precisely, this question might turn out to be important to verify that these rules do not go beyond what is necessary to meet the objectives pursued.

³⁸ One question is in itself whether the stated objectives are really legitimate.

Appendix—Summary of the Commission’s analysis regarding the balancing of detriments and benefits flowing from the salary cap

Type	Nature	Estimated size (total amount over five years and in present value terms)
Detriments		
1. Allocative inefficiency (i.e. Blocked transfers of players)	Negative effect due to the fact that some transfers between players and provincial unions ready to offer a higher remuneration would be blocked because of the salary cap (Commission’s estimate: a total of 42 transfers blocked after five years of implementation)	133,000 \$ [81,000 €]
2. Productive inefficiency (i.e. Costs related to the implementation of the cap)	Costs incurred by the NZRU in order to (i) put in place the salary cap and (ii) investigate provincial unions suspected of violating it Costs incurred by provincial unions in order to (i) verify that they respect the cap, (ii) prepare their defence during an investigation launched by the NZRU and (iii) identify potential regulatory loopholes or carry out lobbying actions	2,100,000 \$ to 2,458,000 \$ [1,286,000 € to 1,505,000 €]
3. Loss of player talent overseas	Negative effect due to the fact that talented players would move to clubs overseas, due to a decrease in the average remuneration offered in the NPC (Commission’s highest estimate: a total of 30 players having migrated after five years of implementation)	948,000 \$ to 1,895,000 \$ [581,000 € to 1,160,000 €]
4. Reduction in player skills levels	Negative effect due to the players’ frustration caused by a higher remuneration inequality, blocked transfers to provincial unions offering higher remuneration and/or whose squad would be more complementary	<i>De minimis</i>
Total estimated amount: 3,181,000 \$ to 4,486,000 \$ [1,949,000 € to 2,749,000 €]		
Benefits		
1. Increased spectator enjoyment	Net gain for the public of New Zealand due to the increase in the number of spectators (estimated by the Commission between 0% and 20% over 5 years)	0 \$ to 1,100,000 \$ [0 € to 674,000 €]
2. Increased viewer enjoyment	Net gain for the public of New Zealand due to the increase in the number of viewers (estimated by the Commission between 0% and 18% over 5 years)	0 \$ to 10,800,000 \$ [0 € to 6,621,000 €]
3. Increase in the NZRU’s and provincial unions’ revenues	Increase in the NZRU’s and NPC provincial unions’ revenues derived from broadcasting, merchandising, advertising, sponsorship and royalty deals	0 \$ to 360,000 \$ [0 € to 221,000 €]
4. Indirect benefits	Improved performance of New Zealand’s international teams (the Super Rugby teams and the All Blacks) allegedly producing a number of indirect benefits for the public: <ul style="list-style-type: none"> - greater enjoyment for New Zealand spectators and television audiences - greater leverage for NZRU in its negotiations over international television rights, sponsorship, and revenue sharing arrangements - greater sponsorship expenditure by New Zealand firms spent in New Zealand instead of being spent overseas - improved trading opportunities for New Zealand firms via the “association with success” factor - increased tourism for New Zealand - a “feel good” factor for New Zealanders 	<i>De minimis</i> given the weak link between the salary cap and the indirect benefits alleged by the NZRU
Total estimated amount: 0 \$ to 12,260,000 \$ [0 € to 7,514,000 €]		
Net estimated positive (negative) effects (rounded): (4,500,000 \$) to 9,100,000 \$ [(2,758,000 €) to 5,576,000 €]		
<p>The Commission has considered eventually that it was reasonable to take the midpoint of this range as the appropriate estimate to determine whether to grant or to decline an authorisation to the salary cap. See point 137 of the executive summary of the decision dated 2 June 2006:</p> <p>« The potential range of benefits and detriments encompasses the possibility that the Proposed Arrangements either have net benefits or net detriments. Therefore, the determination of whether to grant or decline an authorization in this instance requires the exercise of finely balanced judgment. The Commission, in exercising its judgment, has taken into account all of the available evidence and analysis put before it and is inclined to take the midpoint of the range as being a reasonable estimate of the likely net public benefit. This indicates a net public benefit in the order of \$2 million, in present value terms over five years »</p>		

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