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Has the 50+1 rule in German football reached its expiration date?

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The 50+1 rule is a distinctive feature of German professional football. While majority shareholdings of investors are not uncommon in other professional football leagues, this rule makes them almost impossible in Germany. However, the Bundeskartellamt (Federal Cartel Office: FCO) may now have put a stop to this long-standing practice. So, might we even witness investor-led clubs in German professional football in the future?

The 50+1 rule

Since 1999 it is possible to outsource a club's own professional players' division into a public or private limited company. This allows that a parent club operates on a non-profit basis and that a separate limited company manages the professional division (Section 16c No. 1 DFB Statutes, Section 8 No. 1 DFL Statutes). Numerous clubs have since used this possibility. The reasons for such outsourcing include avoiding the loss of the non-profit status and professionalising the decision-making and control structures.

The DFB (German Football Association) wanted the parent clubs to retain their dominant influence over the respective outsourced limited company, which is why the 50+1 rule was established. This rule stipulates that the parent club must always retain at least 50% of the voting shares plus one additional voting share in regard to the shareholders' meeting (Section 16c No. 3 DFB Statutes, Section 8 No. 3 DFL Statutes). Ultimately, this provision leads to the fact that a complete club takeover by an outside investor has to be considered as impossible.

German Football is sometimes even envied abroad for this rule, especially after what happened with the Super League. The 50+1 rule is said to have been one of the reasons why German clubs did not participate in the Super League.

There is only one written exemption to this strict rule (Section 16c No. 3 DFB Statutes, Section 8 No. 3 DFL Statutes): A takeover of a club is only possible if an investor has continuously and substantially promoted the sport of football of the club for more than 20 years. The praesidium of the DFL decides if this exemption can be approved. Approval is subject to the condition that the investor in question will continue to promote amateur football to the same extent in the future. Furthermore, this investor may not resell the shares and may only transfer them back to the parent club free of charge.

Bayer Leverkusen (Bayer), TSG Hoffenheim (Dietmar Hopp) and VfL Wolfsburg (Volkswagen) are currently using this option. So in the case of Bayer Leverkusen, the outsourced professional division (Bayer 04 Leverkusen Fußball GmbH) is a wholly-owned subsidiary not of the parent club, but of the German pharmaceutical company Bayer AG.

The preliminary assessment

It is precisely this exemption that is the main problem in the proceedings (Section 32c GWB) before the FCO, which has now issued a preliminary assessment. In the authority's view, the basic rule can potentially be compliant with competition law. While this rule constitutes a restriction of competition by imposing certain conditions for participation in the Bundesliga and the 2nd Bundesliga, it pursues legitimate objectives. The DFL intends to maintain the club character of the sport and to ensure a certain competitive balance. Moreover, the FCO considers the basic rule to be appropriate and proportionate to achieve such objectives.

However, if the exemption is included in the assessment, then this rule as a whole appears disproportionate. In the authority's view due to this exemption, achieving the legitimate goals can no longer be uniformly assured. Moreover, it creates harm to the competitive balance.

Opinion

The FCO has positioned itself relatively clearly with this assessment. It is evident that the DFL can violate Art. 101, 102 TFEU in the context of the 50+1 rule. Therefore, of most interest are rather the comments on the rule's proportionality, because a competition law violation would be rejected if a rule pursues a legitimate objective, is inherent to these objectives as well as necessary and proportionate.

Regarding the basic rule, it can be stated that it secures the competitive balance as clubs are prevented from obtaining more funding by giving up control over their professional football division to outside investors. An interesting aspect in this context is that the club character is explicitly regarded as a legitimate reason by the FCO. Club character "offers the public at large the possibility to co-determine a club's affairs by becoming a member and hence to participate in Bundesliga activity beyond their role as consumers".

Shifting to the controversial exemption, it can be justified by the fact that investors that have been supporting a club for a significant period of time must be granted protection of legitimate expectation. However, investors are not dependent on such an exemption in order to continue their previous club related activities. Rather, they can protect themselves through contractual agreements and a shareholder position that is compatible with the basic rule. This gives a respective investor a say in the club's management and provides protection from rival sponsors that may want to participate. In addition, issues with the competitive balance raised by the FCO also have to be considered.

Of further particular interest, is the fact that clubs will not receive a licence if they do not comply with the 50+1 rule. The EU Commission has clarified that precisely such licensing requirements that may interfere with the clubs' business decisions "would have to be reviewed very carefully" and "may not go beyond what is necessary".

Moreover, apart from competition law, a court would also have to review this rule with respect to compatibility with EU law – the fundamental freedom of establishment (Art. 49 TFEU) and the free movement of capital (Art. 63 TFEU).

As this is only a preliminary assessment by the FCO, the DFL would not be forced to change the 50+1 rule. But in view of the assessment's wording and the EU Commission's guidelines, it is to be expected that the DFL will at least consider new concepts on how to regulate investments.

Consequently, four possible options for action can be envisaged:

- The DFL can try to modify the exemption so that it would be considered proportionate. This, however, is difficult to imagine; if, for example, the exemption were to be de-radicalised to simplify it for other clubs to qualify for this exemption, the 50+1 rule's effectiveness would probably be weakened. Therefore, the rule would not be characterised as overall proportionate.
- Another possibility would be to abolish the exemption and keep the 50+1 rule in its basic form.
- The 50+1 rule could also be completely abolished. This seems unlikely, as the regulation of investments has long been a characteristic of German professional football.
- It would be more likely that the DFL if they abolish this rule, would introduce another provision to regulate investments. There are already several proposals in this regard. These include lock-up periods and payout limits for investors, deficiency guarantees and ensuring the co-determination and veto rights for club members in regard to fundamental decisions.

The DFL as well as the clubs and investors admitted as third parties now have the opportunity to comment on this preliminary assessment. It remains to be seen how the reactions and potential rule changes will turn out.

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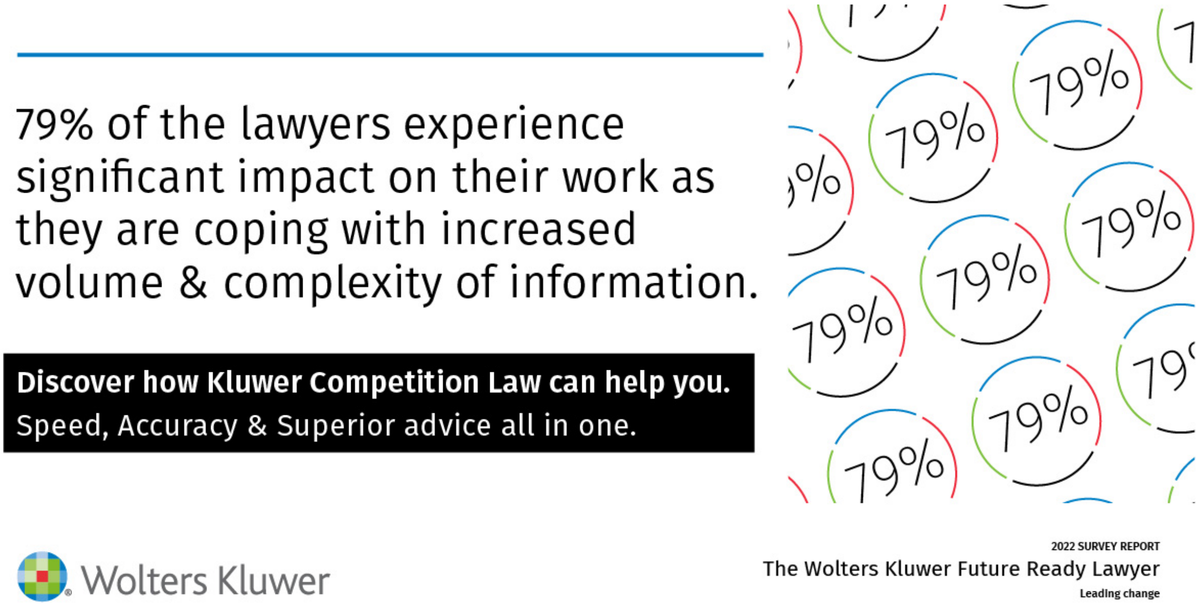

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