

Sports and competition law: recent developments

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Summary

- **The specificities of sport**
- Sporting rules: a taxonomy
- Sporting rules and competition law
- Recent developments

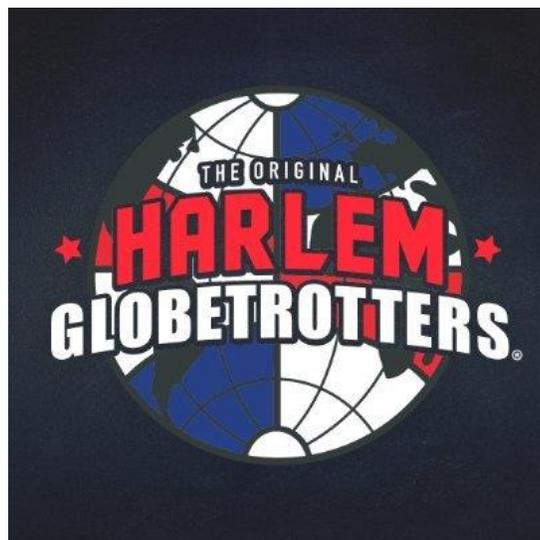
The specificities of sport

- There are two specific features of sporting activities that are worth emphasising in the context of this discussion:
 - The **interdependence** between participants in a competition
 - The protection of the '**European model**' of sport

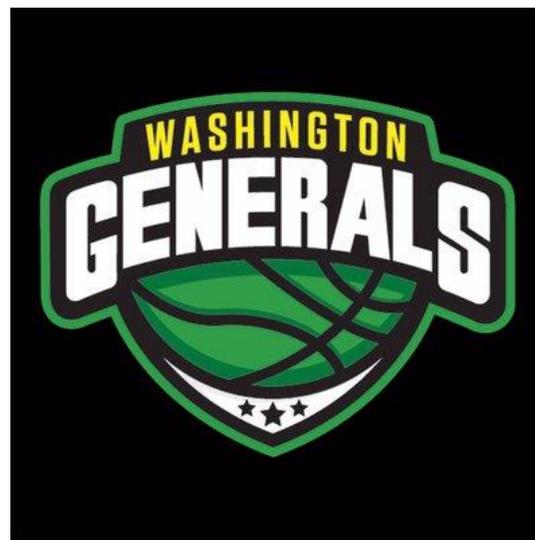
The specificities of sport

- Participants in a sporting event (teams or individuals) are not competitors in the usual sense:
 - The proverbial dominant firm is better off if it controls the whole of the market and its rivals are foreclosed
 - Participants in a sporting event, on the other hand, need each other: the value of each individual participant depends on rivalry with others
 - It is a form of **co-opetition**, whereby they cooperate and compete at the same time...
 - ...or, if one prefers, a joint venture in which cooperation is **more than the sum of its parts**

The specificities of sport



VS



The specificities of sport



The specificities of sport

- The corollary of the above is twofold:
 - First, rules dealing the **organisation of events** and tournaments seem indispensable to the appropriate functioning of sporting events
 - Second, the creation of a **governance structure** laying down sporting rules is as necessary as the need to lay down rules themselves

The specificities of sport

- The Treaties expressly refers to sport and its specificities in Article 165 TFEU:
 - ‘The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport’ and ‘its structures’
 - Express references to ‘fairness and openness’ in sporting competitions

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Sporting rules: a taxonomy

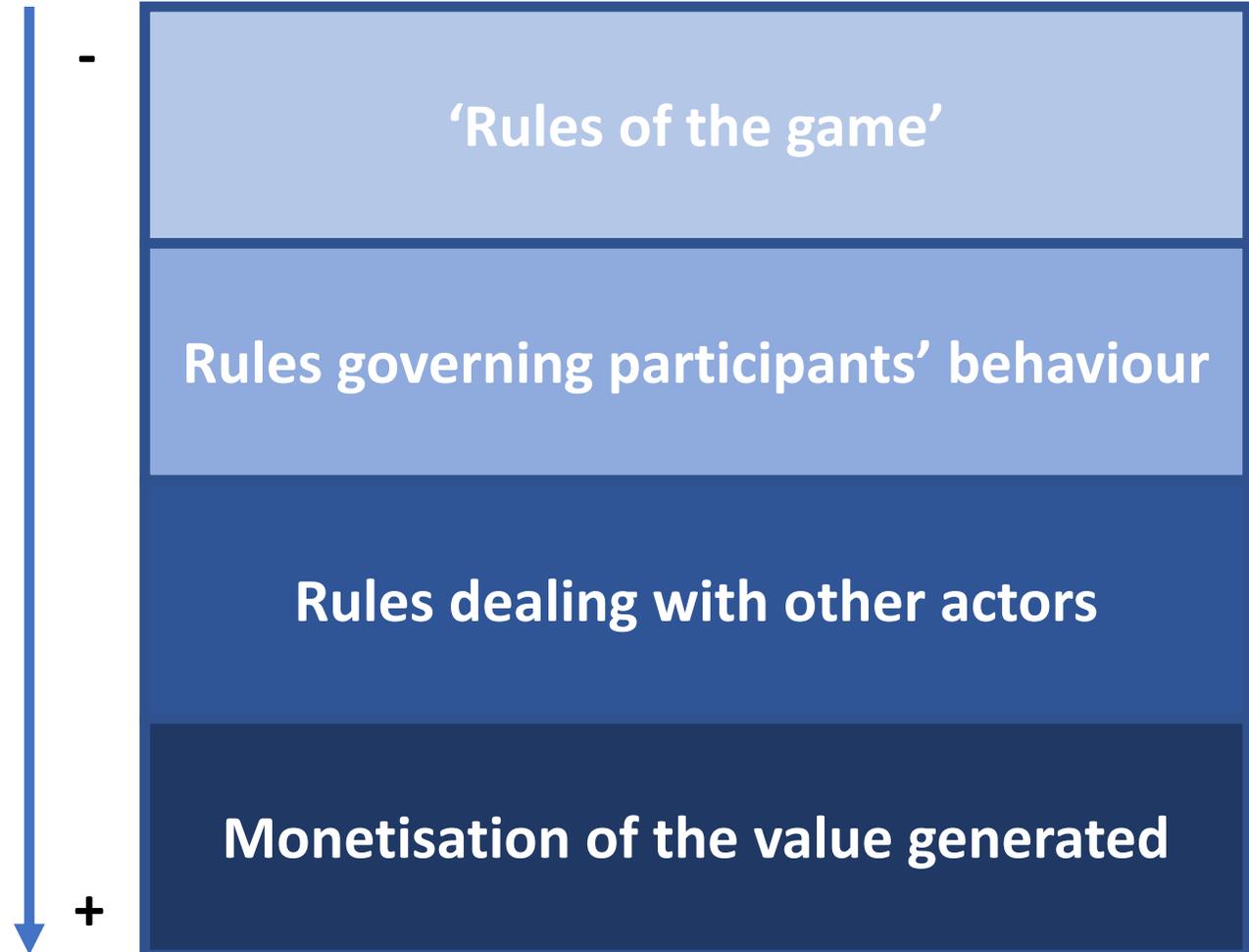
- Sporting rules may pursue a variety of aims:
 - Fairness and integrity of the competition
 - Participants' health
 - Competitive balance
 - 'Grassroots' character
 - Coordination across levels
 - Tackle free-riding
- It is not obvious to draw a clear line between economic and non-economic aims or between purely sporting rules and the rest

Sporting rules: a taxonomy

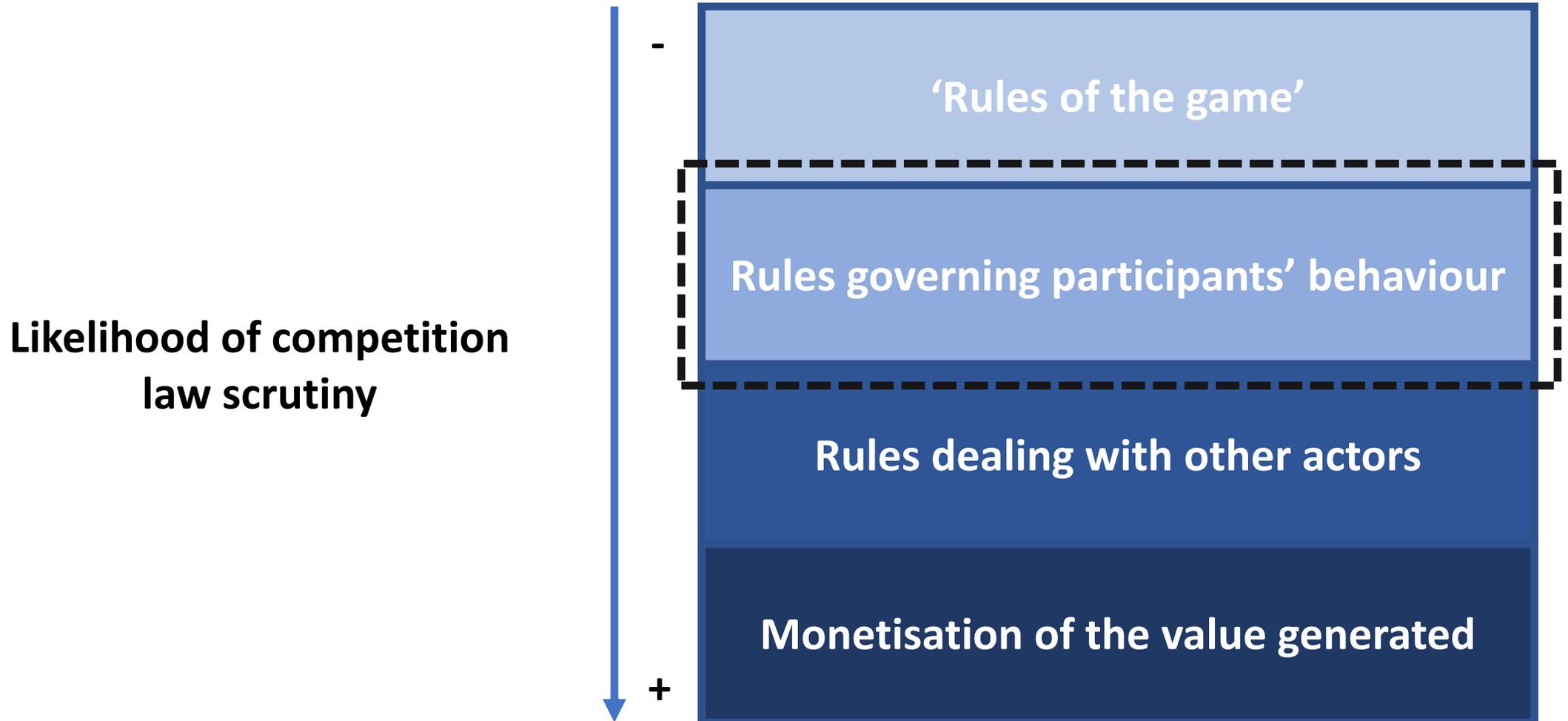
- Sporting rules can be divided, inter alia, along the following lines:
 - **'Rules of the game'** stricto sensu: e.g. size of the pitch
 - Rules governing **participants' behaviour**: e.g. transfer rules
 - Rules governing the **relationship with other actors**: e.g. agents
 - Rules on the **monetisation** of the value generated: e.g. sale of TV rights

Sporting rules: a taxonomy

**Likelihood of competition
law scrutiny**



Sporting rules: a taxonomy



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Sporting rules and competition law

- EU competition law has long taken a relatively hands-off approach vis-a-vis sporting rules:
 - Acknowledgment that **rules and governance structures are inherent** in the organisation of sporting activities
 - Accordingly, rules that relate to sporting aims and the organisation of a competition do not have, as their object, the restriction of competition
 - In the same vein, rules that are **ancillary to a sporting aim** escape the prohibition laid down in Article 101(1) TFEU
 - Rules that go beyond what is necessary to attain the aim in question may have restrictive effects within the meaning of Article 101(1) TFEU

Sporting rules and competition law

'43. As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that ***the general objective of the rules was***, as none of the parties disputes, to combat doping in order ***for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes***, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport'

C-519/04 P, *Meca Medina*

Sporting rules and competition law

'45. Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article [101 TFEU], since they are justified by a legitimate objective. ***Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes'***

C-519/04 P, *Meca Medina*

Sporting rules and competition law

'47. It must be acknowledged that the penal nature of ***the anti-doping rules*** at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they ***could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events***, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that, in order not to be covered by the prohibition laid down in Article [101(1) TFEU], the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport [...]'

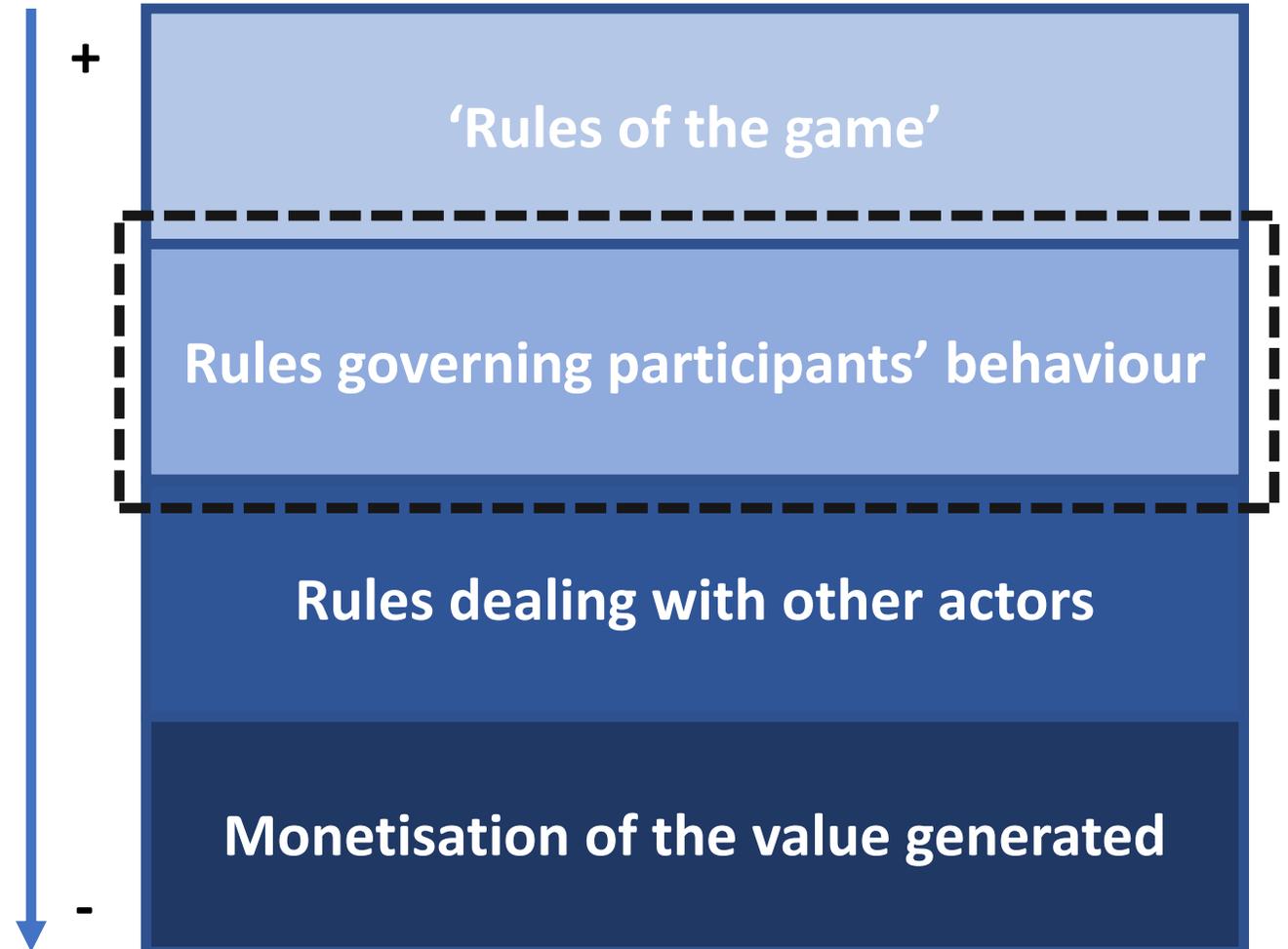
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Recent developments

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Recent developments

- A number of recent and/or ongoing cases deal with rules governing participants' behaviour in a competition:
 - *International Skating Union*
 - *Super League*
 - Homegrown players rules
 - 50+1 rule (Germany)

Recent developments

- Recent developments are interesting in that they highlight a number of misconceptions that persist (or keep coming back):
 - The distinction between rules that pursue an economic aim and those that do not is not decisive
 - It is not because a rule pursues an economic aim that it is necessarily restrictive of competition, let alone by object
 - A rule that goes beyond what is necessary to attain a given aim is not necessarily restrictive of competition by object

Recent developments

‘164. Further, the content of Rule 102(1) a) (ii) of the ISU General Regulations 2014 [...] underlines that the Eligibility rules are aimed at protecting the economic interests of the ISU. This is further confirmed by the assertion made by the ISU that it uses the funds generated by its commercial activities to contribute to the organisation of international competitions by its Members’

Commission Decision in *International Skating Union*

Recent developments

‘109. In addition, even if it were established that the 2016 eligibility rules also pursue an objective of protecting the applicant’s economic interests, ***it should be noted that the fact that a federation seeks to protect its own economic interests is not in itself anticompetitive.*** As the Commission acknowledged at the hearing, the pursuit of economic objectives is an inherent feature of any undertaking, including a sports federation when it carries out an economic activity’

Case T-93/18, *International Skating Union*

Recent developments

‘111. It follows that, even though the Commission wrongly relied on the objective of protecting the applicant’s economic interests as regards the 2016 eligibility rules, it was right to find that the pre-authorisation system was disproportionate, in particular in the light of the alleged other objective pursued by the eligibility rules, that all events should comply with common standards’

Case T-93/18, *International Skating Union*

Recent developments

- The *ISU* and the *Super League* cases are particularly interesting in that they relate to limits to the ability to organise competitions:
 - Accordingly, they can be reasonably be presented as pursuing an economic interest
 - The fundamental question they raise is whether it is anticompetitive for an organisation to set rules limiting competition to itself
 - Put differently: **can a co-opetitive joint venture protect its economic interests**, and if so, under what conditions?
 - In this regard, free-riding considerations are particularly relevant in the analysis ('anti-cakeism')



My policy on cake is pro having it
and pro eating it.

— *Boris Johnson* —

AZ QUOTES

Recent developments

- The case law provides a basis for the assessment of these practices under Article 101(1) TFEU:
 - Measures aimed at addressing **free-riding concerns** do not have, as their object, the restriction of competition (*Cartes Bancaires*)
 - One can draw the same conclusions, by analogy, with the case law on vertical restraints, in particular **franchising** (*Pronuptia*)
 - Not only are these restraints not restrictive of competition by object but sometimes escape Article 101(1) TFEU altogether (*Gottrup-Klim*)

Recent developments

'75. Having acknowledged that the formulas for those measures sought to establish a certain ratio between the issuing and acquisition activities of the members of the Grouping, the General Court was entitled at the most to infer from this that those measures had as their object the imposition of a financial contribution on the members of the Grouping which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system. ***Such an object cannot be regarded as being, by its very nature, harmful to the proper functioning of normal competition***, the General Court itself moreover ***having found***, in particular in paragraphs 76 and 77 of the judgment under appeal, that ***combatting free-riding in the CB system was a legitimate objective***'

Case C-67/13 P, *Cartes Bancaires*

Recent developments

‘16. First, ***the franchisor must be able to communicate his know-how*** to the franchisees and provide them with the necessary assistance in order to enable them to apply his methods, ***without running the risk that that know-how and assistance might benefit competitors***, even indirectly. It follows that provisions which are essential in order to avoid that risk do not constitute restrictions on competition for the purposes of Article [101(1) TFEU]. ***That is also true of a clause prohibiting the franchisee***, during the period of validity of the contract and for a reasonable period after its expiry, ***from opening a shop of the same or a similar nature*** in an area where he may compete with a member of the network’

Case 161/84, *Pronuptia*