

# The International Sports Law Journal



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**THE WATHELET REPORT:**  
Sport Governance and EU  
Legal Order

**WADA**

**Doping**

**FIFA Dispute Resolution  
Chamber**

**Broadcasting Rights**

**White Paper on Sport**

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There have been several recent landmark initiatives relating to the relationship between sport and EU law. First of all, UEFA promoted an “Independent European Sport Review”, best known as the “Arnaut report”, which was published in October 2006. This report strongly supports the increased autonomy of international sports-governing bodies from EU law. In March 2007, the European Parliament adopted a resolution on “The Future of Professional Football in Europe”, the content of which was partly based on the Arnaut report. On 11 July 2007, the European Commission published its “White Paper on Sport”. On 13 July 2007, UEFA issued a joint press statement together with other European federations (ice hockey, basketball, handball, rugby and volleyball) calling for “firmer conclusions from the European Union to aid the future development of sport”. In particular, these federations call for “the appropriate inclusion of sport in the reform treaty”, aimed at “fully recognising the autonomy and specificity of sport as well as the central role and independence of the sports federations in organising, regulating and promoting their respective sports”.

In order to contribute to the diversity of the debate, the ASSER International Sports Law Centre has commissioned Professor Melchior Wathelet, Universities of Louvain-la-Neuve and Liège and a former Member of the European Court of Justice, to analyse the relationship between sport and EU law, particularly in the light of the above-mentioned documents. Professor Melchior Wathelet was asked to analyse the findings of the Arnaut report, *de lege lata* and *de lege ferenda*, also taking into account the economic and political aspects of the issues at stake.

We are very pleased that Professor Wathelet has accepted our invitation and has kindly made his expert opinions available to us in this ISLJ’s leading article on “Sport Governance and EU Legal Order: Present and Future”. The Wathelet Report’s content is officially supported by Professor Stephen Weatherill, Jacques Delors Professor of European Community Law, University of Oxford, United Kingdom, Professor Roger Blanpain, Universities of Leuven (Belgium) and

Tilburg (The Netherlands), co-founder and first President of FIFPro, Professor Klaus Vieweg, Director of the German and International Sports Law Research Unit, University of Erlangen-Nuremberg, Germany, Dr Richard Parrish, Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom and Dr Stefaan van den Bogaert, Lecturer in European Law, Faculty of Law, University of Maastricht, The Netherlands, and other academics and practitioners.

We have further received an official response from WADA on Emile Vrijman’s leading article in ISLJ 2007/1-2 entitled “The ‘Official Statement from WADA on the Vrijman Report’: Unintentional Proof to the Contrary?”. We considered it our duty to make this response which was accompanied by the Official Statement’s full text our second leading item.

Further in this issue of ISLJ, the contribution on the White Paper on Sport by Mr Michal Krejza, Head of the Sport Unit at the European Commission’s Directorate-General for Education and Culture, to the 7th Asser-Clingendael International Sports Lecture in The Hague on 6 September last is published. We proudly confirm that it was the first time after its publication that the White Paper on Sport was presented at a seminar to a wider audience.

Finally, we extend a hearty welcome to Professor Paul Anderson, Associate Director of the National Sports Law Institute at Marquette University Law School, Milwaukee, United States of America, to Professor Wang Xiaoping, Managing Deputy Director of the Research Center for Sports Law, China University of Political Science and Law (CUPL), to Dr Huang Shixi, Director of the Sports Law Center, Shandong University, China, to Professor Denis Rogachev, Member of the State Academy of Law, Moscow, Russia, and to Mr Gary Rice, Partner at Beauchamps Solicitors, Dublin, Ireland, as new members of ISLJ’s Advisory Board.

*The Editors*

# Sport Governance and EU Legal Order: Present and Future\*

by Melchior Wathelet\*\*

*On the future relationship between governance in European sport and in particular professional football and the European Union legal order*

Although sport is part of a healthy lifestyle and is a means of fans devoting themselves to the game and to competition, it has also become a professional business and an economic sector in its own right. To a greater or lesser extent, depending on the discipline, player transfers, infrastructures, media rights, advertising and sponsorship of major national or international events now run into billions of euros or dollars.

At a time when a new European treaty is being drafted, when new questions are being referred to the European Court of Justice (ECJ) for preliminary ruling when there are conflicts between players and their clubs or clubs and their national or European federation, after the publication on 11 July 2007 of the EU Commission's "White Paper on Sport"<sup>1</sup>, we felt it opportune to focus, both in terms of 'lege lata' and 'lege ferenda', on European law applicable to professional sport and, more especially, football. We will do so by taking as a starting point the so-called Arnaut report, named after its author José Luis Arnaut, former deputy prime minister of Portugal and minister of sport in charge of Euro 2004, entitled the "Independent European Sport Review" (IESR)<sup>2</sup> published in October 2006 as well as the European Parliament resolution on the future of professional football in Europe<sup>3</sup> adopted in March 2007, for commenting on the findings and proposals contained therein as well as, in turn, offering some thoughts and suggestions for the future of relations between the governance of European sport and, more especially, that of football, on the one hand, and the Community legal system, on the other.

## I. Introduction

To date, sport has been organised exclusively by Member States which regulate (often in a specific and rigorous manner) - by means of appropriate legislation - the activities of the various stakeholders in the sporting arena (federations, clubs, players, etc.).

And so, by way of example:

- each Member State applies its national competition law to the cen-

tralised sale, by a federation or a league, or the individual sale, of media rights to sporting events;

- each Member State applies its Labour law to the contracts concluded between professional players and sports employers (football clubs, basketball clubs, volleyball clubs, cycling teams etc.);
- in each Member State, it is usual for ordinary courts to decide - on the basis of national law - on conflicts which may arise between the various stakeholders in the sporting arena. This has resulted in a thriving and consolidated jurisprudence.

No claims have ever been made with regard to the fact that this application of national law to the sports sector was going against the "autonomy required" by the federations in order to perform their duties or that this application could be a source of "legal uncertainty". As with all other sectors of society, the sports sector and its protagonists conform - at national level - to the constraints of the rule of law.

The European Union has no explicit competence conferred on it when it comes to sport.

Consequently, it only intervenes in this sector by means of the implementation of other powers invested in it, particularly with regard to free competition and free movement for persons, services and capital.

By means of numerous judgments and decisions, the ECJ and the European Commission have gradually developed a jurisprudence:

- which ensures that the various stakeholders in the sports sector, including international federations, respect fundamental freedoms of movement and competition law;
- which, as for all other sectors, including self-employed professionals, rejects the concept of routine exemption for sports federations but, on the other hand, takes into consideration the specificity of the sport (such as its social role, the need for a certain sporting equilibrium between the participants in a given competition, the need to support training, etc.);
- which, consequently, decides on a case by case basis - in view of all the circumstances of the case in point - on the question of whether restrictions of fundamental freedoms or of free competition created by a rule issued by a federation or by the conduct of a club or a federation are justified by an objective of general interest and are proportionate to the pursuit of this objective. A summary of this jurisprudence can be found in the recent MECA-MEDINA and MAJCEN judgment of 17 July 2006 which we will discuss later.

In short, the EU is limited to having marginal control (namely respect for free competition and fundamental freedoms) over any abuse of power by sports sector stakeholders, including national and international federations.

International federations (mainly UEFA and FIFA) and to a lesser extent the IOC, disputing European jurisprudence, believe that this case by case approach by the ECJ and the Commission generates an intolerable level of "legal uncertainty and confusion" and that in order to remedy the situation it would be necessary to exempt sport from the application of Community law (by virtue of its claimed specificity) and to reaffirm the regulatory autonomy of the federations (particularly international federations) over Community law.

This approach is clearly recommended by the so-called "ARNAUT report" which we must stress, although entitled "independent", is also clearly marked "commissioned" by UEFA<sup>4</sup>. This is no surprise since, although it wishes to focus on sport in general, it mainly concentrates on the world of football.

\* This report was distributed also in its original French version throughout Europe by means of a press-release; see also [www.sportslaw.nl/NEWS](http://www.sportslaw.nl/NEWS)

\*\* Universities of Louvain-la-Neuve and Liège (Belgium) and a former Member of the European Court of Justice. The content of this Report is supported by Professor Stephen Weatherill, Jacques Delors Professor of European Community Law, University of Oxford, United Kingdom, Professor Roger Blanpain, Universities of Leuven (Belgium) and Tilburg (The Netherlands), co-founder and first President of FIFPro, Professor Klaus Vieweg, Director of the German and International Sports Law Research Unit, University of Erlangen-Nuremberg, Germany, and Dr Richard Parrish, Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom.

<sup>1</sup> Available at this address: [http://ec.europa.eu/sport/whitepaper/wp\\_on\\_sport\\_en.pdf](http://ec.europa.eu/sport/whitepaper/wp_on_sport_en.pdf)

<sup>2</sup> Available at this address: [www.independentfootballreview.com/doc/Full\\_Report\\_EN.pdf](http://www.independentfootballreview.com/doc/Full_Report_EN.pdf) (only in English).

<sup>3</sup> Available at this address: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0100+0+DOC+XML+V0//EN>

<sup>4</sup> In its 2006 annual report, the "Independent Football Commission", created in 2001 at the behest of the British government and various British football stakeholders, with a view to monitoring the world of football, also examines this idea of "independence": "Arnaud promotes the desire for UEFA to control all national leagues and FAs. It would be interesting to discover how much input and influence UEFA had over the compilation of the Arnaut report" (p. 18). In its White Paper on Sport, the European Commission indicates that the Arnaut report was financed by UEFA (Commission Staff Working Document - The EU and Sport: Background and Context; page 7).

## II. The state of Community law

As stated, we will try to describe the state of Community law by starting from the approaches that we feel are being upheld by the Arnaut report.

### A. What would be the rules adopted by the sporting federations which, on the basis of European Court of Justice jurisprudence, are beyond the scope of Community law?

Rules which, according to the Arnaut report, would certainly be beyond the scope of Community law and would, therefore, be up to the “sole discretion of the sports governing bodies” would, in particular, include the rules of the game, rules relating to the structure of competitions, rules making it possible for federations to establish sporting calendars, the “home and away” rule, rules relating to the fight against doping and finally, rules relating to the obligation placed on clubs to make their employees available, free of charge, to national teams, this rule being “motivated by purely sporting considerations” and having, therefore, to be “considered as a prime example of a ‘sporting rule’ which should fall outside the scope of EU law”<sup>5</sup>.

The authors of the report could have been able to base their findings on a phrase from an already outdated judgment by the Court of Justice, known as the WALRAVE<sup>6</sup> judgment where, for the first time, the Court had applied rules relating to free movement of workers to the field of sport and had stated that sport was only subject to Community law when it constituted an economic activity in the sense of article 2 of the EC Treaty, tempering this approach to rules of purely sporting aspects and (which) as such (have) nothing to do with economic activity (paragraph 4).

Subsequent jurisprudence ought to have already convinced the authors of the Arnaut report of the non-existence of the principle of widespread exemption for “purely sporting rules”. In fact, both in the BOSMAN judgment of 1995 (which decided that the system of fee paying transfers at the end of an employment contract was contrary to Community law and, likewise, the quota rule, fixing the maximum number of players from other Member States able to take part in a match between clubs) (paragraph 76) and in the DELIEGE judgment of 2000 (the only case in jurisprudence where the Court recognised the purely sporting nature of a rule in respect of a regulation not involving the composition of national sports teams but relating to the selection of athletes for high-level international competitions) (paragraph 43), the Court had already specified that any restriction of the scope of Community provisions “must remain limited to its proper objective” and henceforth, cannot “be relied upon to exclude the whole of a sporting activity” from the scope of the Treaty<sup>7</sup>.

Even on this now outmoded basis, it certainly does not appear reasonable to believe that arranging sporting calendars, which in fact consists of distributing all the production capabilities of the “football product” between clubs and federations, or the obligation to make players available, which makes it possible, for example, for FIFA to organise a World Cup with a commercial value running into billions

of Euro (this event being, by its very nature, in direct competition with products offered by the clubs) should, a priori, escape investigation by Community judges.

It is, however, above all, highly surprising that no major reference is made in the Arnaut report to the MECA-MEDINA and MAJCEN judgment, even though this was given prior to publication of the report in question and which, in relation to anti-doping rules, very clearly moved the boundary between sporting regulations which escape the application of Community law and those falling within its scope<sup>8</sup>. The moment that any sporting rule has an economic effect, even if this is an ancillary economic effect, it will fall within the scope of the major freedoms of movement and competition law. The Court, in effect, states that “the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule of the body which has laid it down” (paragraph 27) and that “if the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty” (paragraph 28) <sup>9</sup>.

Let us remember that, in this case the Court quashed a judgment of the Court of first instance which, basing its judgment on the premise that “the prohibition of doping is based on purely sporting considerations and therefore has nothing to do with any economic consideration” (paragraph 47) had concluded that anti-doping rules, and more particularly, the disputed anti-doping regulation, did not fall within the scope of treaty provisions on economic freedoms and free competition, did not pursue any discriminatory purpose and, therefore, constituted a purely sporting rule, even though it did have economic repercussions (paragraph 49 and paragraph 52). In contrast, the Court of Justice applies the so-called Wouters jurisprudence<sup>10</sup> to anti-doping regulations, mindful of the fact that compatibility of a regulation with Community law cannot be applied in an abstract manner, that it is necessary to take into consideration the global context in which the rule has been enacted or in which it deploys its effects prior to investigating whether or not the resulting restrictive effects on competition are inherent to the pursuit of the legitimate objectives sought by it and are in proportion to said objectives.

Let us remember that the fact that a regulation falls within the scope of Community law does not mean that it is necessarily incompatible with said law. The Court did, in fact, state in the same judgment that an anti-doping regulation does not “necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC Treaty, 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” (paragraph 45).

That said, once a legitimate objective has been defined, it is once again necessary to determine whether the regulation is proportionate, i.e. limited to what is required in order to achieve the objective in question, in this case, the correct conclusion of sporting competitions.

In the case in point, in the Court’s opinion, examination of the proportionality of an anti-doping rule must relate both to the level at which the margin of tolerance over which doping is punishable is set and the severity of the sanctions laid down.

In this regard, let us take two other examples.

In quoting the decision given by the Belgian Competition Council (on the licensing system put in place by the Royal Belgian Football Association), the authors of the Arnaut report believe that rules relating to “club licensing” - intended to encourage strong governance and financial stability and transparency within clubs - should “also fall within the legitimate autonomy of the sports authorities” (p.45).

The Belgian Competition Council, in its decision No. 2004-E/A-25 of 4 March 2004 <sup>11</sup>, did not confirm “the autonomy” of the Royal Belgian Football Association in terms of the “club licensing system”.

In effect, the Competition council judged that: “The two provisions are necessary for the organisation of sporting events. They aim to ensure the equilibrium of sporting events, uncertainty in respect of results and to provide the sector with sound financial management. Although they may

5 Page 42.

6 Judgment of the Court of 12 December 1974, B.N.O. Walrave and L.J.N. Koch v. Association Union Cycliste Internationale, Case C-36/74, European Court reports 1974, page 1405.

7 Judgment of 15 December 1995, Bosman, Case C-415/93, European Court reports, page I-4921 and Judgment of 11 April 2000, Deliège, Case C-51/96, European Court reports, page I-2549.

8 Judgment of 10 July 2006, Case C-519/04, not yet published. This lack of reference is even more surprising since the judgment did not fail to draw the attention of UEFA. In fact, UEFA’s Director of Legal Affairs, Gianni Infantino, talked about it as “a step backwards for the European Sports model and the Specificity of Sport”, as “a strange twist” and as a judgment that

is “unsatisfactory from a legal point of view” (article available at this address, [http://www.uefa.com/uefa/keytopics/kin\\_d=2048/newsid=574246.html#](http://www.uefa.com/uefa/keytopics/kin_d=2048/newsid=574246.html#) under the heading “Sport specificity - UEFA analysis”).

9 See in the Jurisprudence Liège Mons Bruxelles, 2006, page 1792, “L’arrêt MECA-MEDINA et MAJCEN: plus qu’un coup dans l’eau”, by Melchior Wathelet.

10 Judgment of 19 February 2002, Case C-309/99, European Court reports, page I-1577.

11 Competition Council, Decision No. 2004-E/A-25 of 4 March 2004, case CONC-E/A-01/0039, published in the “Revue trimestrielle de jurisprudence du Conseil de la Concurrence” 2004/01, page128.

impose constraints, the Council notes that these are inherent to the pursuit of the legitimate objective sought and are proportionate to this objective.

In this sense, the Royal Belgian Football Association has perfectly fulfilled its role as regulator.

Consequently, it is necessary to decide that the provisions are beyond the scope of article 2, paragraph 1, of the law<sup>12</sup>.

It is, therefore, in application of the “inherent” test, as formulated by the ECJ in the WOUTERS judgment<sup>13</sup> and - more specifically for sport - in its recent MECA-MEDINA and MAJCEN judgment, mentioned above, and, therefore, on the basis of a concrete examination of the disputed provisions that the Competition Council has concluded that there was no breach, in the case in point, of Belgian competition law.

By basing its findings on the judgment given by the Court of Arbitration for Sport in the ENIC case and on the positions taken by the European Commission on this same case, the authors of the report believe, with regard to rules aiming to prevent multi-ownership or the influencing of clubs by third parties, that “the discretion of the football authorities to take the necessary steps to safeguard the integrity of the competitions that they organised should also be respected as matters falling within their natural sphere of competence”.

Once again, the authors of the Arnaut report seem to confuse compatibility with Community law of the UEFA rule prohibiting - to a certain extent - multi-ownership, and non-application of Community law.

In fact, in its decision to dismiss the complaint filed on 27 June 2002 (in the case COMP/37806: ENIC/UEFA)<sup>14</sup>, the Commission in no way believed that the UEFA rule was beyond the scope of Community law (and, so, would come under the sole “discretion” and the UEFA’s “natural sphere of competence”).

On the contrary, by invoking the WOUTERS judgment, mentioned above, the Commission decided that said rule falls within the scope of article 81 of the EC Treaty but that its restrictive effects on competition are inherent “in the pursuit of the very existence of credible pan European football competitions”<sup>15</sup> and that “the limitation of the freedom of action of clubs and investors which the rule entails does not go beyond what is necessary to ensure its legitimate aim: i.e. to protect the uncertainty of the results in the interest of the public.”<sup>16</sup>

Once again therefore, it is after a concrete examination of the rule’s objective and its effects, within the field of application of Community law, that a compatibility report can be drawn up, with no means of deducing, a priori, compatibility with Community law of any rule on multi-ownership (and even less so the non-application of this law to such rules).

In other words, in the light of the MECA-MEDINA and MAJCEN judgment, even the fact that a rule is adopted and implemented by a federation or the IOC in its capacity as regulator (anti-doping rules certainly being one example of this) and not as an economic agent, under no circumstances results in this rule being exempted from the scope of Community law in general and articles 81 and 82 of the EC Treaty in particular, the moment that it has economic consequences and affects one or more freedoms drawn by third parties from the EC Treaty.

## B. What criteria have to be fulfilled for rules issued by sporting federations and falling within the scope of Community law to be declared acceptable?

Here again, we believe the Arnaut report’s analysis to be disputable in

so far as it systematically neglects the fact that a declaration of compatibility with Community law is only ever made after analysis, in each individual case, of the suitability of the rule as regards the general interest objective sought and its proportionality.

Let us take some examples:

### 1. Organisation of competitions

The rules under which federations may impose total acceptance of competitions forming part of the European pyramid on clubs would be compatible with Community law.

And so, both at national and European level “the football authorities may legitimately require their members to commit to participation in the pyramid or co-operative structure as a whole and not merely in one or other part of it”<sup>17</sup>.

To this end, the authors of the report invoke ECJ jurisprudence under which it is lawful for a cooperative’s articles of association to prohibit its members from participating in other organisations in direct competition with said cooperative.

Upon reading the GØTTRUP-KLIM judgment invoked<sup>18</sup>, it is hard to see how this jurisprudence could be used to prove the essential nature of the pyramidal organisation. In fact, paragraphs 32, 34 and 35 of this judgment lay down that:

32. In a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.

34. It follows that such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85 (1) of the Treaty and may even have beneficial effects on competition.

35. Nevertheless, a provision in the statutes of a cooperative purchasing association, restricting the opportunity for members to join other types of competing cooperatives and thus discouraging them from obtaining supplies elsewhere, may have adverse effects on competition. So, in order to escape the prohibition laid down in Article 85 (1) of the Treaty, the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

We have, therefore, noted that the ECJ did not authorise, in abstracto, the prohibition of dual membership but that upon completion of a concrete examination of the objective sought and the necessity of the means employed, decided - in the case in point - that this type of ban does not breach Community competition law.

In addition, in the GØTTRUP-KLIM case, the ban on dual membership aimed to make it possible to place a “counterweight to the contractual power of large producers” and make way for “more effective competition”. In professional sport, a ban on existing, in part, outside the pyramid would appear both in its aims and effects to prevent the appearance of competing producers. Here we have two very different situations.

In any event, it is clear that it would be wrong to try to prevent (a priori and on the grounds of the allegedly lawful nature of the pyramidal organisation) the players or clubs involved from raising the question, by means of appropriate recourse, of the legality under Community law of certain rules involved in the construction of the pyramidal model.

### 2. Player transfers

The same reasoning can be applied to rules on player transfers. In fact, in both the BOSMAN<sup>19</sup> and the LEHTONEN<sup>20</sup> judgments, the ECJ judged that the transfer rules would restrict the free move-

12 Unofficial translation from the French original.

13 See above.

14 Available in English at the following address: <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37806/en.pdf>

15 Points 31 and 32 of the decision.

16 EC Press release of 27 June 2002, ref. IP/02/1942.

17 Arnaut report, page 36.

18 Judgment of 15 December 1994, Case C-250/92, European Court reports, page I-5641.

19 ECJ, 15 December 1995, Bosman, Case C-415/93, European Court reports, page I-4921, pts 99, 100 and 120.

20 ECJ, 13 April 2000, Lehtonen, Case C-176/96, European Court reports, page I-2681, pts 49 and 50.

ment of players and would, therefore, constitute an obstacle on this fundamental right invested by the EC Treaty. It was only in the second instance that the Court verified “whether that obstacle may be objectively justified”<sup>21</sup>, which may be the case - for example - if the deadlines set for player transfers were required in order to ensure “the regularity of sporting competitions”<sup>22</sup>.

Both in the BOSMAN and the LEHTONEN judgments, the Court judged that the regulations in question went “beyond what is necessary for achieving the aim pursued”.

It is, therefore, really by means of a case by case, rather than a general examination, that certain rules relating to a transfer system may possibly be declared to conform to Community law. A fortiori, it is out of the question that some of these rules fall beyond the scope of Community law, as is, however, maintained by the Arnaut report.<sup>23</sup>

### 3. The activity of players' agents

Claiming a greater role for UEFA in this respect (at the present time essentially managed by FIFA), the Arnaut report believes that these rules are inherent “to the proper regulation of sport and therefore compatible with European Community law”<sup>24</sup>.

In referring to inherence criteria, the authors of the Arnaut report fall neatly within the framework traced by WOUTERS and MECA jurisprudence.

It cannot, however, be claimed, as they seem to do, that all rules relating to the activity of players' agents are inherent to the smooth operation of the football market and, therefore, compatible with Community law.

Once again, the Community judge will assess whether the restraints on the freedom of action of players' agents that the rule creates are inherent to the achievement of the legitimate objective sought, on a case by case basis.

Finally, in its PIAU judgment<sup>25</sup>, encouraged to make a decision on the compatibility of the FIFA judgment on the activity of players' agents with articles 81 and 82 of the EC Treaty, the Court of first instance judged that: “On the one hand, the Players' Agents Regulations were adopted by FIFA of its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity (see, by analogy, Case C-309/99 Wouters and others [2002] ECR I-1577, paragraphs 68 and 69). Those regulations do not fall within the scope of the freedom of internal organisation enjoyed by sports associations either (Bosman, paragraph 81, and Delière, paragraph 47).

On the other hand, since they are binding on national associations that are members of FIFA, which are required to draw up similar rules that are subsequently approved by FIFA, and on clubs, players and players' agents, those regulations are the reflection of FIEA's resolve to coordinate the conduct of its members with regard to the activity of players' agents. They therefore constitute a decision by an association of undertakings within the meaning article 81 (1) EC (Case 45/85 Verband der Sachversicherer v Commission [1987] ECR 405, paragraphs 29 to 32, and Wouters and others, paragraph 71), which must comply with the Community rules on competition, where such a decision has effects in the Community.

With regard to FIFA's legitimacy, contested by the applicant, to enact

21 ECJ, 13 April 2000, Lehtonen, Case C-176/96, European Court reports, page I-2681, pt 51.

22 ECJ, 13 April 2000, Lehtonen, Case C-176/96, European Court reports, page I-2681, pt 53.

23 Arnaut report, page 105

24 Arnaut report, p.47.

25 Judgment of the Court of first instance judgment of 26 January 2005, Case T-193/02, European Court reports, page II-209 (paragraphs 74 to 78).

26 Arnaut report, p. 49 and 50.

27 On page 7 of the “White Paper on Sport” of July 2007, to which we will return later, the Commission does not

state otherwise. “Rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players. The ongoing study on the training of young sportsmen and sportswomen in Europe will provide valuable input for this analysis.”

such rules, which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation like FIFA, whose main statutory purpose is to promote football (see paragraph 2 above), is indeed open to question, in the light of the principles common to the Member States on which the European Union is founded.

The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations by a private-law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for civil and economic liberties.

In principle, such regulation, which constitutes policing of an economic activity and touches on fundamental freedoms, falls within the competence of the public authorities. Nevertheless, in the present dispute, the rule-making power exercised by FIFA, in the almost complete absence of national rules, can be examined only in so far as it affects the rules on competition, in the light of which the lawfulness of the contested decision must be assessed, while considerations relating to the legal basis that allows FIFA to carry on regulatory activity, however important they may be, are not the subject of judicial review in this case.”

These are the most relevant Court findings and they continue to be topical.

### 4. UEFA rules on “homegrown players”

Here again, the Arnaut report believes that the rules requiring each club to have a certain number of players under contract who have been trained either at the club or within the national federation to which this club belongs<sup>26</sup> are necessarily compatible with Community law.

Again, it would seem risky to uphold this principle, even acknowledging that, to a certain extent, these rules may be justified by an objective of general interest and are proportionate<sup>27</sup>.

In paragraph 106 of the BOSMAN judgment, the ECJ judged that: “In view of the considerable social importance of sporting activities, and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results, and of encouraging the recruitment and training of young players must be accepted as legitimate” (our underlining).

UEFA invokes these two justifications but also maintains that this system provides “a large reservoir of talent for national teams as a consequence”.

Likewise, UEFA acknowledges that its rule favours the recruitment of “homegrown” nationals rather than nationals from other Member States, thereby creating an indirectly discriminatory obstacle.

Furthermore, it is doubtful that this rule contributes to competitive equilibrium on a transnational level. In effect, nothing will prevent - in a given Member State - the richest club from acquiring the best “homegrown players” prior to training. This was, in addition, explicitly judged by the ECJ in point 135 of the BOSMAN judgment, in respect of nationality clauses (the “homegrown players” clause, as only constituting, in our opinion, a positivised and “restyled” version of the nationality clause); “although it has been argued that the nationality clauses prevent the richest clubs from engaging the best foreign players, those clauses are not sufficient to achieve the aim of maintaining a competitive balance since there are no rules limiting the possibility for such clubs to recruit the best national players, thus undermining that balance to just the same extent”.

What is more, this rule will penalise clubs in small Member States, which will be disadvantaged by the narrowness of their national labour market.

### 5. The centralised marketing of media rights

Here again, the authors of the Arnaut report believe that the concept of the sale or individual ownership of television rights cannot be accepted from an intellectual point of view.

Referring to the findings of Mr Advocate General LENZ in the BOSMAN case (“certain restrictions may be necessary to ensure the prop-

er functioning of the sector”) and the decision of the European Commission in the UEFA Champions League Media rights case, the authors of the report conclude that “It is both acceptable and necessary for the football authorities to require clubs to commit to a central marketing model as a condition of their participation in a sporting competition and compatible with European law”<sup>28</sup>.

Firstly, when we are talking about media rights, we must avoid any confusion between the question of ownership of rights, entitlement to said rights, and their mode of marketing.

Contrary to what is maintained by the authors of the Arnaut report, the principle of individual ownership of these media rights is not only intellectually conceivable but is part of substantive law.

There is no unified or harmonised system of ownership within the European Union, the organisation of these systems coming under the jurisdiction of each Member State. The question of a property ownership system (and, therefore, in particular, that of knowing if said right belongs individually to a club or is jointly owned by several clubs) is governed by national law in each Member State. This was noted by the European Commission in its decision of 23 July 2003 relating to the joint selling of the commercial rights of the UEFA Champions League<sup>29</sup>. In a certain number of Member States, the individual ownership formula was upheld<sup>30</sup>.

It should then be analysed whether the joint sale of these rights, grouped together by an agreement between the individual owners or the co-owners, is compatible with article 81 (1) of the EC Treaty, as the Commission states in paragraphs 122 to 124 of its decision as referred to above:

122. (...) on the basis of the information submitted by UEFA, UEFA can at best be considered as a co-owner of the rights, but never the sole owner. The question of ownership is for national law and the Commission's appreciation of the issue in this case is without prejudice to any determination by national courts.

123. The Commission therefore proceeds on the basis that there is co-ownership between the football clubs and UEFA for the individual matches, but that the co-ownership does not concern horizontally all the rights arising from a football tournament. It is not considered necessary for the purpose of this case to quantify the respective ownership shares.

124. It suffices to note that there are multiple owners of the media rights to the UEFA Champions League. An agreement between the three owners (the two football clubs and UEFA) which are indispensable to produce one unit of output (the license to broadcast one match) would not be caught by Article 81 (1) of the Treaty and Article 53 (1) of the EEA Agreement. However, since the agreement regarding UEFA's joint selling arrangement extends beyond that, Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement apply to the arrangement.

After a detailed investigation, the Commission considered that this joint sales agreement would generate restraints on competition in the sense of article 81 (1) of the EC Treaty but could, to a certain extent, benefit from the exemption provided for in 81 (3) of the EC Treaty, by virtue of improvements in production and distribution brought about by these restraints and by virtue of the fact that an adequate share of the resulting profits would return to consumers.

The Commission decided, however, that: “Exemption should (...) be subject to the condition that football clubs must not be prevented from selling their live TV rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster”.

In conclusion, once again, it was after concrete analysis that, to a certain extent, some joint sales agreements were declared to conform to Community law.

Furthermore, it should be noted that the Commission based its analysis on the premise that this joint sale resulted from the free consent of the clubs involved. It is, therefore, wrong for the Arnaut report to deduce from this decision that it would permit federations to impose a “central marketing model” on clubs as a condition of their participation in a sporting competition.

It is, on the contrary, the free consent of the clubs involved which makes it possible for this model to be conceived and, to a certain extent, to benefit from the exemption laid down by article 81 (3) of the EC Treaty.

### III. The specificity of sport

Apart from the fact that they have never been taken into consideration or accepted by the Court of Justice, certain arguments presented in the Arnaut report attempt to demonstrate that sport should merit different treatment from that reserved for other sectors of economic life.

We admit that on the basis of this type of reasoning, numerous sectors of socio-economic activity could claim a right to exemption from the application of Community law on the grounds of their exceptionality. Do the aeronautics, forestry, health, energy, waste and telecommunications industries not have their own specificity? In any event, both Court of Justice and Commission jurisprudence upholds, by way of justification of restraints on fundamental freedoms or on free competition, objectives of legitimate interest which may differ according to sector and the sports sector has, furthermore, benefited from this.

Blanket exemption from Community law of sporting regulations cannot, of course, be justified, as in the Arnaut report, due to the need to give the relevant bodies a guarantee of being able to act “without fear of their decisions being undermined by the application of European Community law” (page 31 of the Arnaut report). Legal disputes are created and legal decisions are given in all sectors of social and economic life. There is no more legal uncertainty in the field of sport than in other sectors, both with regard to fundamental freedoms and competition regulations and only legislation and jurisprudence can reduce this uncertainty which also results from the changing behaviour of the stakeholders in a given sector. In any event, the solution to legal uncertainty is never to adopt “soft law” or to leave the law to private stakeholders, even if UEFA and the national federations could be considered to be pure regulators, which they are not. They are also leading economic agents in a market that they are also called upon to regulate. With very few exceptions, they are called upon to adopt regulations and decisions of a mixed nature which contribute both to the regulation of the professional football market and to the promotion of their own economic and commercial interests. And so, when UEFA fixes the dates of the final phase of the European Championship which is held in June, it reserves this period of production for itself and makes it unavailable for clubs, with the positive or negative economic consequences that this may bring for either party.

There is, therefore, no reason why, in the name of the specificity of the sports sector, sports federations should be exempted from the application of a law which is applied, for example, to certain associations of professionals, as in the WOUTERS judgment, which relates to a national Bar Association.

The Arnaut report also refers, at great length, to the “European sporting model”, the principles of which would be respected, in full, by UEFA. This model would be based on democratic operation, the separation of powers, the representation of the various stakeholders (players, supporters, clubs, federations) within consultative bodies, the principle of promotion/relegation (with the resultant pyramidal structure), financial solidarity guaranteeing a certain degree of equilibrium in respect of the sporting powers-that-be and recourse to arbitration.

Prior to commenting on some of these points, even if we suppose that these points have all been made, we do not see why said points would justify the exemption of sport from Community law, and more specifically, from provisions relating to the freedom of movement and competition.

<sup>28</sup> Arnaut report, p. 52.  
<sup>29</sup> COMP/C.2-37.398, Official Journal of the European Union L291/25, 8.11.2003.

<sup>30</sup> See points 121 and subsequent points of the decision and, in particular, footnote 59.



Although the impression given by sports federations is sometimes that of public authorities, they are still no more than private entities involved in economic and commercial activities and are, moreover, generally constituted under Swiss law.

In the aforementioned PIAU judgment, the Court of First Instance demonstrated the purely private nature of an international federation, acting “on its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity...”. Even though a Bar Association receives this type of mission from the national legislator, its decisions are still subject to competition law<sup>31</sup>. Even more so for sports federations.

Consequently, it would seem to be inappropriate to compare the division of tasks put in place within UEFA, a purely private entity, with a separation of powers, as practised by democratic States governed by the rule of law and falling within public law.

In addition, it is public knowledge that some clubs, particularly those in the G-14 group<sup>32</sup>, do not share the analysis made by the authors of the Arnaut report, that clubs within UEFA are fully satisfied, particularly with regard to democratic requirements and mechanisms of “representation”.

In this respect, the authors of the Arnaut report believe that a purely consultative representation is sufficient. In our opinion, this is not the case since the degree of participation of clubs in decision making has necessarily to vary according to the issues in question.

And so, simply by way of example, the proven status of the clubs participating in the UEFA Champions League as co-owners, necessarily requires co-management of the commercial rights on which this co-ownership is based. In effect, in view of general legal principles on the subject of managing ‘res communis’, UEFA’s claim for exemption from said management for all the other co-owners is not reasonably justifiable and, consequently, abusive<sup>33</sup>.

Even if the principle of promotion/relegation, which means that the clubs at the top of the sporting pyramid never have a legal guarantee that this situation will continue, can be accepted, there can be no question of requiring clubs to waive any right of criticism of these procedures, if necessary, by legal means, whether these criticisms relate to the format of the different competitions or the sporting calendar and of requiring application of the principle of proportionality to be monitored.

Although financial solidarity and revenue sharing are certainly one means of serving an objective deemed worthy of protection, i.e. maintaining a degree of equilibrium of the sporting powers-that-be, there is no question that any income sharing would necessarily be acceptable under Community law. It suffices to remember that in paragraph 228 of the opinion in the BOSMAN case, Mr Advocate General LENZ prudently expressed himself as follows: “*Mr BOSMAN submitted a number of economic studies which show that distribution of income represents a suitable means of promoting the desired balance. The concrete form given to such a system will of course depend on the circumstances of the league in question and on other considerations. In particular it is surely clear that such a redistribution can be sensible and appropriate only if it is restricted to a fairly small part of income: if half the receipts, for instance, or even more was distributed to other clubs, the incentive for the club in question to perform well would probably be reduced too much.*”

In addition, there is a certain degree of contradiction, indeed

incompatibility, between the principles of “promotion/relegation” and “competitive balance” (used for revenue sharing).

In effect, revenue sharing is a concept deriving from American professional sports, which are characterised by closed leagues (NBA, NFL, etc.). In the United States, although revenue sharing exists, it is only between members of the same elite, guaranteed not to be relegated to a lower category.

In other words, it is the absence of “promotion/relegation” which makes the widespread practice of “revenue sharing” acceptable.

Furthermore, the reticence of the major clubs in each league to support revenue sharing is accentuated by their desire to be competitive in Europe.

Finally, if arbitration is an acceptable method of conflict resolution, it is not acceptable for the various stakeholders within professional sport to have to waive the right to take action through the ordinary courts, in particular, in order to contest the legality of certain federation decisions in respect of Community law.

This obligation to permit the ‘ordinary man in the eyes of the law’ to appear before ordinary courts was one of the conditions imposed by the European Commission on FIFA to put an end to the infringement proceedings relating to transfer rules that it had instituted against FIFA<sup>34</sup>.

The lack of restrictive and exclusive recourse to arbitration does not in any way harm its efficacy, as illustrated by the FIFA Regulations “for the Status and Transfer of Players”, as modified following the intervention of the European Commission which, in its article 22, lays down that recourse to arbitration is optional, any player or club retaining the right to “seek redress before a (...) court”.

What’s more, in practice, it seems that just a small percentage of disputes relating to this ruling are referred to civil courts, most disputes ending up in the Court of Arbitration for Sport.

Without doubt, the fact that this rule was subject to amendments required by the European Commission, prior to its entry into force, and that its Community legality was thereby guaranteed, is not unconnected with this state of facts.

In its judgment of 15 May 2006, ruling in the first instance on the dispute between Sporting de Charleroi, backed by G-14, and FIFA and UEFA, the Charleroi Commercial Court judged that: “... it is clear that the ban issued by the second paragraph of article 51 (FIFA statutes) on recourse to ordinary courts, only applies under the hypothesis that an arbitration agreement in proper and due form would keep the dispute out of these courts.

*Any provision that would lay down a general ban on going before the ordinary courts would, in fact, be contrary to public order and, consequently, ought to be put aside by our court*<sup>35</sup>.

We may question UEFA and FIFA’s true motives, relayed via the Arnaut report, for wishing so ardently that arbitration should be the sole means of recourse against their decisions.

Does the answer not lie, once again, in the alleged desire of these organisations to escape the application of Community law?

And from this perspective, it is not so much arbitration that has garnered the favour of FIFA and UEFA but rather the fact - not by chance - that the place of arbitration is Switzerland.

In fact, the Court of Arbitration for Sport, set up in Lausanne, is an international court of arbitration in the sense of the federal Swiss law on private international law of 18 December 1987.

Consequently, rulings given by the Court of Arbitration for Sport are only open to appeal before the Swiss Federal Court, which mainly limits itself, when it comes to reviewing legality, to serious violations of international procedural public order.

This concept does not, however, include Community law, in particular, on competition, as explicitly judged by the Swiss Federal Court, in a ruling of 8 March 2006<sup>36</sup>.

And so arbitration, provided that it is implemented, on an exclusive basis, by a court of arbitration in Switzerland, incidentally makes it possible to escape Community legal order.

According to article 1704 of the Belgian Judicial Code, sentences given by a court of arbitration sitting in Belgium can only be subject

31 See the Wouters judgment.

32 For further information, see [www.g14.com](http://www.g14.com)

33 In this respect, see Stephen Weatherill, “Is the pyramid compatible with EC Law?”, *The International Sports Law Journal*, 2005/3-4, p. 3 et s.; also in: Stephen Weatherill, “European Sports Law: Collected Papers”, ASSER International Sports Law Centre/T.M.C. Asser Press, The Hague 2007, p. 259 et s.

34 EC press release IP/01/314, available at this address:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/314>, in which the Commission reiterates that: “*arbitration is voluntary and does not prevent recourse to national courts.*”

35 Unofficial translation. This ruling is available on the Charleroi Commercial court website: [www.tch.be](http://www.tch.be).

36 Case 4P.278/2005. See, in particular, this link: [http://www.semainejudiciaire.ch/DATI/DATI\\_JUR/2006/06\\_31.htm](http://www.semainejudiciaire.ch/DATI/DATI_JUR/2006/06_31.htm)

to appeal before the territorially competent Court of first instance, whose judicial review will mainly focus on conformity to public order.

Belgian public order does, of course, include Community public order (in particular, therefore, articles 81 and 82 of the EC Treaty). Where necessary, the Belgian judge may reverse the arbitration ruling given in violation of Community law, i.e. refer to the ECJ any preliminary issue that it may deem necessary.

The Court of Arbitration for Sport already has local chambers in Sydney, in Australia, and in New York, in the United States. The establishment of a headquarters within the European Union, for example, in Brussels, would make it possible to reconcile arbitration and Community legal order.

This would also mean that we would no longer be obliged to question the sincerity of the attraction that arbitration holds for FIFA and UEFA.

In conclusion, although certain measures may be envisaged on the basis of current law (for example, certain practices mentioned by the Arnaut report could be liable for exemption by category in the sense of competition regulations) there is no argument to say that Community law should be applied to the sports sector rather than to other sectors, apart from under the specific circumstances already acknowledged in some Commission decisions or Court of Justice rulings<sup>37</sup>.

#### IV. Towards a change in Community Law?

As we have seen, the relationship between Community law and professional sport is at the level of the EC Treaty itself. If, however, it were to be necessary to amend the law in this matter, particularly to institutionalise or consolidate the powers of the sporting federations, new regulations or directives would not be enough, and it would mean radical change in primary Community law, namely of the Treaty itself, in some of its most fundamental principles.

There is currently no legal or political factor likely to lead to such radical change. Let us look at the texts currently in circulation.

##### 1. Declaration of the European Council of Nice, 7-10 December 2000.

The authors of the Arnaut report make much of this declaration “on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing Common policies”.

The authors admit that this declaration is not enforceable at law because they claim that it should be transformed into positive law<sup>38</sup> but it should also be stressed that it is not even joined with the Treaty of Nice, it contains no proposal to amend the Treaty agreed by the Member States, even if, on certain points, the text echoes the viewpoints of the sporting federations.

##### 2. European Parliament resolution of 29 March 2007 on the future of professional football in Europe

This resolution clearly originates from the Arnaut Report, since it contains similar findings and suggests similar solutions.

This said, the resolution contains no formal proposal to change the Treaty; it expresses a wish that the application of Community law to professional football “does not compromise its social and cultural purposes, by developing an appropriate legal framework, which fully

respects the fundamental principles of specificity of professional football, autonomy of its bodies and subsidiarity”. This overlooks the fact that the jurisprudence of the Court of Justice and the Commission take this specificity into account since their decisions analyse the objective of general interest which, provided that it is in proportion, can inspire the rules of sporting federations and justify the restriction of the fundamental freedoms or freedom of competition.

It overlooks that this same jurisprudence in no way undermines the autonomy of professional sporting authorities acting as regulators, but it is to be expected that, as an economic agent in a market representing billions of euros, the rules of the internal market and competition should apply to them.

The Parliament also takes up the problem of legal uncertainty resulting from an approach based solely on treating cases individually. We have already answered this argument, which applies to all economic sectors and it is furthermore interesting to note that, according to the European Parliament, it is not at all clear whether “the Union of European Football Associations (UEFA) rule stipulating that teams must contain a minimum number of home-grown players (...) would, if it were reviewed by the Court of Justice, prove to be consistent with Article 12 of the EC Treaty”. We feel that it is today in no way impossible to make rules compliant with Community law.

We should also add that the European Parliament is careful not to propose any automatic derogation of the competition rules and has proved stricter with regard to UEFA and, above all, to FIFA, with regard to the need to reinforce their internal democracy.

Last but not least, a resolution of the European Parliament obviously has no legally binding effect and the European Parliament has no powers of decision or co-decision to change the founding treaties.

##### 3. Article III-282 of the Treaty establishing a Constitution for Europe

The Treaty establishing a Constitution for Europe (which we now know will never be ratified as such by the 27 Member States) includes an article III-282 with specific reference to sport.

It is no exaggeration to say that this article does not propose any change to Community law in the sense of the conclusions of the Arnaut Report.

If the article provides that action of the European Union in matters of sport should take into account “the specific nature of sport, its structures based on voluntary activity and its social and educational function”, this phrase gives no particular jurisdiction to the European Union and, furthermore, concerns both amateur and professional sport.

When that same article states that the intention of the European Union to develop “the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen”, it in no way means that this action could derogate the direct provisions of the Treaty as to freedom of movement and competition.

Finally at the level of legislation which could be used to implement article III-282, its paragraph (3) only allows the European Union to adopt recommendations (which are not legally binding) or European laws or framework laws to establish incentive measures, excluding any harmonisation of the laws and regulations of the Member States. This obviously implies that no exception can be made to the provisions as to freedom of movement and competition.

We know that, since the signature of this Treaty establishing a Constitution for Europe in 2004, it transpired that, despite eighteen ratifications out of 27 Member States, the text of the Treaty had no chance of being agreed by all Member States, which was indispensable to its entry into force. After a period of reflection, at the instigation of a very dynamic German presidency, the European Council of June 2007 agreed on the text of a so-called “simplified” treaty, which would include those parts of the Treaty establishing a Constitution for Europe on which the 27 Member States could agree. The general idea adopted in June 2007 was that, except for specific exceptions, the pro-

<sup>37</sup> In our opinion, there is no question of allowing sports federations to benefit from the exemption provided for by article 86 (2) of the EC Treaty which stipulates that undertaking entrusted with the operation of services of general economic interest shall be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Apart from the fact that this type of tasks is generally entrusted to public companies, we cannot really see that a

“service of general economic interest” would be entrusted to sports federations. Furthermore, let us remember that article 86 (2) only results in the companies in question being protected from the application of Community law whilst still being subject to administrative and civil and, of course, Community courts.

<sup>38</sup> See Arnaut Report p. 21: “In plain terms, the aim of the current project is to support and give practical effect to the principles set out in the Nice Declaration, in other words, to implement the Declaration in sport and more particularly in the specific case of football”.



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posals in the Treaty establishing a Constitution for Europe should be incorporated into the new treaty.

It is therefore not surprising to find in the first draft of the amended treaty, prepared by the Portuguese presidency on the basis of the mandate from the European Council of June 2007, the practically unchanged text of article III-282 of the Constitutional Treaty, which was to become article 176 B of the EC Treaty. Nothing else on sport, despite the publication of both the Arnaut report and the Resolution of the European Parliament between the signature in 2004 and the European Council of June 2007.

#### 4. The "White Paper on Sport" of the European Commission published on 11 July 2007

Far from the proposals in the Arnaut Report, the European Commission recalled the relevance of existing jurisprudence, stressing that the MECA-MEDINA and MAJGEN judgment made an important legal point by rejecting the theory of the existence of "purely sporting rules", falling a priori outside the EC Treaty (and therefore its articles 81 and 82) and affirming to the contrary that each sporting rule should be studied case by case in the light of the provisions of articles 81 and 82 EC.

In this context, quoting the principle of subsidiarity, the European Commission refused to take an interventionist approach and - in the main - intends to restrict itself to ensuring the respect of the basic freedoms when necessary. It is appropriate here to quote the passage which the Commission devotes to the "specificity of sport":

*"Sport activity is subject to the application of EU law. (...) Competition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity. Sport is also subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of nationality, provisions regarding citizenship of the Union and equality between men and women in employment.*

*At the same time, sport has certain specific characteristics, which are often referred to as the "specificity of sport". The specificity of European sport can be approached through two prisms:*

- *The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve the competitive balance between clubs taking part in the same competitions;*
- *The specificity of the sport structure, including notably the autonomy and diversity of the sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport;*

*The case law of the European courts and decisions of the European Commission show that the specificity of sport has been recognised and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law.*

*As is explained in detail in the Staff Working Document and its annexes, there are organisational rules that - based on their legitimate objectives - are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued. Examples of such rules would be "rules of the game" (e.g. rules fixing the length of matches or the number of players on the field), rules concerning selection criteria for sport competitions, "at home or away from home" rules, rules preventing multiple ownership in club competitions, rules concerning the composition of national teams, anti-doping rules and rules concerning transfer periods.*

*However, in respect of the regulatory aspects of sport, the assessment whether a certain sporting rule is compatible with EU competition law can only be made on a case-by-case basis, as recently confirmed by the*

*European Court of Justice in its Meca-Medina ruling. The Court provided a clarification regarding the impact of EU law on sporting rules. It dismissed the notion of "purely sporting rules" as irrelevant for the question of the applicability of EU competition rules to the sport sector.*

*The Court recognised that the specificity of sport has to be taken into consideration in the sense that restrictive effects on competition that are inherent in the organisation and proper conduct of competitive sport are not in breach of EU competition rules, provided that these effects are proportionate to the legitimate genuine sporting interest pursued. The necessity of a proportionality test implies the need to take into account the individual features of each case. It does not allow for the formulation of general guidelines on the application of competition law to the sport sector".<sup>39</sup>*

The Commission does not therefore propose any change to the Treaty to meet the general central aim of the Arnaut Report, namely the institutionalisation and consolidation of the authority of the sporting federations.

Finally, the Commission:

- strongly supports the development of the "European Social Dialogue", and finds that "in the light of a growing number of challenges to sport governance, social dialogue at European level can contribute to addressing common concerns of employers and athletes" and that "a European social dialogue in the sport sector, or in its sub-sectors (e.g. football) is an instrument which would allow social partners to contribute to the shaping of employment relations and working conditions in an active and participative way. In this area, such a social dialogue could also lead to the establishment of commonly agreed codes of conduct or charters, which could address issues related to training, working conditions or the protection of young people". Therefore, "the Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector", recalling that authentic representatives of employees and employers must take part in them.<sup>40</sup>
- states that "the White Paper has taken full advantage of the possibilities offered by the current Treaties. A mandate has been given by the European Council of June 2007 for the Intergovernmental Conference, which foresees a Treaty provision on sport. If necessary, the Commission may return to this issue and indicate further steps in the context of a new Treaty provision.<sup>41</sup>

## V. Conclusion

Since UEFA, an association under Swiss law, is not purely a regulator, but also clearly an economic agent in the professional football market, its basic claim is to be given the monopoly in the management of European football and not just its regulation, and to carry out this management without any control of a Community judge.

UEFA's and FIFA's resistance to any form of organised competition, even embryonic, was recently made clear by their Presidents' open call at their last respective congresses to the eighteen member clubs of the G-14 to disband their EEIG and withdraw any litigation, in return for which FIFA and UEFA promised to open dialogue with them<sup>42</sup>.

In passing, we would stress the paradox of suggesting the disbanding of a EEIG of clubs as a precondition for dialogue with them. In effect, because of the complexity and diversity of the subjects to be tackled, a structured negotiating partner would be required, sufficiently representative of the interests it defends, and with a legal personality.

This is what is done with regard to the dialogue between on the one hand, FIFA and UEFA and on the other FIFPro, which represents the players. The difficulty which these international federations experience in reproducing this model in their relationship with the clubs is - in our minds - a reflection of the commercial reality mentioned above, namely that the clubs active in the transnational sphere are perceived by FIFA and UEFA as competitors on the international football market, which is not so with the players, although they are internationally organised within FIFPro.

Furthermore, we would recall that the international federations, without waiting to obtain the privileged status claimed by the Arnaut Report, are trying to achieve a similar result procedurally by making recourse to CAS arbitration compulsory with the intention, or at least

<sup>39</sup> See pp 14 and 15. Underlining is ours. <sup>41</sup> P. 21. of the "white paper on sport"  
<sup>40</sup> P. 21 of the "white paper on sport"

the effect of suppressing any litigation between stakeholders in the football sector (of which they are themselves members) and the community rule of law.

However, respect by these international federations of Community law as it stands and the smooth performance of their regulatory role within the current legal framework of the Community are in no way utopian.

Furthermore, the “European sports model” as postulated in the Arnaut Report, is not a common heritage shared by all sports.

For example:

- in cycling, the role of the International Cycling Union (UCI) is close to that of a pure regulator, the organisers (who are private organisations) and the teams share management and operation of commercial activities generated by the sport;
- in basketball, after a brief breakaway period, the main professional leagues, reunited within the Euroleague Basketball<sup>43</sup>, have succeeded in maintaining the International Basketball Federation (FIBA) as regulator and have won management of the organisation and implementation of European inter-club competition.

Finally, the vision of football promoted by UEFA and FIFA (and reflected in the Arnaut Report) is intrinsically national. It is organised on a national basis (one federation in each state), with management arising out of that structure, and FIFA and UEFA wish to perpetuate this organisational model, not only for competitions between national teams (which is legitimate) but also for club football.

In other words the not only hierarchical but compartmented “European sports model” promoted by these federations is in fact a “national model of European sport”<sup>44</sup>. This model, if adapted to the needs of competitions between national teams, also has the effect - with regard to club football - of rendering the economic fate of clubs dependent to a large extent on the size of their respective national markets, leading specifically to the relative pauperisation of clubs in the “small States”.

This said, our analysis of current Community law and our opinion that primary Community law should not be changed in the sense required by the Arnaut Report, does not preclude modernisation of the current model of the governance of professional sport. Although it is appropriate to reaffirm the legitimacy under Community law of the preponderant role of national and international federations with regard to the organisation and management of competition between national teams, this should not mean that the federations should have absolute freedom because these competitions affect the rights and interests of third parties, namely the clubs, who see themselves deprived of their employees, whom they continue to pay, and therefore of the ability to play matches whenever there is a competition between national teams.

Questions of sporting calendar and player availability are the two points of contact which produce the most important friction between “club football” and the “national football team”.

In effect, the international calendar is neither more nor less than

## LETTER TO THE EDITORS

Montreal, 20 June 2007

**Emile Vrijman's paper published in the 2007 1-2 edition of the International Sports Law Journal**

Dear Sirs,

WADA has read the above-mentioned article and is deeply troubled that a journal of the International Sports Law Journal's standing could publish such an obviously self-serving document, in which the author of a supposedly independent report that was fatally flawed in all respects - methodological, legal and factual - makes an inherently biased attempt to justify and critique his own report.

WADA commented publicly on the so-called *Vrijman Report* one year ago, upon its release. That statement, which was published on WADA's website, is attached to this letter. Vrijman claims in his self-

the production timetable for the “football product”. In other words, in compiling the calendar and rendering organisation of football matches by anyone else subject to prior authorisation, FIFA is setting the production periods reserved for itself and its members and those left for the clubs.

As to availability of players, this is the means by which FIFA and its members assume authority over the “raw materials” (services of players) so that matches between national teams can be arranged within those parts of the calendar which FIFA reserves for the purpose, and this appropriation has the effect of depriving the clubs of the “raw material” whose services they have, however, acquired under contracts of employment.

Further dialogue with the clubs would in no way prevent the national and international federations from maintaining their role as guardians of the sporting ethic, responsibility for all matters connected with refereeing of matches and the discipline guaranteeing the respect of the different rules of the game and the sporting ethic on and off the pitch.

Community law in no way prevents the organisation of a real European social dialogue, which should go further than pure consultation and have a bearing on all participants who could, together, tackle the matters which are important for the future of professional football.

As we see it, the future of professional sport should not be outside Community law which, as interpreted by the European Court and the European Commission, is probably the best guarantee of maintaining flourishing competition between national teams on the one hand and the development of truly European club football on the other.

When the need really arises, as is the case with regard to questions of the international match schedule and player availability for national teams, there can be no doubt that the scope of the application of Community law in the sporting sector will be refined by the ECJ, in particular during proceedings for a preliminary ruling. Far from being a source of legal uncertainty, this jurisprudence would help to consolidate and clarify the rights and obligations of the sector's various parties under EU Law.

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<sup>42</sup> See *Le Monde* of 2 June 2007, p. 15 and in particular where it states that “*Michel Platini, new president of UEFA, thus, on Monday 28 May rated G14 an association which incorporates the 18 most powerful clubs in Europe, which it described as an 'elitist group'. It demanded 'officially' that it should be dissolved and asked its members to 'engage in a fruitful dialogue with other members of European football'. 'I agree with Platini' said Sepp Blatter, Thursday 31 May, on his re-election to the head of the International Football Federation (FIFA), and I say to the clubs 'Come back into the family and withdraw your complaints'. (unofficial translation from the French original)*”

<sup>43</sup> Website: [www.deloitte.com](http://www.deloitte.com).

<sup>44</sup> Note that UEFA in implementation of its own commercial activities, does not restrict itself to respecting the territorial logic. For example, on 21 May 2007, on the launch of the Chinese version of the UEFA website (<http://cn.uefa.com> - the CEO of UEFA Media Technologies SA said: “This is a major step forward in our efforts to bring the passion of European football to the football fans around the world. With SINA, we have found a partner to help us bring our vision of the world's biggest game to the world's biggest audience”, this site offering in particular pay-per-view services.

serving article that “WADA reserves no more than four pages for its criticism” of his investigation. To be accurate, WADA's official statement includes twelve pages of detailed criticism. Although Vrijman's completely unprofessional report arguably did not deserve such attention due to its lack of impartiality, independence, and total disrespect of proper legal process, WADA felt it was necessary to correct the record.

We are concerned that your journal has allowed itself to be manipulated by affording Vrijman an apparently credible platform to defend his exceptionally unprofessional work.

WADA respectfully requests that you publish this response.

Yours truly,

Olivier Niggli  
Director, Legal Affairs

# Official Statement from WADA on the Vrijman Report

## Background

WADA is effectively, the world watchdog for all matters related to anti-doping.

WADA was formed in 1999 and, pursuant to its mandate delivered by its governance, 50 percent of whom come from the Sports Movement and 50 percent from world Governments, it has been responsible for the introduction of the World Anti-Doping Code which took effect from 1 January 2004. WADA has no other interest or mandate but to fight against doping in sport and to provide for all athletes a level playing field. WADA in this particular case is not a concerned party, such as Lance Armstrong, not a lawyer mandated and paid by UCI, like Mr. Vrijman, nor is it responsible for the sport of cycling, like UCI. In 1999 EPO was not detectable in the urine sample of the athletes. A valid test was only available as of the year 2000.

In 2004 the French Laboratory decided, on its own initiative, to start a project on stored samples from the 1999 Tour de France in order to evaluate a number of scientific facts, including the use of EPO prior to the test being in place and the stability of EPO in urine samples.

When informed about the project WADA expressed its interest in its outcome. Neither WADA nor the French Laboratory had any possibility of linking any sample involved in this project with any particular individual and therefore any sanctioning process was out of question. It was very clear for both entities that this was a research project. Linking a sample with a name could only be done by UCI who was in possession of the doping control forms used in the 1999 Tour de France. As far as WADA and the French Laboratory were concerned, confidentiality of the results was fully guaranteed.

The result of the research was sent to WADA headquarters in Montreal by the French Laboratory on 22 August and opened by WADA on 25 August.

*L'Equipe* published an article in its newspaper on 23 August 2005 headlined "The Armstrong Lie." The article published six doping control forms pertaining to Mr. Armstrong and a summary of the finding from the French laboratory in conducting its research from samples collected during the 1999 Tour de France.

The article suggested that Mr. Armstrong had not been truthful in his many utterances that he had never taken performance enhancing drugs, as the author was suggesting he could show through the items exposed during his personal research and discovery, that on six occasions, during the 1999 Tour, Mr. Armstrong's samples showed EPO. The contents of the article need no clarification here, but suffice to say it led to voices of outrage from various quarters, including Mr. Armstrong and UCI.

WADA had nothing to do with *L'Equipe's* publication and learned about it by reading the paper.

It appeared later, and this fact is not contested now by UCI, that 15 doping control forms from Mr. Armstrong had been given with his consent and UCI consent to *L'Equipe*.

Following such publication which linked six samples containing EPO with the name of Lance Armstrong WADA did nothing else but ask UCI, as the responsible international sport federation for the sport of cycling, to look carefully into the matter.

## Process

a. In respect of newspaper articles containing defamation or alleged defamation of individuals, the person so defamed can exercise the process provided by law and sue for damages. This is the right of the individual and the process accorded by most countries, including France. In France, where the article was published, Mr. Armstrong did not issue proceedings for defamation against *L'Equipe*. We are not aware of any proceedings elsewhere either. There are time limits provided for the initiation of such proceedings, and in this case they have now expired. In other situations involving newspaper articles and books, in varying jurisdictions around the world, Mr. Armstrong has sued and some of these pro-



ceedings are still awaiting hearings in courts. One involving *The Sunday Times* in England has a hearing shortly.

- b. As part of its role, WADA accepts the responsibility for ensuring that all allegations of breach(es) of anti-doping rules are properly and professionally investigated. On this occasion, WADA immediately suggested that the responsible organization, namely the international federation for cycling, UCI, conduct an appropriate enquiry to determine whether the facts revealed by the article could lead to any sanction process or to any other steps within the jurisdiction of that federation.
- c. After the exchange of several letters between WADA and UCI, it became obvious to WADA that UCI was not interested in accepting such responsibility. Accordingly, on 5 October 2005, WADA determined that it would accept the responsibility and embarked upon an enquiry by seeking responses to questions issued by it from each of the interested parties, Mr. Armstrong, UCI, the French Ministry, and the French Laboratory as well as *L'Equipe*. Letters were sent to all on 5 October 2005.
- d. After receiving this correspondence from WADA, on 6 October 2005, UCI announced that it would conduct an "independent" enquiry through the offices of a lawyer, Emile Vrijman.
- e. UCI neglected, in making this announcement, to prepare and agree to terms of reference for this enquiry and to properly mandate Mr. Vrijman, pursuant to its rules, to carry out such an investigation. Accordingly, when Mr. Vrijman wrote to WADA on 6 October 2005, WADA replied, on 13 October 2005, seeking the terms of reference and seeking his legal mandate to carry out an investigation.
- f. It was not until 24 November 2005 that WADA had any further correspondence in relation to this matter. On that day, WADA received a letter from UCI, not Mr. Vrijman, with the contents being its mandate to Mr. Vrijman and terms of reference, which seemingly had been issued on 15 November 2005. WADA replied to this correspondence from UCI on 15 December 2005.
- g. Over the next months there was no approach made by Mr. Vrijman to WADA, nor any approach made by UCI. At the Winter Olympic Games in Torino, in February 2006, a pre-arranged meeting between the former President of UCI, Hein Verbruggen, and the President of WADA, Richard Pound, was convened under the auspices of the IOC President, Jacques Rogge. This meeting was convened as one of conciliation to ensure that any differences between the two Presidents could be resolved. At that meeting, Mr. Pound showed Mr. Verbruggen copies of 15 doping control forms relating to samples collected from Armstrong in the 1999 Tour de France. All 15 doping control forms had been released from UCI with the consent of Mr. Armstrong to the author of the article in *L'Equipe*. Mr. Verbruggen accepted these facts. Prior to this revelation, Mr. Verbruggen had denied publicly on many occasions that any doping control forms had been released by him, and that perhaps only one had been released by UCI. Consequently, UCI issued a statement indicating a member of its staff would be suspended for the releasing of this confidential information to a newspaper reporter. Dr. Mario Zorzoli was suspended immediately (but later reinstated in March 2006).
- Also at this meeting, Mr. Verbruggen advised Mr. Pound that he had sighted a draft report authored by Mr. Vrijman, in which WADA was severely criticized and the report would make extremely bad reading for the World Anti-Doping Agency. In response Mr. Pound advised Mr. Verbruggen that WADA had not yet been approached by Mr. Vrijman with any requests for information nor for interviews.
- h. On 10 March 2006, Mr. Vrijman wrote to WADA. Mr. Vrijman wrote again on 15 March. These letters included a list of questions which Mr. Vrijman asked WADA to respond to. WADA responded in full to the list of questions.

- i. WADA subsequently provided, through UCI, two boxes of materials which WADA felt would be of interest to Mr. Vrijman.
- j. WADA heard no more from Mr. Vrijman. WADA received no request for any personal interview, nor any follow up to the responses to the questions that WADA had provided to Mr. Vrijman. WADA was not shown the report in draft form (although this was accorded to UCI, with at least two drafts being provided to the federation), nor was it asked to respond to allegations made against WADA within the report so that its comments would be fully and properly investigated and recorded. In most jurisdictions around the world, this blatant demonstration of bias and lack of proper and professional process is seen as a breach of natural justice.
- k. This breach of natural justice is further exacerbated by Mr. Vrijman's allegations that WADA refused to participate in the inquiry. As noted above, WADA responded to all two of Mr. Vrijman's letters in a complete and timely manner and offered to provide additional information. WADA cannot be faulted for the inquirer's lack of follow up.
- l. The report was published and personally announced by Mr. Vrijman, so that the media received copies prior to it even being delivered to UCI. WADA learned of this publication through the media.

#### Substance of report

- a. The process used by the French Laboratory in conducting its research was not the process used for analysing samples for the purpose of sanctions. Mr. Vrijman, at all times, confuses this fundamental difference and seems to indicate that, in conducting research, the laboratory was required to carry it out in the same manner as for analysing samples for adverse analytical findings. This is not the case, and Mr. Vrijman, in directing himself to the rules relating to samples collected for analysis rather than understanding the difference for research, has totally misdirected himself in his inquiry. This very basic error leads to ill-informed and incorrect outcomes. The laboratory has indicated publicly that it has no doubt whatsoever in the results of its analysis, and that no sample used for the research project was contaminated, manipulated or interfered with. There may be appropriately stored residue still available for DNA and other further analysis.
- b. Mr. Vrijman does not inquire at all into why Mr. Armstrong gave his consent, through his advisers, to UCI to provide 15 doping control forms to the *L'Equipe* reporter who was the author of the article published on 23 August. Mr. Vrijman does not likewise ask or inquire in any depth of UCI management and executives of why they sought Mr. Armstrong's consent, and why they authorized the release of the documents with some redactions in relation to medication. That failure indicates both a lack of professionalism and a distinct lack of impartiality in conducting a full review of all the facts. Indeed, despite Mr. Verbruggen's concession that all 15 forms came from UCI, Mr. Vrijman only suggests it may have been more than one. Why did he fail to review all the files, and interview the responsible personnel? Mr. Vrijman suggests that the article would have been published by *L'Equipe* without these doping control forms, and therefore he did not need to enquire further into why, how, and when they were released. This is a serious factual and process deficiency, which cannot now be remedied in any fashion.
- c. Mr. Vrijman forms views he calls conclusions, based on speculation and the threading together of comments made by various individuals to various journalists. He does not ask any of the individuals, whom he quotes, whether the quotes were accurate, truthful, or otherwise. He does not establish facts, as necessarily required by lawyers before reaching conclusions on the law.
- d. As there are no proper factual conclusions, there can be no proper legal analysis. In this case, however, it is even worse. Mr. Vrijman fails to cite any rule or regulation, by number nor reference, where he can establish that his speculations show a breach. Without a breach of rule, there cannot be allegations of misbehaviour or wrongdoings. There have not been any.
- e. Mr. Vrijman suggests that WADA was formed in 2003. As any expert in antidoping matters knows, WADA was formed in 1999. The Code, for which WADA is responsible, and its allied Standards, have been in place since 1 January 2004. The events at issue which led to the research occurred in 1999. Mr. Vrijman does not establish the rules and laws, which were fully in place at that time. He does not, therefore, establish the facts which lead to proper analysis of those rules, but he reaches conclusions which simply become farfetched and chooses rules which he hopes might be in place but does not specify nor determine when or how they are applicable.
- f. There was no pressure put on the laboratory by WADA. There was no leak from WADA. There has been no discussion of matters with the journalist prior to the publication of the article, and there has been no information given to the journalist which would lead to the identification of the individual, Mr. Armstrong. WADA condoned a research project carried out by the laboratory in an appropriate manner, and sought the results of such research as part of its mandate to continue the fight against doping in sport. Mr. Vrijman insists that WADA exercised inappropriate pressure on the French laboratory. WADA solely advised the laboratory it would be interested in the findings, and disclosed this in the response WADA gave to Mr. Vrijman's questions. There was no other action taken by WADA in relation to the publication of the results of the research.
- g. When the facts are wrong the conclusions that are built on these facts are wrong. Mr. Vrijman's report is fallacious in many aspects and misleading. WADA is presently looking at all its available legal recourses in respect of the report .
- h. UCI now asks questions publicly of WADA. Whilst surmising that UCI cannot be happy with the conduct of its investigator, WADA has no difficulty in answering the questions, and making the answers public. However, when the process is so flawed as it is to date, there can no longer be professional confidence in the author. Therefore, providing further answers to more questions, surprisingly not asked during the inquiry leading to the report, does not remedy a flawed and partial document.



# Interplay Between Doping Sanctions Imposed by a Criminal Court and by a Sport Organization\*

by Lauri Tarasti\*\*

## 1. Introduction

Doping has originally been an internal problem of sport. Anti-doping rules have been included into other competition rules and their content has varied from one sport to another. When it became evident that doping is a problem in all top sports, the battle against doping needed stronger measures and harmonization both between different sports and between different countries. At the same time sports organizations became aware of their insufficient possibilities to battle against doping without the juridical means of public power.

In a world-wide anti-doping conference organized at the initiative of the International Olympic Committee in Lausanne in 1999 sport organizations and governments decided to establish a new international organisation World Anti Doping Agency (WADA) for the battle against doping. The WADA is a private foundation whose domicile is in Switzerland and headquarters in Montreal in Canada. This unique international foundation is based on the cooperation between sport organizations and governments, and the WADA is financed and lead half by sport organisations and half by governments.

The biggest achievement of the WADA has so far been the first world-wide anti-doping code World Anti Doping Code (WADC) which was accepted in Copenhagen in 2003 and which is just now under the revision.

As the governments could not be signatories of the WADC with its doping sanctions accepted by the juridically private foundation WADA, it was necessary to bind the governments with this international policy through other means. This took place under the auspices of the UNESCO and in accordance with the International Convention Against Doping in Sport which came into force in February this year.<sup>1</sup>

## 2. Doping in legislation and in sport rules

The state gives its norms by legislation. The state has a monopoly to make laws. Lower-level norms can be issued by municipalities, if a law allows it. Thus only public power can issue generally binding norms. If somebody breaks these binding norms, he/she will be sentenced in a state criminal court if the violation of the norms is considered a crime.

Authorities have the right to use coercive powers as seizure and search as well as internet search in accordance with law when it is needed for the detection a crime, to study on the case by hearing whomever etc. Authorities can also execute the punishments with force, for example collect fines through execution.

Doping has been criminalized in many countries, especially in Europe, but only seldom outside Europe. A special act on doping has been issued in some countries of the member states of the Council of Europe and also in other member states some forms of doping are punishable as drug abuse, smuggling of medicines or in some other way. A criminal court imposes sanctions in these cases. A usual punishment is a fine and in some cases imprisonment. Doping has, however, not been usually defined in criminal code exactly in the same way as in sport. Doping in the criminal code is often more limited than in sport.

Doping matters in legislation belong to public law.

Sport rules are formulated by sport organizations themselves. They are not generally binding, but only applied to own activity. They can concern not only the athletes but also other people taking part in one or other way in the sport concerned. If these rules will be broken, the

question is not of a crime but of a violation of the rules. The doping offence in the WADC is called an anti-doping rule violation.

A sport organization can impose a sanction for this violation in accordance with its rules. This is not a punishment in the same sense as in the criminal code, but a disciplinary consequence. These sanctions can include consequences only within the power of a private organisation.

Sport organizations do not have such coercive powers as authorities. Their means are limited within their sport, for example they can prevent the athlete to compete. Likewise the execution of the sanctions is limited.

All major sport federations have today their own anti-doping rules. The WADC obliged them to apply the obligatory articles of the WADC as such and also otherwise to follow the principles of the WADC. A sport tribunal established by a national or international sport federation or in some cases the sport organization itself imposes sanctions, normally ineligibility and loss of medals, prize money etc. The last instance to which it is usually possible to apply is the Court of Arbitration for Sport (CAS).

Anti-doping rules of sport organizations belong to the area of private law.

These two systems carried out on one hand in criminal courts applying the state law concerning doping punishments and on the other hand in the sport organizations or their tribunals applying their anti-doping rules with disciplinary sanctions have acted so far nearly totally separately. The difference between public law and private law has kept these two procedures far from each other.

What has been said above is juridically generally accepted and also the CAS has followed and indicated these principles in many decisions.

## 3. Doping sanctions imposed by a criminal court and a sport organization or its tribunal

The same anti-doping violation can be, and often is punishable both as a crime in a criminal court and as a disciplinary offence in a sport organization or its tribunal. These cases have increased strongly last years for many reasons. More countries have included doping crimes into their criminal code, the supervision of doping offences has expanded and, when previously only athletes were punished, today also coaches, doctors and other support people have been convicted guilty of doping crime.

The consequence has been that the same person has been sanctioned twice, in two separate processes, for one act of doping. We have many examples of that.

In Sweden Ljudmila Enqvist, a hurdler and later a bobsleighter, was sanctioned by her national sport federation for life after being detected twice for anti-doping rule violations.

Later she was also punished in the local criminal court with a fine for the possession of doping substances which is a crime in accordance with the Swedish legislation.

In Finland Kari-Pekka Kyrö, a coach in skiing, was sanctioned by the Finnish Ski Association for life after providing his skiers with substances for blood manipulation, and later he was punished with a fine (about 500 euros) in a criminal court for smuggling of drugs. In addition he was imposed to compensate trial costs about 16.000 euros.

Stephane Desauty, a French athlete in 3000 m steeplechase, was arrested in possession of EPO by the French Police and was sentenced by a French criminal court to 4 months suspended imprisonment after having used medical prescriptions which he had forged. The athlete admitted doping and the matter was subsequently dealt with as an anti-doping rule violation first in the French Athletic Association and then in the CAS. The sanction was two years ineligibility.

\* The basis of this article has been the lecture which Mr Tarasti presented in the Sports and Law Berlin 2007 Conference in May 2007.

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1 The Council of Europe's Anti-Doping Convention is already from 1989.



Ridouane Es-Saadi, a Belgian athlete in 5000 m, was arrested in possession of doping substances, including EPO, growth hormone and clenbuterol. He was banned at a sporting level by a Disciplinary Commission of the Belgian Ministry according to the Belgian legislation. After his return to competition he tested positive and was sanctioned therefore for life.

A cyclist, Mr Johan Museeuw, was sanctioned in Belgium under the international federation UCI's rules. Afterwards the public prosecutor initiated criminal proceedings, because the doping offence was also a crime according to the Belgian legislation. At the end of the investigation, the examining chamber decided that the rider had to appear before the criminal court. Mr Museeuw appealed this decision arguing that the court no longer had jurisdiction, because the case had already been determined, but the appeal was dismissed.

When looking at these processes it can be noticed that as a rule the sanction of a sport organization or its tribunal has been made first and the conviction of a criminal court thereafter. However, in the Stephane Desautly case the situation was opposite. In addition, the police investigation often starts the process, but the sanction has been imposed by a sport organization or its tribunal before the punishment imposed by a criminal court due to the speed of the first mentioned procedure. One might say that this order is not of major importance as they are two separate procedures, but the reality is another.

When the first sanction has been imposed, it can have a great significance as evidence in the latter process. When Stephane Desautly had admitted in the criminal court doping, this was the main and convincing evidence in his federation's decision to impose ineligibility. This issue has also been of relevance in the Balco doping cases in the USA where some athletes have chosen not to give evidence before the CAS evidently for fear of repercussions before the national authorities and/or court.

#### 4. Influence of a criminal court's conviction

In the Aissa Ddthoughgi case, this Moroccan athlete in 10 000 m was first arrested in possession of doping substances and sentenced therefore to 4 months suspended imprisonment. This resulted in no consequence from the sport organizations' side, he was not at that time a licensed athlete. But later when he again committed an anti-doping rule violation, the conviction of the criminal court was adduced as the evidence of his prior record and he was banned for 3 years by the Moroccan Federation.

This raises a question, whether the conviction for a doping crime by a criminal court has to be taken into account when estimating multiple violations in another case in accordance with the World Anti-Doping Code. If the answer is positive, the sanction is much harder. The WADC itself gives no clear answer. We could think that these two systems to impose sanctions are also in this point totally separate systems.

Doping crimes can in some special cases differ from anti-doping rule violations in the WADC, especially concerning doping substances, the division of the burden of proof or the level of required evidence. Normally the requirements for a doping crime in a criminal court are a bit higher than for a doping offence in a sport organization or its tribunal. This makes it easier for the sport organization or its tribunal to accept the results achieved in a criminal court than the criminal court to accept the decision and its arguments presented by the sport organization or its tribunal.

Articles 10.2 and 10.3 of the WADC mention only second violation and third violation without any explanation which violations must be taken into account when determining the second and third violation, but it is quite evident that here it has been considered only anti-doping rule violations in accordance with the WADC, not doping crimes imposed by a criminal court.

However, Article 15.4 includes regulation on Mutual recognition as follows:

Subject to the right to appeal provided in Article 13, the Testing, therapeutic use exemptions and hearing results or other final adjudications of any Signatory which are consistent with the Code and

are within that Signatory's authority, shall be recognized and respected by all other Signatories. Signatories may recognize the same actions of other bodies which have not accepted the Code if the rules of those bodies are otherwise consistent with the Code.

Governments or criminal courts are not signatories of the WADC, but it might be possible to make an analogical interpretation that they are considered as the above mentioned other bodies whose rules (i.e. legislation) are consistent with the WADC. However, the comment under Article 15.4.2 of the draft for the revised WADC shows that this possibility has not been considered in this connection. Therefore it should be reasonable to clarify this article or the comment under it to consist of criminal courts.

In accordance with Article 3.1 of the UNESCO's International Convention Against Doping in Sport, States Parties undertake to adopt appropriate measures at the national and international level which are consistent with the principles of the Code (WADC) and according to Article 4.1 the States Parties commit themselves to the principles of the Code, as the basis for the measures provided for in Article 5 of this Convention.

Taking into account what has been said above, it seems to me well argued that the sport organization or its tribunal can approve that the question is of the second or third anti-doping rule violation when a previous violation has been shown in the decision of a criminal court. This is of great importance when imposing the sanction. But I think in addition that the sport organization or its tribunal should explicitly mention in its decision that it has recognised the previous decision of a criminal court before imposing a sanction for the second or third violation. This course of action offers to the athlete concerned - when appealing against the decision of the sport organization or its tribunal - a possibility to show that the conviction of the criminal court has not been correct related to the matter according to the sport organization's anti-doping rules.

In favour of this interpretation is Article 3.2.3 in the draft of the revised WADC:

The facts established by a conviction or finding of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence of the substance of the conviction unless the Athlete or other Person establishes that the conviction violated principles of natural justice.

#### 5. Some comparisons

If we compare the punishments in a criminal court and the sanctions in a sport organization or its tribunal including the CAS, we can notice that a normal punishment for a doping crime has been a fine or in some cases suspended imprisonment and a normal sanction for an anti-doping rule violation has been two years ineligibility.

For the top-athlete the last mention sanction is much stricter than a fine or suspended imprisonment because it interrupts the athlete's carrier and prevents him/her to carry on his/her occupation. This results in often big economic losses compared with relatively low fines.

But for many athlete's support persons the situation can be opposite. For them two years ineligibility in sport is often only minor consequence, but a fine and especially suspended imprisonment can be of major importance. This can have a great impact on their civil profession.

This is one reason why in some countries the use of doping substances is not a crime in criminal code but trafficking in any prohibited substance or prohibited method and administration or attempted administration of a prohibited substance or method to any athlete are punishable. This results in a situation where the athletes (if only using doping substances) are mainly imposed sanctions for anti-doping rule violations in a sport organization or its tribunal, and other persons involving doping affairs are mainly imposed punishments for doping crimes in a criminal court. This division seems to be rational in many respects. Germany has this year accepted this kind of the solution in its new doping act and in Finland this system has been included into the criminal code some years ago.

Special difficulties can arise if the decisions made by a criminal court and by a sport organisation or its tribunal are opposite i.e. one indicates the guilt of the athlete and another the innocence of the athlete. In the famous Butch Reynolds case the Arbitration Panel of the IAAF<sup>2</sup> considered Butch Reynolds guilty of doping offence but Mr Reynolds home court, federal district court in Ohio exonerated him and ordered the IAAF to compensate 27,3 milj. dollars to Mr Reynolds. The IAAF announced that it will not accept this conviction and appealed to the federal appellate court which decided that the local court had had no jurisdiction in the case and dismissed totally the action of Mr Reynolds. In the Torino Winter Olympic Games in 2006 an Austrian skiing coach Mr Walter Mayer was sanctioned for life for an anti-doping rule violation, but an Austrian court was of the opinion that Mr Mayer had not been shown guilty of any crime according to the Austrian legislation.

When the sanctions are different or deal with different kinds of sanctions, it can be possible to execute both decisions, even though opposite. The question is of two separate processes also in the execution. The execution of the conviction of a criminal court is naturally enforceable in the country of the court. But it depends on international conventions, especially between the countries concerned, whether the conviction is enforceable in other countries.

The decisions made by a sport organization or its tribunal will be executed in all countries and in all sports in accordance with the WADC, but it can be difficult to enforce these decisions outside sport. The international conventions (Lugano, Brussels and New York) on jurisdiction and the enforcement of judgements in civil and commercial matters can have a great influence also on the decisions made by sport organizations or their tribunals including the decisions of the CAS. The Swiss Federal Court has confirmed twice that the CAS is an internationally accepted arbitration court whose jurisdiction is exclusive under these above mentioned conventions.<sup>3</sup> The same conclusion was reached by the US Supreme Court in the Mary Decker Slaney case.<sup>4</sup> However, all these conventions are binding only for the state parties to the conventions and even in some contracting parties it has been unclear how to apply these conventions.

The international sport federation cannot demand its member federations to stand against the decision made by the court, civil or criminal, of the federation's own country, because naturally all athletes, clubs and national federations are bound by their own country's law and are under the jurisdiction of the national courts. But the international sport federation can keep its decisions in all other countries, where the decision of a court of another country is not entitled to recognition and enforcement. The international sport federation can normally be refused to do so only in its own domicile's civil court.

## 6. *Ne bis in idem*

One of the leading principles in criminal law is that in one and the same crime only one punishment can be imposed, "*Ne bis in idem*". Can or ought it to be applied also in doping sanctions?

Theoretically the answer is clear and generally accepted. A punishment in a criminal court and a doping sanction in a sport organization or its tribunal are not against the principle *Ne bis in idem*. The question is of two separate matters. Only the punishment by a criminal court is a punishment in the sense of criminal law. The doping sanction by a sport organization or its tribunal is a disciplinary measure. The first one belongs to the area of public law, the last one of private law.

Many examples of this separateness has been presented under Point 3 above. An example to opposite direction is just pending in Belgium. In this case a cyclist Mr Frank Vandenbroucke was sanctioned for doping in a disciplinary proceedings of the sport federation. He was also prosecuted before the criminal court for the same facts. Mr Vandenbroucke pleaded that he already had been sanctioned with a

disciplinary sanction and that any criminal proceedings had to be dismissed. The criminal court of first instance did not accept this defence and imposed a punishment, but the court of appeal accepted the appeal, based on Vandenbroucke's argumentation. The case is now pending in the Supreme Court "Cour de Cassation".

This distinction between a punishment imposed by a criminal court and a sanction imposed by a sport organization or its tribunal has so far been easily noticable. Fine and imprisonment have been measures by courts and ineligibility and loss of prize money measures by sport organizations or their tribunals. In fact, it would be strange, if public power would start to determine ineligibility in sport as long as the sport has its more or less autonomous position.

This situation is not unique in society. For example, doctors have their licenses to carry on their profession. If a doctor makes himself/herself guilty of a crime, he/she will be punished in a criminal court according to the criminal code, but he/she can lose his license in a separate process, in an administrative procedure.

But this answer will not be anymore easy to accept, if the draft of the revised WADC will be brought into force. In accordance with its Article 10.12 Imposition of Financial Sanctions

Anti-Doping Organizations may, in their own rules, provide for financial sanctions on account of anti-doping rule violations. However, no financial sanction may be considered a basis for reducing the period on Ineligibility or other sanction which would otherwise be applicable under the Code.

If this happens, in a same doping offence there can be two fines, one imposed by a criminal court and another imposed by a sport organization or its tribunal. The first fine goes to the state and the latter to the sport organization depending on its rules. Can the separateness of these two sanctions still stay?

I am doubtful. Regarding the athlete he/she has to pay twice for one act, only the address is separate. From his/her point of view there is no difference in fines between public and private law because the consequence is same. However, *Ne bis in idem* -principle has been valid as a part of human rights only in criminal processes, not related to disciplinary sanctions. If this kind of situation would arise, the civil court or the execution authority would be obliged to deal with and to solve whether *Ne bis in idem* -principle shall be applied or not. The fine imposed by a state court can be executed directly by execution authorities, but the fine imposed by a sport association or its tribunal can not be executed without a separate decision, normally of the civil court. When making this decision the court should accept the ground for execution and at the same time whether or not to apply *Ne bis in idem* -principle.

But the same result or more from the point of view of doping control's effectiveness can be obtainable by purely means of private law. Very often the top athletes have made or make an agreement with their sport federation for different kinds of economic and other benefits and rights. In these agreements it is possible and often used, that the athlete commit himself/herself to compensate to his/her federation the image and/or economic losses in the case of doping offence of which he/she is guilty. This kind of a contractual penalty can be quite high. Contractual penalties are normal in business contracts.

## 7. Cooperation in detecting doping offences

Cooperation is not possible between courts and sport organizations, when a matter has reached the stage of court handling. The court must decide the case independently. However, the WADA has filed in the Operatio Puerto Case in Spain a formal request to be accepted as a civil party in the court. The WADAs request was firstly dismissed on 27 March 2007, but after the appeal it was accepted which can be internationally an important precedent. The aim of the WADA was to get all material in the case to be used as evidence later before the CAS.

Instead cooperation is very useful at the earlier stages in the investigation process. Before a doping case is dealt with before a criminal court, the police has conducted its investigations and the prosecutor

2 I was the chairman of this Panel.

3 The judgements 15 March 1993 and 31 October 1996.

4 The New York Convention was the main

reason to dismiss Ms Decker Slaney's claims in the Southern District Court of Indiana, Indianapolis Division Nov. 5, 1999.

decided to prosecute. They have strong powers for these purposes. Police can hear whomever person as witness, make home search, confiscate property, take samples, conduct telephone and internet surveillance including email etc. depending on the severity of the case. Doping procedures in sport organizations have today started from police investigations more often than previously as a result of more active involvement by the police.

A sport organization's or its tribunal's powers are limited to measures in connection of sport. The athletes are obliged to give samples in doping control whenever and they can be requested to give necessary evidence and come to a hearing with the consequence that if they do not fulfil their obligations they will be sanctioned for an anti-doping rule violation. These powers are still more limited related to the athlete's support personnel.

This imbalance in means has resulted in that sport organisations have needed and need in many cases investigation help. Such cases are numerous and most important.

The Tour de France doping scandal in cycling in 1998 started from police investigations, and the Chinese doping scandal in swimming in 1998 started from Australian customs' seizure. Obscurities in the Balco laboratorium began to be detected in the USA originally in the tax authorities' investigations. The Operatio Puerto in Spain is the investigation conducted by the Spanish authorities into doping practices that followed the seizure of prohibited substances and other material by the Spanish police in 2006. It has concerned so far mainly cycling. In the Athens Olympic Games in 2004 two Greek sprinters, Kenteris and Thánou, escaped from doping control. The IAAF waited as long as possible for the results of police investigations with the purpose to get better evidence before imposing sanctions.

It can be pointed out from these examples that many major disclosures have happened and evidently will happen from inquiries and investigations conducted by police or other governmental agencies. They have sufficient powers for that. The sport organizations are not able to detect effectively trafficking, smuggling, distribution etc. of doping substances. They do not have any mandate to conduct necessary investigations outside sport. On the other hand police has usually not sufficient resources nor interest to take urine or blood samples from individual athletes. This part of doping control is and will stay in the hands of sport organisations. Anti-doping organisations in the whole world have conducted nowadays about 180.000 tests yearly.

The lack of powers to make investigations is a big problem for the sport organizations and for the WADA. In the last publication of the WADA "Play true" (1/2007) is a strong appeal: "The challenge put before the anti-doping movement now is, in what ways can cooperation and the sharing of information - between governments agencies and law enforcement on the one hand, and sport and anti-doping

authorities on the other - be improved to bring greater efficiency to the fight against doping in sport."

The aim to achieve better cooperation between governments and sport organizations can be seen in some new articles of the revised WADC when the WADC will be accepted in a big doping conference in Madrid in November this year. According to its Article 3.2.3 mentioned already above

The facts established by a conviction or finding of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence of the substance of the conviction unless the Athlete or other Person establishes that the conviction violated principles of natural justice.

The sport organizations' obligation to announce significant anti-doping rule violations to the public authorities has been determined in the last sentence of Article 10.3.2 of the draft. In the Comment to this sentence it has been said that "Since the authority of sport organizations is generally limited to Ineligibility for credentials, membership and other sport benefits, reporting Athlete Support Personnel to competent authorities is an important step in the deterrence of doping." In fact, already Article 10.4.2 in the present WADC includes the same rule but only in the milder form "may be reported".

The information exchange from the opposite direction i.e. from governments to sport organizations has been regulated in Article 22.1.1 of the draft as follows:

Each government shall encourage all of its public services or agencies to share information with Anti-Doping Organizations which would be useful in the fight against doping where to do so would not otherwise be legally prohibited.

Article 13 in the UNESCO Convention Against Doping in Sport includes a respective principle.

These are steps towards closer cooperation, but not at all sufficient in the battle against doping. In all circumstances certain powers, such as those of house search, seizure, internet surveillance etc. will remain in the realm of law enforcement. It seems to be juridically very difficult to give any such kind of powers to private organs such as a sport organization or its tribunal. Consequently, the sport organizations' large scale anti-doping investigations are possible also in the future only through cooperation and coordination with state agencies. The cooperation between the police and other governmental authorities and the sport organizations seems to be the most effective way to improve the battle against doping.

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# Doping in Sport, the Rules on “Missed Tests”, “Non-Analytical Finding” Cases and the Legal Implications

by Gregory Ioannidis\*

Much discussion has been generated with the introduction of a new rule to combat the use of performance enhancing substances and methods in sport. This discussion has been initiated and subsequently became an integral part of the sporting public opinion, as a result of the application of this rule on high profile professional athletes, such as the Greek sprinters Kenteris and Thanou.<sup>1</sup>

Before, however, an analysis of the application of this rule can be produced, it is first of all necessary to explain and define the operation of the rule and perhaps attempt to discover the reasons for its creation.

The article would concentrate on the IAAF's [International Association of Athletics Federations] rule on missed tests and critically analyse its definition and application, particularly at the charging stage. This would enable us to test the validity of the rule, by examining its application on potential alleged offenders and would also provide us with a unique opportunity to interpret the intention of the legislator. The relevant rule under examination is the IAAF's Rule 32.2.d which states:

*“Doping is defined as the occurrence of one or more of the following anti-doping rule violations: (d) the evaluation of 3 missed tests (as defined in Rule 35.17) in any period of 5 years beginning with the date of the first missed test.”<sup>2</sup> Further, Rule 35.17 goes on to “define” what a missed test is. It states: “If an athlete fails on request to provide the IAAF with his whereabouts information, or to provide adequate whereabouts information, or is unable to be located for testing by a doping control officer at the whereabouts retained on file for that athlete, he shall be subject to an evaluation by the IAAF Anti-Doping Administrator for a missed test. If, as a result of such evaluation, the IAAF Anti-Doping Administrator concludes that the athlete has failed in his obligation to provide whereabouts information or adequate whereabouts information, the IAAF Anti-Doping Administrator shall evaluate the failure as a missed test and the athlete shall be so notified in writing. If an athlete is evaluated as having 3 missed tests in any period of 5 years beginning with the date of the missed test, he shall have committed an anti-doping rule violation in accordance with Rule 32.2(d).”*

It is clear from the above rules that doping does not only relate to the use of prohibited substances and methods, but also to the “occurrence

of one or more anti-doping rule violations”. These anti-doping violations may incur in situations where the athlete did not use performance enhancing substances, but simply, where he “missed”, “failed” and/or “evaded” the test. For the purposes of analysing these rules, we would call these specific cases “non-analytical finding” cases.

The reason for the examination of the IAAF's rule, concentrates on the fact that it is attracting intense criticism, in relation to its application on anti-doping violations. In addition, this regulation in question has been associated with high profile cases, and has also become the source of a unique form of questioning. A series of questions arise out of its construction, interpretation and application in practice.

These questions cannot be answered without a further examination of the factual issues that surround the application of this regulation. This work aims to explore the operation of these rules, in order to be able to explain and test the application of the regulations in question. It further aims to interpret the construction and the reasoning behind the creation of the said regulations.

## Factual Analysis

The significance of this regulation lies in the fact that it does not concern positive tests for the use of performance enhancing substances, but instead the so-called “non-analytical finding” cases.<sup>3</sup> Such cases, as mentioned above, do not include positive tests on behalf of the athletes, but rather anti-doping violations, in a form of a strict liability offence, where the accused athlete missed, failed, refused and/or evaded the test. The last two ingredients of the offence form the subject of a separate analysis, as they require, it is submitted, a mental element on behalf of the accused athlete. The analysis would examine all of these provisions and it will show that, not only are they mutually incompatible, but they are also unworkable because of their specific definitions.

An independent observer would produce, not surprisingly, the following questions: what is a “missed test”? How does it operate? Is it a strict liability offence? Does it require knowledge (of the test) on behalf of the athlete? Does it create injustice? Does it breach recognised principles of law? Does it violate rules of natural justice and due process? Does it breach human rights? Are the Doping Control Officers, responsible for conducting the tests, adequately trained for the application of the rule and most importantly, are they independent, fair and unbiased?

The answers to these questions reveal significant findings, which they would, without a doubt, call for a review and re-examination of the propriety and fairness towards the application of this regulation. It would come as no surprise when the time arrives where a case attempts to test the legality and fairness of this rule before a national court of law. I was certainly privy, and still am, to the doubts expressed as to the specific elements of the offence in the analysis of this regulation.

Despite the fact that certain regulations of sporting governing bodies attempt to exclude the resolution of a private dispute before national courts of law<sup>4</sup>, it is submitted that where an error of law and/or injustice have occurred, immunisation from judicial intervention may not so easily be achieved.

Under English law, an attempt to exclude the courts from their effort to interpret the law is considered to be against public policy. To this effect, Lynskey J has argued in the past:

*“The parties can, of course, make a tribunal or council the final arbiter on questions of fact. They can leave questions of law to the decision of a tribunal, but they cannot make it the final arbiter on a question of law.”<sup>5</sup>*

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1 The author advised and acted as Counsel for the Greek sprinters in an appeal brought against them by the IAAF [Track and Field's governing body] before the Court of Arbitration for Sport in Lausanne and against their clearing of any anti-doping violations at first instance. This appeal was eventually withdrawn by the IAAF, last June, with both sides reaching an out of court settlement. The analysis of the present article does not, in any way relate to the above-mentioned Appeal, nor does it describe factual or otherwise situations arising out of this case. The author concentrates solely on his personal interpretation of the current regulatory framework.

2 The IAAF proceeded with a modification to this rule in 2006. Prior to the modification, the rule required “3 missed tests in 18 consecutive months”.

3 Examples include the cases of the American sprinters Tim Montgomery, Chirstie Gaines, Kelly White and the well-known and highly publicised case which arose out of the Athens Olympic Games with the Greek sprinters Konstantinos Kenteris and Katerina Thanou.

4 Take for example the IAAF's Rule 45.1: “Anti-Doping rules are, by their nature, competition rules governing the conditions under which the sport of Athletics is to be held. They are not intended to be subjected to or limited by the requirements and legal standards applicable to criminal proceedings or employment matters.”

5 Baker v Jones [1954] 2 All Er 553, p. 558.

F O R T H C O M I N G

# The Sporting Exception in European Union Law

Richard Parrish and Samuli Miettinen

*The Sporting Exception in European Union Law* is the definitive, comprehensive and up-to-date account of EU sports law. It provides a detailed critique of major European Court of Justice judgments including *Walrave* (1974), *Donà* (1976), *Heylens* (1989), *Bosman* (1995), *Deliège* (2000), *Lehtonen* (2000), *Kolpak* (2003), *Piau* (2005) and *Meca-Medina* (2006) and a modern framework for the application of ECJ jurisprudence to sport. It also provides advanced commentary on major sports-related competition decisions of the European Commission. The book examines the application of EU law to broadcasting issues, to rules affecting player mobility in Europe and to issues of sports governance. In doing so it provides comprehensive coverage of all the current issues in EU sports law including the *Oulmers* case, the home-grown player debate, the regulation of players' agents, the impact of the Services Directive, the impact of the Audiovisual Media Services Directive, the influence of the 2006 Independent European Sports Review, the details of the 2007 Commission's White Paper on Sport, the likely impact of the Treaty Article for sport in the Reform Treaty and prospects for social dialogue within the sports sector.

*The Sporting Exception in European Union Law* is a reference tool for all those involved (academics, practitioners, researchers, advisers, administrators, marketers and broadcasters) in the field of international sport and the challenges that the interface between European law and sport provides in daily law.

Dr Richard Parrish is Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom, and Chairman of the Association for the Study of Sport and the European Union. Samuli Miettinen is a senior lecturer at the Centre.

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# FOREWORD

Sport is not mentioned in the EC Treaty. And yet sporting practices may have profound economic implications, and they may cut across basic assumptions of the EC Treaty such as non-discrimination on the grounds of nationality, free movement across borders and undistorted competition. So if the EC Treaty is to be interpreted in a manner apt to achieve its objectives it cannot afford sport unconditional immunity from its scope of application. On the other hand, sport has characteristics which are not shared by other sectors of the economy and, moreover, the Treaty is deficient in setting out any helpful framework for understanding just what is 'special' about sport. So the EU's institutions, most of all the Court and the Commission, are wisely circumspect when invited to intervene in sport. Add in a host of actors with incentives to argue for maximum autonomy for sport - sports federations and governing bodies, most obviously - and others, particularly those adversely affected by the choices made by governing bodies, with incentives instead to promote the aggressive application of EC law, and the scene is set for the shaping of a fiendishly complicated and hotly contested area of law and policy.

The European Court has a rather spotty record in keeping the law on track. Plenty of sporting practices have been challenged but found to suffer no rebuke when examined in the light of EC law. But *why* do some sporting rules escape condemnation under EC law? Usually, in my view, it is not because they exert no economic effects. In fact there are few such 'pure' rules. Usually it is because their economic effects are a necessary consequence of their contribution to the structure of legitimate sports governance. This is true of nationality rules governing the composition of national representative teams, of rules governing selection for international competition, of 'transfer windows', of rules forbidding multiple club ownership, of anti-doping rules and procedures, and so on. But in its first great case on sport, *Walrave and Koch*, the Court referred to 'a question of purely sporting interest' which 'as such has nothing to do with economic activity'. And it thereby introduced the idea of rules which lie beyond the reach of the Treaty. For governing authorities in sport this is a delightful notion, for it helps their interest in maximising the scope of their autonomy from legal supervision. This is the widest possible version of the 'sporting exception'. But I think it is misleading. Most sporting practices *do* fall within the scope of the Treaty - because they have economic effects - but this is not to say they are incompatible with it. In my view the correct way to understand the so-called 'sporting exception' in EC law is simply to regard it as the space allowed to sports governing bodies to show that their

rules, which in principle fall within the EC Treaty where they have economic effects, represent an essential means to protect and promote the special character of sport. There is no blanket immunity. There is case-by-case scrutiny. EC law applies, but does not (necessarily) condemn. And I think that recently, in *Meca-Medina and Majcen v Commission* the Court adopted this approach.

This is the territory explored by this very fine book. It examines the development of the law and it then applies the analysis to particular areas of controversy, including broadcasting and the labour market. It richly repays close reading and it is the product of deep thinking and conscientious research. Richard Parrish has already shown us the way in his pioneering book *Sports Law and Policy in the European Union* (2003), in which he built his narrative around the appealing notion of 'separate territories', according to which there is 'a territory for sporting autonomy and a territory for legal intervention' (p.3). In this book, with the reinforcement of his co-author Samuli Miettinen, Richard Parrish shows us a great deal of overlap between those territories, and the writers pore over the frictions that exist at the boundaries.

In general sports governing bodies remain wearily reluctant to engage seriously with the need to demonstrate intellectually durable reasons why their structures and practices should be treated as necessary and therefore compatible with EC law. Even today they frequently complain about having to do what every other commercially active party has to do - comply with the law. 'Sport is special!' They declare. So it is - but not *that* special. If governing bodies want to take seriously the space which EC law allows them to show why and to what extent sport is truly special, while also generating large amounts of money, then this book provides them, their members and their legal advisers with a platform from which to develop balanced and well-informed arguments. I congratulate Richard Parrish and Samuli Miettinen on their scholarship. This book is a terrific addition to the literature on sport and the law and, I am sure, will be welcomed by all those with a professional, regulatory and academic interest and stake in this developing and important subject.

*Stephen Weatherill\**

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This is obviously an encouraging statement which should allow some latitude for the accused athlete, where an obvious error of law has occurred, or some other principles of law have not been observed. The truth of the matter, however, is that the Court of Arbitration for Sport in Lausanne (CAS) remains the final arbiter, for both the facts and the law, and as such is followed by the parties to a dispute.<sup>6</sup> Lynskey J's statement, however, would not find application in practice, if the accused athlete feels that his rights have been breached and CAS has failed to produce an appropriate remedy. In my experience and in recent cases before CAS, the panel has remained silent on questions relating to human rights.<sup>7</sup> On a different issue, that of the lifting of the provisional suspension, the Panel suggested that CAS is not a court of law, but a tribunal, and therefore not the appropriate forum to deal with complex legal issues, such as the one raised by counsel for the accused athletes! And with the ECJ's recent decision in *Meca-Medina v Commission of the European Communities* [C519/04]<sup>8</sup> it is clear that actions that take a different road from that to Lausanne may also conventionally fail.

### The Need for Stricter Rules

There is no doubt that the objects of the rules of sporting governing bodies are simple: healthy competition, equal or level-playing field for all and punishment for those who do not obey the rules. The rules themselves, however, are not always straightforward. As my learned friend, Michael Beloff QC suggests:

*"In my experience, rules of domestic or international federations tend to resemble the architecture of an ancient building: a wing added here, a loft there, a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole."*<sup>9</sup>

This is an element which gives rise to intense criticism, particularly from the penalties' point of view. The issue of proportionality or the argument that the punishment is disproportionate to the offence committed has given rise to many different interpretations before national courts of law. It has been suggested that a four year ban is contrary to German law<sup>10</sup>, whereas it was held valid under English law.<sup>11</sup> The case of *Meca-Medina* certainly confirms that a ban which is over a certain number of years could be held disproportionate. The introduction of WADA [World Anti-Doping Agency], with the main aim to harmonise different rules and penalties from different sports, suggests that a two year ban could be upheld as reasonable and proportionate to the offence committed. The European Court of Justice appears to agree. There are, however, exceptions to this general rule. If a second offence is committed and the accused is found guilty, then the ban takes the form of life ineligibility from international and national competitions.<sup>12</sup> There may be cases where the accused athlete is able to establish "exceptional circumstances" and have his lifetime ban reduced to 8 years.<sup>13</sup> Or there may be a case where an athlete is found to have committed two separate anti-doping rule violations, which have not arisen from the same test, and could receive a sanction of a three-year ban.<sup>14</sup>

To make things even more complicated and perhaps disadvantageous for the accused athlete, the sporting governing bodies, with the assistance of CAS, have devised a specific *standard of proof*. This indicates that the standard of proof in doping cases should be below the criminal standard but above the civil standard.<sup>15</sup> In addition, the CAS has already argued<sup>16</sup> that the ingredients of the offence must be established "to the comfortable satisfaction" of the court, bearing in mind "the seriousness of the allegation" made. The CAS has also suggested that the more serious the allegation, the greater the degree of evidence required to achieve comfortable satisfaction.<sup>17</sup> The "comfortable satisfaction" standard of proof is rather subjective and is not always the same for prosecution and defence. As Michael Beloff suggests<sup>18</sup>:

*"The CAS held in the Chinese swimmers cases that the standard of proof required of the regulator, FINA, is high: less than the criminal standard, but more than the ordinary civil standard. The Panel was also content to adopt the test, set out in Korneev and Gouliev v IOC20, that ingredients must be established to the comfortable satisfaction of the court, bearing in mind the seriousness of the allegation made. To adopt a criminal standard [at any rate, where the disciplinary charge is not one of a criminal offence] is to confuse the public law of the State with the private law of an association. The CAS went on, in Korneev, to reiterate the proposition that the more serious the allegation, the greater the degree of evidence required to achieve 'comfortable satisfaction'."*

With respect, I would have to disagree with the above statement, regarding the disciplinary nature of the anti-doping offences. In my personal view, the disciplinary charge and the sanction that follows such a charge, produce elements of a criminal law regulation. If one considers the penalties that follow the exclusion of an athlete from his trade, one would arrive at the safe conclusion that such penalties not only exclude the offender from his trade, but they also have as an aim to "exhaust" him financially. The harshness of the rules in relation to the application of the penalties<sup>21</sup> not only is disproportionate to the offence committed, within the disciplinary framework, but it also creates an anathema of a kind that usually the criminal law regulates. It follows that the nature of the disciplinary proceedings and the subsequent penalties imposed on the offender meet the criteria established in many criminal codes, whether in common law jurisdictions or civil law ones.<sup>22</sup>

But what is the standard of proof required of prosecutor and defendant where the burden shifts? Although in English criminal law the defendant could use the civil standard when making out his defence, the matter before CAS is still open to interpretation. And the "degree of evidence" is also an issue which could cause legal "headaches". For example, what is the degree of evidence required to achieve comfortable satisfaction? What is the admissibility of such evidence? How do you assess its probity? What rules do you apply in relation to disclosure of such evidence?

Despite the fact that professional athletes are now considered employees<sup>23</sup>, or self employed in the case of many individual sportspeople and should be treated in the same way as other professionals,

6 See Dr. Gregory Ioannidis "WADA Code draft revision: questions remain", World Sports Law Report, January 2007, pp 14-15.

7 IAAF v SEGAS, Kenteris & Thanou CAS A/887/2006 [unreported].

8 The ECJ dealt with the issue as to whether sporting governing bodies' anti-doping rules were exempt from review under EC competition law because they concerned purely sporting matters which did not affect economic activity.

9 "Drugs, Laws and Verspapaks", in "Drugs and Doping in Sport: Socio-Legal Perspectives", Cavendish, 2000, p. 42.

10 That was the view of the German Federal Court in the case of Katrin Krabbe against the IAAF [1992], unreported, 28

June.

11 In the case of Paul Edwards v BAF & IAAF [1997] Eu LR 721, Ch D.

12 Not always the sporting governing bodies appear to follow the application of this regulation as it could be seen in the recent case of the American sprinter and former world record holder Justin Gatlin.

13 See IAAF Rule 40.3.e.  
14 See IAAF Rule 40.8.

15 See the CAS' decision in Wang v FINA CAS 98/208, 22 December 1998, para 5.6.

16 In the case of Korneev and Russian NOC v IOC, Gouliev and Russian NOC v IOC, Mealey's International Arbitration Report, 1997, pp 28-29.

17 Ibid.

18 "Drugs, Laws and Verspapaks", in "Drugs and Doping in Sport: Socio-Legal Perspectives", Cavendish, 2000, p. 50.

19 Wang v FINA CAS 98/208, 22 December 1998, para 5.6.

20 Korneev and Russian NOC v IOC; Gouliev and Russian NOC v IOC, reported in Mealey's International Arbitration Report, February 1997, pp 28-29.

21 See the case of Torri Edwards v IAAF & USATF CAS OG 04/003, where the Panel notes: "The Panel is of the view that this case provides an example of the harshness of the operation of the IAAF Rules relating to the imposition of a mandatory two-year sanction."

22 It is not my intention to analyse the issue of criminalization of doping in sport. This has been done elsewhere. For further discussion see: Dr. Gregory Ioannidis, "Legal regulation of doping in sport and the application of criminal law on doping infractions: can a coercive response be justified", I.S.L.R. 2006, 1(MAY), 29-39.

23 See the decision of the European Court of Justice in Case C-415/93 Union Royale Belge des Societies de Football Association ASBL v Jean-Marc Bosman [1996] 1 CMLR 645

it is submitted that the special nature of sport has led tribunals to adopt different ways of dealing with issues of disclosure and admissibility of evidence. It is evident from the CAS' jurisprudence, that the sporting tribunal is not bound by the rules of evidence which apply in English courts or indeed in any other common law or civil law jurisdiction. It is hardly ever the issue before the CAS as to whether there is a distinction between relevance and admissibility. Whatever is relevant to the issues of the case could be admissible, as long as the evidence is direct, which of course carries more weight than the indirect evidence. In certain circumstances, and I have certainly been privy to such development, the sporting tribunal may even allow hearsay evidence to be admitted, as long as it is fair. This, in essence, may prove to be helpful towards establishing a stronger case for the prosecution, but it violates procedural rights afforded to the defendant, that would, otherwise, have been protected in a procedure before a national court of law.

Finally, there is another obstacle for the athletes when they prepare their defence. The majority of the offences covered in the sporting governing bodies' regulations are strict liability offences. Athletes are responsible for the substances found in their bodies, but strict liability could operate rather unfairly where the rules themselves are unclear and their applicability to the facts of the cases doubtful. This is certainly the issue in the majority of the circumstances, as the rules in force do not clearly and in a concise way establish the intention of the legislator or their actual, correct and proper application. Although there may be an opportunity, for an athlete, to put a case in rebuttal, it is submitted that in cases where there is a prohibited substance present, the athlete may find himself in a very difficult situation rebutting the allegation. Testing laboratories usually operate under the auspices of the sporting governing bodies and there may be cases where issues of independence and bias may be put into question.

It is submitted that the above analysis indicates the degree of difficulty accused athletes face when they are against charges of anti-doping violations. The reason behind such difficulty relates to the argument that without rules supporting strict liability, the prosecuting authorities will never be able to prove the charges and therefore the war against doping in sport would become futile. Furthermore, the whole process would become unnecessarily expensive and sporting governing bodies could face the threat of legal action being taken against them. The issue of bankruptcy is not a new one for sporting governing bodies.

The CAS seems to support the idea of strict liability and has in the past rejected the principle of *nulla poena sine culpa*, or at least, tried not to apply it or interpret it too literally.<sup>24</sup> To a certain extent, the use of strict liability rules on behalf of sporting governing bodies, or at least, the reasoning behind their use, could be understood. What would, however, find itself labouring under great difficulty, is the argument that the CAS should be seen to support the operation of strict liability rules. This, however, appears to support the contention that if the non-intentional use of performance enhancing substances were to be allowed, it would then create a legal minefield and eventually bankrupts the sporting governing bodies. This would appear to be the reason as to the CAS' propensity to support the operation of strict liability rules. But where is the balance to be struck? Strict liability

<sup>24</sup> Quigley v UIT CAS 94/129, para 14.

The Panel notes: "Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on model

budgets - in their fight against doping. For those reasons, the Panel would as a matter of principle be prepared to apply a strict liability test. The Panel is aware that arguments have been raised that a strict liability standard is unreasonable, and indeed contrary to natural justice, because it does not permit the accused to establish moral innocence. It has even been argued that it is an excessive restraint of trade. The Panel is unconvinced by such objections and considers that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard.

rules are arbitrary and capricious and when the rights of the individual are breached and general principles of law are violated, the accused is left with no remedy and the whole system becomes unfair, unjust and offensive. This as a result offends against fairness and justice. The following pages will attempt to test the rules on missed tests and therefore try to establish as to whether the above arguments could be justified in terms of striking a balance between the fight for a healthy and fair competition and the rights of the accused athletes.

### The Rule on Missed Tests: "Dead Man Walking"

It has already been suggested that the rule on missed tests relates to the so-called "non-analytical finding" cases. This means that if sanctions were to apply on an athlete for an anti-doping violation, the athlete must have missed the test. What does this mean and how does it apply in practice? Let us test this in practice, by creating a hypothetical scenario

#### Test Case 1:

*Fred Bloggs is a well-known and famous athlete. Prior to his event, during an international competition, he is notified that he has missed 3 anti-doping controls and he is therefore subject to a sanction under his sporting governing body's regulations. The regulation on missed tests states that if the athlete misses 3 tests in a period of 5 years, he would be deemed to have committed an anti-doping violation. The regulation also states that the athlete must be informed in writing about the alleged missed test, must be given the opportunity to produce his explanation and then the governing body must proceed with the evaluation of the alleged missed test. No decision should be taken before the athlete is fully informed of the missed test at a time. It is now the 24 of January 2006. The first recorded attempt to test the athlete was on 27 December 2005. The second on 23 January 2006, and the third on 24 January 2006. The athlete is unaware of the number of the missed tests he has, as he has not been informed in writing and no evaluation has taken place yet for any of them.*

Let us now analyse this scenario. As it has been explained above the provisions for missed tests are set out in at Rule 35.16. The Rule requires the athlete to miss 3 tests in a consecutive period of 5 years, before any sanctions could be applied. In order to understand the legislator's intention for the correct application of this rule, it is first of all necessary to explain the procedure and the operation of this rule. The appropriate governing body has to notify the athlete in writing that a missed test has been recorded. The athlete is then given the opportunity to respond and provide an explanation to the allegation. If the explanation is not accepted then the Anti-Doping Administrator has to proceed with the evaluation of the test. If the Administrator concludes that the test has been evaluated as a missed test, he has to notify the athlete in writing.

It is submitted that the intention of the legislator is not to make one missed test an offence, but to give the opportunity to the athlete to realise that the completion of 3 missed tests is a serious anti-doping offence which carries an equally serious sanction. The legislator, following the principles of natural justice and basic human rights, provides the athlete with the opportunity to process in his thought the seriousness of such an offence, by giving him the ability to be more diligent. It is submitted therefore, that the number 3 which carries the penalty for the offence, provides the athlete with the flexibility to organise his professional career accordingly. This flexibility, however, cannot be achieved, unless the athlete in question has the knowledge as to the correct number of missed tests.

It is submitted that from the facts of the test case above it is obvious that there are procedural breaches, which would have a serious effect on the accused. There may be a possibility that the accused missed the test because he was trying to avoid detection or be subjected to a test. This is a speculation and it is based on mere suspicion, which of course runs counter to every principle of fairness and justice in law. We also need to remember that the regulation under analysis, so far, does not include evasion of the anti-doping control. It is submitted that notification here is the essential ingredient before the rule



can start operate in a proper and fair way. It is important therefore, for the athlete to have knowledge as to the correct number of the missed tests he has. In such case, it is also important to establish either intention or negligence and allow an effective application of the sanction. It offends against fairness and justice to apply a sanction when the athlete does not know that what he was doing was wrong and contrary to the rules. It also offends against the intention of the legislator who clearly states that the athlete needs to be informed in writing. Again the legislator indicates that the elements of communication and knowledge are the necessary ingredients before any sanction could be applied.

#### Variation to Test Case 1:

*“Fred Bloggs is also informed that he is subject to another sanction for breaching an additional rule and therefore committing another anti-doping violation. That on the same day [24 January 2006] he missed a test, he also refused the test and tried to evade it. The sanction for this offence carries a penalty of 2 years’ ineligibility from national and international competitions. No successful notification of the test was communicated to the athlete.”*

It is obvious now that the application of two different rules on the same alleged test creates controversy and confusion. There may be a case where the prosecutors do not know which charge to proffer against the athlete and the athlete’s defence is thereby undermined by having to defend multiple counts. The sporting governing body alleges that the athlete missed the test and also refused it at the same time, on the same day. In a purposive interpretation of these two rules, on missed tests and refusal that is, the outcome not only is ambiguous, but also extremely absurd! You cannot miss a test and refuse it at the same time! The tribunal obviously must interpret this according to the surrounding circumstances, the intention of the legislator and of course the intention of the party who drafted it, to apply it in a way that suits its case. Lord Denning’s judgment in *Reel v Holder* provides useful guidance on this issue.<sup>25</sup> The Master of the Rolls argues:

*“One can argue to and fro on the interpretation of these rules. The people who drew them up could not possibly have envisaged all the problems which would have to be coped with in the future in regard to them. The courts have to reconcile all the various differences as best they can.”*

This is also true in the case where the rules create conflict. The rules must be interpreted purposively and not pedantically. In the case of a conflict or injustice the rules must be interpreted contra preferentem in favour of the athlete. And this is true when rules of strict liability are involved.

It is submitted that the tribunal must have some sort of evidence before it in order to support the finding. The evidence must be overwhelming. Not hearsay, not doubtful. Strong, good evidence which proves beyond doubt, considering the seriousness of the allegation and the severity of the action that the accused had knowledge and intended to commit the alleged offence. This evidence however, must be supported and fit into the purposive interpretation of the rules that dictate the relationship between the prosecuting authority and the accused. The Tribunal must apply valid rules correctly interpreted. And in doing so, it must consider, at the same time, the probity of the evidence. The surrounding circumstances of the evidence submitted, while suspicious could not and should not form the basis for concluding that the athlete might have offended. The surrounding circumstances cannot be evidence of the subjective suspicion that the athlete knew, so therefore tried to do a runner! The surrounding circumstances should form the basis of the objective fact that the athlete had

not been notified, so therefore did not know about the test. And as Rule 32.2.c of the IAAF explains, it is an offence if you fail or refuse, or otherwise seeking to evade an anti-doping control, after having been requested to do so by a responsible official!<sup>26</sup> The legislator is clear: after having been requested to do so by a responsible official. The purposive interpretation clearly suggests that prerequisite for the application of the rule is the request to the athlete by a responsible official. This is the first stage. Then the second stage follows, where the prosecuting authority has to establish whether the athlete failed, or refused or even evaded the test.

It is submitted that the intention of the legislator and its true meaning must be followed at all times. The prosecuting authorities should not be allowed to re-write the rules so they could be given the opportunity to circumvent, the otherwise ill-drafted provision, or their inability to apply the rule properly and fairly. As the Panel notes in the case of *Baxter v IOC*<sup>27</sup>

*“The Panel is unable to rewrite or to ignore these rules unless they were so overtly wrong that they would run counter to every principle of fairness in sport.”*

Furthermore, the application of two different rules on the same test and the allegation that the athlete refused to undergo a test and also that he missed the same test, at the same time, is confusing and absurd. The Panel in the case of *IAAF v Qatar Associations of Athletics Federations*<sup>28</sup> clarified the difference between refusal and a missed test:

*“A missed test is defined as a consequence of a failure by an athlete to keep the IAAF informed of his or her whereabouts. It is completely different in nature and quality to a failure or refusal to provide a test when asked to do so.”*

The jurisprudence of the CAS on this point is extremely helpful and suggests that it is important for the sporting community that the sporting governing bodies establish clear and concise rules. As the Panel noted in *USOC v IOC & IAAF*<sup>29</sup>

*“The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply.”*

The Panel also cites a passage from *Quigley*<sup>30</sup> at p. 24, para 74:

*“The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.”*

Similarly, it is equally important that the athletes are informed not only of the regulatory framework in force at any given time, but most importantly, be given the opportunity to comprehend the application of this regulatory framework in order to plan their lives and careers accordingly. As our test case indicates, the regulatory framework must be followed and interpreted in a proper and fair way, if sanctions are to be applied on the accused athlete. At the same time consideration must be given to the fact that such sanction would have serious and incalculable consequences in the, otherwise, short career of an athlete. In any other event, we should not expect from an athlete to follow a

<sup>25</sup> *Reel v Holder* [1981] 3 All ER 321

<sup>26</sup> IAAF Rule 32.2.c states: “...the refusal or failure, without compelling justification, to submit to doping control having been requested to do so by a responsible offi-

cial or otherwise seeking to evade doping control.”

<sup>27</sup> *Alain Baxter v IOC*, CAS, 2002.

<sup>28</sup> Unreported, April 19, 2004, CAS

<sup>29</sup> CAS 2004/A/725 p. 23, para 73

standard pattern of behaviour when we fail miserably to explain to him the exact precepts of the rules in force! In the case of *USOC v IOC & IAAF*<sup>31</sup> the Panel cited another relevant passage from Quigley which stated:

*“To take every step to ensure that competitors under their jurisdiction were familiar with all rules, regulations, guidelines and requirements in such a sensitive area as doping control”* And the Panel continues by stating: *“It is important that the fight against doping in sport, national and international, be waged unremittingly. The reasons are well known...it is equally important that athletes in any sport...know clearly where they stand. It is unfair if they are to be found guilty of offences in circumstances where they neither knew nor reasonably could have known that what they were doing was wrong. For this purpose, it is incumbent both upon the international and the national federation to keep those within their jurisdiction aware of the precepts of the relevant codes.”*

Similarly, in the case of *Tori Edwards v IAAF & USATF*<sup>32</sup> the Panel clearly states its dissatisfaction with the operation of the IAAF rules and cites two examples. The first one at page 16, para 5.14 where the Panel states:

*“The Panel is of the view that this case provides an example of the harshness of the operation of the IAAF Rules relating to the imposition of a mandatory two-year sanction.”* The second example could be found on page 17, para 5.18 *“The Panel notes with unease that the IAAF Rules are unclear and that they make it almost impossible to establish that there are exceptional circumstances.”*

This also indicates the argument submitted in the introduction of this work that strict liability rules could operate in a harsh and unfair way against the accused athlete. Unfairness becomes operative in a situation where punishment is applied to the innocent athlete in a case where the rules themselves are unclear or their applicability to the facts of the case doubtful. The CAS in the case of *KABAEVA v FIG*<sup>33</sup> analysed the correct application of strict liability rules. The Panel stated that

*“The Respondent contends that the doping regime put in place by the Respondent’s rules is one of strict liability. According to the Respondent it is sufficient to prove that an athlete used a forbidden substance. The Respondent submits that there is no room for any consideration of guilt. The Panel disagrees.*

*The Respondent’s rules (Section 1.4 of the DCR) expressly provide that an athlete is “liable to sanctions” if he/she “is found guilty of doping” (emphasis added). In the Panel’s view this is a clear indication that the Respondent’s doping rules require an element of fault, i.e. intent or negligence, in order for the athlete to be sanctioned for doping.*

*In addition, the Panel wishes to point out that there is recent CAS case law according to which federation rules allowing for a suspension of an athlete for doping (as opposed to disqualification from a particular event) without fault on the part of the athlete would not sufficiently respect the athlete’s right of personality as established in Articles 20 and 27 et seq. of the Swiss Civil Code which CAS Panels are required to apply (Article 58 of the Code; see CAS 2001/A/317, A v FILA, Award of 9 July 2001, p. 16 et seq.) According to this view, it is necessary for the federations to put forward the objective elements of the doping offence. If the federations succeed in doing so the athlete is presumed to be guilty of a doping offence but he/she has the opportunity of rebutting this presumption by proving that he/she did not act with intent or negligence. The Swiss Federal Tribunal has repeatedly considered this system of reversal of the burden of proof to be compatible with public*

*policy (see judgement of 4 December 2000, 5 p. 427/2000, R v IOC at 2 a), not published; judgement of 31 March 1999, 5P.83/1999, N. et al. v FINA, in Digest of CAS Awards II, at 3 d), p. 781; judgement of 15 March 1993, G v FEI, in Digest of CAS Awards I at 8 b), p. 575).”*

Furthermore, the Panel, in the same case, goes on to analyse the standard of proof. The Panel states that:

*“As to the standard of proof, the Panel appreciates that because of the drastic consequences of a doping suspension on a professional athlete’s exercise of his/her trade (Article 28 Swiss civil code (ZGB)) it is appropriate to apply a higher standard than the generally required in civil procedure, i.e. to convince the court on the balance of probabilities. Following established CAS case law, the disputed facts therefore have to be ‘established to the comfortable satisfaction of the court having in mind the seriousness of the allegation’ (cf CAS OG/96/003, CAS OG/96/004, K & G v IOC, .20; CAS 98/208, N. et al v FINA, Award of 22 December 1998, CAS Digest II, p. 234, 248; confirmed by the Swiss Federal Tribunal, Judgment of 31 March 1999 [5P. 83/1999], unpublished).”*

As it has been argued above, the CAS held in the Chinese swimmers cases that the standard of proof required of the regulator, FINA, is high: less than the criminal standard, but more than the ordinary civil standard.<sup>34</sup> The Panel was content to adopt the test, set out in *Korneev and Gouliev v IOC*, that ingredients must be established to the comfortable satisfaction of the court, bearing in mind the seriousness of the allegations made.

The CAS went on, in *Korneev*, to reiterate the proposition that the more serious the allegation, the greater the degree of evidence required to achieve ‘comfortable satisfaction’.

In the case of *French v Australian Sports Commission and Cycling Australia*<sup>35</sup>, the Panel went one step further towards defining the standard of proof. The Panel states:

*“The Appellant submits that pursuant to the Australian authority of Briginshaw v Briginshaw and CAS jurisprudence, the standard of proof required to be met by the Respondents is somewhere between the balance of probabilities and beyond a reasonable doubt. The Appellant further submits that although the CAS jurisprudence itself is silent on the issue, Briginshaw further stands for the proposition that the more serious the offence, the higher level of satisfaction the Panel should require in order to be satisfied of the offences charged. It is further submitted that given the serious allegations with respect to trafficking and aiding and abetting and the consequences thereof, a very high standard almost approaching beyond a reasonable doubt is required for the Panel to accept that the offences have been proven. The Panel accepts that the offences are serious allegations and that the elements of the offence must be proven to a higher level of satisfaction than the balance of probabilities.”*

It is submitted that particular emphasis should be given to the circumstances that give rise to an allegation for an anti-doping violation. Careful consideration should be given to the status of the accused, the publicity it has attracted and most importantly the serious breaches of the regulatory framework, if any, on behalf of the sporting governing bodies, which would allow the escalation of the negative publicity with the main aim to paint a bad picture for the athletes, which would also allow the sporting authorities to reduce considerably the burden of proof. This, it is submitted, cannot reduce the standard of proof to a mere probability, a mere suspicion. The degree of comfortable satisfaction of the Panel should be extremely high in order for it to meet the objective criteria required for a decision which would affect the livelihood of a dedicated and highly celebrated athlete. This appears to be in line with the Panel’s judgment in the case of *USADA v Montgomery*<sup>36</sup> where the Panel states:

*“As often becomes evident when the question of standard of proof is debated, the debate looms larger in theory than practice. Counsel for*

30 Arbitration CAS 94/129, USA Shooting & Q. / International Shooting Union (UIT), award of May 23, 1995, at p. 24, para 74

31 CAS 2004/A/725 pages 24-25, para 75

32 CAS OG 04/2003

33 CAS 2002/A/386, page 10, paragraph V 1.2

34 Wang v FINA CAS 98/208, 22 December 1998, para 5.6.

35 CAS 2004/A/651, page 10, para 42

36 CAS 2004/O/645, p. 13.



T · M · C · A S S E R P R E S S

## The Council of Europe and Sport

### *Basic Documents*

Edited by

Robert Siekmann and Janwillem Soek  
*ASSER International Sports Law Centre*

*With a Foreword by Dr Ralf-René Wenzelmann, Director for Youth and Sport, Council of Europe, Strasbourg*

The Council of Europe is unquestionably the body that has made the most substantial contribution to paving the way for a European sports model. The Council of Europe was the first international intergovernmental organisation to take initiatives to establish legal instruments and to offer an institutional framework for the development of sport at the European level. The first stage of the Council of Europe's work in this field was marked by the adoption of the Committee of Ministers' Resolution on Doping of Athletes in 1967. The extensive work of the Council of Europe on sport is evident through the main texts on sport, such as the European Sports Charter, the Code of Sports Ethics, the European Convention on Spectator Violence, and the Anti-Doping Convention. Sport co-operation within the Council of Europe is organised in partnership with national governmental and non-governmental bodies.

*The Council of Europe and Sport: Basic Documents* is the second volume in the Asser series of collections of documents on international sports law, containing material on the intergovernmental (interstate) part of international sports law. The first volume was devoted to the European Union. In previous other publications, non-governmental materials, i.e. statutes and constitutions, doping rules and regulations and the arbitral and disciplinary rules and regulations of the international sports organisations were published.

This book provides an invaluable source of reference for governmental and sports officials, legal practitioners and the academic world. With the increasing public interest in the legal aspects of sports, this collection of documents is a timely and welcome contribution to enhancing the accessibility of basic texts on international sports law and policy.

The book's editing team consisted of Dr Robert Siekmann and Dr Janwillem Soek, both of the ASSER International Sports Law Centre, The Hague, The Netherlands.

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all parties concurred with the views expressed by the members of the Panel during the 21-22 February 2005 hearing to the effect that even if the so-called 'lesser', 'civil' standard were to apply, - namely, proof on the balance of probability, or, in the specific context in which these cases arise, proof to the comfortable satisfaction of the Panel bearing in mind the seriousness of the allegation which is made (what might be called the 'comfortable satisfaction' standard) - an extremely high level of proof would be required to 'comfortably satisfy' the Panel that Respondents were guilty of the serious conduct of which they stand accused."

The Panel, in the same case, goes on, to explain the threshold of the standard of proof<sup>37</sup>. The Panel states:

*"In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or 'comfort', required. That is because, in general, the more serious the allegation, the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not."*

I submit that it is not a question of being more probable than not. Such a test has an enormous degree of subjectivity and it cannot produce certainty or explain the precepts of reasonableness of the probability in question, given the gravity of the allegations and the effect that such allegation could have in an athlete's personal and professional life. It is my contention that on a balance between the gravity of the allegation, followed by the severity of the sanction and the destruction of the personal and professional life of an athlete, the standard of proof should approach the level of certainty and not the level of suspicion. In other words, the more serious the allegation, considering at the same time the special characteristics of the accused and the effect of the allegation on him, the higher the degree of a compelling evidence or justification required to meet the standard of proof.

Finally it is submitted that the present rules operate in an extremely harsh way without regard to the individual's rights. I would like to reiterate the point that it is important for the observation of justice and fairness that the rules of the sporting governing bodies are constructed in a way that produce consistency, proportionality and they do not offend against the rules of natural justice. In the case of *Squizzato v FINA*<sup>38</sup> the Panel argued:

*"Applying the above explained principle was all the more necessary within sport, because regulations of sport federations, especially their doping rules, were often too strict and did not leave enough room to weigh the interests of the federation against those of the athlete concerned, in particular his personality rights [see Aanes v FILA, CAS 2001/A.317]"*.

In para. 10.24, the Panel goes on to note that:

*"The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still - like before - regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case."*

In conclusion, it is submitted that there is a need to protect the expectation of athletes to participate in competitions for which they are likely to have prepared for several years, if not their entire life. Although this need has to observe the quest for a healthy competition, it also needs to create clear and reliable measures in order to provide athletes with the highest degree of certainty about their rights as well as their duties.

It is also equally important for the sporting governing bodies to observe the rules on confidentiality and public disclosure. There are always examples where high-ranking officials from within the

Olympic movement demonstrate an undisputable bias against athletes, before the athletes had the opportunity to have a fair hearing. Public statements to that effect not only breach the rules of natural justice, but they also create a field of fear. Athletes should not have to worry about high-ranking officials who make statements that indicate a certainty as to the guilt of the athletes. High-ranking officials should refrain from branding innocent athletes guilty, before all the internal disciplinary mechanisms have been observed and exhausted. This seems to be in line with the judgment of Mr Christopher Campbell in the case of *USADA v Tyler Hamilton*<sup>39</sup>

*"However, if it is at all desirable for athletes to believe they will obtain a fair hearing, it is imperative that high-ranking officials within the Olympic community refrain from making statements demonstrating bias against an athlete before the athlete has a hearing. Mrs Hamilton's statements are by no means an exaggeration or unreasonable. As she so eloquently stated, athletes should not have to worry that high ranking officials are sending clear messages to the arbitrators to find the athlete guilty regardless of the facts of the case. The IOC and WADA should consider making rules prohibiting such conduct to comply with a very important fundamental principle of the Olympic movement, fairness."*

## Conclusion

It has been argued that the main aims behind the creation of rules controlling anti-doping in sport, is to create a safe level playing field and to protect the image of sport. These justifications are well-documented and followed by the sporting governing bodies in public statements all over the world. In theory, there is nothing sinister in supporting and condoning such principles. In practice, however, the application of these rules causes exactly the opposite effect of the one they are supposed to protect: the sport and the individual athlete.

There may be many and different reasons as to why the application of anti-doping rules on anti-doping violations lacks certainty and fairness. It may be the lack of clarity in the drafting; or the realisation that sport has been commercialised and commoditised and it would not be in the best interests of the SGBs if the athletes were to be banned; or, perhaps, the inability of the sporting governing bodies to prosecute the offence. Sometimes, the way the sporting governing bodies prosecute the alleged offence, is similar to something Christopher Columbus wrote when he finished his adventure in America. He said:

*"When I was traveling to America, I didn't know where I was going; when I arrived in America, I didn't know where I were; when I left America, I didn't know where I'd been!"*

Finally, it is submitted that healthy competition demands attention and action at every level, where medicine, sport and the law merge. Doctors, lawyers, parents, schools, club coaches and governing bodies must all address the issues raised and the implications for modern sport. The detrimental side effects of the use of performance enhancing substances must be constantly stressed in order that sports participants who are tempted to use them will understand that a better performance is not the only effect of this practice. To this effect the sporting governing bodies must ensure they create clear and concise rules that can be understood by all those concerned. Athletes, in particular, must be informed clearly about the behaviour they are required to follow. Rules such as the ones analysed in this work must be scrapped altogether, as they offend against fairness and justice, they fail to observe basic human rights and they violate the rules of natural justice and due process. They can only be described as "a relic from the middle ages" and they have no place in a democratic society which equally respects the rights of the individual and that of the public.

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37 *ibid*  
38 CAS 2005/A/830, p.13, para 10.23

39 United States Anti-Doping Agency  
Appeals Committee, 2004, p.7.

# Termination of International Employment Agreements and the “Just Cause” Concept in the Case Law of the FIFA Dispute Resolution Chamber

by Janwillem Soek\*

## Introduction

Every employed individual has a contract of employment, and the same applies to professional footballers. The majority of contracts are served out without any difficulty. This contribution considers the employment relationships which do in fact culminate in disputes between the employer (the club) and the employee (the professional footballer). As a general principle employees have a right to terminate their employment with an employer and employers have the right to terminate the employment of employees. But these rights come with responsibilities. Among the reasons for FIFA drawing up Regulations for the Status and Transfer of Players are to compel parties to respect the employment agreements they have signed. Because circumstances can always arise which make continuing an employment relationship impossible, the Regulations specify rules covering cases where employment contracts are terminated prematurely. In labour law in general, personality conflicts, general dissatisfaction with performance, petty issues or one incident of inappropriate behaviour or misconduct, are usually not serious enough to warrant dismissal for just cause. In football however such aspects can indeed be a reason for terminating the contract with just cause. According to the Regulations, on the basis of the documents provided by the parties the Dispute Resolution Chamber (DRC) must establish whether just cause for terminating an employment contract applies in any such situation. However just cause for dismissal is not defined in the Regulations. Over the years the DRC has handed down numerous rulings on the issue. In each case the DRC carefully investigates the facts and circumstances surrounding the employment contract breach by one of the parties. It investigates whether general conclusions can be derived from the DRC's jurisprudence in terms of the concept of 'just cause'. The high-profile decisions have not been selected from the substantial number of published rulings. The main fact that the parties covered by the published rulings are entirely anonymous means this is not possible. One cannot conclude from the judgements whether they involve players who enjoy global fame. A selection has been made from the judgements with a view to a better understanding of the 'just cause' concept. The rulings which pass muster have been grouped into central themes. This method has been used to discover whether the connotation of the concept of 'just cause' is related to a specific case, or whether it is in fact entirely insensitive to this.

The main focus in this contribution is on the stipulations in the FIFA Regulations for the Status and Transfer of Players covering the termination of employment contracts with and without just cause.

No further consideration is given to the consequences which the absence of just cause can have, given that this would involve its own comprehensive investigation. After dealing with the relevant stipulations in the Regulations, attention switches to the body which is tasked with establishing whether the reasons for termination are valid or not based on the Regulations: the FIFA Dispute Resolution Chamber (DRC). Thereafter, before moving to a description of a number of DRC judgements in instances of employment contracts being terminated with or without just cause, a few words are dedicated to the way in which parties are required to substantiate their contentions. But before tackling any of this, something should be said about the two versions of the Regulations for the Status and Transfer of Players, which applied for some considerable time, depending on the moment at which a claim was lodged with FIFA.

## 1. The FIFA Regulations for the Status and Transfer of Players of 2001 and 2004

Following the Bosman judgment<sup>1</sup> a new situation arose for both clubs and players at the end of an employment contract's term. The club then had no further influence on the player and could no longer - as was previously the case - require a transfer fee for the transfer of a player to a new club. The European Court maintained the principle of the free movement of employees within the context of the football industry. In the view of the Court however that principle was not hindered by the phenomenon of the transfer fee. The Bosman judgment even embodied a dual justification of such a fee.<sup>2</sup> On one hand this meant the 'competitive balance' could be maintained, while on the other the training and development of young players could be encouraged. In the new situation which arose, the clubs explored the possibilities for not being left empty-handed financially following the switch in employment contracts. One solution was found in transferring a player before the ending of the employment relationship. Here when a player was transferred to a new club, the clubs could still demand a transfer fee. On this basis employment contracts covering an unusually long term were signed with players. In practice new restrictions were created which frustrated the free movement of players. Under pressure from the European Commission<sup>3</sup> the FIFA Executive Committee drew up rules to harmonise the free movement of players and the practice of transfer fees. 2001 saw the introduction of the FIFA Regulations for the Status and Transfer of Players, which addressed the criticism of the European Commission.<sup>4</sup> At the end of August 2001, FIFA and FIFPro reached agreement on FIFPro's participation in the implementation of FIFA's new regulations on international transfers of football players.<sup>5</sup> In 2004 FIFA drew up a new rule which came into effect on July 1, 2005. Drolet<sup>6</sup> believed that the FIFA Regulations for the Status and Transfer of Players 2005 "should be considered more an adjustment than a new set of rules. [...] They attempt to fix some of the problems that were found in the 2001 rules." When one puts the two versions side by side, as has been done in the Annexe, it becomes apparent that the differences in these two texts, where they concern contractual stability, are certainly substantial, and that they go a lot further than just 'adjustments'.

As mentioned above, the moment at which a claim is lodged with FIFA determines the applicability of one or the other of the versions of the Regulations for the Status and Transfer of Players. The 2005 edition of the Regulations came into effect from July 1, 2005. In a large number of cases, which were processed by the Dispute Resolution Chamber long after July 1, 2005, the 2001 edition was declared to be applicable because they had been submitted before that date.<sup>7</sup>

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1 Union Royale Belge des Sociétés de Football Association and Jean-Marc Bosman, 15.12.1995, Case C-415/93, 1 CMLR 645.

2 Consideration 106.

3 See: *The Complaint of the European Commission against FIFA Regarding International Transfers* on the website of the Professional Footballer's Association [www.givemefootball.com/pfa.html?newsID=299](http://www.givemefootball.com/pfa.html?newsID=299).

4 EU Press release *Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international transfers*, IP/01/314. The fact that the

Regulations address the criticism of the European Commission does not detract from the fact that the Regulations lack a legal foundation. The issue of the status of the Regulations is not considered here. See also FIFA's Principles for the amendment of FIFA rules regarding international transfers, [www.europa-kommissionen.dk/upload/application/ba42bo81/fifi-regler.pdf](http://www.europa-kommissionen.dk/upload/application/ba42bo81/fifi-regler.pdf).

5 EU Press release IP/02/824.

Memorandum of Understanding, Barcelona, 2.11.2006

[www.sportslaw.nl/documents/cms\\_sports\\_id78\\_1\\_FIFPro-MOU-FinalSig2-E-20061102%5B1%5D.pdf](http://www.sportslaw.nl/documents/cms_sports_id78_1_FIFPro-MOU-FinalSig2-E-20061102%5B1%5D.pdf).

6 Jean-Christian Drolet, *Extra Time: Are the New FIFA Transfer Rules Doomed?*, in ISLJ 2006, no. 1-2, p. ...

## 2. Respect for the Employment Contract

According to Art. 13 of the FIFA Regulations for the Status and Transfer of Players 2005, an employment contract between a professional footballer and a club may in principle only be ended at the conclusion of the agreed term or by means of a mutual agreement.<sup>8</sup> The intention of this principle is that when a player and a club choose to enter into an employment relationship, they will respect the agreement. A unilateral severance of a contract without a valid reason - particularly during the so-called 'protected period'<sup>9</sup> - should be discouraged to the full.<sup>10</sup> Honouring the contract is however not a principle which can be evaded. Although Art. 16 prescribes that "[A] contract cannot be unilaterally terminated during the course of a Season"<sup>11</sup>, at the same time Art. 14 stipulates that a contract may be terminated prematurely by one of the parties - without this having any consequences - if a valid reason ('just cause') can be shown. For a player a valid reason could be that he has not received a salary from the club for a considerable time. For a club such a reason could lie in the recalcitrant attitude of a player. In the explanation with the article one reads that interpretation of the concept of 'just cause' should be determined afresh "in accordance with the merits of each particular case". Art. 14 must be regarded as a *lex specialis* in terms of Art. 16. "It represents the only situation in which either party is entitled to unilaterally terminate the contract at any time, i.e. also during the course of a season" according to the explanation with Art. 16. Should a contract be terminated on the basis of a just cause, FIFA can take provisional measures.<sup>12</sup> The most important measure is to allow the player to register with a new club. "Particularly so as not to endanger the existence of the player", according to the explanation.<sup>13</sup>

A valid sporting reason ('sporting just cause') can also be grounds for the premature termination of the employment relationship.<sup>14</sup> Such a reason could be that a player cannot play for more than 10% of the playing time of official matches during a season. It is however the case that a player may only claim sporting just cause within 15 days following the final official match of the season. A 'legal' just cause can indeed terminate an agreement during the season, but a 'sporting' just cause cannot.

In summary the following principles are embodied in the Regulations:

1. Contracts should be respected;
2. Contracts can be ended by one party, without this having any consequences should there be a just cause;
3. Contracts can be ended by a professional footballer if there is a sporting just cause;
4. Contracts cannot be ended within the course of a season;
5. Should there be termination without just cause, compensation should be paid, which can be stipulated in the contract; and
6. Should there be termination without just cause, a sporting sanction should be imposed on the party breaking the contract.

## 3. Consequences of Termination with and without Just Cause

Chapter IV of the Regulations specifies the consequences of terminating an employment contract for clubs and players.

1. Should the player have a sporting just cause to terminate the contract, then neither the club nor the player will be penalised with a sporting sanction; however the club may be obliged to pay the player compensation.<sup>15</sup>

2. Should the player have a just cause to terminate the contract, then no sporting sanction will be imposed on the player but it will be imposed on the club; the club may be obliged to pay the player compensation.<sup>16</sup>
3. If during the protected period the player has no just cause to terminate the contract, then a sporting sanction will be imposed on the player and he is obliged to pay compensation to the club.<sup>17</sup>
4. If after the protected period the player has no just cause to terminate the contract, then no sporting sanction will be imposed on the player but he does have to pay compensation to the club.<sup>18</sup>
5. Should the club have just cause to terminate the contract, then no sporting sanction will be imposed on the club; it will however be imposed on the player and he will have to pay the club compensation.<sup>19</sup>
6. If during the protected period the club does not have just cause to terminate the contract, then a sporting sanction will be imposed on the club and it will have to pay the player compensation.<sup>20</sup>
7. If after the protected period the club does not have just cause to terminate the contract, then no sporting sanction will be imposed on the club but it will be obliged to pay the player compensation.<sup>21</sup>

Breaking an employment contract during the protected period or after its conclusion leads to the imposition of compensation.<sup>22</sup> The amount of such compensation is calculated on the basis of objective criteria. The following criteria should be considered in determining the compensation: the remuneration and other payments to which the player is entitled under the existing contract and/or under the new contract; the remaining duration of the existing contract to a maximum of five years; the fees and expenses paid by the previous club (to be paid off during the contract's term); and whether the contract termination occurred within the protected period.<sup>23</sup> When a player has to pay compensation to his old club, the club with which he registers following the contract break will also be responsible for payment of the compensation.

Alongside the payment of compensation, a sporting sanction can also be imposed on the player. This sanction can comprise a ban on playing in official matches during four months. If aggravating circumstances are involved, the ban can stretch to six months. The sanctions take effect from the start of the next season at the new club. A unilateral termination of the employment contract after the protected period does not lead to a sporting sanction. In such a case disciplinary measures can certainly be taken against the player. The club which terminates a contract during the protected period risks a ban on being allowed to register new players.

What should be understood under the concepts 'just cause' and 'sporting just cause' and whether these are issues in specific cases, should be decided by the Dispute Resolution Chamber (DRC) or the FIFA Players' Status Committee<sup>24</sup> within the context of each individual case. Before moving on to looking at which reasons are considered valid by the DRC to terminate an employment contract since the Regulations came into effect, something needs to be said about that body. What are the duties and powers of the DRC?

7 According to Art. 26(1) of the 2005 edition of the Regulations, "[A]ny case that has been brought to FIFA before these Regulations come into force shall be assessed according to the previous regulations".

8 An equivalent of this rule was not present in the Regulations of 2001.

9 Regulations, Definitions 7, "Protected Period: a period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28th birthday of the Professional, or to a

period of two entire Seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional."

10 See also FIFA Circular no. 769, Zürich, 24.8.2001, [access.fifa.com/documents/static/regulations/PS%20769%20EN.pdf](http://access.fifa.com/documents/static/regulations/PS%20769%20EN.pdf).

11 Art. 21(1)(c) Regulations 2001 stipulated that "unilateral breach of contract without just cause is prohibited during the season".

12 Art. 6 Regulations.

13 Explanation with Art. 6 Regulations.

14 Art. 15 Regulations. This article is identical in essence to Art. 24 Regulations 2001.

15 Art. 14 Regulations.

16 Art. 14 Regulations.

17 Art. 17 Regulations.

18 Art. 17 Regulations.

19 Art. 14 Regulations.

20 Art. 17 Regulations.

21 Art. 17 Regulations.

22 It is not possible to distil a guideline for calculating the extent of compensation from the DRC decisions, given that the

relevant monetary amounts are set aside in the decisions.

23 In their contracts parties can include a clause establishing the amount of compensation the player should pay if he terminates the contract unilaterally. With this so-called 'buy-out clause' parties agree that the player has the right at any time which suits him and without providing valid reasons, to terminate the employment contract, even during the protected period. In such an instance no sporting sanction will be imposed on the player.

#### 4. The Dispute Resolution Chamber

Although Art. 61(2) of the FIFA Statutes lays down that proceeding to a normal court of law is forbidden unless otherwise established in the various FIFA rules, in principle a player enmeshed in an industrial law dispute with his club is empowered to present this dispute before a court.<sup>25</sup> If legislation in the country in question does not prescribe mandatory jurisdiction of a court in labour disputes, a dispute may be subjected to national or international sport arbitration. Yet according to the principle of 'litispendency', a case pending before civil courts cannot be dealt with by the decision-making bodies of sports arbitration.<sup>26</sup>

After a dispute has been notified to FIFA, it is transferred to the DRC for processing. If the DRC is called on to settle a case, it checks in the first instance whether it is empowered to handle the case. In this respect, it refers to Art. 18(2) and (3) of the Rules. Thereafter the DRC must determine whether the Rules Governing Procedures on Matters Pending before the Decision Making Bodies of FIFA are applicable to the matter at hand. With reference to the competence of the DRC, Art. 3(1) of the Rules states that the Dispute Resolution Chamber shall examine its jurisdiction in the light of Arts. 22 to 24 of the Regulations. In accordance with Art. 24(1) in connection with Art. 22(b) of the Regulations, the DRC shall adjudicate on the employment-related dispute between a club and a player having an international dimension.<sup>27</sup>

The DRC can therefore only declare itself competent when it comes to "employment-related disputes between a club and a player having an international dimension"<sup>28</sup>. Such an "international dimension" applies when it involves a footballer holding a different nationality than the country in which the club is based. If the player is a subject of the country where the club is based, then in principle the DRC must declare that it has no authority<sup>29</sup>. In principle, because "in the absence of a national sports arbitration tribunal [... the DRC] is competent to deal with a dispute, even if written agreements signed between the parties involved in the dispute contain a clause by means of which the (exclusive) jurisdiction of another body is chosen".<sup>30</sup>

Even if a national sports arbitration tribunal exists, the DRC could still declare it holds authority if it cannot be guaranteed that the tribunal is composed of members chosen in equal numbers by players and clubs with an independent chairman.<sup>31</sup>

Before declaring itself competent in an employment dispute with an international dimension, the DRC must ascertain whether the parties have expressed a preference for a written agreement, or whether a collective bargaining agreement has provided for an independent arbitration tribunal. A condition is however that such an independent arbitration tribunal guarantees fair proceedings and respects the principle of equal representation of players and clubs. Once parties have made their choice for resolution of their dispute by a body other than the DRC, then the DRC acts in compliance with the general legal principle whereby *electa una via non datur recursus ad alteram* - once the parties have agreed to refer their dispute to a certain decision-making body, this authority will be held to decide on the entire matter.<sup>32</sup>

It still needs to be noted that the competence of the DRC only stretches to resolving disputes arising from an employment contract. In one case the termination of a training agreement was presented to the DRC. A training agreement is independent from any employment contract possibly signed between the player and the club, and it therefore does not have the status and binding effect of an employment contract. This view is clearly reproduced in French law.<sup>33</sup> A training agreement does not constitute an employment contract but is rather an instrument meant to safeguard and protect the rights of a player in formation. The DRC judged that it was not competent to issue a decision on the consequences of any possible termination of the training agreement.<sup>34</sup>

Before proceeding to deal with a case, the DRC must first ascertain whether it is empowered to do so. Here the DRC refers to Art. 18(2) and (3) of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber. Should the issue have been presented to FIFA prior to the procedure, the DRC must conclude that the Procedural Rules on Matters Pending before the

24 The DRC comprises an equal number of representatives of players and clubs and has an independent chairman, i.e. the chairman of the Players' Status Committee. The 10 members representing the players are nominated by FIFPro and the 10 representing the clubs are nominated by associations and leagues from the whole world. The Executive Committee of FIFA appoints the nominated members. Panels are drawn up from members of the DRC of at least three people responsible for settling industrial law disputes. The rulings of the DRC are open to appeal at the Court of Arbitration for Sport (CAS).

25 Compare Roger Blanpain, *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*, The Hague, London, New York 2003, p. 103. Although a judge can issue an opinion on a unilateral and premature termination of an employment contract without just cause, "[...] then it is the DRC alone that is exclusively competent to determine what sporting sanctions should be imposed under article 42 para. 1(b)(ii) and what financial compensation should be awarded pursuant to article 42 para. 1(b)(iii)", according to the Court of Arbitration for Sport, CAS 2006/A/1192, *Chelsea v. Mutu*, consideration 58.

26 Case 1161241 of 21.11.2006. In that case the DRC deemed it of utmost importance to underline that the practice of parties of having their legal cases heard by several decision-making bodies with

the aim of getting the most favourable ruling, known as 'forum shopping', cannot be upheld at all by the DRC.

27 Despite the fact that this is established in the Regulations and the DRC has no interpretation latitude here, the DRC refers in various judgements to "the well-established jurisprudence of the Dispute Resolution Chamber according to which, in general, in employment-related disputes between a club and a player having an international dimension, i.e. the parties do not belong to the same country, both parties were entitled to refer the dispute to FIFA's bodies, unless, if the parties have expressed a preference in a written agreement, or it is provided for by collective bargain agreement, an independent arbitration tribunal respecting the principle of equal representation of players and clubs with an independent chairman has been established at national level". See Cases 65349 of 1.6.2005, 631290 of 23.3.2006, 46610 of 27.4.2006, 861174 of 17.8.2006, 1061318 of 26.10.2006.

28 Art. 22(b) Regulations.

29 A player resident in country G submitted his dispute with a club based in country T to the DRC. At the time of signing the employment contract he held the nationality of both countries T and G. The player submitted that he had relinquished nationality of country T, adding a substantiating document from the Ministry of the Interior of country T. The football association of country T notified FIFA that the petitioner was registered as a

subject of country T and held a licence in country T. In addition the player had played 18 times for the U-21 national team of country T. The association maintained that the dispute between the player and the club must be settled by the association because the dispute did not have an 'international dimension'. The club believed that the player was "... taking advantage of his dual citizenship in bad faith". The DRC considered "that a dispute is international when two parties of clearly different nationality are claiming against each other. However, when both parties have the same nationality, the dispute shall be considered as national or internal, with the consequence that the rules and regulations of the Member Association concerned shall be applied on the matter and the deciding bodies in accordance with the relevant provisions are compelled to decide on the issue. Therefore, in situations where a player is claiming outstanding amounts or compensation for breach of contract from a club, which has its domicile in a country different to the one of which the player is a national, FIFA is competent to deal with the matter and intervenes, subject to all formal requirements being given, if one of the parties institutes legal proceedings before its legal bodies. Inversely, if the player has the nationality of the country of domicile of the club involved, FIFA is not competent. If FIFA would deal with such cases and intervene in the matter, the internal competence of FIFA Members would be violated. These prin-

ciples of delimitation between the competence of FIFA and the competence of the Member Associations are primordial for the reciprocal recognition of the organisations and autonomy of FIFA and the Member Associations. Hence, all national disputes fall within the exclusive competence of the Member Association concerned and only the legal bodies of this Member Association shall hear respective claims." Case 11527 of 2.11.2005.

30 Case 86833 of 17.8.2006. See also, *inter alia*, cases 64357 of 10.6.2004, 11475 of 26.11.2004, 35284 of 11.3.2005, 65412 of 1.6.2005, 65414 of 1.6.2005 and 86833 of 17.8.2006.

31 Case 14288 of 15.1.2004. See also, *inter alia*, Cases 6400276 of 10.6.2004, 114415 of 26.11.2004, 35283 of 11.03.2005. In Case 730291 of 4.7.2003 the issue was that the Arbitration Body of the Greek League of Football Clubs had already issued a ruling in a 'national' case. It did not appear that the right of parties to be heard had been respected in this procedure, nor that there was a proper and clear motivation of the decision taken. The DRC considered that "it could be concluded that decisions taken by national sports arbitration tribunals, which do not fulfil all of the [...] fundamental procedural principles, cannot be considered as binding for the Chamber and as a consequence, in such cases, the Chamber can re-examine the entire affair *de novo*". See also Cases dec\_res\_ch\_4\_07\_2003 of 4.7.2003, and 631290 of 23.3.2006.

Decision Making Bodies of FIFA apply. With regard to the competence of the Chamber, Art. 3 par. 1 of the abovementioned Rules states that the Dispute Resolution Chamber shall examine its jurisdiction in the light of Arts. 22 to 24 of the Regulations. In accordance with Art. 24(i) in combination with Art. 22(b) of the Regulations, the Dispute Resolution Chamber shall adjudicate on employment-related disputes between a club and a player having an international dimension. If the international dimension is also present, the consequence is that the DRC is the competent body to decide on the present litigation involving a player and a club regarding the alleged breach of contract and allegedly outstanding compensation in connection with an employment contract. In Art. 42(i)(b) of the Regulations of 2001 it was determined that “[T]he triggering elements of the dispute (i.e. whether a contract was breached, with or without just cause, or sporting just cause), will be decided by the Dispute Resolution Chamber”. Although a determination was not included in the wording of the 2005 Regulations, the assignment of the DRC did not change.<sup>35</sup>

The procedures of the DRC run in accordance with the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (DRC) (the Rules). These Rules have been drawn up on the basis of Art. 31(i) of the FIFA Statutes.

De DRC does not award any amount as a contribution to legal expenses.<sup>36</sup>

In a number of cases the DRC had to establish whether one of the parties in an employment contract had just cause to terminate the contract. Since 2002 FIFA has published on its site a considerable number of rulings from the DRC involving labour disputes.<sup>37</sup> The DRC’s duty is to consider the arguments of parties to determine whether the party who ended the contract had a just cause for this. Before moving on to handling a number of decisions, demonstrating the way in which the DRC reaches its rulings, attention will first be devoted to the way in which the arguments put forward by the parties must be proved.

To conclude this section the various principles to which the DRC considers itself to be committed must be pointed out, where these are not raised elsewhere in this contribution.

- The principle of *venire contra factum proprium*. The DRC maintains that only the employment contract which is lodged with the football association may be applied, where it is in conflict with that principle.<sup>38</sup>
- The principle of *no ultra petita*. The award shall not exceed the claimant’s claim.<sup>39</sup>
- The principle of *culpa in contrahendo*. According to this principle a party to a negotiation for a contract has to compensate causal damages incurred by the other party, if through its own fault it has infringed its obligation to act in good faith during the negotiations and has thereby breached the confidence of the other party in the negotiations.<sup>40</sup>
- The principle of *res iudicata*. According to this principle judicial decisions that have become definitive can no longer be called into question.<sup>41</sup>

- The principle of *pacta sunt servanda*. When parties have signed an agreement, they are then required to fulfil that agreement and to comply with it.<sup>42</sup>

## 5. He Who Alleges Must Prove: the Burden of Proof

Everything concerning an employment relationship agreed between parties must be established in writing. The employment contracts agreed with players, together with their annexes, must be registered with the relevant football association.<sup>43</sup> The DRC resolves industrial law disputes on the basis of the documents submitted by the parties. In a number of decisions the DRC emphasised that “In view of the principle of the burden of proof, which is a basic legal principle in every legal system, a party to a procedure is obliged to provide evidence proving its allegations presented in a legal action if it wishes to use them as the basis for its position. In other words, any party deriving a right from an alleged fact shall carry the burden of proof (Art. 12 par. 3 of the Rules governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber).”<sup>44</sup> If, for example, a player fails to present any evidence for his claim that he is entitled to receive a salary, the claim of the player cannot be taken into consideration due to lack of evidence. In a case in which the player alleged that he had been deceived into signing the employment contract in question, but that he had neither outlined how this might have happened, nor submitted any clear evidence corroborating such allegation, the DRC, in application of the principle of the burden of proof, and due to lack of evidence, rejected the argument of the player.<sup>45</sup> “[...] a document signed by the relevant parties, is in principle a written proof of a valid contract and cannot be declared invalid for a simple allegation.” The DRC also remarked that the party making an allegation has the burden of proof to sustain it reasonably in order to preserve the legal principle of legal security.<sup>46</sup> In another case, covering a player’s requests for the reimbursement of medical costs that he had allegedly incurred due to his injury, the DRC acknowledged that the player did not present any written document substantiating such costs, which was the reason why, in accordance with its well-established jurisprudence, the DRC rejected these requests.<sup>47</sup> According to Art. 12(4) of the Rules the DRC may also consider evidence not offered by the parties. From the determination in a case, “[...] that the allegation of the claimant [...] cannot be upheld due to the lack of documentary evidence and the lack of probative force of the claimant’s allegation”<sup>48</sup>, one could presume that proof could also be provided in another manner than in the submission of items; however no ruling is known in which the ‘probative force’ of an allegation was the deciding factor. What if the defendant does not respond to the demand? In such a case the DRC reaches a decision only on the basis of the facts and proof provided by the claimant, since with its conduct, the respondent renounces its right of defence and thus accepts the claimant’s allegations.<sup>49</sup>

As a rule the burden of proof lies with the party making the allegation. From that point of view, the provision included in Art. 17(4) of the Regulation 2005 is noteworthy. It states that “[I]t shall be pre-

32 Case 106176 of 26.10.2006.

33 Art. 15-4 of the French Loi du 16 juillet 1984, reviewed by the Loi no. 99-1124 du 28 décembre 1999, provides that the integration of a player into a formation centre is subject to the conclusion of a training agreement.

34 Case 114667 of 26.11.2004.

35 Compare the explanation with Art. 24 Regulations.

36 See Cases 34545 of 24.3.2004, 114635 of 26.11.2004, 65723 of 1.6.2005, 95473 of 23.9.2005, 6585, 115999 of 2.11.2005, 16246 of 12.1.2006, 26332, 261043 of 21.2.2006, 36460 of 23.3.2006, 86999 of 17.8.2006.

37 www.fifa.com/en/organisation/committee/detail/0,1474,1889876,00.html. Rulings from November 2006 were recently placed on the site. According to

Art. 17 of the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (DRC) “[D]ecisions, should they be of general interest, may be published by the general secretariat in a form determined by the Players’ Status Committee or the DRC, e.g. condensed in the form of a media release. Due restraint shall be exercised when publicizing decisions. On substantiated request by a party, certain elements of the decision may be excluded from publication.” The published rulings have been made anonymous. Sometimes the nationality of the player and the club’s country of establishment are indicated. The number of a case begins with the month in which the ruling was issued, followed by the last figure of the year, which in turn is fol-

lowed by a figure. 1151234, for example, concerns a ruling issued in November 2005.

38 Case 34325 of 24.3.2004.

39 Cases 114707, 114708 of 9.11.2004, 115236 of 2.11.2005, 16309 of 12.1.2006.

40 Case 16830 of 12.1.2006.

41 Case 861307 of 17.8.2006.

42 Cases 25485 of 4.2.2005, 55532 of 13.5.2005, 115236 of 2.11.2005, 16723 of 12.1.2006, 36619, 36882, 361145 of 23.3.2006, 106678, 106715 of 26.10.2006.

43 As a consequence, and following the jurisprudence of the DRC, the missing registration of the annex cannot be to the detriment of the player.

44 Case 361095 of 23.3.2006. See also, *inter alia*, Cases 26332 of 21.2.2006, 36811 of 23.3.2006, 361095 of 23.3.2006. In ruling 106876 of 26.10.2006 the DRC referred

to its well-established jurisprudence, according to which at least the *essentialia negotii* must be proven by the party who derives any rights from a labour relationship (cf. to the legal principle of the burden of proof). These are: the parties of the employment, the duration of the employment period, the remuneration and the signature or the approval of the parties to the relevant employment.

45 Case 36882 of 23.3.2006.

46 Case 116339 of 21.11.2006.

47 Case 862 of 17.8.2006.

48 Case 116611 of 21.11.2006.

49 Cases 75377 of 28.7.2005, 115999 of 2.11.2005, 16716 of 12.1.2006, 461150 of 27.4.2006, 96392 of 28.9.2006, 611814 of 21.11.2006.





T · M · C · A S S E R P R E S S

## **The Strict Liability Principle and the Human Rights of Athletes in Doping Cases**

*by*

Janwillem Soek

*With a Foreword by Hein Verbruggen, UCI Honorary President for life  
and IOC Member*

This book deals with the legal position of the athlete in doping cases under the law of the regulations of national and international sports federations and how this legal position can be reinforced.

According to the rules of the sports organizations applicable to doping offences, where prohibited substances are found in athlete's bodily fluids the athlete in question is strictly liable for a doping offence. In the disciplinary procedure there is no discussion about his guilt and the athlete is not given an opportunity to disprove his guilt. One of the starting points of the European Convention of Human Rights (ECHR) is that suspects are not guilty until their guilt has been proven conclusively based on the law, which includes the right of defence.

The author analyzes the nature of doping offences and puts forward arguments in favour of the application of the rights of the defence as laid down in the ECHR in disciplinary doping proceedings. In his argumentation he also addresses the procedural system of sanctions and the practical and economic consequences the sanctions may have for the athlete concerned.

As not only the athlete himself, but also sports clubs and sponsors may suffer serious damage from such sanctions, this book on the strict liability principle will be of great interest to practitioners and academics in more than one field of law. Moreover, it will be a welcome addition to the literature and the continuing debate on doping in sport, which is a matter of great concern to many interested parties.

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sumed, unless established to the contrary, that any club signing a Professional who has terminated his contract without just cause has induced that Professional to commit a breach.”<sup>50</sup> With this rule the club is placed in a tricky predicament; it is after all difficult - if not impossible - to prove that something has *not* occurred.

## 6. The Interpretation of ‘Just Cause’ by The Dispute Resolution Chamber

If a club does not pay a player the salary agreed in the employment contract for reasons which do not concern the player, then there is a clear breach of the contract on the club’s side and the player has just cause to terminate the contract. In a considerable number of rulings the DRC has expressed its opinion that “the persistent failure of a club to pay the salaries of a player, without just cause, is generally to be considered as a unilateral breach of an employment contract”.<sup>51</sup> A delay of three to four months in the payment of salaries must clearly be considered a ‘persistent failure’. The club has just cause for terminating the employment contract if, for example, the player absents himself from the club without its permission for generally personal reasons, which are not considered to be appropriate for the conduct of the club. It goes without saying that the situation is never as simple as just sketched. The clubs and the players generally have a reason, presented to the opposing party, to consider themselves no longer bound by the agreement. Each time anew the DRC must decide on the basis of the provisions of the employment contract and other items submitted by the parties, which party is or is not in contravention or has given the opposing party just cause to terminate the agreement. The selection of DRC rulings which follows is intended to provide an impression of the way in which the DRC interprets the concept of ‘just cause’. The decisions which will be highlighted are grouped thematically. As already noted above, recognition that one party has a just cause to terminate the contract leads to such termination having no consequences for that party. If by contrast it is determined that there is no just cause, then “[I]n all cases, the party in breach shall pay compensation”, furthermore - when the breach occurs during the protected period - “sporting sanctions shall [...] be imposed”, according to Art. 17(1) and (3) of the Regulations (2004).<sup>52</sup> The cases which will be highlighted below serve only to provide an insight into the way in which the DRC reaches a conclusion as to whether a just cause applies or not. Given the framework of this contribution, no further consideration will be given to the way in which compensation is determined or whether there are grounds to impose a sporting sanction.

### 6.1. Terminating the agreement because of a player’s absence

– When a player arrived in the country of his new club, he immediately gained the impression that the club was no longer interested in his services. Instead of being able to move immediately into an apartment with satellite television, a phone and heating, he had to wait five weeks before such accommodation was made available. The apartment which was eventually provided had no heating, so that his wife became ill. When he went back to his own country on holiday, he discovered that the club had only obtained a visa for two weeks. The club had also not arranged a work permit. The player eventually had to arrange his own visa in order to return to the club. Because the club had relocated to another city, he had to leave his wife behind. Because his wife felt lonely the player returned to collect her. The player had not turned up for the training session

because he had to collect his wife. The club took his absence as a reason to impose a fine on him and to terminate the employment contract. The player submitted the case to the DRC. The issue the DRC had to address was whether dismissing the player was justified. The DRC acknowledged that a club had the right to impose a disciplinary sanction on a player when such a player did not comply with the contract obligations. This sanction did have to be in proportion to the seriousness of the player’s breach of contract. The player had conceded that he had been absent without the club’s permission to collect his wife. In such an instance the club was justified in imposing a disciplinary sanction. This disciplinary sanction, comprising the payment of a fine equalling an entire month’s salary, was the heaviest penalty which could be imposed in accordance with the contract. In light of the circumstances the DRC approved the imposition of such a disciplinary penalty; the other penalty - dismissal of the player - was felt by the DRC to be undeniably out of proportion. The DRC could not accept such a sanction. The DRC thus believed that the club had terminated the employment contract without just cause.<sup>53</sup>

– A football association called up a player to participate in a friendly match against the team of a European football association. The association notified the club that it had taken all the necessary steps to ensure that the player would return to his club after the match. However after the match the player travelled at his own expense to his country of birth. The club demanded compensation from the player on the grounds of a breach of contract. The football association received a letter from the player - before the club had implemented its claim - in which he detailed the reasons for not returning to his club. The player stated that he had gone home after the match because he had received verbal permission from the club’s president to visit his family and be present at the birth of his child. He was surprised that the club took his absence badly and had barred him. Furthermore, he stated reasons for being surprised, because the club had begun negotiations with his old club regarding transfer to the old club. In addition the political instability in the region scared him from returning to his club. Given that there was no proof of the alleged verbal permission, the DRC declared this point to be irrelevant. The DRC then judged that the negotiations on transfer to his old club did not constitute a valid reason for the player to ignore the club’s request that he return. The player could not assume a positive outcome to the negotiations, nor could he make any assumption of the time the negotiations would take in advance. Neither did the political instability provide a reason for the player not to return, because the country in which the club was established was not involved in any conflict. The DRC thus concluded that the club was justified in claiming compensation from the player, on the basis of a unilateral termination of the employment contract without just cause, losses suffered.<sup>54</sup>

– Following the ending of a contract of hire, a player was still under contract to his club for a month. In contravention of the employment contract the player did not return to his club. The DRC regarded this conduct as a breach of the contract. It provided a reason for a penalty to be imposed on the player. The relevant football association decided that the player was suspended from playing in official matches for four months. The association applied the four-months rule of Art. 23(1)(a) of the Regulations. The DRC raised queries about the proportionality of such a sanction. The proportionality principle requires that the extent of the sanction must be in agreement with the extent of the offence. The DRC noted that during the month in which the player was absent from his club, there were no official matches on the programme. The player’s absence did not therefore pose any serious problems for the club. The DRC reached the conclusion that the sanction imposed on the player was out of proportion. It would have been in proportion to impose a fine on the player. The DRC ruled that the suspension should be retracted and that the player should immediately be entitled to register with a club of his choice.<sup>55</sup>

– After he had been absent from the club without authorisation, the club fired a player. The employment contract provided for a fine

<sup>50</sup> The sanction with which the club was threatened was not minimal: “The club shall be banned from registering any new players, either nationally or internationally, for two Registration Periods.” A similar stipulation had already appeared in the Regulations of 2001, in Art. 21(a) and (c).

<sup>51</sup> Cases 35131, 35243 of 11.3.2005, 65332, 65349 of 1.6.2005, 16309 of 12.1.2006, 261091 of 21.2.2006, 36460 of 23, 36811,

361095, 361145, 361206 of 23.3.2006, 461150 of 27.4.2006, 96315 of 28, 96454 of 28.9.2006, 611631 of 21.11.2006.

<sup>52</sup> Compare Arts. 21 and 23 of the Regulations (2001).

<sup>53</sup> Case dec\_res\_ch\_22\_11\_2002 of 22.11.2002. Cf. Case 300702 of 22.11.2002.

<sup>54</sup> Case dec\_res\_ch\_6\_06\_2003 of 6.6.2003.

<sup>55</sup> Case 6400276 of 10.6.2004.

as a sanction, equal to three months' salary. The player challenged the course of events and demanded that a sanction be imposed on the club, as provided for in the employment contract, comprising a specific amount. The club defended itself by suggesting that right from the start of the employment relationship the player had exhibited extremely unpleasant conduct. The player was not willing to follow instructions from the coach and only wanted to train when it suited him. In a variety of instances he had refused to take part in his team's training. All this was grounds for the club to impose the fine stipulated in the employment contract, and to declare the agreement to be terminated. The club was justified in imposing a fine of one month's salary on the player. The DRC accepted such a disciplinary sanction, but could not accept the dismissal. It was the DRC's opinion that such a response was unquestionably disproportionate. The DRC believed that the club terminated the employment contract with the player without just cause. The player was thus justified in demanding a sanction provided for in the employment contract, consisting of a specific sum to be paid by the club.

– After an unauthorised absence from training for a period extending to 30 days, a club stopped paying a player's salary. An article in the Regulations concerning the Players' Status and Transfer from the relevant football association stated that: "Players and clubs may invoke just cause and sporting just cause for unilateral termination of contracts for the following reasons: ...Clubs: a player absent without leave from the training sessions and official matches of the team for a period extending over 30 days, where such can be proven". The club was in default in not corroborating this with documentary evidence. The club in fact alleged that the player had been absent from training for a period extending 30 days as from 31 March 2005. The DRC noted that the 30-day time limit had not yet expired on 1 April 2005, the date on which the club confirmed having ceased its payment to the player. The DRC reached the conclusion that the club breached the employment contract signed with the player without just cause.<sup>56</sup>

*From a variety of decisions it is apparent that the DRC does not regard the absence of a player without the club having given permission, as direct justification for the club to terminate the employment contract. As a general rule, a long-lasting absence of a player from his club without authorisation and without other just cause is to be considered as an unjustified breach of the employment contract by the player.*

– According to his employment contract a player was entitled to receive a monthly salary, which should be paid over a period of two years. Prior to the definitive signature of the contract the player and the club's most important shareholder, in his capacity as the club's president, signed a 'private agreement' which referred to the employment contract. According to this agreement the player would receive a supplementary amount for his services during the first year. After some time the player left the club without a valid reason. The club demanded repayment of all the costs the club had paid in the player's favour, because the player had breached his contract without just cause. The player defended himself by stating that the club had not met the obligations towards the player which the club had agreed to prior to signing the employment contract in the 'contract proposal'. The player pointed out that what the club had paid him was substantially less than indicated in the proposal. The player asked the DRC to rule that he had terminated the employment contract with the club legitimately. The DRC stated first that only the employment contract signed by the parties could be considered. This could not be the case when it came to the documents the parties had exchanged prior to signing the agreement in the context of the negotiations. From the written evidence which the club had submitted the DRC felt it was clear that the club had complied with the obligations arising from the employment contract. The DRC rejected the player's claim. He could not argue a valid reason for leaving the club. This was grounds for the

DRC to rule that the player had breached the contract unilaterally without just cause.<sup>57</sup>

– After medical treatment by the club doctor had not brought about the recovery of a player, the club gave the player permission to return to his country of birth to be treated medically there. Two weeks later the club asked the player to return to investigate his physical condition. The player had not recovered fully and the club again permitted him to return to his own country to recuperate fully. The player did not return to the club after this. In his view the club had defaulted on the payment of a variety of amounts to which he believed he was entitled. In its submission to the DRC the club stated that the player had not been injured during a match, but while on holiday. The club believed that it had no financial obligation. The club had not submitted any items of evidence to FIFA which would support its position.

– A player notified his club that he had to go to France to conclude the procedure involved in acquiring French nationality. The club still owed the player his inducement fee and a month's salary. He asked the club to pay the money so that he could finance his return trip to the club. The French footballers' union notified FIFA some time later that the player had still not received the money from the club, and that the player could therefore not return to the club. Three months later the player had still not received the money and he asked that the employment contract be terminated. FIFA authorised the player to seek a new club. The club defended itself by suggesting that it could not agree to the player's demand for the money. The club maintained that the player had breached the employment contract. The DRC regarded the player's non-return to the club as a contract breach, but it needed to be established whether the player had just cause for his conduct. After studying all the relevant documentation the DRC ruled: "[...] that it had no reasons to doubt the explanations and evidence put forward by club A. Moreover, the Chamber felt that the player had attempted to mislead this deciding body by simply claiming that he had not been paid." The DRC judged that the player had breached the contract without just cause by not returning to the club and that there was no plausible explanation for this conduct. The player had to return excess payments to the club. The player's economic situation restrained the DRC from imposing further financial sanctions. But the DRC did impose a sporting sanction: he was barred from playing any official matches for four months.<sup>58</sup>

– A club and a player signed an employment contract with two supplementary addenda. The first addendum stipulated that the player would receive an additional salary, and a new salary was established in the second addendum. "[...] From the moment of signature of this Agreement, all other arrangements between the parties regarding the Football player's salary [...], are to be considered invalid". The player maintained that from the start of the employment relationship, the club had defaulted in paying the salary, or had paid the salary irregularly and late. During the winter break the club notified the player that he would be placed on the transfer list. The club then notified him that the club would be going on a training camp, and that during this time they would attempt to find a new club for the player. Although the club's leadership put pressure on him to return home and find a new club, the player participated in the training camp. After conclusion of the training camp the pressure on the player to sign an agreement ending the employment relationship increased. At that stage the player was still owed a substantial amount by the club. The player was under the impression that his agent had launched a legal procedure against the club for ending the employment contract. The player became ill and mononucleosis was diagnosed. The club instructed the player to report to the club. The player responded that he could not travel because of his illness. However the player had not provided the club with a medical certificate confirming his condition. In its submission to the DRC the club contended that the player had breached the employment contract. According to the contract the player was required to notify his medical condition to the club doctor. The doctor would then be able to launch an investigation. The club asked the DRC to declare the employment contract to be terminated and to declare the player to be the guilty party. The DRC rejected the player's request regarding calculation of the salary and ruled

<sup>56</sup> Case 96317 of 28.9.2006.

<sup>58</sup> Case 74025 of 22.7.2004.

<sup>57</sup> Case 14381 of 15.1.2004.

that arrangements about salary prior to signing the addendum were not applicable. The DRC then focused on the issue of the alleged contract breach and on the time at which the employment relationship between the parties was ended. The DRC was not convinced by the player that he had received permission to be absent. Such absence required a written declaration from the club and this could not be produced. The DRC also believed that in terms of the employment contract, the player had an obligation to contact the club doctor to apprise him of his medical condition. The fact that the player was not in a condition to travel should not have prevented the player from approaching the club doctor by telephone. The DRC believed that neither of the parties to the employment contract had acted in compliance with the contract's provisions. On one hand the club had not complied with its contractual obligations to pay the player his salary because he was absent, and on the other the player was in default by being absent without permission and not contacting the club doctor. The DRC concluded that the contract was terminated through the agency of the conduct of both parties. The club was required to pay the player his outstanding salary. Neither party was entitled to receive compensation from the other.<sup>59</sup>

– A club submitted a complaint to FIFA involving a player who had not reported to the club, in contravention of the employment contract. The club learned from the press that the player had signed a contract with another club. The club asked FIFA not to authorise transfer to the other club's country and if necessary to impose disciplinary sanctions on the player. To FIFA the player declared that a friend who worked for the club had sent him a written proposal. He had signed the proposal on the assumption that this was a pre-contractual agreement which would only bind him if he decided to go to the club's country at the end of the season. One of the agreement's provisions stipulated that the validity of the agreement was dependent on a medical examination before a specific date. Given that the club had not made contact with him regarding the medical examination, nor that it had requested his transfer certificate, the player assumed that the agreement was no longer valid and he was free to sign with another club. The club believed that the player had understood the content of the agreement fully when he signed. The club had made several attempts to contact the player, but without success. The club immediately notified FIFA that the player had not reported. The DRC ruled that neither party had complied with the employment contract. But at the same time it believed the situation was largely attributable to the club's negligence. It was the club's responsibility to ensure that its football association would request the player's ITC, even if the sportsman had not reported to the club. It was only with such a request that the club would have expressed its actual intentions adequately. A player cannot be transferred without the ITC. The player signed one month later than the latest date for the medical examination specified in the employment contract. All this caused the DRC to doubt the credibility of the club's allegations. Given the lack of effort by both parties, the DRC declared the contract to be null and void and rejected the club's demands.<sup>60</sup>

– After the final playing day of the season and before the end of the contractual term, a player left club A to join club B. The football association of club B asked the association of club A to send it the player's ITC. Club A responded that the player was still under contract. Through the DRC club A requested compensation from the player on the grounds of a breach of contract without just cause. Club A also held Club B liable to pay compensation because the club had prompted the player to breach his contract. Club B stated that it had made attempts to enter into discussions with Club A, but that it had given up because club A did not want to cooperate. The player signed an

employment contract with club B one day following expiry of the contract with club A. The DRC's opinion was that the player had breached his contract if he had signed an employment contract with club B before expiry of the contract with club A, or, if he had participated in official matches of club B. The DRC pointed out that a club which requests that an ITC be sent does not necessarily already need to have signed a contract with a player. From all the above it could not be concluded that the player had acted in conflict with the employment contract of club A. The DRC believed a club has the right to impose a sanction on a player if the latter acts in conflict with the obligations in the employment contract. "Such an entitlement serves to caution the player without having to revert to the ultimate measure, the rescission of the employment contract, and it serves to protect the interests of the employer." In this case, as in every case where a club is considering a disciplinary sanction, the club must ascertain whether the player can provide reasons to justify his conduct. The DRC considered that the player had not harmed the interests of club A by his absence and by attending the trials of club B, given the fact that this occurred during the holiday period of club A. In addition it was in the player's interests to ensure a new employment contract before the expiry of the term of the old one. The DRC ruled that it is important for a player to be able to make arrangements for his future and that he may do so even during an ongoing employment, provided he does not violate the interests of his current employer. As a result, the Chamber determined that the sanctions envisaged by club A against player B were misplaced and that it should therefore not inflict them on the player. Did club A have the right to claim compensation from club B in accordance with Art. 23 (2) (a) of the Regulations? The DRC could not establish that club B had prompted the player to breach his contract given that they could not detect a breach of contract in the player's conduct. The DRC rejected the demands of club A against the player and club B.<sup>61</sup>

– In a case the DRC again had to decide whether a player had breached his contract with or without just cause by not reporting to his club. What makes this case exceptional is that the DRC, after careful consideration of the items of written evidence submitted by the club, determined that the signatures on the various items differed. It was impossible to establish which signature was the player's and which was not.<sup>62</sup> The DRC considered that: "[N]otwithstanding the fact that claims pertaining to falsification of documents merely fall within the jurisdiction of criminal courts, [it] confirmed that, in this specific case, it had to take a decision on whether the parties had actually signed a contract before turning to the question as to whether this contract had been breached or not." Because the signatures on the items produced by the club differed individually from each other, the DRC was unable to determine whether the player had actually signed the employment contract. On the basis of the Regulations the DRC could only proceed from documents which were properly signed. Verbal agreements could not be taken into account. The DRC found it surprising that the player had admitted he had received the most important amount, i.e. the signing-on fee, but not the amounts arising from the receipts submitted by the club. This fact convinced the Chamber of the player's good faith and of the plausibility of his allegations. In this light, the DRC concluded that it was not established that the player signed a contract with the club. The DRC rejected the club's claim, that the player had terminated the employment contract without just cause.<sup>63</sup>

*Alongside the foregoing personal reasons - not those involving the club - not to return to the club, reasons of another nature could apply to the player. One of these reasons could lie in the irregular or even complete non-payment of the agreed salary. Is the inadequate payment regime of the club a just cause for ending the contract by the sportsman, or will the absence of the player in fact be a reason for the club to suspend payment of the salary and ultimately to end the contract with just cause? The DRC's duty is to ascertain the triggering element in such a case. If the player can prove that the club was negligent in paying his salary, he then has a just cause to terminate the employment contract.*

59 Case 74210 of 22.7.2004.

60 Case 74378 of 22.7.2004.

61 Case 114632 of 9.11.2004.

62 In Case 46294 of 27.4.2006 the DRC considered that "[...] as a general rule and with the possible exception of cases of evident divergence of the signatures, as long as the falsification of a signature

or a document is not established by a final and binding decision of a competent criminal authority, the DRC has to presume the authenticity of the signature or the document in question".

63 Case 74165 of 22.7.2004. See also Cases 611631 and 611727 of 21.11.2006.



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### 6.2. Terminating the contract because the player is not permitted access to the training

– After a club had recommended that a player train with the club's youth team, the parties signed a document in terms of which the player was released from attending the club's training sessions for an unspecified period. The player alleged that from that time he was no longer allowed back at the club. He refused to sign an agreement with the club relating to the premature termination of the employment contract, because the club did not wish to pay him any compensation. The club's position was that the employment contract had been terminated on the basis of mutual agreement. Consequently the player was at liberty to sign with another club. The club ignored FIFA's request to submit a copy of the relevant agreement. The player claimed payment of his salary up to the time that the employment contract would have ended based on the club's unilateral termination of the contract without just cause. The DRC pointed out that the club had submitted an inadequate explanation to FIFA, referring only to the fact that both parties had reached agreement on ending the employment contract. The club had not submitted a copy of the agreement. The DRC considered that the respondent's inability to prove its position in the matter left the DRC with no other choice but to accept the statement of the claimant. The DRC concluded that the club had ceased to meet its contractual obligations to the player, by refusing to allow him to train with his team. The DRC reached the conclusion that the club had unilaterally breached its employment contract with the player without just cause. The DRC established the time at which the employment relationship had ended and ordered the club to pay out the salary arrears and payment of compensation arising from unilateral breach of contract without just cause.<sup>64</sup>

*A club which believes that termination of an employment contract between parties has been agreed and which, based on this, bars the player from joining training, must prove the mutual termination. If they cannot, then there is a unilateral breach of contract without just cause.*

### 6.3. Terminating the contract for disciplinary reasons

– A club terminated the employment contract with a player because he had misbehaved during an official match. "After scoring a goal the player celebrated in a way which was considered indecent." The disciplinary committee of the football association in question initially barred the player from playing matches for seven months. This sanction was confirmed on appeal. FIFA believed that the sanction imposed was disproportionate, particularly given the list of sanctions to be imposed for such offences in the FIFA Disciplinary Code. Concurrently FIFA issued permission to the football association in another country to register the player immediately. The club maintained to the DRC that the contractual breach was entirely attributable to the player's misbehaviour, and requested compensation, partly for damage suffered to the club's image. For his part the player asked the DRC to instruct the club to pay salary arrears and other remuneration. The items submitted showed that the player's salaries were not paid regularly before he was suspended by the Disciplinary Committee of the relevant football association. The club had to be deemed responsible for not having complied with its contractual obligation to pay the player's salaries. Apart from the DRC being of the opinion that the disciplinary sanction had been disproportionate, it rejected the club's claim for compensation and agreed the player's claim.<sup>65</sup>

*A club cannot be denied the right to impose a disciplinary sanction on a player if such player does not comply with the execution of his contractual obligations. However such sanction must be in proportion to the seriousness of the offence. Unilateral and premature termination of the employment contract with the player is a just cause in this context.*

<sup>64</sup> Case 34624 of 24.3.2004. See also, *inter alia*, Case 55472 of 13.5.2005.

<sup>66</sup> Case 26439 of 21.2.2006. See also: CAS 2006/A/1192, *Chelsea v. Mutu*.

<sup>65</sup> Case 14558 of 15.1.2004.

### 6.4. Termination of the agreement because of drug use

– A player under contract to a club was hired for a season. During that season the player was tested positive for drug use. At the end of the season the player and hiring club broke their employment relationship prematurely. Then the relevant body of the club's football federation decided to suspend the player for one year for drug-taking. Around the time that the penalty was announced the player and his employer signed a cancellation agreement whereby the club committed itself to pay a certain amount to the player, "unconditionally" and "irrevocably". The player was transferred to club V. A little later the FIFA Disciplinary Committee extended the player's suspension to a worldwide basis. Club Y notified the player that it considered the cancellation agreement null and void. According to the club, the player had concealed his 12-month suspension and therefore he had obtained the club's agreement fraudulently. The club added that had it been informed of the player's suspension, it would never have concluded the said cancellation agreement, but would rather have terminated the player's contract with just cause. The club believed it had a right to terminate the player's contract unilaterally. The player submitted a claim to FIFA. According to the cancellation agreement, he had the right to an agreed amount. According to the club, an agreement based on illegal grounds is null and void, since it can never represent the true intention of the parties to that agreement. The DRC agreed with the club that the positive result of the drugs test could possibly have constituted a just cause for the club to terminate the employment contract unilaterally. Was the player not aware of a drugs procedure at the time of signing the cancellation agreement? And did the club therefore not have the right to regard the agreement as invalid? The DRC found it was not arguable that the player was aware that a drugs procedure was pending. What is more, the DRC had difficulty in accepting that the player would not have been interested in the result of the drugs test that had been carried out. Even just in light of the fact that the player had changed his address subsequent to the drugs test, the DRC could not find any indication that the player had tried to obtain knowledge of the result of the test for a considerable period of time. The player's reasoning as to why he was not or could not have been aware of his suspension had to be considered too simple and superficial. The player had to be held responsible for the circumstance that he might not have been aware of his suspension which was communicated by letter to his former address. The drugs test was carried out well in advance of the date on which he signed the disputed agreement with the club. The player had also not notified the club of the fact that he had undergone a drugs test. The player should have done this. By failing to do so, the player had withheld an important fact from the knowledge of the club during the negotiations relating to the premature rescission of their employment relation, a fact which would presumably have brought about a different outcome to such negotiations. In the event of the player having informed the club of the mere fact that he underwent a drugs test, the club would at least have been in a position to postpone negotiations until it could gain knowledge of the drugs test result. The DRC felt justified in its belief that the behaviour of the player was in anticipation of possible events in the near future related to the drugs test he had undergone, and that the player had induced the club into entering into the disputed agreement, in accordance with which the club agreed to pay an amount to the player "unconditionally" and "irrevocably" in light of the early termination of the relevant employment contract by mutual consent. The DRC's conclusion was that the player had deceived the club through his behaviour. When signing the cancellation agreement, the club was acting in ignorance. Had the club known the factual circumstances, it would not have concluded a cancellation agreement with such contents with the Claimant. The club could not be held liable for execution of the cancellation agreement it entered into with the player.<sup>66</sup>

*Among the published rulings of the DRC only one case can be found where drug use plays a role. The DRC considered - very reservedly - that the positive result of a drugs test could possibly have constituted a just cause for the club to terminate the employment contract unilaterally.*

### 6.5. Terminating the contract because of the player's physical condition

– A provision in an employment contract stipulated that the agreement would not be valid until the player had undergone a medical examination successfully in a hospital designated by the club. The medical examination did in fact occur the day after the agreement was signed. The club maintained that the player had concealed an injury, one which was present when he signed the agreement. The club believed that the contract should therefore be declared null and void. As a result the club refused to pay the player his salary and other remunerations. Art. 30 of the Regulations stipulates that the validity of an employment contract may not be dependent on the positive result of a medical examination. Such an examination should occur before signing the agreement, or the club would be liable to pay the entire salary amount. The DRC believed that Art. 30 of the Regulations offers clear and unmistakable indications involving the relationship between a medical examination and the validity of an employment contract. Given the clear wording, the provision allows no latitude for interpretation. The provision is compulsory and requires strict implementation. The provision in the employment contract should be regarded as null and void given that the provision - in conflict with the requirements of Art. 30 - makes the employment contract dependent on the positive result of the medical examination. The club should have ensured the medical examination was held before signing the contract (cf. Art. 30(2) of the Regulations). Even if, for whatever reason, the club had decided to have the medical examination carried out after a training camp, that would be at their own risk. The DRC believed that the club had breached the contract with the player. The player had just cause to terminate the contract unilaterally.<sup>67</sup>

In the abovementioned case the club wanted to terminate the employment contract with the player on the basis of concealed physical indisposition at the start of the contract period. A case now follows where the club ended a contract on the basis of an injury which occurred during the term of the contract. The DRC uses the general principle according to which it falls under the club's obligations to be responsible for its players in case of injury occurring during the validity and performance of the employment contract, especially if the injury is caused during a match played by the player for his club in fulfilment of his contractual obligations.

– A player was seriously injured during a match. "As a consequence of such injury, [the club] informed him in front of his team colleagues, that the club could no longer count on him." The player left the club and departed for his home country to undergo an operation and then to recuperate. The player claimed payment of his salary from the club for the entire season, as well as the expenses he incurred with the operation and the subsequent rehabilitation. The club resisted by referring to Art. 12 b) of the player's standard contract, which permitted the club "to release players at any time prior to July 1, unless the contract is guaranteed". Such a guarantee was not included in the addendum linked to the contract. In the view of the club, termination of the contract was thus valid. Yet not entirely certain of its case the club added that the trainer "has no records of [the player] being injured while he was there. The club paid for his flight to country X and paid him for his services until he was released". The DRC believed that the fact that the player's salary was not explicitly guaranteed in the addendum to the employment contract "[...] cannot and does not constitute just cause for a club to unilaterally terminate its employment contract with a player, as happened in the present case, and even less to be 'under no further obligation to a player for payment of future contract payments'". In fact, the Chamber deemed that in view of its potestative nature, the aforementioned contractual clause shall not have any effect." The DRC rejected the validity of the contractual provision and came to the conclusion that the club had terminated the player's

contract without just cause. The DRC awarded the player's financial claim.<sup>68</sup>

– A player was unable to complete the remainder of his employment relationship because of serious illness. The DRC outlined that the incapacity of the player to fulfil the terms of his employment contract creates a particular situation according to which one party, the player, can no longer perform his obligation and the other party, the club, is free to withdraw from the agreement. Consequently, the responsibilities for the contractual non-fulfilment, in this case, had to be shared between the club and the player.<sup>69</sup>

– According to a club an employment contract had been terminated prematurely because the player became injured. The club believed it therefore had no obligation to continue paying the player any salary and bonuses. The DRC pointed out that in industrial law there is a fundamental principle that if an employee (player) becomes injured, this does not constitute just cause for the employer (club) to terminate the contract prematurely and unilaterally, and does not constitute a reason for the employer to cease paying the employee's salary.<sup>70</sup>

– A player was injured twice in the space of three months. After the second injury the club doctor and the coach recommended that the player should undertake light training. The player refused to consider this and stayed away from training repeatedly. Given the ongoing absence of the player on the grounds of his injury, it was not possible to register him for the first phase of the championship. The club had asked the player to continue training and to wait until the championship's second phase. The player did not agree to this, and the club thus offered him the opportunity to seek a new club. The player requested compensation. The club refused and requested the player to continue with training. The player refused. The club decided not to pay the player any further salary and ended the contract. The DRC took into consideration that the player's absence had to be explained from the fact that he was unable to offer his services to the club for several months. The DRC concluded that in stopping payment of the salary and attempting to terminate the employment contract, the club had breached the contract without valid reason.<sup>71</sup>

– With regard to the question as to whether a club committed a unilateral breach of the employment contract without just cause, the DRC took note that the club indicated the player's injury as the reason for the premature termination of the employment contract. The DRC stated that - in accordance with its established and persistent jurisprudence - the premature and unilateral termination of an employment contract by a club because of a player's injury was always considered to be an abusive termination of the contract without just cause.<sup>72</sup>

In one of the rulings the DRC considered "that according to its established jurisprudence the premature and unilateral termination of an employment contract by a club because of an injury or its closest consequences must be considered as a termination of the contract without just cause".<sup>73</sup>

According to Art. 30 of the Regulations the validity of an employment contract cannot be made dependent on a positive medical examination. The same applies to obtaining a residence or work permit. This latter issue was the subject of the next case.

*It falls under the club's obligations to be responsible for its players in case of injury which occurred during the validity and performance of the employment contract, especially if the injury is caused during a match played by the player for his club in fulfilment of his contractual obligations. According to the DRC's established jurisprudence the premature and unilateral termination of an employment contract by a club because of an injury or its closest consequences must be considered as a termination of the contract without just cause.*

### 6.6. Termination of the contract because of a dubious provision in the contract

– A Polish player signed an employment contract with a Swiss club, based on the standard contract of the Swiss Football League. The player was not given a licence because the maximum number of foreign players had been fulfilled. At the end of the season the player was barred from training with the club. The player was then notified that

67 Case 113291 of 21.11.2003.

68 Case 55230 of 13.5.2005.

69 Case 75570 of 28.7.2005.

70 Case 75570 of 28.7.2005.

71 Case 16493 of 12.1.2006.

72 Case 16828 of 12.1.2006. See also, *inter alia*, Case 26332 of 21.2.2006.

73 Case 26332 of 21.2.2006.

the employment contract - in accordance with a provision it contained - was terminated, because he had no work permit. Back in Poland the player found a club for which he could play. The Swiss club only wanted to release the player if he waived any claim on the club. The player demanded payment of his salary to the end of the term of the employment contract. In accordance with the standard contract the club was required to take steps to obtain a work and residence permit from the Swiss authorities. Art. 30 of the Regulations stipulates that "1. The validity of a transfer contract or of an employment contract between a player and a club cannot be made conditional upon the positive results of a medical examination or upon the acquisition of a work permit. 2. The player's prospective new club shall be required to make any necessary investigations, studies, tests and/or medical examination or to take any appropriate action before concluding the contract, otherwise it will be liable to pay the full amount of compensation for training and development agreed upon (and/or the amount of the salary due)." Standard jurisprudence of the DRC is that no appeal to Art. 30 can be made if the termination of an employment contract - on the grounds of one of its provisions - is made dependent on acquiring a residence permit. The rationale of Art. 30 is that a club should have taken all measures whereby a player may start work after signing an employment contract, and that no uncertainties should exist whether the player may or may not appear with the club. The decision of the Swiss government took three months. The DRC believed that a player should not have to be subjected to uncertainty for this period as to whether he may or may not join a club. The DRC ruled that the club had terminated the contract without just cause.<sup>74</sup>

- An employment contract featured a clause which stated: "Should the player not live up to the performance requirements imposed by the employer, the contract may be terminated at any time, at the initiative of the employer". The DRC believed that application of such a clause could not be upheld since it is arbitrary and based on non-objective criteria.<sup>75</sup>

*It is the club's responsibility to take any appropriate action before concluding the contract, in particular, to ensure that the player is provided with the required work permit and residence permit. A provision in the employment contract which maintains that not obtaining a work or residence permit could be a reason for unilateral termination of the contract, was declared by the DRC to be invalid.*

#### 6.7. Terminating a contract because of a player's lack of effort

- A club sent a letter to a player informing him that the second instalment of the signing-on fee was ready to be paid, but that it would be paid only once the player demonstrated his utmost performance. The DRC believed the club had committed a breach of contract by failing to pay the player's salaries.<sup>76</sup>

- A club maintained that a player had not met the contractual obligations, particularly in terms of the level of his preparation and skills. His performance was substandard and he did not exhibit the necessary effort during training to improve this performance. The DRC believed the player's poor performance could not be regarded as just cause to terminate the contract.<sup>77</sup> In a comparable case the DRC ruled that the alleged poor performance of a player during a competition did not constitute a valid reason to terminate the employment contract.<sup>78</sup> In another case, in which a club terminated

a contract unilaterally because it was dissatisfied with the player's performance, the DRC pointed out that the contractual provision to which the club referred to justify its unilateral termination of the contract, could not produce the intended result. Application of the provision would lead to an unacceptable result, based on subjective criteria which, in terms of the relevant provision, could only be invoked unilaterally. The DRC ruled that the club had breached the contract without justification and the club therefore had to compensate the player.<sup>79</sup>

- According to a provision in the employment contract a player was subject to a 30-day trial period. The same provision stipulated that the club could end the contract at any time within the trial period if it was dissatisfied with the player's performance. The club was dissatisfied and terminated the contract. The DRC ruled that trial periods were unacceptable within the football context. "Indeed, probation periods are generally solely in favour of the employer, i.e. the party that commonly has stronger bargaining power. What is more, by their nature, probation periods principally go against one of the main pillars of both the previous and the current version of the FIFA Regulations for the Status and Transfer of Players, i.e. maintenance of contractual stability, and the rules related to contractual stability."<sup>80</sup>

- According to a provision in the employment contract the club had the unilateral right to terminate the contract with the player if the player's performance no longer met the club's requirements. The club terminated the contract. The player believed that he had the right to receive compensation from the club on the grounds of the premature termination. Given the fact that the provision did not stipulate any compensation in favour of the other party at the moment the club invoked the provision, the DRC concluded that the provision could not be regarded as valid.<sup>81</sup>

- A provision in the employment contract stipulated that "[the player] has to follow the instructions regarding training and camps and must maintain the level of performance upon which [the club] signed the contract with him, otherwise this will be considered a termination of the contract [...]". Based on this provision, the club decided to terminate the contract unilaterally, given the player's poor performance. The DRC emphasised that, despite the content of the aforementioned contractual clause, a player's lack of performance cannot and does not constitute just cause for a club to unilaterally terminate an employment contract, as happened in the case at hand. In fact, the DRC deemed that in view of its potestative nature, the relevant contractual clause should not have any effect.<sup>82</sup>

As a guiding principle the DRC maintains that the non-fulfilment of such basic contractual obligations as the payment of salaries may not be implemented as a tool to sanction a player for disappointing performance levels.<sup>83</sup> The DRC's established jurisprudence has also maintained that the premature and unilateral termination of an employment contract by a club because of a player's alleged poor performance must be considered as a termination of the contract without just cause.<sup>84</sup>

*According to its established jurisprudence the premature and unilateral termination of an employment contract by a club because of a player's alleged poor performance must be considered as a termination of the contract without just cause.*

#### 6.8. Termination of the contract because of the player's political asylum

- A player fled from country B and was granted political asylum in country C. The player terminated his employment relationship with his club in country B. The employment contract between the player and the club had a five-year term. At the time of signing the contract the player was 16 years old. Art. 35 of the old Regulations stipulates that "a player who has not reached his eighteenth birthday may sign a contract as non-amateur only for a period not exceeding three years. Any clause referring to a longer period shall not be recognised by FIFA or a national sports tribunal". The DRC concluded that the player was not permitted to sign a five-year contract at the age of 16. The invalidity of the relevant contractual provision had no repercus-

74 Case 35931 of 11.3.2005.

75 Case 96315 of 28.9.2006.

76 Case 74653 of 22.7.2004. See also Case 46290 of 27.4.2006, in which the DRC considered that, "as a general rule, poor performance cannot be considered a reason for the club to reduce payments to the player, because it is unilaterally determined by the club and based on purely subjective criteria".

77 Case 65657 of 23.6.2005.

78 Case 16695 of 12.1.2006.

79 Case 46552 of 27.4.2006.

80 Case 86833 of 17.8.2006. See also, *inter alia*, Case 55359 of 13.5.2005.

81 Case 114534 of 26.11.2004, 65580 of 1.6.2005.

82 Case 75975 of 28.7.2005.

83 Case 3542 of 11.3.2005. See also, *inter alia*, Cases 55769 of 13.5.2005, 361300 of 23.3.2006, 46290 of 27.4.2006, 96315 of 28.9.2006.

84 See for example Case 96315 of 28.9.2006.



sion for the entire contract. The DRC reduced the term of the contract to three years. The football association of country C requested the player's ITC from country B. Country B's football association refused to provide the ITC, because it was based on the existence of a valid employment contract between the player and the club in country B. The player adduced that he was granted political asylum in country C after having left club B's country and, as a consequence, even if a contract were found to exist, it would be frustrated by his refugee status, since returning to club B's country would constitute a serious threat to his life or freedom. The player believed it was imperative that he be permitted to continue his career outside country B. The DRC ruled that granting him refugee status did not *ipso facto* imply that the employment contract would be terminated with just cause. Neither did the relevant provision automatically give him the right to register with a club affiliated to a different football association. The DRC acknowledged that the club in country B was not in default in providing a detailed report of the situation and its ultimate point of view. The DRC believed that both parties had defaulted on meeting their respective contractual obligations. Their employment relationship had been disrupted in such a way that proceeding with it was no longer among the possibilities. This detail, and the fact that the employment contract between the parties still only had four months to run, motivated the DRC to consider that the player would be jeopardised if he was to be prevented from registering immediately for another club. As a consequence, the DRC decided that the player should be released from his contractual relationship with club B and be immediately authorised to proceed with his football career; he was therefore considered free to sign for another club of his choice without any compensation being due to club B.<sup>85</sup>

*The granting of refugee status does not ipso facto automatically imply that a player's employment contract with a club in the country from which he has fled, is terminated with just cause.*

#### 6.9. Termination of a contract because of insufficient playing time by the player

– Club A unilaterally terminated the employment contract with player B. The club cited a provision in the contract which read: "If the starting appearance is less than 70% of the entire CFA League A matches (only starting appearance or total appearance time per game of no less than 45 minutes can be counted) by his own will, Party A has the right to terminate this agreement and transfer Party B to another football club, except for injuries which should be confirmed by the doctors or hospital appointed by Party A." According to the club the statistics of CFA League A demonstrated a 64% starting appearance rate. The club believed that now that the player's starting appearance was less than 70% of the entire CFA matches, the club had the right to terminate the contract. The DRC acknowledged that if the provision in the employment contract could not be invoked by the club at the end of every playing season, the incorporation of this clause into the contract would be pointless. By virtue of the same logic the Chamber could not agree with the player's reasoning with regard to the phrase "by his own will", which he employed to mean that any non-appearances that may have occurred outside of his scope of influence, such as a decision by the coach not to field him, should not be taken into consideration when calculating his appearance percentage. This, the DRC reasoned, would narrow the non-appearance percentage down to comprise only the player's deliberate absences, which would be senseless considering that the club could deal with such deliberate absenteeism, regardless, by way of disciplinary sanctions or even the unilateral cancellation of the contract with just cause. Should the club's interpretation of the provision be dismissed? It was particularly undesirable that the provision offered the club

ample opportunity to abuse its position and to cancel the contract unilaterally, merely by preventing the player from playing more than 70% of the matches in a season. The fact was that the provision did not offer the player the opportunity to terminate the contract prematurely. On the other hand it was considered important to point out that the club could not invoke the provision at any given time during the playing season, but that it was restricted to one period, namely on conclusion of the entire season. This offered the player some legal certainty and security. The content of the provision was explicitly accepted by both parties when they signed the contract. Taking everything into consideration, the DRC decided that the provision was acceptable, although it embodied some dubious aspects. The club had met its financial obligations to the player, which offered no latitude for other motives for the club to dismiss the player. The DRC concluded that the club's application of the relevant provision to terminate the employment contract had not led to a termination without just cause.<sup>86</sup>

– In another case, where it had to be decided whether it was possible in terms of the employment contract that the player would only be paid if he had played a specific number of matches, the DRC ruled that application of such a provision was arbitrary. In such a case it ultimately depended on the favour of the club as to how many matches it allowed the player to play. The DRC determined such a provision to be unacceptable.<sup>87</sup>

*It is noteworthy that amongst the considerable quantity of published rulings there is not one involving 'sporting just cause'. Certainly there are rulings where it is not the player who terminates the contract because of too little playing time, but the club. A clause in the employment contract which grants the club the unilateral right to terminate the contract with the player if the player does not fulfil the agreed playing time, can be acceptable if it can be shown that in signing the contract the parties were aware of the content of this clause. In general such an (arbitrary) clause should be regarded as non-binding.*

#### 6.10. Termination of the contract because of not being enabled to play

– A player and a respondent signed an employment contract. With the emphatic agreement of the player the club signed a loan contract with club B. The contract was ended prematurely with the agreement of all parties. Then club A signed a loan contract with club C, again with the emphatic agreement of the player. The player accused club A of being in default in not having accomplished the necessary release prerequisites so that the player could be registered for the second club with the football federation of the said club (C Football Federation). Based on the submitted documents, the DRC stated that no evidence was provided by the player for the allegation that club A delayed the procedure concerning issuing the ITC for the player so that he could be registered for club C with the C Football Federation, and therefore, as accused by the player, that it had abusively prevented the player from practising his professional activity. The evidence convinced the DRC that club A had made the required efforts to obtain issuance of the ITC. Club A could not be held responsible for the non-registration of the player for club C with the C Football Federation. The DRC acknowledged that club A affirmed having had no knowledge of the player's situation and residence from the day it was last contacted about the player's registration with club C, until the day it was notified by FIFA of the claim lodged with FIFA by the player. The DRC was of the opinion that following the registration failure, it would have been the player's obligation to revert to his club of origin to offer his services immediately. Until the day it was informed of the present claim, club A could assume in good faith that the player had been registered with club C. The evidence showed that once club A had learned of the situation from FIFA, it tried to find a new club for the player, again on a loan basis. Given this approach of club A to negotiate a further loan of the player with club D, the DRC considered that club A had shown its willingness to continue the contractual relationship with the claimant. The player refused to sign the employment contract with club D.

<sup>85</sup> Case 74234 of 22.7.2004. The 2001 version of the Regulations includes the provision in Art. 33: "Any problems arising in connection with the status of refugee players shall be settled definitively by the

FIFA Players' Status Committee." A similar provision is not included in the 2005 version.

<sup>86</sup> Case 25247 of 4.2.2005.

<sup>87</sup> Case 16107 of 12.1.2006.

The loan contract with club C would end on a certain day. From that day the player should have offered his services to club A. But on that day the player signed an employment contract with club E. By acting this way, the player manifested having not fulfilled his contractual obligation towards club A by not offering his services to the employer after the loan period with another club expired. The player had also added that club A had not paid his salary for some months. According to the DRC, salary payment was the obligation of club B. As far as the salary during the two loan months was concerned, the DRC determined that club A, in good faith, could have assumed that the player was regularly registered with club C. In particular, it was emphasised that the player did not render, nor even offer, his services to club A. Therefore the DRC concluded that club A was not responsible for payment of the player's salaries for this period of time. All in all, only the payment of one month's salary was outstanding and non-payment of one monthly salary is no valid reason to terminate the employment contract unilaterally with just cause. The DRC concluded that a valid employment contract between the player and club A still existed and had to be respected by both involved parties throughout its validity.<sup>88</sup>

*If a club which has loaned a player from a foreign club is not provided with the player's ITC, the player should offer his services to the original club. The argument that he could not play for the foreign club does not offer the player just cause to terminate the employment contract prematurely.*

#### 6.11. Terminating the contract by not taking up the option to extend the contract

– A Tunisian player and a Libyan club signed an employment contract for three seasons. The contract stipulated in Art. 14 that at the end of the first season the parties should reach agreement on revising the contract's value for the second season. After returning from holiday following the first season, the player was told by the club that it no longer wished to make use of his services. The player was free to register for another club outside Libya. The player, who did not agree with this course of events, attempted to rejoin the club, but without success. The player approached FIFA because the club had breached the contract without just cause. The player believed he had the right to compensation. The DRC had to find an answer to the question as to whether the relevant employment contract could be considered valid for a three-year period. According to the DRC the employment contract contained all elements necessary to be binding for the first season (e.g. salary, contract duration, parties, etc.). However the contract said nothing about the salary for the next season. The DRC was of the opinion that inclusion in the contract of the player's salary, payable in compensation for the services rendered, was a prerequisite for the contract to be considered valid and binding upon the parties involved for the specific period. Taking into consideration the wording of Article 14, the DRC agreed that the relevant employment contract had to be considered valid and binding upon the parties for the period of one year, with the option for both parties to extend it on condition that a mutual agreement be found. Now that the Libyan club did not want to extend the contract past the first season, the relationship was thus

<sup>88</sup> Case 631290 of 23.3.2006.

<sup>89</sup> Case 11475 of 26.11.2004. See also, *inter alia*, Case 114628 of 26.11.2004.

<sup>90</sup> Case 261245 of 21.2.2006. See also Case 36858 of 23.3.2006, in which the DRC determines that, in accordance with its established jurisprudence, a clause which gives one party the right to unilaterally cancel or lengthen the contract, without providing the counter-party with same rights, is a clause with disputable validity.

<sup>91</sup> In this section the issue is not a situation in which two identical contracts are signed by a player and a club, which dif-

fer only in terms of salary. Regularly, the contract stipulating a lower remuneration is deposited with the respective Federation, whereas the other agreement, indicating the actual salary, is only known to the parties to the contract. In such cases, on the occasion of disputes regarding the salary effectively agreed upon, the DRC takes the higher salary into account in order to prevent the respective players from being victimised by this practice. Case 106678 of 26.10.2006.

<sup>92</sup> Case 35239 of 11.3.2005.

terminated. The DRC decided to reject the claim lodged by the player.<sup>89</sup>

– That such a ruling is strongly dependent on the specific circumstances is apparent from the determination of the DRC in another case. There the DRC indicates its established jurisprudence which states that “[...] a clause which gives one party the right to unilaterally cancel or lengthen the contract, without providing the counter-party with same rights, is a clause with questionable validity. Specifically, in general, a unilateral option in favour of a club cannot be considered, since it limits the freedom of the player in an excessive manner and leads to an unjustified disadvantage of the player's rights towards the club. [...] the unilateral extension option in the case at hand does not fit with the general principles of labour law. [...] as a general rule, the unilateral extension option in the relevant employment contract is not legally binding on the player [...]”<sup>90</sup>

*If a club does not take up the option to continue an employment relationship, then the relationship is terminated under certain circumstances. Generally such an option is declared not to be binding.*

#### 6.12. Terminating the contract because of a competing employment contract<sup>91</sup>

– A player signed an employment contract with club Z. Club X's football association refused to provide the ITC, because the player was still considered to be under contract with club X. The player stated that he was registered with club X as an amateur. Club Z submitted a declaration from the player and his agent in which they maintained that the player was not under contract with another club. This had been a precondition for club Z to sign the employment contract. Club X maintained that the player was under contract to it, and submitted a copy of the contract as well as documents which would show that it had met its financial obligations to the player. According to club X club Z was fully aware of the existence of a contract between it and the player. Club X claimed that the player had violated his contract with it. The player denied having signed the contract submitted by club X or having ever received the money stated on the submitted receipts. The player could not substantiate his position with documentation. But club X could, and submitted a fax addressed to it, in which club Z notified it of its interest ‘in transferring’ two players, including the player in question. In this fax club Z offered an amount for this player and another player. Club X would obtain the right to 15% of the total amount club Z would receive should the players be transferred in the future. On the basis of that offer to pay a transfer compensation, the DRC concurred that club Z must have been aware that the player in question was contractually bound to club X, in contradiction of the statements it had made throughout the proceedings. The DRC concluded that the player was bound by the employment contract with club X and that by signing a contract with club Z, he had terminated the contract with club X unilaterally without just cause during the protected period. Articles 21(1)(a), 22 and 23(1)(a) of the Regulations applied and the player should pay compensation to club X.<sup>92</sup>

– The agreement between a player and club A stipulated that the club had an option to extend the contract by two years after the first season. Should the club decide to take up the option then the owner of the transfer rights should be paid compensation. The club took up the option, but did not pay the compensation. The player asked FIFA to authorise him to sign with a club of his choice. The club had not paid because it was not clear who it should pay the compensation to, and it did not want to run the risk of having to pay twice. On expiry of the contract's term and in anticipation of a ruling from the DRC on the unilateral option of the club, FIFA permitted the player to sign for another club provisionally. The player signed a four-year agreement with club B. This contract contained a penalty clause should the player be guilty of breach of contract. The football association of club B asked the association of club A to provide the player's ITC. This latter association refused, citing the contractual dispute between club and the player pending with the DRC. The player changed his mind

and asked FIFA to allow him to return to club A. The player signed a two-year contract with club A. Club B asked the DRC via FIFA to rule that the player had breached his contract without just cause by breaking his contract unilaterally, and to rule that club A had incited the player to do so. The player maintained that in his opinion, there had never been a valid employment contract between him and club B, because club A's football association had not provided club B with the ITC. In the first place the DRC investigated whether the contract between the player and club B was in valid existence. The DRC acknowledged that the player and club B were not contesting having exchanged a common manifestation of intent and that the relevant mutual aim covered all *essentialia negotii* of an employment contract. Equally, none of the parties claimed having signed the contract in mistake as to the motivation, the subject or the nature of the transaction nor based on a factual error. Consequently, the DRC established that, as a general rule, the employment contract concluded between the player and club B was valid and legally binding for both parties. The fact that club B had not been granted possession of the ITC did not detract from this. "The validity of an employment contract is not subject to the issuing of an ITC", according to the DRC. "The conclusion of an employment contract constitutes an act of private law, and it develops its effects *inter partes* only. Consequently, it is not admissible to make the validity of an employment contract dependent on an action, which lies within the power of disposition of a third party - in the case of issuing the ITC, in the first place, the association and moreover, the player's former club." The agreement between the player and club B was valid and parties had to fulfil the obligations arising from such contract. Then the DRC investigated whether there were valid reasons which could justify the premature departure of the player. The player had not submitted such reasons and the DRC stated that it could not see any just cause. For the sake of good order, the DRC declared that the legal status of the contractual relationship between the player and club A was unclear. The dispute about the validity of the unilateral extension of the employment contract still had to be settled. FIFA's authorisation to sign with another club was issued provisionally, in anticipation of the ruling of the DRC on the first employment contract. Should the DRC reach the conclusion that club A had legally extended the contract, then the player might possibly have an obligation to return to club A to serve out his contract. The DRC stressed that under these hypothetical circumstances the player would have had, not only the right, but the obligation to terminate his engagement prematurely with club B. *In casu*, this was, however, not the case. The player freely changed his mind, withdraw his claim against club A and returned to the latter. The DRC concluded that the player had broken the employment contract with club B without just cause.<sup>93</sup>

– In a recent decision<sup>94</sup> the DRC had to deal with a case in which two identical employment contracts were signed between a player and a club, differing only with regard to the indicated salary. The DRC noted that, regularly, the contract stipulating a lower remuneration is deposited with the respective federation, whereas the other agreement, indicating the actual salary, is only known to the parties to the contract. In such cases, on the occasion of disputes regarding the salary effectively agreed upon - in line with the jurisprudence of the DRC - the DRC takes the higher salary into account in order to prevent the respective players from being victimised by this practice.

*In general a player breaches his contract without just cause, if during the term of an existing and valid contract with one club - and in particular during the protected period - he signs a contract with another club.*

### 6.13. Termination of a contract because an accident insurance policy is not taken out

– Club C, club B and a player signed an agreement for the loan of

the player's federative rights. The same agreement contained the provisions of the player's employment throughout the loan period. Club B, which had taken on the player, was in default by not having arranged an accident insurance policy on behalf of the player, as stipulated in the loan agreement. The last contract had also established that club C was entitled to terminate the relevant loan agreement with just cause, should club B not take out the aforementioned accident insurance policy. Club C and the player decided to terminate the relevant loan agreement and the employment contract respectively with club B. Club C, via his national association, requested the player's international registration transfer certificate, but the national association of club B refused, based on the existence of a valid employment contract between the player and its affiliated club, club B. Later a decision taken by a labour court in the country of club B authorised player A to join his previous club. The player claimed payment of his outstanding salaries and asked FIFA to consider his employment contract with club B as terminated with just cause and consequently, that he be considered free to sign for the club of his choice. Club B submitted various arguments in defence, but failed to provide FIFA Administration with evidence supporting its position. The DRC took note of the fact that club B had failed to comply with its contractual obligations; in particular, it failed to take out an accident insurance policy on behalf of the player as established in the loan agreement between it and club C. The DRC reached the conclusion that, notwithstanding the fact that the player took advantage of club B's default to terminate their employment contract, he did in fact have just cause to end the relevant contract, since club B failed to take out the aforementioned accident insurance policy, as contractually established.<sup>95</sup>

*If a club defaults by not arranging accident insurance with the player as the beneficiary, this furnishes the player with just cause to terminate the employment contract unilaterally and prematurely.*

### 6.14. Terminating a disputed employment contract

– A Serbian player signed a three-year employment contract with a Russian club. The Russian football association provided the association from Serbia and Montenegro with the International Registration Transfer Certificate (ITC). Not long afterwards the player notified the Russian association that the club was not meeting its contractual obligations, while at the same time he submitted a claim to FIFA. Three or four days after the start of his service period the coach notified the player - without any justification - that he would not be using his services. The coach prohibited him from taking part in the team's training. Thereafter the player received no response from the club and he left Russia. He asked the DRC to compel the club to meet its contractual obligations. He maintained that refusal would constitute unilateral contract breach without just cause. The player asked that he be awarded an amount of compensation for breach of contract equalling the full value of his employment contract. The Russian football association notified FIFA that the player had never signed an agreement with the club. The DRC concluded that the document submitted to it by the player was a contract, which contained the most important elements of an employment contract. In addition the Russian football association had received the player's ITC from the player's former association, which could be regarded as a clear indication that the player and the club had entered into an employment relationship. The DRC felt that the player's request to compel the club to meet its contractual obligations was superfluous because both the Russian association and the club denied the existence of the contract. The DRC ruled in favour of the player's financial claims.<sup>96</sup>

– A club and a player signed an employment contract. The club defaulted on payment of monetary amounts to which the player had a contractual right. The player notified FIFA that his employer owed him an amount. The club denied that it had an employment relationship with the player. Because the player could not submit the documents necessary to obtain a residence permit and he could thus not be registered with the football association, the club regarded the contract to be void. In the first instance the DRC established that the

93 Case 114796 of 16.11.2004.

94 Case 106678 of 26.10.2006.

95 Case 14-270802lhv of 15.1.2004. In a similar vein Case 1482 of 15.1.2004.

Compare, regarding an individual insurance policy, Cases 35171, 35283 and 35284 of 11.3.2005.

96 Case 114707 of 9.11.2004.

club had failed to present any relevant documentary evidence corroborating its allegation in this respect. The DRC then referred to its well-established jurisprudence according to which it is the club's responsibility to take any appropriate action before concluding the contract, in particular, to ensure that the contractual party, i.e. the player, is provided with the required work permit. The obligation to register an employment contract at a member association is solely incumbent upon the club. According to Art. 30 of the Regulations, the DRC concluded that the validity of a contract may not be made subject to the granting of a work permit. The club had not remitted any salary payment to the player on the basis of the relevant employment contract and its annex. The DRC reached the conclusion that the club breached the employment contract signed with the claimant without just cause.<sup>97</sup>

*Despite proof to the contrary, a club can deny that it has an employment relationship with a player. Enforcing the contractual obligations is then superfluous. A contract is not void if a work or residence permit is not obtained.*

#### 6.15. Terminating the contract on the basis of a provision in the contract

– According to a provision in an employment contract both parties had the right to terminate the contract on one month's written notice. The provision then went on to specify the financial arrangements should the contract be terminated. The club notified the player by letter that the employment contract would be terminated due to unsatisfactory performance, with application of the relevant provision from the contract. The player submitted a claim against the club to FIFA. The player believed that the contract was still in force and that the club therefore owed him his salary for a number of months. In its defence the club maintained that the player had actually breached his own contract, because after the club terminated the contract the player had not continued to play for the club until the end of the notice period, but had chosen instead to leave the country immediately. The DRC concluded that the provision in the employment contract had to be considered as totally valid and legally binding. As a consequence, the DRC decided that the club did not breach the relevant employment contract without just cause but in accordance with clause [in question] of the relevant contract, which was signed and approved by both parties. No compensation for breach of contract without just cause (compare Art. 17 of the Regulations) was due. In other words, the DRC decided that the player, in view of the legally valid termination of the employment contract, had no right to claim the salary for the months following the one-month notice period. The club had also argued that the player did not continue to play for the club until the end of the notice period, choosing instead to leave the country immediately and that he had thus failed to fulfil his contractual obligations during the one-month notice period. The player's contention was that playing had been made impossible because the club prevented him from returning to its premises. In this respect the DRC referred to Art. 12(3) of the Rules, in accordance with which a party deriving a right from an alleged fact shall carry the burden of proof. In view of this, the DRC decided that the player was unable to prove that he returned to the club after having been notified of termination of the relevant contract, and/or that he was prevented by the club from returning during the notice-period. The DRC thus determined that the player had not fulfilled his contractual obligation towards the club during the relevant notice period. The DRC ruled that the player was also not entitled to receive the salary for the one-month notice period.

*A clause incorporated in an employment contract which operates unilaterally to the club's advantage, and which the club can use during a number of seasons, is in conflict with the general principles of labour law. Such a clause cannot be invoked because it is arbitrary and not based on objective criteria. The situation differs however if both parties have explicitly stipulated the right to terminate the contract in accordance with a specific notice period.*

## 7. Conclusions and comments

Once an employment contract has been signed it should be respected by the parties involved. FIFA emphatically discourages unilateral and premature termination, particularly during the protected period. According to Art. 16 of the Regulations an employment contract may not be terminated unilaterally during the course of a season. This differs if parties agree the termination mutually. Art. 13 which specifies this also notes that the agreement "may [...] be terminated on expiry of the term of the contract", which is a truism. But not all employment contracts are signed under a fortunate constellation, and in the Regulations it was necessary to include a provision which offers an escape route for the apparently implacable rule of Art. 16. A general prohibition on the unilateral termination of an employment contract is of course not possible. An employment relationship could be affected by this to such an extent that it would be inhumane to force parties to continue working together notwithstanding. There is a price tag attached to breaching a contract unilaterally. The party responsible for the breach can be obliged to pay the opposing party compensation. He is also threatened with a sporting sanction. Only if he can indicate just cause does he not have to fear paying compensation or a sanction, according to Art. 14. But the concurrent existence of Arts. 14 and 16 raises a number of issues, both in terms of their sequence and their content. It is first stipulated that "a contract may be terminated by either party [...]" and then that "a contract cannot be unilaterally terminated [...]" One might first expect the strongest provision, and then a stipulation which eases it. If one ignores for a moment the consequences of unilateral termination in Art. 14, then the contradictions inherent in the two articles become apparent to the reader. The articles could have been interwoven: "A contract cannot be unilaterally terminated during the course of a season, unless in the case of just cause". A second article could then have stipulated that the assumption of a just cause would not entail any consequences.

Disputes involving employment contracts with an international dimension are lodged with FIFA and settled by the Dispute Resolution Chamber. This body has to decide whether the reasons for terminating a contract unilaterally are valid or not.

A disrupted working relationship does not automatically lead in general industrial law to termination of the employment contract, at least not in Western European countries. In the legal systems of these countries the employee is well protected against dismissal by the employer. There is generally a compulsion to explore all available options to reach an internal resolution of a conflict. In the Netherlands for example an employer must launch a dismissal procedure with a governmental body (the Centre for Employment and Income) or the courts, before being able to terminate the employment contract. These bodies assess whether the employer does in fact have sufficient and valid reasons to carry out a dismissal. The employer would not readily resign, because he would then be culpably unemployed and would ultimately lose his right to official benefits payments. Things are different within the context of football. A team can only function optimally and achieve the desired results if there is a particular cohesion within the team's members on one side, and the team members and the club's leadership on the other. A conflict with a team member rapidly leads to the entire team no longer meeting expectations. The short duration of a football career also plays a vital role. If a player - for whatever reason - no longer fits within a team, he will soon be inclined to sign for another club to further his career; after all, if a footballer is unable to play for some time, or if his performance is suffering under the existence of a conflict, that will be to the detriment of his career opportunities.

"A contract may be terminated by either party [...]", according to Art. 14 of the Regulations. In the correct perspective this provision addresses not so much the possibility of terminating an employment contract, but the consequences of such termination. The termination is "without consequences of any kind [...] in the case of just cause". In the notes to Art. 14 one reads that "[T]he principle of respect of contract [established in Art. 16, JS] is, however, not an absolute one. In

<sup>97</sup> Case 96317 of 28.9.2006.



## Beiträge zum Sportrecht

Herausgegeben von Kristian Kühl, Udo Steiner und Klaus Vieweg

Band 28

**Silke Ackermann**

# Strafrechtliche Aspekte des Pferdeleistungssports

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Nach kurzer geschichtlicher und begrifflicher Einführung in das Thema beschäftigt sich Silke Ackermann hauptsächlich mit der Frage, ob bei Manipulationen durch Mitbewerber eine Betrugsstrafbarkeit gegeben ist.

Diese durch die massiven Dopingfälle in anderen Sportarten immer wieder gestellte Frage wird auf Grundlage des geltenden Betrugstatbestandes verneint. Im Anschluss daran stellt sie fest, dass auch der strafrechtliche Schutz der Tiere vor Manipulationen im Tierschutzgesetz sowie eine Strafbarkeit auf Grundlage des Arzneimittel- sowie Betäubungsmittelgesetzes nur in Ausnahmefällen gegeben ist. Sodann untersucht die Autorin, inwieweit das verbandsrechtliche Verfahren der deutschen reiterlichen Vereinigung die staatlichen Verfahrensgrundsätze übernommen hat und somit ein faires Verfahren gewährleisten kann. Abschließend wird die Frage aufgeworfen, ob de lege ferenda ein strafrechtliches Dopinggesetz geschaffen werden sollte. Dies wird im Ergebnis jedoch auf Grund erheblicher rechtsstaatlicher Bedenken verneint. Stattdessen zeigt die Autorin flankierende Maßnahmen auf, um die Situation im Reitsport zu verbessern.

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fact, both a player and a club may terminate a contract with just cause, i.e. for a valid reason". In the notes with Art. 17 one reads the mirror image of this: "Unilateral termination of an employment contract without just cause is always inadmissible". This cannot be so. The concept of 'just cause' is after all not a concept which is hard and fast, about which there can be no discussion and which can immediately be used to declare an employment contract to be terminated. Art. 14 should rather be regarded as a provision with a content which has retrospective force. 'Just cause' is a relative concept. The DRC's duty on the basis of the circumstances is to determine whether one party had just cause to terminate an agreement. In a DRC procedure a party who terminates an employment contract will always maintain that he had just cause to do so, for example, because the opposing party breached the contract. It is up to the DRC within the context of the case to determine *in casu* what should be understood under 'just cause' and whether the party has based its case justifiably on this.

The DRC settles disputes purely on the basis of physical evidence. One regularly encounters the pronouncement that "the Chamber deemed it appropriate to declare that it could only decide on the basis of documents duly signed by the parties and that, in accordance with the Rules Governing the Practice and Procedures of the Dispute Resolution Chamber, verbal agreements would therefore not be taken into consideration." The DRC is clear in terms of argumentation which is not supported by physical evidence. In one of its rulings it can be read that: "[...] the fact that [a player] did not present any evidence confirming that he was effectively prevented from complying with his contractual obligations towards [a club] and [the DRC] means that the present claim must be rejected". Only the facts substantiated by signed documents can be considered for assessment. These documents must make it clear that one party had a just cause to terminate the employment contract. In cases where the documents do not invoke such a clear outcome, the DRC can fulfil the balance towards just cause on the basis of reasonableness. The opposite can also occur. In one of its rulings the DRC considered that "[...] if such a termination would be accepted as a termination with just cause, this would create a disproportionate repartition of the rights of the parties to an employment contract, to the strong detriment of the player".

Art. 17(4) of the Regulations 2005 stipulates that - unless evidence to the contrary is submitted - a club which signs a contract with a player who has terminated his contract with another club without just cause, has incited the player to commit a breach of contract.<sup>98</sup> This rule can lead a club into legal difficulties unnecessarily. The club must prove it has no blame for the contract breach of a player, and legally this is not very nice. According to Art. 17(1), for example, a player can terminate a long-term contract unilaterally - under specific conditions<sup>99</sup> - legitimately on conclusion of the protected period, without running the risk of having a sporting sanction imposed.<sup>100</sup> It is not logical to impose a sanction on the player's new club if it can prove it did *not* have a hand in the player's transfer.

Art. 42 (1)(b) (i) of the Regulations (2001) began with the phrase "[T]he triggering elements of the dispute (i.e. whether a contract was breached, with or without just cause, or sporting just cause), will be decided by the Dispute Resolution Chamber of the FIFA Players' Status Committee". Although this wording did not recur in the Regulations (2004), it cannot thus be assumed that the DRC's method of operation has changed. In the notes to Art. 24 of the new Regulations FIFA also declares that "the triggering elements of the dispute will be handled by the DRC". The DRC needs to isolate that element which can be characterised as the cause of the dispute between parties. In the most simple instance the persistent failure of a club to comply with its financial obligations towards a player without valid reasons, is generally to be considered as a unilateral breach of employment contract without just cause. If the club can show that the reasons for the persistent failure of a club to comply with its financial obligations lie in the fact that without providing reasons or having permission, the player was absent from the club, then the triggering element can be found in this and the element that the club defaulted on payment moves one link down in the causality chain. Should no element be apparent in the sequence which offers justifica-

tion for the first element, then the conclusion can be based on the assumption that the contract breach occurred without just cause. Should the DRC's analysis of the items and circumstances lead to the conclusion that a breach of contract did indeed occur, which is blameworthy - i.e. without just cause - then they can attach consequences to the contract breach, such as the payment of compensation and the imposition of sporting sanctions.

## 8. Concluding Remarks

The right of dismissal in the football industry has a number of specific features which distinguish it from 'normal' industrial law. This is partly because of the relatively short working lives of the employees, partly through the flexible and global deployment of employees and partly through commercial pressure. If a player does not fit in a team, or because of his conduct on or off the field, a team can suffer and the issue for the club is to get rid of him as quickly as possible. A professional club is geared towards winning results which will attract spectators and which will encourage the commercial world to sign sponsorship agreements. The player considers his market value. If he is unable to play, because he does not fit well within a team or doesn't have a good relationship with the trainer, then his market value drops and he would like to relocate as quickly as possible to a club where he will indeed be able to play. In a disrupted working relationship the parties' first instinct is not to restore that relationship. They want to carry on, but without each other. An incident which would cause one to simply shrug in normal life can lead to unprecedented consequences in the football world. Newspapers' sports pages have to be filled, so that the media quickly latches onto an incident, fleshing it out to influence public opinion. Football needs the facility of an 'instant divorce'. On one hand, with an eye to contractual stability FIFA wants to encourage respect for the employment contracts signed by the various parties, but under practical pressure it has to offer the possibility for parties to part quickly in the interim for a price. The parties to an employment contract, who are blamed for breaching a contract, can be obliged to pay compensation to their opposing parties. The possibility of ruling the payment of loss or damage remuneration in the form of compensation, is also at variance with normal dismissal law. It is particularly because dismissal law in the football industry is so 'idiosyncratic' that FIFA created the Dispute Resolution Chamber. It is the DRC's task to steer the interim termination of employment contracts in football in the right direction. Its only restrictions are that it can only rule on contracts with an international character and that it can then only be approached if a national court of law does not offer imperative conciliation of a contract. If it is authorised, the DRC's duty is to determine which party bears the blame for terminating the agreement and to establish the degree to which the opposing party has suffered loss or damage which must be compensated. One finds a large number of DRC rulings on the FIFA site. It is said that all rulings have been published since 2005 (with the exception of those settled by FIFA's Legal Department). Each in its own way commands respect for the capability with which the DRC tackles and resolves each dispute. Given the major importance this has for dismissal rights in the football industry, the DRC's jurisprudence deserves greater recognition than it is now accorded.

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<sup>98</sup> See also FIFA Circular no. 769, Zürich, 24.8.2001, [access.fifa.com/documents/static/regulations/PS%20769%20EN.pdf](http://access.fifa.com/documents/static/regulations/PS%20769%20EN.pdf).

<sup>99</sup> Three conditions: the player must cancel the employment relationship within 15 days after the final official match of the season, it must be a transfer with an international dimension, and compensation must be paid to the club.

<sup>100</sup> In *The Times* of 9.5.2007 Tony Higgins, head of FIFpro, was interviewed in connection with the Webster case. "Basically, this rule was introduced as a compromise between FIFA and the European Commission to give footballers the sort of employee rights that anyone else would expect in the workplace", according to Higgins.

# For Whom the Bell Tolls: Sports or Commerce? Media Images of Sports: Ideology and Identity\*

by Sermin Tekinalp\*\*

*Factors such as the development of professionalism in popular sport, the establishment of great sporting organizations, the building of magnificent stadiums, the interest of governing parties in football as a means of power and national superiority, the development of new industries related to football, the popularization of sports products, the increase in newspaper circulation and the ratings of radio and television channels related to national and international football matches are some of the incentives that make football and other popular sports one of the most influential industrial sectors. Live broadcastings from television channels and digital facilities have both increased the fascination with and appeal of football matches and have helped the sports industry to reproduce itself again and again. The marriage between sports and the media has resulted in a mushrooming of sports products and powerful actors in sports business. This article mainly deals with the commercialization of sports and the role of televised images to reproduce ideology and identity and their part in the distribution of certain malpractices in sports.*

## 1. Introduction

The backbone of sport and the highest-ranking state sports organization in Turkey is the Directorate General of Youth and Sport which is part of the Cabinet of the Prime Minister and was established in 1938. Referees, provincial representatives, coaches and observers together with appointed staff undertake voluntary duties in the organization. Within the structure of the Directorate General, there are currently 37 separate federations, among which the Turkish Soccer Federation, which became autonomous in 1992.

The most outstanding achievement of Turkey in the field of sports was the European Championship of Galatasaray in the 1999-2000 season. Having been challenged by the most powerful soccer teams of Europe, and becoming eligible for the final without losing a single match, Galatasaray, in the final, defeated the British team Arsenal and became the first Turkish team to win the cup. This was an event that carried Turkish soccer to the world soccer arena.

The most important goal of the Directorate General of Youth and Sports is to formulate programmes so that citizens of all ages will engage in sports for the development of their physical and mental health, to support handicapped citizens and to encourage the state to become involved in sports. The general image conveyed by written and audio-visual mass media is that the biggest and most important sporting activity is football and that football provides the most entertainment to the largest part of the public. The heroes reflected on the screens are mostly healthy, well-known, rich, white male stars. However, while the directorates draw up rules and principles and many proposals are being made to develop and disseminate sport all around the country to create healthy generations, the written principles are never realized. The style, manner and language used in the presentation of sporting activities (mostly football) both by the official state organizations and especially by the mass media fail to provide the envisaged physical and spiritual motivation for citizens of all ages, genders and positions. Instead, football has become an arena of fierce competition and violence among the male professionals of teams and football clubs, male hooligans in the stadiums and streets and football addicts. This is no different in the USA and in Europe.

Sports policy in Turkey is somewhat similar to the European sports policy or, in broader terms, to the global sports policy. National sports

policies almost all over the world lack the legislative framework to cope with the growing issues arising from the rapid development of sports as an industrialized sector. In Europe the birth of a socio-cultural sporting agenda can be traced to 1984 (R. Parrish 2003, pp. 162, 173, 205) when issues concerning youth, education exchanges and sports were identified and steps were taken. For example, European sport has been favouring free market broadcasting in England since 1996. The Sports Council favoured a free market in sports rights, thus allowing sporting organizations to maximize their income from the sales revenues generated from television rights. This has enabled English football to invest in new and improved stadiums, better facilities for fans and players and in grassroots investment in youth football.

The tension between the EU's regulatory ambitions on the one hand and political policy ambitions for sport on the other has been the drive behind the development of today's EU sports policy. This policy is not however legally rooted in the Treaty. In other words, sport is not mentioned in the legally binding chapters of the Treaty, which means that EU sports policy also lacks a legislative framework.

Today, football is a world phenomenon and its potential is working in the direction of international capitalism. With the steering and directives emanating from FIFA and multinational companies football and its actors have become very profitable industrial products. Factors such as the development of professionalism in popular sport, the establishment of great sporting organizations, the building of magnificent stadiums, the interest of governing parties in football as a means of power and national superiority, the development of new industries related to football, the popularization of sports products, the increase in newspaper circulation and the ratings of radio and television channels related to national and international football matches are some of the incentives that make football and other popular sports one of the most influential industrial sectors. Live broadcastings from television channels and digital facilities have both increased the fascination with and appeal of football matches and have helped the sports industry to reproduce itself again and again. With the deregulation and commercialization of television, channels almost competed to flirt with football and, to a certain extent, with other popular sports like basketball. The marriage between them has resulted in a mushrooming of sports products. The new global image of sports, mainly football, has led intellectuals and some sports professionals to question the problem of ethics in the structuring, organizing, broadcasting and dissemination of sporting activities in countries.

This article deals with certain examples of and reasons for malpractices in sport and its production and reproduction by the media and how they through their messages present a certain ideology and an identity for hooliganism.

## 2. The Globalization and Industrialization of Sport

The relationship between sports and industry has other ideological dimensions as well which foster the main priorities of capitalism, namely those of the 'consumption culture' and of 'power' and 'fame'. All these notions indirectly stem from the idolization of football and basketball stars. Famous players are presented in advertising as the Gods of mount Olympus. There is a belief that the public only wants reports of heroism and record-breaking shows. Huge masses are numbered and depoliticized by sports programmes and news just like they are by other hypnotizing forms of entertainment. Before and during important football matches, people have been known to be so pre-occupied with the tension caused by speculating on the victory of their teams or the joy of play itself that governments in Turkey have

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used these instances to pass crucial laws in parliament or to increase petrol prices while the masses were given an overdose of football victories (S. Tekinalp 2003 p. 341).

Football clubs have greatly increased their ability to earn gate, television and sponsorship revenues (S. Dobson 2001, p. 374). In the late 1980s and 1990s the pace of change accelerated as club owners and players alike were deluged by an avalanche of new revenue from sources such as television, sponsorship and merchandising. Conn (as argued in Dobson p. 419) argues that a new breed of businessmen and entrepreneurs are attracted into football, because there has been a shift towards a more commercially oriented, profit-driven business ethos in football.

Sponsorship has always been an industry in sports. Some business organizations, driven by the belief that the sports industry is a business sector, assist sports organizations and individuals involved in any kind of sport in finding sponsors. Sponsorship has a very wide range and may consist of the sponsoring of one-off events such as a tennis or golf tournament, or can be the long term (e.g. three-year) sponsorship of a league such as a football league. Sponsorship can be of individuals, such as the Adidas sponsorship of a tennis player, or can be of a group of individuals forming a team, such as the JVS sponsorship of the Arsenal Football Team. If a team is sponsored, it may attract more and better players, thus raising the quality of the team. It means better organization and high-quality coaching as well. Being sponsored gives a team status. That status is conferred by the status of well-known international brands like Nike, Adidas, Coca Cola, or local quality brands. The better known the sponsor is, the higher the status of the team will be.

On the other hand, sponsorship may have disadvantages. The most important of these in the light of our thesis is that sponsors may heavily sponsor major sports such as football, basketball, cricket, or motor racing, but give little support to minor sports that attract little or no public attention. This is a growing tendency in sponsorship, which increases the gap in favour of popular major sports and this damages the development of sport generally. Another negative factor of sponsorship is related to personal human rights. The players have to wear or use the equipment of the sponsoring company whether they, as individuals, approve of the sponsor or not. There is often no consultation with the persons who have to wear the sponsor's name.

Sponsors also hope to get credit from the public for encouraging young people to take part in sport and to improve their ability. They sometimes pay for running and teaching courses which lead to official recognition. These awards are for adults in clubs, schools or sports organizations. As sports becomes more marketable and thus attracts sponsors, this in turn has enabled television and spectators to be attracted to them. The media should also take the responsibility of attracting more sponsors to make them support sport in general, i.e. also investing in minor sports that are less well-known and to attract young people, women and the disabled. All these factors combined make all the sports actors and the audience condition themselves on 'success' and on 'winning the game' unconditionally. With the globalization of sport in the direction of the business world, the essential aim, meaning and ethics of sport for humanity have almost become lost. Before we analyze the media and the relationship between sport and media messages, we need to look at some malpractices in sport to shed some light on the problem.

### 3. Betting and Money Laundering in Sport

The relationships of sports clubs with the black market is another crucial issue that should be dealt with. A recent example of this is provided by a modest London team, West Ham, which purchased two Argentinian players, Terez and Mascherano. The sum involved in the transfer, which was too high to be paid by such a team (1 million dollars for each), was put forward by MSI (Media Sports Investment). MSI is located in the Virgin Islands which is known as a tax paradise and a haven for many types of black market money transfers. Upon further investigation it was uncovered that MSI was backed by Russian capital. MSI also controlled the Brazilian team Corinthians.

This relationship was investigated by the Brazilian Intelligence Department (Agencia Brasileira de Inteligencia) and further findings uncovered that their relationship was part of a black money laundering scheme with the money in question belonging to a very rich Russian businessman. This example highlights the need that those operations of sports clubs that have economic dimensions should be founded on principles of transparency with balanced access to the market. Additionally contracts should be clear, legal and open to inspection.

The increased level of investment in football clubs by undisciplined or underground sources is a matter of great concern. Worries are frequently voiced about the potential for money laundering, betting, bribery and match fixing. For illegal gamblers and money launderers, betting and fixing matches is a good way to make big money. UEFA and Bet Fair detected irregular betting on last season's UEFA Cup Match between Badri's club, Dinamo Tbilisi, and Panionios. Tbilisi led 2-0 at half time only for Panionios to win by 5-2. There were further rumours of a 'fix' predicting that Cyprus Omonia would beat Dinamo Bucharest in the UEFA Cup. The heavily backed Cypriots did win the second-leg tie.

A mushrooming epidemic of under-age gambling on the internet is threatening some nations' security as some internet bookies are allegedly terrorist fronts. It is illegal to bet on sports in the USA, unless you are in Nevada, but in the past five years many Americans have started using the internet to bet with bookmakers in countries that permit sports betting. This has turned sports betting into a huge industry. British bookmakers were recently arrested by US Police (<http://www.newyorker.com/talk/content/articles>). To prevent such situations from continuing to occur, the power (human and financial) of the supervising bodies, as well as that of the courts and tribunals, should increasingly be used to deal with cases of international corruption and money laundering.

Betting in Turkey created a billion dollar informal economy through an organized group of some 300 distributors and bookies (Turkish Daily News, 24 February, 2007). These sites headquartered abroad are fed mainly by south-eastern bookies who reportedly earn \$50 billion monthly. Virtual gambling has reached an alarming rate in Turkey. Reports say that 400,000 people bet online on overseas websites. This means that websites are creating a billion-dollar black market. Terrorist groups headquartered in regions in the south-east are being fed by this black money. Online betting on horse racing alone accounts for \$400 million annually.

### 4. Young Players' Transfers

Another important issue in sports is the international transfer of young players from developing countries. There is an unregulated labour market for young (even under-age) players with affiliated and non-affiliated clubs in developing countries. Clubs are involved in the business of transferring players under 18 years of age through an underground market. Although the new FIFA regulations prohibit the transfer of minors under 18, illicit transfers still take place, because European clubs continue to deal with unapproved agents, especially among African and Latin American non-affiliated clubs. This illegal activity becomes more prevalent with teenage players as these are crowded out by approved agents from the most profitable market transferring the most famous professional players (<http://www.sport-sanddev.org>).

The lack of tight FIFA supervision (no legal penalty or economic sanctions since the players' agents permit is a source of revenue for FIFA) is detrimental to the whole business. National states should unite to enforce a uniform world-wide regulation for business. An international professional association of players' agents can be established to supervise fees and honorariums and contracts between players and agents, especially if concluded by those who have committed past misdeeds in the business.

### 5. Racial and Gender Discrimination

Analyses of reports on sports in the media (Wenner 1998, pp.36-38) suggest that stereotyped renderings of black athletes attribute their



achievements to “natural abilities and instincts” while white athletes are portrayed as hardworking and intelligent. Marginalization and sexualization of female athletes are primary means by which current societal patterns of patriarchy in sport are reproduced.

We habitually witness the abuse of black and other minority players at both professional and grassroots levels of the game. Ethnic minorities and migrants are mostly excluded from football federations, clubs and certain fan clubs across Europe. To counter football racism and discrimination in Europe (FARE), a European Action week is organized every year in Montecchio, Italy. The idea behind FARE Action is the desire for greater participation of ethnic minorities and migrants, for the inclusion of women and girls and for fair play rules. The World Cup against Racism (Mondiali Antirazzi) has been organizing alternative tournaments against racism. They are propagating multiculturalism and challenging the “fortress Europe” scenario which excludes different ethnic, religious and cultural groups.

Gender discrimination is another huge problem. In terms of media coverage, women are almost invisible. In other words, women in sports reporting and broadcasting face discrimination in the predominance of male sports in the media world. In the west, sexual harassment of female sports writers has been reported. A football player can run a razor up a woman writer’s leg or yell obscenities at them (<http://www.feminist.org/sports>). We occasionally observe (on television) a football player using humiliating language to the face of a woman reporter who asks him questions he does not like.

The sexualization of women athletes in the media (where they are portrayed as sexual objects available for male consumption rather than as competitive athletes) may discourage young girls from engaging in those sports deemed unfeminine. The media trivialize female athletes by devoting disproportionately smaller amounts of time to their performances as well as highlighting their physical attractiveness or their domestic roles such as wife, mother or supportive girl friend of a male. Female athletes are evaluated partially in terms of the extent to which their physical characteristics or domestic roles correspond to dominant notions of femininity (Wenner p. 38).

## 6. Hooliganism and Violence

Football hooliganism is defined by most as disorder involving football fans (G. PEARSON). Usually this involves criminal activity and in most - but certainly not all - cases occurs either at or just before or after a football match. Much football-crowd disorder is spontaneous, but many of it is also prearranged by gangs (or ‘firms’) who attach themselves to football clubs and arrange to meet, and fight, firms from other clubs. Incidents of crowd disorder at football matches have been recorded as early as the 19<sup>th</sup> century. It is often claimed that hooliganism at football matches became much more prevalent in the 1970s and 1980s, with more reported wide-scale violence at matches. However, again it is difficult to say whether the amount of disorder increased or whether the growing media interest in, and coverage of, crowd disorder has meant it is reported far more regularly.

Football hooliganism was one of the first issues to attract academics to the study of football, with sociologists, historians and psychologists developing hypotheses explaining why football hooliganism continues to occur. It is unlikely that football will ever be totally free of crowd disorder. Whenever large groups of people get together, often under the influence of alcohol, there is the potential for disorder, regardless of whether there is a football match taking place or not. But political, social and cultural sanctions and legislative codes can solve the problem or at least decrease the amount of disorder and violence.

The latest and most violent example of hooliganism in Turkey was seen during the match between Galatasaray and Fenerbahce, the biggest Derby game of the League, on 20 May 2007. Galatasaray fans tried to attack the Fenerbahce bus and clashed with the police. After the brawl between the fans and the police they were allowed into the stadium. During the game they threw objects, water bottles, parts of the plastic seats and even stones onto the pitch. Some commentators wrote that the incidents were organized.

## 7. Sports Media

In a study covering four sports newspapers, Fanatik, which claims to be the market leader, disclosed striking results about the presentation and distribution of sports news (K. Dearn N. 2006) They randomly selected a date -Monday, 27 May 2006- and analyzed the contents of Fanatik. More than half of the contents (including the TV pages, the crossword, the horse-racing results and other sports activities like tennis, archery, yachting and equestrianism) consisted of football news. This was even the case while other sports enjoyed more success and the Efes Pilsen Basketball Team took the Stefanel Koraic Cup in March. Only one of the sports news dailies, Tarafat, led its front page on the story.

Football is also king among TV channels. The major commercial channels virtually ignore other sports and only the government’s TRT 3 is active in covering minority sporting interests.

Television, which has grown into an effective and massively popular instrument of entertainment, attracting wide audiences and generating many new revenue streams from direct advertisers and advertising agencies, has used sports programming as a ratings increasing device. The resulting higher audience totals have dramatically increased network profit margins. Therefore, this globalization of sports through the increased coverage of sporting events (particularly football) and the subsequent increase of the audience as brought about by the sports industry, which creates new and ever growing revenue streams, are key to the growth of a new and exciting business culture. Thus, the popularization and prevalence of sports (primarily football) and the fact that it has simultaneously become an important industrial sector is not a coincidence.

With the globalization of coverage and the subsequent industrialization of football matches by the media, they have become a very important source of revenue, attracting known brands such as Adidas, Canon, Gillette, Snickers, Coca-Cola, McDonalds and Ford that invest millions of dollars of sponsorship money in well-known, leading sports teams. The rivalry among these brands helped stimulate the growth of the sports industry and the resultant ratings which yield massive advertisement revenue through the coverage of sporting events. In the Finals of the 2006 World Cup, for instance, it was not only France and Italy that competed with each other but also two rival shoe brands, Puma (Italy) and Adidas (France) (Hurriyet 9 July 2006, p. 15). Sporting events of this magnitude attract huge and widely varied audiences to stadiums and television screens, which only increases the appetite of all commercial advertisers.

Because of competition among TV networks to attain the highest ratings, sports programmes and sports content in news programmes have been transformed into entertainment. Instead of serious sports programming and sports documentaries, magazine-style sports programmes fill the airwaves (Yasin 1996, p. 283). The media’s regular coverage includes season and big game previews, pre-game analysis and interviews, post-game analysis and interviews and profiles of well-known players, coaches and others who influence the world of sports. They all target a male audience aged 8 and up (more specifically between 18 and 49). In developing and underdeveloped countries the situation is much worse. The media multiply this reality by promoting only men in sports. Of course, media critics tend to ignore this. They also ignore the multi-billion-dollar media domain, because it is seen as an entertainment and profit arena and not the business of investigative journalism. Media channels offer their perspectives for this global industry, but it is not, in reality, investigative. In short, the media ignore the fact that sports reporting is not only big business, it is also a potent cultural force full of ethical issues. Research shows that girls in the west have approximately one-half the sports opportunities of boys (<http://www.womensportsfoundation.org>).

During national games, citizens of a country representing many different cultures see themselves as members of a large unified community under the same identity. National sports has the power to impose this collective identity upon the citizens of the country. Only sports can create such a force and nationalistic feeling. Media representations of sport, particularly international sport and the Olympic Games, focus substantially on national unity and identity, champi-

oning the dominant values and ideals of the nations in which they originated (Wenner 1998, p. 36). Yet, on the other hand, the common metaphor used in football matches is that of war. The language used to describe the matches between countries display elements of nationalism or even jingoism. They see the players as warriors going to battle. Years ago George Orwell already described sports as “an unflinching cause of ill will” (<http://elt.britcoun.org>).

Media language can be used to inflame national tensions and thus create a flammable mixture of sports and politics. The broadcasting of national sports events is one of the most influential nationalistic rituals within which the media operate. Some intellectuals criticize the popularization of football in this way, because it increases rough nationalistic sentiments on the part of the public by intensifying and popularizing rough male violence and because it promotes sports as a hobby and entertainment for men only. The language used by the media and in the stadium by fans reflects male sexuality, masculine violence and wild nationalistic terminology.

Football has been a very lucrative industry, especially where it relates to television. In 1998, the international media earned 35 billion dollars through advertising during the World Cup alone. Organizations such as the League of Champions, the European Championship, and the World Cup has over the years helped football to develop more and more as an industrial sector. Reports say that sporting events like these also cause an increase in the sale of television sets (Talimciler 2001, p. 280).

### 8. Sport Images, Ideology and Althusser

Althusser mentions two major mechanisms for ensuring that people within a state behave according to the rules of that state. The first is what Althusser calls the RSA, or Repressive State Apparatuses, that can enforce behaviour directly, such as the police, and the criminal justice and prison system. Through these ‘apparatuses’, the state has the power to force you physically to behave. More important for literature studies, however, is the second mechanism which Althusser investigates, which he calls ISAs, or Ideological State Apparatuses. These are institutions which generate ideologies which we as individuals (and groups) then internalize, and act in accordance with. These ISAs include schools, religions, the family, legal systems, politics, arts, sports and the media. These organizations generate systems of ideas and values, which we as individuals believe (or don’t believe); this is what Althusser examines. How do we come to internalize, to believe, the ideologies that these ISAs create, (and thus misrecognize or misrepresent ourselves as unalienated subjects in capitalism)? Broadcasting sports news and matches are associated with some ideological terminology which we reinternalize over and over again as the messages are repeated.

Althusser claims that ideology is a structure (<http://www.tamilnation.org/ideology>) that affects social life continuously at every level and in different forms (Althusser 2003, Kazanci 2002). He derives this idea of ideology as a structure from the Marxist idea that ideology is part of the superstructure, but he links the structure of ideology to the idea of the unconscious deriving from Freud and Lacan. Because ideology is a structure, its contents will vary, i.e. you can fill it up with anything, but its form, like the structure of the unconscious, is always the same. And ideology works ‘unconsciously’. Like language, ideology is a structure/system which we inhabit, which speaks us, but which gives us the illusion that we are in charge, that we freely chose to believe the things we believe, and that we can find many reasons why we believe those things. Hence the final part of Althusser’s argument: How is it that individual subjects are constituted in ideological structures? Or, in other words, how does ideology create a notion of self or subject?

All ideology has the function of constituting concrete individuals as subjects - of enlisting them in any belief system. According to Althusser:

“We are born into subject-hood, if only because we are named before we are born; hence we are always already subjects in ideology, in specific ideologies, which we inhabit, and which we recognize only as truth or obviousness. Everybody else’s beliefs are recognizable as ideological, i.e. imaginary/illusory, whereas ours are simply true.

Think, for example, about different religious beliefs. Everybody who believes in their religion thinks their religion is true, and everyone else’s is just illusion, or ideology.”

How does ideology (as structure) get us to become subjects, and hence not to recognize our subject positions within any particular ideological formation? How do we come to believe that our beliefs are simply true, not relative? Althusser answers this question with the notion of *interpellation*. Ideology interpellates individuals as subjects. The word ‘interpellation’ comes from the same root as the word ‘appellation’, which means a name; it has nothing to do with the mathematical idea of ‘interpolation’. Interpellation is a hailing, according to Althusser. The interpellated subject in the ideology of the sport commercial would thus see bodybuilding, for example, as an ideal way of development, would behave as if body building or rigorous exercise was a necessity, something of central importance. The subject here would be some notion of physical perfection, or body cult, the rules that the subject is subjected to.

A particular ideology says, in effect, “hey you!” and we respond “me?,” “you mean me?” And the ideology says, yes, “I mean you”. We can see examples of this every day in commercials, in sports broadcasting and sports commercials. You are a nationalist; you are a male who has to win all the matches; you can swear and yell because you have the right to do so, because you are a man; the disabled and women do not attract your attention in a world of male sport; because the capitalist ideology does not interpellate you as a responsible subject for them; you are a fan and admirer of well-known sportsmen; you drink the Pepsi or Coca Cola that the famous athletes drink; you wear the Adidas or Nike that they wear; you imitate their way of life, love, deals, hair styles, etc. All the sports events call you as subjects and say: “You belong in this world”, “HEY YOU!”, “I want you”, “Remember, I am giving you the things that you want”. Althusser was enchanted by Freud, and even more enchanted by Lacan; the ideas of the imaginary, the mirror, the specular, and the subject/Subject have all been derived from or are parallel to Lacanian notions.

### 9. Sport Images, Identity and Lacan’s ‘Mirror Stage’

We can describe the relationship of football heroes with the individual audience within the framework of Lacan’s “Mirror Stage” idea. Lacan (1986) proposes that human infants pass through a stage in which an external image of the body (reflected in a mirror, or represented to the infant through the mother or a caregiver) produces a psychic response that gives rise to the mental representation of an “I”. The infants identify with the image, which serves as a *gestalt* (“pattern” or “figure”) of the infants’ emerging perceptions of selfhood, but because the image of a unified body does not correspond with the underdeveloped infant’s physical vulnerability and weakness, this imago is established as an “ideal I” toward which the subject will perpetually strive throughout his or her life (<http://www.english.hawaii.edu/criticallink/lacan>).

For Lacan, the mirror stage establishes the ego as fundamentally dependent upon external objects or another. As the so-called “individual” matures and enters into social relations through language, this “other” will be elaborated within social and linguistic frameworks that will give each subject’s personality (and his or her neuroses and other psychic disturbances) its particular characteristics. Lacan’s ideas about the formation of the “I” developed over time in conjunction with his other elaborations of Freudian theory. When we ponder on Lacanian “mirror stage” theory from the psychological situation of football fans especially, the ideal “I” in the mirror through which he is striving to catch the image throughout his life, is the team as a whole (of which he is a part). When the team or the heroes that he identifies with are down, he is also down. He internalizes everything related to them. Lacanian theory, and specifically the model of the mirror stage, made an enormous contribution to leftist intellectual circles in Britain at the time when cultural studies was emerging as a field. In this article the effect of sports on individual audiences (specifically on football fans) is evaluated through the theory of Lacan so as to point out how important the effect of sports images is, and the language and the ideology they impose on personal development.



# Beiträge zum Sportrecht

Edited by Kristian Kühl, Udo Steiner, and Klaus Vieweg

Band 27

Klaus Vieweg / Robert Siekmann (Eds.)

## Legal Comparison and the Harmonisation of Doping Rules

Pilot Study for the  
European Commission

Tab., Abb.; 705 S. 2007 <978-3-428-12413-8> Geb. € 96,-



In 2001 an international research group consisting of sports law experts from Germany, The Netherlands and the UK finalized a research study on „Legal Comparison and the Harmonisation of Doping Rules“, commissioned by the EU. The study provided the drafters of the World Anti-Doping (WADA) Code, which was finally adopted in 2004 and is now officially in force, with an important tool, giving them an overview of the doping rules and regulations of national and international sports organisations, including a comparative analysis, as well as a survey and analysis of the relevant public law legislation available.

This publication is instrumental to better understanding the background of the issue of the harmonisation of doping rules and regulations, the results of which are laid down in the WADA Code, which is a milestone in the international campaign to combat doping in sports.

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Violence in sport and especially football is another issue which is not compatible with the ethics of sportsmanship. Most verbal abuse is directed toward officials, referees and players and involves yelling, profanity, taunts and insults. Physical abuse involves kicking, throwing an object and spitting. These actions repeated in front of millions of spectators confirm a role by demonstrating values, ways of thinking and acting. Sportsmanship expresses an aspiration or ethos that could be enjoyed for its own sake, with proper consideration for fairness, ethics, respect and a sense of fellowship with one's competitors. The on-field and off-field behaviour of some of our high-profile footballers continues to attract newspaper headlines. We admire their actions so much on the field and off the field because of the sympathy which we have for them. When they get married or have a baby this sympathy and interest is converted into commercial revenue. They sell the story to a magazine or a TV show. A sportsman can be regarded as a role model for young people which influences their aspirations for their future.

## 10. Conclusion

The vast sums of money involved in international soccer have likely led to some of the sport's ethical problems. FIFA's finances dramatically improved through the financial success of the 2006 World Cup in Germany which was watched by a cumulative audience estimated at 26.3 billion. The World Cup in Germany produced a \$207 million profit of which FIFA received \$60 million. This amount of money flowing to the organizations, from the biggest to the smallest, cautions us that money will induce some to act strangely. There is no excuse for wealthy clubs locking up talent by handing out contracts to more than 30 players when only 11 players take to the field.

If players are at each other's throats and not educated; if the coaches do not impose a minimum ethical discipline on their players; if we do not offer help to the referees, who are supposed to be the guardians of ethics of fair play; if the coach who humiliates or beats his/her player in public and goes on doing the same thing without heeding the least warning or punishment from the authorities, then there is a problem in the world-wide sports arena. We really need a revolution in sport, both at local and international level. Sport should advance the joy and quality of life, be a vehicle of peace all over the world, but instead modern sport is directed to unconditional "success" at the expense of ethical, cultural and humanistic aims. It is in danger of turning competitions into the kind of fierce fights as engaged in by the gladiators in ancient Rome. Ukrainian coach Mikhaylo who was caught on camera when pushing and shoving his 18-year old daughter Kateryna who had lost in the swimming finals is the latest blatant example of this motivation by unconditioned success at all levels.

UEFA and FIFA have recently taken action and have promoted new regulations in order to prevent and sanction such discriminatory behaviour. But this is not enough. In order to eradicate discrimination and malpractices in sports activities, more disciplinary controls and sanctions and, most importantly, a radically new, open and welcoming culture are needed, as are long-term projects aiming at mutual support and cultural exchanges. These should be implemented at governmental, international and media levels.

The media has a powerful influence on the socialization of girls and young women in sports. For this reason it is imperative that we observe and challenge those media representations that perpetuate the notion that only white, young, physically attractive non-disabled men and rarely women can, and do engage in sports. Constantly promoting this ideal image greatly restricts the availability of role models and a representation that depicts a wider range of creating and sustaining change. The media should not only increase the amount of coverage of women's sports, but also extend it to women with disabilities as well as older women.

What should the aim of sports programmes be, besides entertainment? The view that there is some sort of internal connection between the practice of sports, games or other physical activities and the development of qualities such as moral character or understanding is an ancient and persistent one. It reaches back at least as far as the philosophical writings of Plato (Car 1998, p. 119). Television chan-

nels can broadcast or illustrate sports for children, girls, women, elderly people and the disabled. Sports programmes can be a developmental aid and a public asset that enhances the physical and psychological well-being of people of different genders and ages.

An alternative would be to entertain the masses through educational messages rather than to corrupt the language; to improve the use of correct terminology in both sports literature and native language itself (S. RUHI 1999). Instead, what the masses are getting and thus what society is getting is the creation of fanatics, encouraging violence and corrupting the language by the use of profanity. In sports confrontations, the use of vulgar and obscene language, physical violence and even rioting by fanatic followers and sometimes even the players are common sights. Neither laws nor the directives and warnings of the sports federations and clubs have been able to stop this. Besides organizational principles and law, the media should also assume the responsibility of playing an effective role against these malpractices in sport.

Regarding the main issues of popular sports and the sports media, the following topics are likely to be topics of investigation and solution.

- The media coverage of sports
- The trafficking of young players
- Money laundering, betting and match fixing
- Protecting the integrity of sports on an international level
- Governance in sports organizations of all levels
- Challenging ethnic racism and gender discrimination
- A developmental sports policy on national and international levels

The International Sports Law Journal

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# Sports Broadcasting Rights in the United States

by John T. Wolohan\*

## 1. Introduction

In 2005, the National Football League (NFL) announced the largest sport broadcast agreement in television history. The deal, which involves all four of the major television networks in the United States, plus ESPN, a national cable sport network, increased the NFL's total broadcast revenue by more than 50 percent, going from \$2.45 billion per season to \$3.74 billion per season.<sup>1</sup> The NFL, however, is not the only professional sports league generating large sums of money for their broadcasting rights.

In 2006, Major League Baseball (MLB) signed a \$3 billion deal with two television networks: TBS and Fox, which will run until the year 2013. Under the agreement, TBS will broadcast 26 regular season Sunday games and some postseason playoff games. Fox received the right to televise the World Series, MLB's All-Star game, a Saturday afternoon game of the week and one League Championship Series. In addition, MLB in 2005, entered into an agreement with ESPN worth about \$2.4 billion over eight years for the rights to broadcast games on Sunday, Monday and Wednesday nights. ESPN also agreed to pay MLB an average of \$11 million a year for radio broadcast rights and \$30 million a year to televise games on new media such as cell phones and wireless devices.<sup>2</sup>

In 2002, the National Basketball League (NBA) sold its' broadcasting rights to three networks for \$4.6 billion over six years.<sup>3</sup> The agreement, which averages \$765 million a year, will allow ABC to show 15 Sunday afternoon games, as many as five playoff games and the entire NBA Finals in prime time. ESPN acquired the rights to broadcast games on Wednesday nights and a doubleheader on Fridays. ESPN also received the right to televise 22 games in the first round of the playoffs, as well as one of the conference finals. The third network, Turner Sports, acquired the right to show 52 regular season games, most of them as part of a Thursday night doubleheaders on its' TNT channel. Turner Sports also received the right to show 45 playoff games, the conference final not on ESPN and the all-star game.<sup>4</sup>

Even though television rating for the 2007 NBA Finals were the

lowest ever, the league in June 2007 was close to signing a long term deal that would increase the revenue it annually received from television. In addition to broadcasting rights, however, the new deal would require the NBA to guarantee its' broadcast partners international and digital rights that will allow them to show game highlights via broadband, mobile and video on demand sources.<sup>5</sup>

Even the National Hockey League (NHL) and Major League Soccer (MLS) have been able to cash in by selling their television rights. For example, in 2005, the NHL sold the cable television rights to its games to Outdoor Life Network (OLN). OLN, a cable sports channel owned by Comcast, the biggest cable provider in the United States with 24 million subscribers, changed its' name in September 25, 2006 to Versus.<sup>6</sup> Versus, which agreed to carry games on Monday and Tuesday nights, will pay the NHL over \$69 million per season for three years. The NHL also has agreement with NBC, for seven regular season games and six Stanley Cup playoff games on Saturdays, whereby the league and the network will share all revenue, after NBC takes out the costs of production.<sup>7</sup>

In 2007, MLS sold its' broadcasting package for an estimated \$20 million per year.<sup>8</sup> Under the deal, ESPN will pay \$8 million to broadcast 25 regular season games, the All-Star Game in July and three playoff matches. In addition to ESPN, MLS also has contracts with Fox Soccer Channel and Fox Sports en Espanol for 28 Saturday broadcasts, with Spanish-language network Univision for 25 Sunday games and with HDNet. As a result of the contracts, 110 of the 195 regular season matches will now be on television. ABC, one of the four major networks in the United States and along with ESPN part of the Disney Corporation, will broadcast MLS Cup.<sup>9</sup>

As a result of all of the billions of dollars being generated by sports broadcasting rights, the economics of professional sport has changed. Whereas it use to be, a team survived or failed simply on the number of tickets it could sell, today the wellbeing of the entire sports industry has become inextricably intertwined with television.<sup>10</sup> To understand the relationship between sports and television in the United States, the rest of this chapter will attempt to examine the past, current and future state of sport broadcasting rights. The chapter will begin with a review of the development of sports broadcasting in the United States. In particular, the chapter examines how early case law had helped establish current ownership rights of the sport broadcasts. Next the chapter will examine how teams and sports leagues sell their broadcasting rights. This section will devote particular attention to the impact of Federal Antitrust Law and the Sports Broadcasting Act of 1961 on sport broadcasting rights. The chapter concludes by examining the potential future impact issues, such as regional sports networks, pay per view, the Internet and satellite radio and television could have on sport broadcasting.

## 2. The Development of Sport Broadcasting Rights

Sports teams and leagues have been selling the rights to broadcast their games on radio and television almost since the beginning of sports. For example, in 1939, the Mutual Broadcasting System paid

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1 Bill Griffith, *NBC is back in NFL*, Boston Globe, April 19, 2005, at F1.  
2 Richard Sandomir, *ESPN Increases Budget in a Deal With Baseball*, New York Times, September 15, 2005, at D5.  
3 Ken Denlinger, *NBA Deal is \$4.6 Billion; Pact With ABC/ESPN, Turner Shifts Games Mostly to Cable*, Washington Post, January 23, 2002, at D9.  
4 *Id.*  
5 John Ourand & John Lombardo, *NBA near deal with TV partners*, Street & Smith Sports Business Journal, June 4 - 10, 2007, at 1.

6 Larry Stewart, *OLN Switches to 'Versus'; The sports network, which picked up the NHL last year, changes to its new name today to convey that its reach goes beyond outdoors*, Los Angeles Times, September 25, 2006 at D7.  
7 Richard Sandomir, *ESPN Passes on N.H.L. Television Rights, Ending 21-Year Relationship With League*, New York Times, August 18, 2005, at D2.  
8 Steven Goff, *MLS Tries to Make Waves on Air; TV Deal Tabs Weeknight Games as Key to League's Wider Appeal*, Washington Post, May 3, 2007 at E1.  
9 *Id.*  
10 Robert Alan Garrett & Philip R. Hochberg, *Sports Broadcasting and the Law*, 59 INDIANA LAW JOURNAL 155 - 194 (1983).

the NFL \$2,500 for the right to broadcast on network radio that year's NFL championship game.<sup>11</sup> The game was broadcast to 120 stations nationwide. The NFL was also the first league to televise its championship game coast-to-coast, when it sold the rights to the game to the DuMont Network for \$75,000 in 1951.<sup>12</sup>

To better understand the relationship between sports and television, however, it is essential to go back to the time before television. In 1921, MLB began selling the rights to the baseball World Series to various radio stations. However, in 1934, WOCL, a radio station in Jamestown, New York, conceived of a way to broadcast that year's World Series without paying MLB for the right to do so. While listening to the authorized radio broadcast of another radio station, WOCL provided its audience with a running account of the games based upon the information it received from the other radio broadcast.<sup>13</sup>

When WOCL applied to renew its broadcasting license before the Federal Communications Commission (FCC), MLB filed a complaint challenging the license renewal. In particular, MLB alleged that WOCL's actions violated section 325(a) of the Communications Act of 1934, which states that: ... "nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."<sup>14</sup>

While the FCC found that WOCL's conduct was "inconsistent with fair dealing, and amounts to an unfair utilization of the results of another's labor," and was "deceptive to the public," it found that such conduct did not violate Section 325 of the Communications Act.<sup>15</sup> The Communications Act, the FCC held, defines rebroadcast as "actually reproducing the signal of another station mechanically or by some other means."<sup>16</sup> Therefore, since the FCC concluded that WOCL did not technical rebroadcast the 1934 World Series, it renewed WOCL's license.<sup>17</sup>

Having lost the right to control the dissemination of play by play accounts of their games by the FCC, MLB and its teams shifted their attack into the state and federal courts. In *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,<sup>18</sup> the Pittsburgh Athletic Company, owner of the MLB Pittsburgh Pirates sued KQV, a Pittsburgh radio station, to stop the station from broadcasting play-by-play descriptions of the Pirates' home games without the consent.

The Pittsburgh Pirates, who had already entered into contracts with two local radio stations, giving the stations the exclusive right to broadcast all of the Pirates home and away games, sought to prevent KQV from broadcasting play-by-play descriptions. KQV, which secured the game information by paying observers whom it stationed at various vantage points outside the Pirates' Field, claimed that the broadcasts were legal because it was simply broadcasting news.<sup>19</sup> In addition, the station argued that because it received no compensation for its broadcasts from sponsors, the broadcasts did not represent unfair competition to the Pirates and their radio broadcast partners.<sup>20</sup>

In ruling against KQV, the court found that the Pirates "by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games."<sup>21</sup> As a result, when KQV broadcast the games without the teams consent, the court held that KQV had interfered with, and misappropriated the Pirates property rights. Such misappropriation, the court ruled unjustly enriched KQV to the detriment of the Pirates and their radio broadcast partners.<sup>22</sup>

The decision by the court *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, for the first time clearly establishes that sports teams and

their leagues<sup>23</sup> have an exclusive property rights to the play-by-play broadcasts of their games. In addition to a property right, in 1976, teams and leagues acquired copyright protection. Under the Copyright Act of 1976,<sup>24</sup> once a live sports broadcast is "fixed in any tangible medium of expression,"<sup>25</sup> such as video or audio tape, it qualifies for copyright protection<sup>26</sup> and the owners of the broadcast receives the exclusive right to "reproduce," "prepare derivative works," "distribute" and to "perform the copyrighted work publicly."<sup>27</sup>

### 3. Ownership of the Broadcasting Rights

When the United States Congress passed the Copyright Act of 1976, there were only three national television networks in the United States. Since then, however, the number of television networks has grown tremendously. As a result of all the additional channels, of which some are 24 hour sports channels, the networks have turned more and more to sports to fill their programming needs. For example in the 1980s, television and cable networks went from an average of approximately 4,600 hours of sports programming to 7,500 hours. In the 1990s, television and cable networks broadcast over 14,000 hours of sports programs.<sup>28</sup> As the number of hours dedicated to sports programming has increased, television and cable networks have continued pay higher and higher rights fees to broadcast sporting events, especially the most popular sports like football. With so much money involved in sports broadcasting rights, it is not surprising that there should be legal challenges over who owned the rights to such broadcasts, the teams, players or broadcaster.

#### 3.1. Team v. Players

In *Baltimore Orioles v. Major League Baseball Players Association*,<sup>29</sup> the Seventh Circuit Court of Appeals was asked to determine who owned the players televised performances the teams or the players. The Major League Baseball Players Association (MLBPA), after decades of negotiations concerning the allocation of television revenue, in 1982 sent letters to the each team and MLB's television and cable partners claiming that the players owned the property right in the televised performances of their games and that any use of those performances and images without the players' permission was an illegal misappropriation of the players' rights.<sup>30</sup>

In response to the Players' letter, the teams sought a declaratory judgment from the court showing that the teams owned the exclusive rights to the broadcast revenues. In addition, the teams argued that as the employers of the players, they possessed all broadcast rights in the games. In support of this position, the teams argued that the games constituted copyrighted "works made for hire"<sup>31</sup> under the Copyright Act. As owners of the copyrighted work, the teams argued they had the exclusive right to "distribute" and "perform the copyrighted work publicly"<sup>32</sup> and that the players had no rights to the broadcast.

After determining that the broadcasts were protected under the Copyright Act, the Seventh Circuit Court of Appeals move on to examine whether the players performances were works for hire within the meaning of Copyright Act. Under the Copyright Act, the Seventh Circuit Court ruled that a work made for hire "is defined in pertinent part as a work prepared by an employee within the scope of his or her employment."<sup>33</sup> Using this definition, the Seventh Circuit Court ruled that since the players were clearly the employees of their respective clubs, and that their employment encompassed performing in front of both live and televised audiences, the teams own the entire copyrighted broadcast of the game.<sup>34</sup>

11 <http://www.nfl.com/history/chronology/1931-1940>

12 <http://www.nfl.com/history/chronology/1951-1960>

13 *In re A.E. Newton*, 2 F.C.C. 281, 283 (1936).

14 47 U.S.C. § 325(a) (2006).

15 *In re A.E. Newton*, 2 F.C.C. 281 (1936).

16 *Id.* at 284.

17 *Id.* at 285.

18 *Pittsburgh Athletic Co. v. KQV*

*Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938).

19 *Id.* at 492.

20 *Id.* at 493.

21 *Id.* at 492.

22 *Id.* at 494.

23 *Madison Square Garden Corp. v.*

*Universal Pictures Co.*, 255 A.D. 459, 7

N.Y.S.2d 845 (N.Y. App. Div. 1938)

(hockey); *Twentieth Century Sporting*

*Club, Inc. v. Transradio Press Serv., Inc.*,

165 Misc. 71, 300 N.Y.S. 159 (1937) (box-

ing); *Southwestern Broadcasting Co. v.*

*Oil Center Broadcasting Co.*, 210 S.W.2d

230 (Tex. Civ. App. 1947) (high school

football); *Johnson-Kennedy Radio Corp. v.*

*Chicago Bears Football Club, Inc.*, 97 F.2d

223 (7th Cir. 1938) (professional football).

24 17 U.S.C. §§ 101 - 1332 (2006).

25 17 U.S.C. §102 (2006).

26 17 U.S.C. §101 (2006).

27 17 U.S.C. §106 (2006).

28 Symposium, *The Future of Sports*

*Television*, 14 Fordham Intellectual

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Journal 641 (2004).

29 *Baltimore Orioles v. Major League*

*Baseball Players Association*, 805 F.2d 663

(7th Cir. 1986).

30 *Id.* at 665.

31 17 U.S.C. § 201(b) (2006).

32 17 U.S.C. §106 (2006).

33 *Baltimore Orioles v. Major League*

*Baseball Players Association*, 805 F.2d 663,

667 (7th Cir. 1986).

34 *Id.* at 670.

The Seventh Circuit Court concluded by noting that “in this litigation the Players ... seek a judicial declaration that they possess a right - the right to control the telecasts of major league baseball games - that they could not procure in bargaining with the Clubs.”<sup>35</sup> If the players want to receive a direct share of the broadcast revenues, the Seventh Circuit Court ruled that the Players’ Association must use the negotiating table to attain their goal. As of 2007, none of the professional sports unions have negotiated for a direct share in broadcast revenues.

### 3.2. Teams v. Broadcasters

Another group seeking to share in the revenue generated by sports broadcast were the television networks themselves. Under Section 111 of the Copyright Act of 1976, cable operators are required to pay royalties to the creators of copyrighted program material that is used by the cable systems.<sup>36</sup> In order to facilitate this requirement, the Act requires that cable operators obtain a copyright license and periodically pay royalty fees into a central fund.<sup>37</sup> To distribute the royalty fees to the creators of the copyrighted works, the Act created an independent Copyright Royalty Tribunal.<sup>38</sup>

In making its’ initial royalty distribution in August 1979, the Copyright Royalty Tribunal determined that sports leagues were eligible for 12% of the \$ 15 million Fund. In an effort to recoup the some of the rights fees, the television networks argued in *National Association of Broadcasters v. Copyright Royalty Tribunal* that they have a copyrightable interest in the sports telecasts they produce and that therefore they should share in the distribution of cable royalties.<sup>39</sup>

While agreeing with the broadcasters that they had a copyrightable interest in producing sports broadcast, the court upheld the Copyright Royalty Tribunal’s decision not to award any sports royalties to the broadcasters. In citing the Tribunal, the court held that work of television stations in broadcasting sports events has minimal market value because “the public tunes in sports broadcasts mainly to see the sports performance, not the activities of the director and the cameramen.”<sup>40</sup> As a result, the court ruled that “the Tribunal’s award of 3.5 % to commercial television broadcaster clearly falls within the ‘zone of reasonableness’ in terms of compensating broadcasters for their activities.”<sup>41</sup>

### 3.3. Teams v. Teams

Since you can not have a game without two teams, the question of who owns the right to distribute audio and video broadcast of any game can be an important one. For example, could station A after acquiring the rights to broadcast all of the New York Yankees home and away game, contract with a Boston station to broadcast the Boston Red Sox away games against the Yankees into the Boston market? If so, clearly this would impact the value of the Red Sox local contact, since it could not offer an exclusive contact.

Fortunately, due to the amount of money involved in local radio and television contracts, this question has been resolved by the leagues and their own internal league wide policies which give each team certain territorial rights. However, as we will also see, as technological advances continue to develop, it is getting harder and harder for teams to keep other teams from infringing into their local media markets.

## 4. How are Broadcasting Rights Sold?

In examining how sports broadcasting rights are sold, there are a number of important factors to keep in mind. First, since profession-

al sport in America developed before television, most of the rules regulating television broadcasts are the same rules the leagues developed for radio. Second, due to the size of the United States, every professional sports team has two television markets: local and national. While both television markets are an important revenue source, for many professional sports teams, the local television market is the most important market. This is true, even though the national broadcasting rights generate more money, because the national money has to be shared with all the other teams and the league office. Therefore, except for the NFL, whose teams do not sell their local right because all league games are televised as part of their national package, sports teams are allowed to sell and control the television rights within their own local market.

Another important factor affecting sports broadcasting rights is that even as teams and leagues seek ways to maximize revenue from television and other media outlets, team owners are at the same time trying to protect their home attendance and ticket sales. For example, in 1950, before the league agreed to pool their television rights, the Los Angeles Rams of the NFL entered into an agreement to televise all of their games, both home and away, into the Los Angeles market.<sup>42</sup> The Rams, however, reversed their television policy in 1951 after they suspected that people were staying home and watching Rams games on television instead of attending the games. Under the new policy, the Rams would only televise their road games.<sup>43</sup>

Today, even with all the influx of television and radio money, professional sports clubs still make a large percentage of their revenue from ticket sales. As a result, team owners need to perform a delicate balance between maximizing revenue from television and protecting their home ticket sales.

To help solve this problem, the leagues and team owners have developed league wide rules governing when certain games could be broadcast into a team’s home territory and which teams controlled the broadcasting rights within certain markets. For example, as individual teams began to sell the broadcasting rights to their games, the NFL developed a by-law that prohibited any clubs from broadcasting their games into another team’s home territory (75 miles radius of a Club), on the day that such other club was playing a game and broadcasting it into its’ own home market.<sup>44</sup> In developing the rule, the NFL claimed that the by-law, by preventing potential spectators from staying home to watch other games on television, actually protected weaker teams by adding to their home game attendance.<sup>45</sup>

Unfortunately for the NFL, however, the rule was challenged by the United States Justice Department in *United States v. National Football League*.<sup>46</sup> In particular, the Justice Department argued that the rule violated Federal Antitrust laws<sup>47</sup> by restricting the rights of the other NFL teams to sell their games within another team’s local market. In support of this argument, the Justice Department pointed to the fact that since most NFL games are played on Sundays, and since the teams, when they are not playing at home, almost always either broadcast or televise their away games back into their home territories, the restrictions effectively prevented live broadcasts of practically all outside games in all the home territories.<sup>48</sup>

In upholding the legality of the NFL’s by-law, the court held that while it is essential that teams compete as hard as they can against each other on the playing field, it was not necessary and indeed unwise for teams to compete as hard as they could against each other in a business way. If all the teams competed as hard as they could in a business way, the stronger teams would likely drive the weaker ones into financial failure.<sup>49</sup> Which in turn, would not only cause the weaker teams to fail, but eventually the entire whole league, both the weaker and the stronger teams, would fail.<sup>50</sup> Therefore, under these circumstances it was reasonable that the league would establish rules to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance. In addition, the court noted that since the greatest part of the NFL’s income was derived from ticket sale, reasonable protection of home game attendance was essential to the very existence of the individual clubs, and the League.<sup>51</sup>

As for the NFL’s restriction on televising other teams’ games into

35 *Id.* at 679.

36 17 U.S.C. § 111 (2006)

37 17 U.S.C. § 111(c) (d) (2006).

38 17 U.S.C. §§ 801 - 810 (2006).

39 *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (1982).

40 *Id.* at 379.

41 *Id.*

42

<http://www.nfl.com/history/chronology/1941-1950>

43 [www.nfl.com/history/chronology/1951-1960](http://www.nfl.com/history/chronology/1951-1960)

44 *United States v. National Football League*, 116 F. Supp. 319 (1953).

45 *Id.* at 325.

46 *Id.*

47 15 U.S.C. § 1 *et seq.*

48 *United States v. National Football League*, 116 F. Supp. 322 (1953).

49 *Id.* at 323.

50 *Id.*

51 *Id.* at 325.

another team's home territories when the home team was playing an away game and telecasting it back into their home territories, the court held that since there was no home gate attendance to protect, any prohibition of outside telecasts were unreasonable and an illegal restraint of trade.<sup>52</sup>

While the court's decision allowed the NFL's teams to continue to individually negotiate and sell their television rights with local broadcasting networks, the league was forced to return to Federal Court a few years later to try and overturn their own victory. In 1960, when the American Football League (AFL) was created, the individual teams of the AFL pooled their television rights together and sold the rights to all of their games to a single national television network (ABC) for \$1.6 million. The AFL then distributed the money evenly among all its teams. As a result, the AFL was able to compete for players against the more established NFL and in most cases outbid the NFL teams for the best players.

With the NFL losing all of the best young players to the new AFL, the NFL in 1961 pooled all of their television rights together and entered into a contract with CBS granting the network the exclusive right to televise all league games for a two year period. In exchange for the right to televise all NFL games, CBS agreed to pay the league \$4,650,000 annually.<sup>53</sup> Before the NFL could implement the new contract, however, it first sought a declaration from the courts that the new contract with CBS did not violate the court's 1953 decision.

The court, in ruling that the NFL's contract with CBS violated its' 1953 decision, noted that the new contract marked a basic change in how NFL teams sold their television rights. Up until this contract, each team individually negotiated and sold the television rights to its games. Under this contract, however, the teams have agreed among themselves and with the League, that each club will pool its television rights with those of all of the other clubs, and that only the resulting package of pooled television rights will be sold to a purchaser.<sup>54</sup> As a result, the court found that the teams and the league have eliminated competition among themselves in the sale of television rights to their games.<sup>55</sup>

Unable to enter into the new television contract with CBS by the court, the NFL immediately petitioned Congress for special legislation allowing it to pool its members' television rights. In support of their petition, the NFL argued that if it were not allowed to pool the league's television right and share all television revenues among the teams, the smaller market teams would be at a competitive disadvantage with larger market teams like New York and Los Angeles. Should these weaker teams be allowed to flounder, the league argued, there would be a real danger the league would become impaired and its continued operation imperiled.<sup>56</sup> As a result of the NFL's request, Congress passed the Sports Broadcast Act of 1961.<sup>57</sup>

## 5. Sports Broadcasting Act

The Sports Broadcast Act of 1961 states that:

The antitrust laws ... shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.<sup>58</sup>

By granting professional sports leagues a limited exemption from

antitrust laws to pool their television broadcast rights, the Sports Broadcast Act has allowed the leagues to negotiate single television packages to sell to the network. By pooling the television rights, the leagues have forced the networks into a continuous bidding process that has seen the value of all sports broadcasting rights increase. It should also be noted here that although the Sports Broadcast Act specifically only mentions the professional sports of football, baseball, basketball, and hockey, newer sports like professional soccer have pooled and sold their television broadcast rights too.

Professional sports are not the only sport organizations, however, that have had their broadcasting policies involving pooled rights challenged under Federal Antitrust law. For example, in *National Collegiate Athletic Association (NCAA) v. Board of Regents of the University of Oklahoma*<sup>59</sup> a group of colleges and universities challenged the television restrictions imposed by the NCAA on the number of college football games each school could play on television. Under the television restrictions, colleges and universities were prohibited from participating in more than two nationally broadcast football games during any single year, and no more than three over a two year period.<sup>60</sup> In finding that the NCAA's television policy acted to restrict the total number of college football games on television, the United States Supreme Court held that the NCAA rules constituted an unreasonable horizontal restraints that in violation of the Federal Antitrust laws.<sup>61</sup> As a result of the Supreme Court's decision, the number of college football games on television has increased dramatically. In addition, colleges and universities have been able to sell their television individually and as a league, without sharing the revenue with the NCAA or other NCAA member schools.

Besides granting the sports leagues a limited antitrust exemption, under Section 2, the Sports Broadcast Act excludes from the Act's immunity any joint agreement "which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home."<sup>62</sup> The purpose of Section 2, which was inserted on the recommendation of the Justice Department, was to codify the Federal Court's 1953 decision in *United States v. NFL* governing which games individual teams could blackout within their own home territories, when those teams were playing at home.

Since the NFL continued its' practice of blacking games in the local market when the teams were playing at home, Section 2 of the Sports Broadcast Act was subjected to numerous legal challenges,<sup>63</sup> as well as the source of further congressional action, over the next twenty years. As a result of the negative fan reaction, the NFL even though it won every challenge, started to voluntarily lift the local blackout of sold out Championship games.

Still not satisfied, Congress enacted legislation requiring the league to lift the local blackout of any pooled telecast if all the tickets available for purchase were sold seventy-two hours or more before the game started.<sup>64</sup> In enacting the legislation, Congress found that since the NFL main argument in support of blacking out games within the local market was to protect their gate revenue, once the games were sold out, there was no longer any need to black out the games. While Congress only enacted the legislation for a limited time, during which it would conduct a study of the legislations economic impact on the league, the NFL in 1975 voluntarily agreed to continue to televise all games sold out seventy-two hours before the event.

Another issue that has arisen under Section 2 of the Sports Broadcast Act is the scope of the blackout. For example, since the NFL defines a team's local market as a seventy-five mile radius around the stadium, what happens when a television station is outside the seventy-five mile radius, but its' broadcast signal is able to reach inside the home territory. That is exactly the issue the United States Eleventh Circuit Court of Appeals was asked to decide in *WTWV, Inc. v. NFL*.<sup>65</sup> If Section 2 only applied to stations physically located within the 75-mile radius, the court ruled that technological advances could completely undermine the purpose of the Sports Broadcasting Act. As a result, signal penetration, not station location, the Eleventh Circuit

52 *Id.* at 327.

53 *United States v. National Football League*, 196 F. Supp. 445 (1961).

54 *Id.*

55 *Id.*

56 S. REP. No. 1087, 87th Cong., 1st Sess. 2 (1961); H.R. REP. No. 1178, 87th Cong., 1st Sess. 2-3 (1961).

57 15 U.S.C. §§ 1291-95 (2006).

58 15 U.S.C. § 1291 (2006).

59 *National Collegiate Athletic Association v. Board of Regents*, 486 U.S. 85 (1984).

60 *Id.* at 90.

61 *Id.* at 107.

62 15 U.S.C. § 1292 (2006).

63 *Blaich v. National Football League*, 212 F. Supp. 319 (S.D.N.Y. 1962) (involving challenge to NFL's decision to blackout the 1962 league championship game in New York City).

64 47 U.S.C. § 331 (now expired).

65 *WTWV, Inc. v. National Football League*, 678 F.2d 142 (11th Cir. 1982).



held should determine which television stations are televising within club's home territory.<sup>66</sup> As technological advances in cable and satellite television transmission have improved over the past 25 years, the Eleventh Circuit Court's decision to apply Section 2 to any signal that can penetrate a team's home market has become increasingly important.

## 6. Limitations on Broadcast Rights

While the Sports Broadcast Act has given the professional sports leagues a limited exemption from the Federal Antitrust laws, because of cable television a other technology advances, sports teams and leagues still face a number of limitations in controlling their broadcasting rights.

### 6.1. Royalty Payments for Retransmission

One of the biggest limitations placed upon the team's control of its broadcasting rights involves the retransmission of their games by cable systems. For example, in sports like baseball, basketball, or hockey where broadcasting revenues account for approximately half of each club's local revenues, each team has the right to grant local television the networks the exclusive broadcasting rights of their games in their local markets. However, even though a large part of the teams broadcasting revenues come from their local television contract,<sup>67</sup> the clubs do not have the right to control the secondary transmission of the broadcasts by cable systems outside of their local markets. The clubs lost that right under the Copyright Act of 1976, which provides cable systems with a compulsory license to retransmit whatever television programming is authorized by the rules of the FCC.<sup>68</sup> The cable systems are allowed to retransmit a team's games without even negotiating for the right or paying royalties directly to the team. The only obligation the cable systems have when retransmit a team's game is that they must on a semiannual basis, deposit a royalty fees with the Copyright Royalty Tribunal.<sup>69</sup>

The right of cable systems to retransmit broadcasts was also recognized by the United States Second Circuit Court of Appeals for the in *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*<sup>70</sup> Eastern Microwave (EMI), was a common carrier that transmitted signals from broadcast networks to cable television systems. The cable system, in turn, retransmits the signal to its subscribers' televisions.<sup>71</sup>

Doubleday Sports, Inc., the owner of the New York Mets, had a contract with WOR-TV in New York to broadcast approximately 100 Mets games per season. WOR-TV also had a long-standing relationship with EMI, which allow EMI to retransmit WOR-TV's signal. The Mets, however, believed that EMI was free loading off its copyright and wanted EMI to pay it a royalty fee for the retransmission of their games on cable. In particular, the Mets claimed that EMI's retransmission of Mets games constituted copyright infringement.

As a result, EMI went to court seeking a declaratory judgment that it was a passive carrier exempt from copyright liability under 17 U.S.C. § 111(a)(3) of the Copyright Act as a common carrier.<sup>72</sup>

In rejecting the position of Doubleday Sports, the Second Circuit relied on Section 17 U.S.C. § 111(a)(3) of the Federal Copyright Laws, which states that:

[t]he secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if - (3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, that the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; . . .<sup>73</sup>

In finding that EMI did not violate Doubleday's exclusive right to display its copyrighted work by passively retransmitting the entirety of

WOR-TV's broadcast signal to its customer, the Second Circuit held that the services clearly fall within the exemption provided for in 17 U.S.C. § 111(a)(3).<sup>74</sup>

In writing the Copyright Act, Congress drew a careful balance between the rights of copyright owners and those of cable systems like EMI, providing for payments to the former and a compulsory licensing program to insure that the latter could continue bringing a diversity of broadcasted signals to their subscribers.<sup>75</sup> If the courts were to grant Doubleday's request, the Second Circuit found that EMI and other cable systems would be forced to negotiate with and pay all copyright owners for the right to retransmit their works. Assuming such requirement were not impossible to meet, the Second Circuit held that such an action would produce a result never intended by Congress, namely a substantially increased royalty payment to copyright owners with no increase in number of viewers.<sup>76</sup>

In addition, the Second Circuit noted that Congress had already established a specific scheme for recognition of the rights of copyright owners.<sup>77</sup> Under the scheme, which is outlined in the Copyright Act, television broadcast stations like WOR-TV must pay license or royalty fee directly to copyright owners like Doubleday, while cable systems like EMI pay license fees under their compulsory licenses to the United States Copyright Office in accord with formulae provided in the Copyright Act.<sup>78</sup> The fees paid by EMI and other cable systems are then distributed to copyright owners like Doubleday by the Copyright Royalty Tribunal (Tribunal).<sup>79</sup> The Congressional scheme thus provided for compensation from CATV systems to copyright owners measured by the number of cable viewers or potential viewers, and placed the responsibility for payment of that compensation on the CATV systems.

### 6.2. Contractual or League Restrictions

In addition to royalty payments, professional sports teams and leagues have also challenged the distribution of copyrighted programs to cable system operators under the theory of contractual exclusivity. For example, in *ABC Sports, Inc. v. Atlanta National League Baseball Club, Inc.*,<sup>80</sup> the American Broadcasting Company (ABC) and Major League Baseball challenged the right of the Atlanta Braves and its commonly owned flagship television station WTBS, located in Atlanta, to televise the 1982 League Championship Series (LCS).<sup>81</sup> Under the then-existing contract between ABC and Major League Baseball, even though ABC owned the exclusive nationwide rights to televise the 1982 League Championship Series (LCS), each team participating in the LCS the right to televise their playoff games over their local flagship stations. In the case of the Atlanta Braves, their flagship television station WTBS, a superstation carried by cable systems throughout the country and watched by more than 25 million households.

Since the contract was negotiated before creation of superstations, ABC and Major League Baseball filed a lawsuit seeking to prevent WTBS from broadcasting the LCS. In support of its' motion, ABC and Major League Baseball claimed that if WTBS was allowed to telecast the game to millions of cable subscribers nationwide it would violate ABC's contractual exclusivity. The case was settled before a decision was rendered by the court.

The biggest case involving superstations and the right of teams and leagues to control and disseminate their games is *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*.<sup>82</sup> In the early 1990s, the NBA, acting through its Board of Governors, sought to limit the number of games NBA teams could broadcast over super-

66 *Id.* at 146.

67 Jeff Friedman, *The Impact of Major League Baseball's Local Television Contracts*, 10 SPORTS LAWYERS JOURNAL 1 - 43 (2003).

68 17 U.S.C. § 111(c)-(d) (Supp. V 1982).

69 17 U.S.C. § 111(d)(1) (2006).

70 *Eastern Microwave, Inc. v. Doubleday Sports*, 691 F.2d 125 (2d Cir. 1982).

71 *Id.* at 126.

72 *Id.* at 126.

73 17 U.S.C. § 111(a)(3) (2006).

74 *Eastern Microwave, Inc. v. Doubleday Sports*, 691 F.2d 125, 133 (2d Cir. 1982).

75 *Id.* at 132.

76 *Id.*

77 *Id.* at 133.

78 17 U.S.C. § 111(d)(2)(B).

79 17 U.S.C. § 111(d)(5).

80 *ABC Sports, Inc. v. Atlanta National League Baseball Club, Inc.*, No. 82 Civ. 6104 (S.D.N.Y. Oct. 4, 1982).

81 *Id.*

stations from 25 to 20. In reducing the number of games carried by superstations, the NBA was trying to protect the value of its teams' local television contracts. In particular, the league was worried that the popularity of Michael Jordan and the Chicago Bulls might cause people in NBA markets outside of Chicago to watch the Bulls play on television instead of their own local team. If this happened, local television revenues would go down for every team in the league except Chicago.

The Chicago Professional Sports Limited Partnership, owners of the Chicago Bulls, and WGN Continental Broadcasting Co. (WGN), a superstation in Chicago, to whom the Bulls had licensed 25 Bulls games for the season, sought to enjoin the league from enforcing the new 20-game rule. The Bulls not only challenged the new 20 game rule as a restraint of trade, but they claimed they had the right to broadcast all 41 of their home games over WGN television.<sup>83</sup>

Claiming that the league had the right to fix the number of games its' team played on a superstation based on the Sports Broadcasting Act, the NBA in 1993 signed a contract that transfers all broadcast rights to the NBC. Since NBC, however, only wanted to broadcast 26 games during the regular season, the network transferred back to every team the right to broadcast all 82 of its regular-season games (41 over the air, 41 on cable), unless NBC wanted to broadcast a given contest. In addition, the NBA-NBC contract allowed the league to broadcast 85 games per year on superstations. The NBA entered into a contract with the Turner stations (TBS and TNT) for 70 games, leaving only 15 potentially available for WGN to license from the league.

While the case was settled before a final decision was handed down, the United States Seventh Circuit Court of Appeals did reach the following conclusions. First, that when acting in the broadcast market the NBA was closer to a single firm than to a group of independent firms. This is important, because as a single firm, the NBA would be analyzed only under § 2 of the Sherman Antitrust Act and would only be found guilty of violating Federal Antitrust laws if it could be shown that the NBA possessed monopoly power in the relevant market, and that its exercise of this power had injured consumers.<sup>84</sup>

Second, while considering whether the Sports Broadcasting Act's exemption applied to cable broadcasting, the Seventh Circuit, reaffirming the district court's findings, found that the Sports Broadcasting Act only applied to free commercial television and not subscription television.<sup>85</sup> As a result, the Seventh Circuit concluded that the NBA can not prevent individual teams from selling their television rights to games that were not included in the national package. In addition, the Seventh Circuit, in sending the case back to the lower court, ruled that the NBA did not have the right to limit the number of games teams are allowed to telecast on superstations, even though games broadcast on a superstation might compete with the national broadcasting package.<sup>86</sup>

### 6.3. Home Satellite Systems

Another issue that teams and leagues have been forced to address is the unauthorized interception and rebroadcast of their satellite transmissions. This has been an especially serious problem in professional

football because of the NFL's 72 hour blackout rule. Under the NFL's "Blackout Rule," any game not sold out within 72 hours of its start is blacked out within a 75 miles radius of the home stadium. As mentioned in a previous section, the reasoning behind the rule is the protection of home gate receipts.

However, since the network broadcasters use satellites to send the images of the game to those television stations outside the area, viewers within a team's home territory have routinely been able to intercept the game's satellite transmission. While intercepting the game's satellite transmission for private viewing in an individual's home is fine as long as there is no "direct charge made to see or hear the transmission"<sup>87</sup> and the "transmission thus received is [not] further transmitted to the public."<sup>88</sup>

The problem, however, is not with the private homes, but with the bars and restaurants within a team's home territory that intercept the game's satellite signal and show it to its customers. Such public broadcasts violate both Section 605 of the Communications Act of 1934<sup>89</sup> and Federal Copyright law.<sup>90</sup> A good example of how the courts have handled such retransmissions is *National Football League v. Rondor*.<sup>91</sup> In 1993, the NFL and one of its' teams, the Cleveland Browns, sued a number of bars and restaurants in the Cleveland area for copyright infringement. The NFL and the Browns argued that the bars and restaurants violated their copyright by using satellite dishes, special antenna, or any other equipment or device not of a kind commonly used in private homes to broadcast blacked out Browns games within the local Cleveland market.<sup>92</sup>

While acknowledging that they televised the games, the bars and restaurants claimed that such broadcasts fell within the "home system" exemption to the Copyright Act. The home system exemption provides in relevant part that there is no infringement where reception is made "on a single receiving apparatus of a kind commonly used in private homes."<sup>93</sup>

In reviewing the legislative history behind the home system exemption, the court found that Congress intended to exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment. Congress, however, did not intend to exempt from liability those proprietors who had commercial systems installed or converted a standard home receiving apparatus into the equivalent of a commercial system.<sup>94</sup>

In the present case, the court concluded that the antenna systems used by each of the bars and restaurants was much larger than the "common" antenna used in private homes.<sup>95</sup> Therefore, even though the bars and restaurants had clearly established that the equipment they used to receive the blacked-out games was of a kind commonly available for use in private homes, the court still rejected their home system claim. Section 110(5) of the Copyright Act, the court held requires that the bars and restaurants show that the equipment is "of a kind commonly used, not available for use, in private homes."<sup>96</sup>

## 7. Future media Issues

As sports leagues continue to look to increase revenues beyond traditional gate, sponsorship and network and cable television, the following are just some of the areas in which they will be seeking to expand their traditional revenue base.

### 7.1. Regional Sports Network

Historically, there has always been a close relationship between professional and college sports teams, which play the games, and the media and broadcasting companies that broadcast the events. As rights fees have skyrocketed, however, television and cable companies came to the realization that if they purchased the teams, they could own the entire inventory of games and events. A good example of this type of vertical integration is Cablevision in New York. Cablevision is the only large cable operator in the greater New York metropolitan area with over 3 million subscribers. In addition to owning the cable distribution system, Cablevision also had a controlling interest in two regional sports networks: the Madison Square Garden Network and Fox Sports New York. To ensure a steady supply of programming for

<sup>82</sup> *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. NBA*, 95 F.3d 593 (7th Cir. 1996), rev'd 874 F. Supp. 844 (N.D. Ill. 1995); *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. NBA*, 961 F.2d 667 (7th Cir. 1992), aff'd 754 F. Supp. 1336 (N.D. Ill. 1991); *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. NBA*, 808 F. Supp. 646 (N.D. Ill. 1992).

<sup>83</sup> *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company v. National Basketball Association*, 754 F. Supp. 1336 (1991).

<sup>84</sup> *Chicago Professional Sports Limited*

*Partnership and WGN Continental Broadcasting Company v. National Basketball Association*, 95 F.3d 593 (7th Cir. 1996).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 667.

<sup>87</sup> 17 U.S.C. § 110(5)(a) (2006).

<sup>88</sup> 17 U.S.C. § 110(5)(b) (2006).

<sup>89</sup> 47 U.S.C. § 605 (2006).

<sup>90</sup> 17 U.S.C. §§ 101 - 1332 (2006).

<sup>91</sup> *National Football League v. Rondor*, 840 F. Supp. 1160 (1993).

<sup>92</sup> 17 U.S.C. §102 (2006).

<sup>93</sup> 17 U.S.C. §110 (5)(b) (2006).

<sup>94</sup> *National Football League v. Rondor*, 840 F. Supp. 1160 (1993).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1170

its regional sports networks and cable distribution system, Cablevision also purchased the New York Knicks of the NBA and the New York Rangers of the NHL. In addition, it entered into contracts with the New York Yankees and New York Mets of MLB, the New Jersey Devils of the NHL and the New Jersey Nets of the NBA. As a result, Cablevision through the Madison Square Garden Network and Fox Sports New York had broadcast contracts to carry all the professional sport in the New York area.<sup>97</sup>

While these regional sports network are still usually owned by the media companies, there has been a shift by some high profile teams to create their own regional sports network, either by itself or in alliance with others. The best and most successful example of these new media companies is the Yankees Entertainment and Sports (YES) Network. In an effort to maximize revenue, and control the distribution and production of their broadcasts, the New York Yankees launched their own regional sports network in 2001 when their contract with Madison Square Garden Network expired. The YES Network then purchased the local broadcast rights to, among others, New York Yankees baseball games, the New Jersey Devils NHL games and the New Jersey Nets NBA games.

The network however got off to a rough start when negotiations between Cablevision, the owners of the Yankees old broadcasting partner Madison Square Garden Network, and the new YES network broke down over two major issues. The first issue involved the tier of service on which YES would be offered to Cablevision subscribers. Cablevision wanted to offer YES as a "premium" channel, instead of carrying it on an expanded basis package. If offered as a premium channel, subscribers would have had to pay an addition price for the YES network, which would have made it more expensive compared to the Madison Square Garden Network and Fox Sports New York. Cablevision offered both Madison Square Garden Network and Fox Sports New York as part of their expanded basis package.<sup>98</sup> The second dispute involved the price to be paid by Cablevision to YES. The YES network believed that the price Cablevision was offering was not equal to its market value.<sup>99</sup>

Unable to reach an agreement on these issues YES filed suit, claiming that Cablevision was using its status as a "vertically integrated multichannel video programming distributor to protect its monopoly over local sports programming by refusing to grant YES Network carriage on its system on nondiscriminatory terms such as those terms and conditions available to its affiliates."<sup>100</sup>

Two sides eventually reached an agreement on the two issues, whereby Cablevision agreed to pay YES market value and added YES to its expanded basis package. The new YES network has generated millions of dollars of addition revenue opportunities for the New York Yankees. As a result of the success of the YES network, more and more teams are exploring the option of creating their own regional sports network with other teams in other sports within the same local markets.

## 7.2. Pay-Per-View (PPV) & League Channels

Pay-per-view (PPV) events have almost been associated exclusively with professional boxing. For example, in May 2007, the Oscar De-La Hoya fight against Floyd Mayweather was projected to be watched by over a million buyers at \$54.95.<sup>101</sup> However, while boxing has been televising their championship fights on a pay per view basis for a number of years, other professional sports leagues have been slow to

follow the migration from free television to PPV. Over the last few years, however, that seems to be changing as more and more professional and college sports leagues have begun to explore the various PPV options.

One option being developed is the single sport channel, such as the NFL Network, and NBA TV. While the ultimate goal of the leagues is to get these channels on an extended basis cable package, in which they would receive a per-subscriber fee, right now most of the single sport channels are on premium sports tier packages.<sup>102</sup> As a result, in order for fans to watch the channels, which broadcast games, news and game highlights 24 hours a day, seven days a week. They have to pay an addition subscription fee. In addition to professional sport leagues, college and universities are also exploring the idea of creating their own sports networks. For example, the Big Ten Network which will begin broadcasting college athletic events in 2007 is being closely watched by other college and universities sports conferences who are seeking ways to increase their revenue from sport broadcasting.<sup>103</sup>

Another PPV option, which is being explored, allows individuals or bars throughout the country access to all out-of-market leagues games. For example, if you purchased the NFL Sunday Ticket package, you would be able to watch all the NFL games during the entire season, even if those games were blacked out in your local market. Whereas the NHL Center Ice package gives viewers access to up to 40 out-of-market NHL games a week, plus Premiere Canadian matchups and select games from the first two rounds of the Stanley Cup Playoffs.

As a result of the migration of professional sports into PPV, their revenue through pay-per-view (PPV) contracts have increased dramatically from a humble \$ 435 million in 1991 to \$ 3 billion in 2000.<sup>104</sup> It should be noted that there are some dangers to moving more and more events to pay per view. First, as boxing has demonstrated, the more events you move to PPV, the more difficult it is to attract and cultivate new fans. Since moving all major championship fights to PPV, boxing has found it difficult for the public and casual fan to identify with and follow individual fighters.

In addition, professional sports leagues need to be careful that they do not move some many games and events to PPV, especially major championships like the Super Bowl and World Series, that Congress is pressured to intervene by revoking the Sports Broadcasting Act and the leagues' limited antitrust exemption. In fact, in 1994 the FCC, at the request of Congress, conducted an examination of the migration of sports programming from broadcast television to a subscription medium (i.e., any type in which the viewer pays a fee).<sup>105</sup> While the FCC concluded at that time, that there had not been significant migration of sports programming from broadcast to subscription television,<sup>106</sup> leagues and teams need to be careful that they do not take too many events off free television.

The migration of sports to PPV has not gone unchallenged either. For example, in *Shaw v. Dallas Cowboys Football Club, Ltd.*,<sup>107</sup> a group of fans filed a class action lawsuit against the NFL claiming that the NFL's satellite programming package "NFL Sunday Ticket" violated Section 1 of the Sherman Antitrust Act by reducing competition and artificially raising prices by restricting the options available for non-network broadcasts of NFL games.<sup>108</sup> In ruling that the subscription satellite broadcast of NFL games does not fall within the Sports Broadcasting Act exemption, the United States Third Circuit Court of Appeals held that the "NFL Sunday Ticket" could be challenged under federal antitrust laws.<sup>109</sup> As the court noted, the Sports Broadcasting Act only exempts commercially sponsored free broadcast from antitrust scrutiny, not subscription satellite packages.

A second class action lawsuit, this time filed against the NBA and challenging the validity of the league's "NBA League Pass" is *Kingray, Inc. v. NBA*.<sup>110</sup> In *Kingray*, the court again examined whether the practice of selling subscription satellite packages violated of the Sherman Act.<sup>111</sup> In particular, the court was asked to determine whether the contract between the NBA and DirecTV not only constituted an illegal price-fixing scheme, but also restricted the output of live broadcasts in violation of Federal antitrust laws.<sup>112</sup> Finding

97 *Yankees Entertainment and Sports Network v. Cablevision*, 224 F. Supp. 2d 657 (2002).

98 *Id.*

99 *Id.*

100 *Id.* at 664.

101 John Ourand, *De La Hoya to be biggest hit in pay-per-view history*, Street & Smith Sports Business Journal, April 30 - May 6, 2007, at 12.

102 Eric Fisher & John Ourand, *DirecTV talks binge on MLB net*, Street & Smith Sports Business Journal, January 29 - February 4, 2007, at 1.

103 Michael Smith & John Ourand, *SEC*

*will look to Big Ten Net for a signal*, Street & Smith Sports Business Journal, April 30 - May 6, 2007, at 1.

104 Ronald Cass, et al., *The Future of Sports Television*, 14 FORDHAM INTELLECTUAL PROPERTY, MEDIA AND ENTERTAINMENT LAW JOURNAL 645 - 694 (2004).

105 *Inquiry into Sports Programming Migration*, 9 FCC Rcd. 3440 (1994).

106 *Id.*

107 *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299 (3d Cir. 1999).

108 *Id.*

109 *Id.* at 302.

insufficient evidence to support any of the claims, the court ruled that the “NBA League Pass” did not violate Federal antitrust law.<sup>113</sup>

### 7.3. Internet

Another media outlet that has transformed the way individuals watch sport is the Internet. The internet has allowed fans can keep up to the minute tabs on their favorite teams, with instant real time information and scores. Professional sports leagues have been able to cash in on the Internet via subscription-based services. For example, for a one time subscription fee, the NBA will stream live video onto your computer. The NBA League Pass package, which costs subscribers \$179, offers subscribers access to 40 regular-season NBA games each week, both online and through cable or satellite. The NBA is not the only league trying to expand its online offerings. For years, MLB has been selling Internet packages of live games. In addition, the NFL has also launched a service with Yahoo to show games live on computers outside North America.

In order to preserve their lucrative television deals and ensure that fans still watch the games on television, the leagues employ special technologies that can pinpoint an individual’s location by checking a computer’s Internet address and blocking those games on television in the provider’s location.

### 7.4. Satellite Radio

Another media market professional sports clubs and leagues have exploited to generate new revenue is satellite radio. The benefit of satellite radio is that it allows listeners the opportunity to follow their home teams even when they are traveling outside of the teams’ local home market. Currently in the United States there are two satellite radio stations: XM and Sirius, which have 13 million subscribers.

In building a listener base, and trying to attract advertisers, both stations have actively sought out various professional sports leagues. For example, Sirius has contracts for hundreds of millions of dollars with the NFL, NBA, NHL and the NCAA, while XM has contracts with MLB for 11 years, \$650 million, and with the NHL for 10 years, \$100 million.<sup>114</sup>

If a proposed merger between the two satellite radio providers is approved, however, the sports leagues would lose most of their bargaining leverage. Since the merger would eliminate all competition for sport programming, professional leagues it could potentially lose hundreds of millions of dollars in rights fees and advertising revenue. As a result, if the proposed merger is approved, professional sports leagues might decide to purchase their own satellite broadcast company.

### 7.5. Mobile Phones & other Hand Held Wireless Devices

One final area where the evolution of this technology is likely to change how the leagues and teams broadcast their sports is mobile phones and other wireless devices. A good example of this is the NBA’s new contract with ESPN, ABC and TNT. The deal which is worth \$7.4 billion over eight-years increased the NBA television revenue even though the 2007 N.B.A. Finals and a postseason saw the number of views reduced for all the networks.<sup>115</sup>

The reason the networks were willing to keep the NBA on television, and actually increase the rights fee paid to the league was the fact that the new contract included the leagues digital rights, including Internet, broadband, mobile and video-on-demand. Under the new deal, television networks will, among other things be allowed to simulcast games on their broadband and mobile outlets. In addition,

the new agreements are flexible enough to extend rights to technologies that are developed through 2016.

A couple examples of how important a revenue stream the NBA and television networks consider mobile phones and other wireless devices is that during the 2007 NBA Playoffs, ESPN.com generated 1.1 million unique visitors to view N.B.A. content and 700,000 wireless users. During the season, 32 million N.B.A. video streams were viewed on ESPN.com.<sup>116</sup> While this number is small compared to the 88 million total viewers who watched the playoffs on TNT, the leagues and networks believe the digital rights for mobile phones and other wireless devices are going to be a key asset in the future.<sup>117</sup>

A second example of how valuable the leagues consider the transmission of game data via mobile phones and other wireless devices, and how far they will go to protect those rights, is National Basketball Association and NBA Properties, Inc. v. Motorola.<sup>118</sup> In 1996, Motorola developed and sold handheld pager which displays updated information of professional basketball games in progress. The product, which was much like a mobile phone, displayed various information on NBA games in progress, such as the teams playing; score; the team in possession of the ball; and time remaining in the quarter. The information was updated every two to three minutes, and more frequently near the end of the first half and the end of the game. The device, however, had a lag of approximately two or three minutes between events in the game itself and when the information appears on the pager screen.

In an effort to stop Motorola from transmitting the scores or other data via the pagers, the National Basketball Association and NBA Properties, Inc. filed a lawsuit claiming that Motorola had unlawfully misappropriated NBA’s property by transmitting real-time NBA game scores and statistics taken from television and radio broadcasts of games in progress. The district court<sup>119</sup> agreed with the NBA and granted an injunction against Motorola. The Second Circuit Court of Appeals, however, reversed the decision on the misappropriation claim and vacated the injunction. In particular, the Second Circuit held that Motorola’s transmission of “real-time” NBA game scores and information tabulated from television and radio broadcasts of games in progress did not constitute a misappropriation of hot news that is the property of the NBA.

## 8. Conclusion

In concluding, it is important to note that since 1961, when the United States Congress passed the Sports Broadcast Act, the communications industry has undergone and is still undergoing a dramatic revolution. As advances in cable, satellite, the Internet and pay-per-view technological, have changed the marketplace, consumers are now have ability to watch sports from around the globe 24 hours a day. Team and league owners, however, need to be careful that while they look for new ways to generate money by moving their sports off free television to cable, pay-per-view and the internet, they do not create a backlash in Congress. As noted above, in 2007, the United States Congress was already being pressured to look into Major League Baseball’s attempt to move certain games off cable and on to pay-per-view. If professional and college sports continue to take their games and events off free television, Congress might be forced to revoke the Sport Broadcasting Act. Such an action could have a catastrophic impact of professional sports leagues. For example, if the leagues were no longer able to pool the broadcasting rights of all their teams, the teams from smaller media markets would all of a sudden find it very difficult to compete financially with those teams from the larger media markets. Unable to attract and pay the best players, the competitive balance of the league could erode, causing not only the weaker teams to fail, but eventually the entire whole league.

110 *Kingray, Inc. v. NBA*, 188 F. Supp. 2d 1177 (S.D. Cal. 2002).

111 *Id.* at 1188.

112 *Id.*

113 *Id.* at 1200.

114 John Ourand, *XM-Sirius merger could cost leagues*, Street & Smith Sports Business Journal, February 26 - March 4, 2007, at 3.

115 Richard Sandimir, *N.B.A. Renews TV Pacts, Adding Links to Digital Use*, New York Times, June 28, 2007, at D2.

116 Richard Sandimir, *N.B.A. Renews TV Pacts, Adding Links to Digital Use*, New York Times, June 28, 2007, at D2.

117 Richard Sandimir, *N.B.A. Renews TV Pacts, Adding Links to Digital Use*, New York Times, June 28, 2007, at D2.

118 National Basketball Association and NBA Properties, Inc. v. Motorola, 105 F.3d 841 (2nd Cir. 1997).

119 *NBA v. Sports Team Analysis & Tracking Systems*, 939 F. Supp. 1071 (1996)

# Sports Broadcasting Rights in India

by Vidushpat Singhania\*

## Introduction

Cricket is the most popular sport in India, far more popular than other sports like hockey, football and tennis, with some people even considering cricket at par with their religion. With the Indian population standing today over a billion, of whom the majority are ardent supporters of the Indian cricket team, it makes for a lucrative business proposition to be involved with the multi-million dollar industry of cricket in India. Thus begins the whole saga of the private broadcasters race to get a pie of the industry and at the top is the Board of Cricket Control of India (BCCI), the sole association regulating cricket and this multi-million dollar industry.

In this article I will attempt to discuss the current problems being faced in sports broadcasting in India, with the main emphasis being on the current broadcasting row where the parties involved include the BCCI, Nimbus sports broadcast, promoted by Nimbus communications, ESPN Star sports, Prasar Bharati<sup>1</sup>, being the national broadcaster, Zee networks and Ten Sports.

The role of the government through the passing of the Sports Broadcasting Signal Bill (hereafter referred to as the 'The Bill') in the Lok Sabha (National Parliament) on the 8<sup>TH</sup> of March, 2007, will also be enunciated with its impact on the 'broadcasters'<sup>2</sup>, the BCCI and the "common man" (aam aadmi)<sup>3</sup>. It will also be discussed whether the government is justified in putting into ambit all cricket games to be of national importance without any specific criteria classifying them, in order to remove the ambiguity involved with it, or whether they should follow a more systematic approach. The provisions of the European Council's Television Without Frontier Directive will also be discussed, while comparing it to the Bill.

## Background

The potential of the broadcasting and the advertising of the Indian cricket industry cannot be accurately estimated. With the Indian (national team) cricket matches contributing 70% to 80% of the revenue generated<sup>4</sup>, the importance of the sports broadcasting rights becomes even greater. The rights to the International Cricket Council (ICC) organized events like the World Cup, the Champions trophy etc are regulated by the ICC through the various rules and legislations.<sup>5</sup>

With the advent of privately owned broadcasting companies, there has been an influx of more companies into this sphere of sports broadcasting, which was previously dominated by the national broadcasters who had a monopoly. However there is increasing demand by

the people for these sporting events, for which the supply is limited since in a country like India, where cricket is the most popular sport, there is a great demand for the game, however the national team can only play a limited number of matches, and therefore the supply for the same cannot be increased, as the demand<sup>6</sup>. Thus the broadcasters seek acquisition of exclusive sports rights as a method of gaining a viable market share.

In 2004, Zee acquired the rights to broadcast by bidding at \$260 million, which was further increased by Zee to better the offer being made by a competitive company. Zee even agreed to pay a deposit of \$20 million as a part of the deal. In the end the total worth that Zee was paying to the BCCI was estimated at \$308 million. After the meeting in order to finalize the contract, on the basis of the renegotiated price, BCCI returned the deposit paid by Zee, stating that they were not bound by the letter of intent, as there was no concluded contract between them and Zee. Thus Zee alleged that their fundamental rights were violated and initially sued BCCI under Article 32 of the Constitution for a writ of 'mandamus'<sup>7</sup>. However the Supreme Court observed that BCCI was not a state organ under Article 12 of the Constitution, thus a writ under Article 32 did not lay against them. However the Court also observed that if any rights of a person were violated by such an association, then a person could file a petition under Article 226 of the Constitution, which conferred wider powers to the High Courts in India.<sup>8</sup> The Madras High Court further dismissed the appeal of Zee stating that there was no valid contract between them and BCCI, thus they had no right under either a statute or a contract to sue BCCI.<sup>9</sup>

Zee after the previous litigation with BCCI, this time signed a contract with BCCI in 2006 for cricket rights to broadcast 25 One Day Internationals (ODI's) to be played by India in offshore non-ICC venues, for a sum of \$219 million (Rs. 89,10,849)<sup>10</sup>. This contract with BCCI failed on the 31<sup>ST</sup> May 2007, after the passing of 'The Sports Broadcasting Signal Bill' since Zee contended that an essential condition of the contract was the exclusivity of the broadcasting rights which were no longer guaranteed with the passing of the Bill which made it mandatory for them to share their feed with Prasar Bharati. Thus they called for the re-negotiation of the whole contract, which they alleged had taken place in the case of Nimbus who had initially signed a deal for \$619,000 (Rs. 2,52,05,799), which after the passing of the Bill was renegotiated and slashed by 12%<sup>11</sup>.

Similarly after the passing of the Bill Nimbus withdrew from the rights to the Afro-Asia games on the 30th May 2007, after paying an amount of \$12 million for the three editions of the games to be played in 2005<sup>12</sup>. Even Zee TV failed to pay an advance in compliance with its earlier contract and thus rescinded the contract on the 31th May 2007. After this ESPN Star sports moved in to buy the rights for the Afro-Asia game and Nimbus bought the rights for the games to be played by India in Ireland in June and July 2007.

In the recent pass an article was carried in the Hindustan Times stating that the broadcast of the live matches would also be available on the DTH network, since they relayed the DD channel of Prasar Bharati, which in turn is carrying live feed of the game. Though BCCI has written a letter addressing the issue, the matter is still pending before the High Court. The Bombay High Court's decision dated 2nd July 2007, has dismissed the appeal of BCCI and Nimbus to issue a stay of private Direct To Home (DTH) companies transmitting Doordarshans' live feed of the Future Cup, without subscribing to the Neo sports, the Nimbus's channel. The Court has held in appeal that the said issue is scheduled to be heard on the 27th August 2007, thus the judges will not interfere in the process.<sup>13</sup>

Thus in the given circumstances, the whole question of BCCI selling broadcasting rights becomes a myth, since the right owners lose any competitive chance to earn any revenue from selling the rights of the game. In the given circumstances a question that can be raised is:

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1 Section 2(i) (m) 'The Sports Broadcasting Signal Bill, 2007'.  
2 Section 2(i) (a) 'The Sports Broadcasting Signal Bill, 2007'.  
3 Free Translation.  
4 [www.cricketnetwork.co.uk./main/s119/st67405.htm](http://www.cricketnetwork.co.uk./main/s119/st67405.htm).  
5 For the 2007 Cricket world cup, the ICC came up with the 'Sunset legislation' which governed the various rights like the marketing, broadcasting, sponsorship etc. This legislation was ratified by all the Caribbean countries hosting the World Cup for the period of duration of the event.  
6 On inelasticity of demand for major events see Comm. Dec.2000/400 Eurovision OJ 2000 L151/18 (annulled,

but not on the point of market definition, in cases T-185/00 et al M6 and others v Commission[2002] ECR II-3805); Comm. Dec. 2000/12 1998 Football World Cup OJ 2000 L5/55.  
7 Mandamus means "We Command". It is an order from a superior court to a lower court or tribunal or public authority to perform an act, which falls within its duty.  
8 Zee Telefilm Ltd V Union of India & others 2005(1) SCALE 666.  
9 BCCI v Zee Telefilm Ltd, 2005(2) CTC 609.  
10 <http://www.indiantelevision.com/headlines/y2k7/may/may425.php>.  
11 [www.cricketnext.com/news/zee-cancels-bcci-broadcast-deal/25258-13.html](http://www.cricketnext.com/news/zee-cancels-bcci-broadcast-deal/25258-13.html).  
12 <http://content-uk.cricinfo.com/ci/content/story/296401.html>.  
13 Board of Cricket Control and Anr v. M/S Tata Sky Ltd. & others; Appl/572/2007/s/1791/2007.

should BCCI re-negotiate the broadcasting contracts with the private broadcasters. Secondly, with the exclusivity clause no longer present, will BCCI and cricket in general lose money which would further hamper the prospects of the players' careers?

Another development that has taken place recently and is very much in the limelight is the declaration by the CEO of Zee Networks, Mr. Subhash Chandra to start an independent cricket league to harness new talent. The proposed name for the league would be Indian Cricket League (ICL). The plan has however run into rough weather with BCCI opposing the league, advising players not to be a part of it. It is interesting to note that a similar problem had taken place in the 1970's in Australia where Mr. Kerry Packer wanted to buy the exclusive rights for test cricket, which were then presented to a non-commercial channel Australian Broadcasting Corporation (ABC). Because of his failure to obtain the rights he started a parallel cricket tournament the World Series Cricket (WSC). A similar plan is being undertaken in India by Mr. Subhash Chandra through the Indian Cricket League (ICL), due to his failure to get exclusive broadcasting rights. The outcome of the League and its legal position is still in conflict and yet to be determined.

### Indian legal scenario

In India the right to free speech and thus the freedom of press is guaranteed as a fundamental right under Article 19 (1) (a) of the Constitution. The right of broadcasting as a part of the fundamental rights of the citizens has long been settled by the Supreme Court. It has been held by the Supreme Court in the case of *Life Insurance Corporation v. Manubhai Shah*.

The freedom of speech and expression guaranteed to the citizens of India includes the right to propagate one's view through print media or through any other communication channel, e.g., radio and television.

Article 19 (1) (a) states that all citizens shall have the right of speech and expression. It is also explicitly written in the Constitution that such freedom is subject to restrictions only on grounds mentioned in Article 19(2). It states:

“(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”<sup>14</sup>

Thus as can be clearly seen from the provision of the Constitution, no state body can impose restrictions beyond what has been provided in the Constitution. It has however been held by the Supreme Court<sup>15</sup> that what is paramount is the right of the listeners and viewers and not the right of the broadcaster, whether the broadcaster is the state, a public corporation or a private individual or body.

Such a fundamental right is not infringed by the government through regulating broadcasting, since the government by regulating broadcasting is in no way inhibiting the freedom of speech of the people. It has been argued that like roadways, broadcasting frequencies are public domain, thus they have to be regulated in a certain way. It may even be said that they represent the material resources of the community within the meaning of Article 39(b):

‘[t]hat the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good.’

They can also be said to be ‘facilities’ within the ambit of Article 38 of the Constitution. Thus they must be employed in conformity with the provisions of the Constitution for the greater interest of the public. It is vital for the security of the state that certain frequencies be reserved for the protection and the integrity of the state like the ones reserved for the military and police. Thus it can be said that broadcasting cannot be fully privatized and opened just on the basis of market forces, because it would then threaten the security of the state.<sup>16</sup> Thus it has been held by the courts that though no single body or person is allowed to have a broadcasting monopoly, it is essential for the state to regulate such broadcasting through a statutory body and licensing.

Sports broadcasting falls within the meaning of the freedom of speech and expression. Thus the broadcasters have the right to broadcast events of their choice. The only restriction that can be placed upon them is based on Article 19 (2), but since they are using the resources of the community which do not belong to them in their individual capacity, their actions are to be regulated in case of the use of these resources by statutory bodies through licences.

Initially the broadcasting of radio and television was thought to be covered by the ambit of clause (1) of Section 3 of the Telegraph Act in the following words:

“‘Telegraph’ means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.”

Further, Section 4 of the Act regulates the privileges and powers of the government under the Act. The government after the decision of the Supreme Court<sup>17</sup> also established a statutory body Prasar Bharati under the Prasar Bharati (Broadcasting Corporation of India) Act, 1990, enacted on 15 September 1997. Also the sharing of sports feed was further regulated under the Downlinking Guidelines of 11 November 2005 and the Uplinking Guidelines of 2 December 2005. Now sports broadcasting in India is governed by the Sports Compulsory Broadcasting Bill, 2007.

Besides those for organizing and broadcasting a cricket match in India various other permissions like those from the Ministry of Human Resource, the Ministry of Home Affairs, the Ministry of Finance or the Central Board of Excise and Customs have also to be obtained.

### Status of BCCI

BCCI was originally a society registered on 28th November 1940 under the Central Legislation of the Societies Registration Act, 1860 at Madras. After the enactment of the Tamil Nadu Societies Registration Act 1975, the 1860 Act as far as it applied to Tamil Nadu was repealed. Under Section 53 of this Act BCCI stood registered. BCCI is a national recognized sports federation<sup>18</sup>, thus it has the authority to represent the interest of cricket in India.

It is clearly stated in the Supreme Court judgment that BCCI is a non-profit making organization which controls the officially organized game of cricket in India<sup>19</sup> and not a club. It was contended on behalf of BCCI and the Cricket Association of Bengal (CAB) that the main aim of these associations is to promote the game of cricket, to foster the spirit of sportsmanship and the ideals of cricket, and for imparting education through organizing and staging tournaments between the members of ICC or other organizations. It was also contended that the money generated by these associations is required to fund the traveling, boarding, lodging and other daily expenses of the participating cricketers and officials. A huge amount is also spent for organizing and publicizing the matches, similarly for the well being of cricket in India and the development of youth subsidies and grants are given to the members in order to facilitate them to maintain, develop and upgrade the infrastructure, to coach and train players and umpires and to pay them when the series and matches are played.

Thus, although it can be questioned that BCCI is a non-profit

<sup>14</sup> [http://lawmin.nic.in/legislative/Arttr-242%20\(1-88\).doc](http://lawmin.nic.in/legislative/Arttr-242%20(1-88).doc).

<sup>15</sup> Ministry of Information and Broadcasting, Government of India v Cricket Association of Bengal & others; AIR 1995 SC 1236.

<sup>16</sup> Eric Barendt in his book 'Broadcasting Law: A Comparative Study [1993 edition].

<sup>17</sup> Ministry of Information and

Broadcasting, Government of India v Cricket Association of Bengal & others; AIR 1995 SC 1236.

<sup>18</sup> <http://library.thinkquest.org/11372/data/addresses.htm>.

<sup>19</sup> Ministry of Information and Broadcasting, Government of India v Cricket Association of Bengal & others; AIR 1995 SC 1236.

organization, is it pertinent for it to sell its contracts commercially as a part of its functions. Will the selling of such contracts make BCCI an organization engaged in a profession? The Supreme Court has held the latter issue to be in the negative and has held, drawing an analogy with the press, that selling of rights is part of the functions of BCCI. However, since they involve resources owned by the community jointly, they need to be regulated. It is pertinent to note that besides promoting cricket at the international level, BCCI has to fund and give grants to various associations in India, in order to help them maintain the grounds, besides the salaries and wages of the ground staff, coaches and the players. It is thus a proposed argument that to promote cricket amongst the youth, providing them with facilities in par with the international standards and better wages to the cricketers at the domestic level, BCCI needs more money, the main source of which is the selling of the broadcasting rights. Thus with the various regulations, especially the introduction of the Sports Broadcasting Signal Bill, the power of BCCI to earn maximum revenue has been curtailed, due to mandatory sharing of the feed with Prasar Bharati.

It is however alleged by many, that BCCI has considerable financial resources which are being mismanaged. The Supreme Court has held that the accounts of BCCI can be scrutinized. Thus measures should be taken to impose such scrutiny on a regular basis and the autonomous BCCI could also distribute the money earned by the sale of the TV rights amongst its member state and district associations, thus providing the cash sapped associations with money and serving the game at the grass roots level.

### The Sports Broadcasting Signal Bill, 2007

The provisions of the Sports Broadcasting Signal Bill are discussed under the following headings:

- Events of national importance and the regulations around Europe; Direct-To-Home Broadcasting (DTH) and the Bombay High Court decision;
- Failure of the Bill to mention the rights on short reporting.

The most important question that comes to my mind is what can be classified as events of national importance under the Bill. Under Section 2 (1) (s):

“Sporting event of national importance’ means such national or international sporting events, held in India or abroad, as may be notified by the Central Government in the Official Gazette to be of national importance.”

The said provision fails to mention the criteria the Central Government will take into consideration in declaring a sporting event to be of national importance. The Bill leaves the declaration of such events to the arbitrary discretion of the Central Government. Section 6 of the Bill refers to the applicability of the provisions of the downlinking guidelines and the uplinking guidelines regarding the said issue. The said guidelines in Paragraph 5.1.1 include all cricket matches played by India and the semi-final and finals of all other international competitions. Thus a question that can be raised is: are all matches played by the Indian team of national importance, due to which the contractual rights of the broadcasters can be curtailed? Secondly, there is an ambiguity as to what the semi-finals and finals of international competition of cricket mean. Does it mean all series being played between the Full Members of ICC as well as the Associate members? If yes, then the question of such events being of national importance is in itself doubtful since I fail to understand what ‘national interest’ which is in itself an ambiguous term according to this Bill, do the Indian people have say e.g. in a Tri-series played between say England, South Africa and The Netherlands, apart from the interest

pertaining to that of entertainment. Secondly, if the greater interest of the viewers has to be taken into account then I fail to understand why the people living in India would be so interested in watching semi-finals and finals of second rung teams of the Associate Members of the ICC, not involving people of the national teams. Thus by leaving such a broad ambit, I believe that the government is continually transgressing on the contractual rights and the freedom of the private broadcasters. In order to remove such ambiguity from the Bill certain guidelines have to be laid down which give vent to the objectives that are to be achieved and which also should be wide enough to include future events. They should be expressly defined in order to help individuals and companies know of their rights in certainty before they enter into a contract in India in relation to such events.

The government itself in a notification number 603/1/2005-BC-III<sup>20</sup> dated 5 April 2006 has classified some national and international events, which in the eyes of the government are of national importance. This notification lays down events related to Tennis, Hockey, Football, Chess and Billiards and Snooker which will be classified as events of national importance. It also covers Summer and Winter Olympics, Asian Games, Commonwealth Games and Afro-Asian Games. But it fails to mention any cricketing event and the ambit of such an important sport of the country is left open.

We also have to discuss the shortcomings of the Bill in relation to what events can be classified as events of national importance in general and the criteria defining them. In order to bring out the ambiguity of the guidelines applicable under the Bill, we shall look further to similar laws in the world and how they have defined events of national importance and how such events are being regulated there.

In the European Union broadcasting activities are centric in Directive 89/552 to which further amendment has been made through Directive 97/36 (“Television without Frontiers”), which among other things provides for an insertion of a new Article 3a providing:

“Each Member State may take measures in accordance with the Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television”.<sup>21</sup>

The Explanatory Note to the Council of Europe’s convention on Trans-frontier Television reads regarding Article 9bis, paragraph 2(e) as follows:

“Events to which national measures apply must genuinely be of major importance for society in all or part of the relevant Party, which means that they should be outstanding events which are of interest to the general public of the geographical area covered by the Council of Europe or of a Party to the Convention or an important part of the population of a given Party to the Convention. Such events are, for example, the Olympic Games, the football World Cup and the European Football Championship. In general terms, on the basis of a case by case evaluation made in the light of the documentation provided by Parties, events may qualify as an event of major importance for society if at least two of the following conditions are met:

- the event and its outcome has a special general resonance in the relevant Party, not simply a significance to those who ordinarily follow the sport or activity concerned;
- the event has a generally recognized, distinct cultural importance for the population in the Party concerned and in particular contains elements of its cultural identity;
- it involves the national team in the sport concerned in a major international tournament;

the event has traditionally been broadcast on free television and has commanded large television audiences in the Party concerned.”<sup>22</sup>

Thus the Council of Europe has laid out certain guidelines for the Member States, in order to prepare a list as to what event can be list-

<sup>20</sup> <http://www.mib.nic.in/information/CODES/frames.htm>.

<sup>21</sup> European Council’s Directive relating to ‘the pursuit of television broadcasting

activities’. [http://europa.eu.int/lex/en/consleg/pdf/1989/en\\_1989Lo552\\_do\\_001.pdf](http://europa.eu.int/lex/en/consleg/pdf/1989/en_1989Lo552_do_001.pdf).

ed. It is important to note that sporting events such as the Olympics, the football World Cup and the European Football Championship have been included as a part of a definition and the scope is left open to include other events. Thus the broadcasters in the given scenario know of the listed events and other events that could fall into the purview of national importance, for which only free-to-air broadcasting rights can be acquired by them. This is taken into consideration by them during the acquisition of broadcasting rights.

In its ruling in *R v Independent Television Commission, ex parte TV Danmark I Ltd* the English House of Lords concluded that a member state in which a broadcaster is based is required to prevent the exercise by that broadcaster of exclusive rights in such a way that a substantial proportion of the population in another member state would be deprived of the possibility of watching a listed event on television.

Taking the national legislations into consideration, we can analyze the provisions of Dutch legislation. According to the Dutch laws the broadcasters under Article 71 t of the Media Act have to share their feed with NOS (the Dutch joint national broadcaster) guaranteeing access to information of the general public which it considers is necessary in the interest of democratic society. It is explicitly stated that the 'preferential right' was not intended to protect the interests of NOS; rather it was given to protect the interests of the Dutch public. However it is further classified as what events will be included in the list, which guarantees such exceptional rights to NOS. Under Article 72 of the Media Act:

- "2) An event may be placed on the list referred to under paragraph 1 if at least two of the following requirements are fulfilled:
- a. the event is of general interest to the Dutch society;
  - b. the event has special cultural meaning;
  - c. the event was already broadcast on free television in the past and could count on high ratings;
  - d. it is a major international sports event in which the national team participates."

Thus taking the above European and Dutch laws into consideration, and comparing them with the Sports Mandatory Broadcasting Bill, it can be stated that the Bill is similar to them in relation to sharing of feed with the national broadcasters, however where the Bill is lacking is its failure to mention criteria that have been laid down in Europe and the Dutch law, which serve as guidelines to the government for it to declare by notification events in the ambit of national importance. Both the Council of Europe and the Netherlands lay down four criteria in order to classify an event to be of national importance. Compared to these guidelines the Indian Sport Broadcasting Signal Bill only lays down a single criterion expressly, that is that it should be a major international sporting event with the participation of the national team. Guidelines fail as to how the government will decide events to be of national importance like that of general interest to the society, having a special cultural meaning to the people of the country or a simple criterion that such an event has been aired on Doordarshan (the public television channel) or the AIR (All India Radio) previously with high ratings. Thus the Bill leaves a lot to the arbitrary discretion of the Central Government through the Information and Broadcasting Ministry.

The second question under consideration is the meaning of DTH under this Bill and what exactly is Prasar Bharati's DTH. DTH is defined in Section 2 (1) (j) of the Bill as follows:

"Direct-To-Home (DTH) broadcasting service' means a service for multi-channel distribution of programmes direct to a subscriber's premises without passing through an intermediary such as a cable operator by uplinking to a satellite system."

22 Article 9bis, paragraph 2(e), Explanatory note: 'European Convention on Transfrontier Television'; <http://conventions.coe.int/Treaty/EN/Reports/Html/132.htm>.

23 Norms made under the Press Council Act, can be read on the website; <http://presscouncil.nic.in/home.htm>.

The question to be solved is what does Prasar Bharati's terrestrial and DTH network mean, in compliance with Section 3 (1) of the Bill. The question to be answered is whether the private companies like Tata Sky are owners of private DTH network within the ambit of this section, since Prasar Bharati doesn't have its individual DTH network. If this is the case then the holders of the broadcasting rights only stand to lose by acquiring broadcasting rights. Thus in due time they will stop buying the rights for the sums being paid today, which will only be harmful for the players, BCCI, Prasar Bharati and the interest of the viewers at large. This conflict is yet to be settled and the case is pending for a hearing in August 2007, before the Bombay High Court.

One issue which the Bill completely fails to address is the issue relating to short reporting and news reporting. What are the rights of the news channels to show the highlights of the matches, and if they have such rights, what is the length of time or the period for which they can be shown or relayed? So far there has been no reported conflict between the broadcasters of sports events and the news channels related to the reporting of events. Thus no explicit regulation or guidelines have been laid down. The right to access to information is necessary in conformity with fundamental rights. However, taking possible future conflicts into account, there is a need to regulate the reporting of sports events in India. The press council norms<sup>23</sup> of journalistic conduct fail to mention anything related to how the conduct of the journalist is to be regulated in terms of sports reporting. The criticism regarding the performance of the cricketers at most can be governed by the codes against defamation of private individuals and associations, because the 'public figures' as mentioned in the said norms include the actors and singers besides the people in public offices but not the sports personalities including cricketers. The game of cricket is also part of a public performance and the members of the public are interested in their activities as has been discussed before. The freedom to broadcast reports of the same is included in the press's right of freedom of speech and expression; only subject to restrictions imposed by the Constitution. If this was the case given the present scenario, then the press would be able to broadcast the whole match as a part of the news, since there is no explicit regulation of the same. Since the Sports Broadcasting Signal Bill is dealing with the broadcasting aspects related to sports, it should also consider the regulation of news reporting of the sports events.

In Europe specific restrictions on the rights of such reporting have been imposed. The recommendations of the Committee of Ministers of the Council of Europe state that in general the authorized duration of a short report should depend on the time needed to communicate the information content of the event. It differentiates between the primary and the secondary broadcasters and also recommends that the short report should not be reused and all original program material should be destroyed after the production of the report. It also recommends that the primary broadcaster should be allowed to charge a fee for the short report. The Council of Europe has also identified the importance of legislation for regulating short reporting through its Article 9 of the European Convention on Transfrontier Television:

"Each Party shall examine and, where necessary, take legal measures such as introducing the right to short reporting on events of high interest for the public to avoid the right of the public to information being undermined due to the exercise by a broadcaster within its jurisdiction of exclusive rights for the transmission or retransmission (...) of such an event."

These regulation is basically implemented to bring the European broadcasting law in conformity with Article 10 of the European Convention on Human rights (freedom of expression).

In the Netherlands on November 2004 the Parliamentary Undersecretary for Education, Culture and Sciences pointed out that NOS should have the opportunity to broadcast 'reasonable' extracts.

In Italy certain guidelines regarding the same have been laid down in Article 3 of the Regulation for the Exercise of Radio Reports passed by the LNP (national parliament). It states that 'radio reports by those bodies which have been granted access to the premises of the stadium



must be broadcast within the programmes the purpose of which is purely informative'. It further lays down rules for the reporting of football matches, in particular stating that news broadcasters are allowed a maximum of three minutes informative window for every fifteen minutes of the game (football match) with a maximum of three windows for each of the two halves. There are further provisions in Article 3 of the Regulation for the Exercise of Television Reports issued by the LNP, which limit the dissemination on the basis of the timing to relay the same. It states that it can be done only after 22:30 hours in the evening for games commencing no later than 15:00 hours, after 22:30 hours for games commencing no later than 18:00 hours and after 24:00 hours for evening games.

Thus taking the Dutch, the Italian and broadly the European law into account, it can be said that there is a lacuna in the Sports Broadcasting Signal Bill, with relation to provisions on short reporting, which must be inserted into the Bill through an amendment. For this amendment the government can look towards the guidelines laid down in other systems of law, after which it should use its discretion at least to set a broad guideline.

### Conclusion

There is a need for more regulation in India not only in relation to sports broadcasting but also with regard to transfer of players in case of football and hockey, regulating the advent of the new Indian Cricket League and what should be its status. A more comprehensive regulation is also needed to govern the injuries, doping and employment aspects in sports and the relationship that exists between the players, their agents and the associations or the clubs they belong to.

The Sports Broadcasting Signal Bill needs to be amended to incorporate short reporting as well as defining the events of national importance, thus putting an end to the disputes and defining the legal position of broadcasters clearly before they enter into contracts.

In the end with Formula setting its sights on India, the whole legal regulation relating to sports in general including broadcasting, needs to be addressed on an urgent basis. The whole issue of it being a sport of 'national importance' will again come up since it has not been referred to in the Bill. The various contracts involved with the sport, which have their own pecuniary quality in conformity with the need of the sport, will also come into limelight, thus highlighting the current lacunae.

### ANNEX

#### The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Bill, 2007\*

A Bill to provide access to the largest number of listeners and viewers, on a free to air basis, of sporting events of national importance through mandatory sharing of sports broadcasting signals with Prasar Bharati and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fifty-eighth Year of the Republic of India as follows:

#### Chapter I - Preliminary

1. (1) This Act may be called the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007.
- (2) It extends to the whole of India.
- (3) Save as otherwise provided, it shall be deemed to have come into force on the 11th day of November, 2005.
2. (1) In this Act, unless the context otherwise requires,
  - (a) "broadcaster" means any person who provides a content broadcasting service and includes a broadcasting network service provider when he manages and operates his own television or radio channel service;
  - (b) "broadcasting" means assembling and programming any form of communication content, like signs, signals, writing, pictures, images and sounds, and either placing it in the electronic form on electro-magnetic waves on specified

frequencies and transmitting it through space or cables to make it continuously available on the carrier waves, or continuously streaming it in digital data form on the computer networks, so as to be accessible to single or multiple users through receiving devices either directly or indirectly; and all its grammatical variations and cognate expressions;

- (c) "broadcasting service" means assembling, programming and placing communication content in electronic form on the electro-magnetic waves on specified frequencies and transmitting it continuously through broadcasting network or networks so as to enable all or any of the multiple users to access it by connecting their receiver devices to their respective broadcasting networks and includes the content broadcasting services and the broadcasting network services;
- (d) "broadcasting networks service" means a service, which provides a network of infrastructure of cables or transmitting devices for carrying broadcasting content in electronic form on specified frequencies by means of guided or unguided electromagnetic waves to multiple users, and includes the management and operation of any of the following:
  - (i) Teleport/Hub/Earth Station,
  - (ii) Direct-to-Home (DTH) Broadcasting Network,
  - (iii) Multi-system Cable Television Network,
  - (iv) Local Cable Television Network,
  - (v) Satellite Radio Broadcasting Network,
  - (vi) any other network service as may be prescribed by the Central Government;
- (e) "cable television channel service" means the assembly, programming and transmission by cables of any broadcasting television content on a given set of frequencies to multiple subscribers;
- (f) "cable television network" means any system consisting of closed transmission paths and associated signal generation, control and distribution equipment, designed to receive and re-transmit television channels or programmes for reception by multiple subscribers;
- (g) "community radio service" means terrestrial radio broadcasting intended and restricted only to a specific community and within specified territory;
- (h) "content" means any sound, text, data, picture (still or moving), other audiovisual representation, signal or intelligence of any nature or any combination thereof which is capable of being created, processed, stored, retrieved or communicated electronically;
- (i) "content broadcasting service" means the assembling, programming and placing content in electronic form and transmitting or retransmitting the same on electro-magnetic waves on specified frequencies, on a broadcasting network so as to make it available for access by multiple users by connecting their receiving devices to the network, and includes the management and operation of any of the following:
  - (i) terrestrial television service,
  - (ii) terrestrial radio service,
  - (iii) satellite television service,
  - (iv) satellite radio service,
  - (v) cable television channel service,
  - (vi) community radio service,
  - (vii) any other content broadcasting services as may be prescribed by the Central Government;
- (j) "Direct-to-Home (DTH) broadcasting service" means a service for multi-channel distribution of programmes direct to a subscriber's premises without passing through

\* Bill No. 26-C of 2007, as passed by Lok Sabha on 8.3.2007.

an intermediary such as a cable operator by uplinking to a satellite system;

- (k) "Guidelines" means the Guidelines issued under section 5;
  - (l) "multi-system cable television network" means a system for multi-channel downlinking and distribution of television programmes by a land-based transmission system using wired cable or wireless cable or a combination of both for simultaneous reception either by multiple subscribers directly or through one or more local cable operators;
  - (m) "Prasar Bharati" means the Corporation known as the Prasar Bharati (Broadcasting Corporation of India) established under sub-section (t) of section 3 of the Prasar Bharati (Broadcasting Corporation of India) Act, 1990;
  - (n) "prescribed" means prescribed by rules made under this Act;
  - (o) "satellite television service" means a television broadcasting service provided by using a satellite, and received with or without the help of a local delivery system but does not include Direct-to-Home delivery service;
  - (p) "satellite radio service" means a radio broadcasting service provided by using a satellite and directly receivable through receiver sets by multiple subscribers in India;
  - (q) "service provider" means provider of a broadcasting service;
  - (r) "specified" means specified under the Guidelines issued under section 5;
  - (s) "sporting events of national importance" means such national or international sporting events, held in India or abroad, as may be notified by the Central Government in the Official Gazette to be of national importance;
  - (t) "terrestrial television service" means a television broadcasting service provided over the air by using a land-based transmitter and directly received through receiver sets by the public;
  - (u) "terrestrial radio service" means a radio broadcasting service provided over the air by using a land-based transmitter and directly received through receiver sets by the public.
- (2) Words and expressions used and not defined in this Act and defined in the Cable Television Networks (Regulation) Act, 1995, the Telecom Regulatory Authority of India Act, 1997, the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act, 1933 shall have the meanings respectively assigned to them in those Acts.

#### Chapter II - Mandatory Sharing of Sports Broadcasting Signals with Prasar Bharati

3. (1) No content rights owner or holder and no television or radio broadcasting service provider shall carry a live television broadcast on any cable or Direct-to-Home network or radio commentary broadcast in India of sporting events of national importance, unless it simultaneously shares the live broadcasting signal, without its advertisements, with the Prasar Bharati to enable them to re-transmit the same on its terrestrial networks and Direct-to-Home networks in such manner and on such terms and conditions as may be specified.
- (2) The terms and conditions under sub-section (1) shall also provide that the advertisement revenue sharing between the content rights owner or holder and the Prasar Bharati shall be in the ratio of not less than 75:25 in case of television coverage and 50:50 in case of radio coverage.
- (3) The Central Government may specify a percentage of the revenue received by the Prasar Bharati under sub-section (2), which shall be utilised by the Prasar Bharati for broadcasting other sporting events.
4. The Central Government may specify penalties to be imposed, including suspension or revocation of licence, permission or registration, for violation of various terms and conditions as may be specified under section 3, subject to the condition that amount of a pecuniary penalty shall not exceed one crore rupees:

Provided that no penalty shall be imposed without giving a reasonable opportunity to the service provider:

Provided further that no act or omission on the part of any person after the 11th November, 2005 and before the date of promulgation of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Ordinance, 2007 shall be subjected to penalties.

#### Chapter III - Powers of the Central Government to Issue Guidelines

5. The Central Government shall take all such measures, as it deems fit or expedient, by way of issuing Guidelines for mandatory sharing of broadcasting signals with Prasar Bharati relating to sporting events of national importance:

Provided that the Guidelines issued before the promulgation of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Ordinance, 2007 shall be deemed to have been issued validly under the provisions of this section.

#### Chapter IV - Miscellaneous

6. (1) The provisions of the Guidelines issued by the Central Government for Downlinking of Television Channels on the 11th November, 2005 and for Uplinking from India on the 2nd December, 2005 for mandatory sharing of the sports broadcasting signals shall be deemed to be valid as if they have been issued under this Act.
- (2) Notwithstanding anything contained in any judgement, decree or order of any court, tribunal or other authority, any action taken by the Central Government or the Prasar Bharati in pursuance of the Guidelines referred to in sub-section (1) shall be deemed to be and to have always been for all purposes in accordance with the law, as if the Guidelines had been validly in force at all material times and notwithstanding anything as aforesaid and without prejudice to the generality of the foregoing provisions, no legal proceeding shall be maintained or continued in any court for the enforcement of any direction given by any court or any decree or order which would not have been so given had the Guidelines been validly in force at all material times.
7. The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.
8. Every rule and Guidelines made and issued, as the case may be, under this Act shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or Guidelines, or both Houses agree that the rule or Guidelines should not be made, the rule or Guidelines shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or Guidelines.
9. The relevant provisions under the Guidelines for Downlinking of Television Channels issued on the 11th November, 2005 and the Guidelines for Uplinking from India issued on the 2nd December, 2005 for mandatory sharing of sports broadcasting signals with Prasar Bharati, shall continue to remain in force till fresh Guidelines are issued under this Act.
10. (1) The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Ordinance, 2007 is hereby repealed.
- (2) Notwithstanding the repeal of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Ordinance, 2007, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.



T · M · C · A S S E R P R E S S

## Players' Agents Worldwide: Legal Aspects

**Robert Siekmann, Richard Parrish, Roberto Branco Martins  
and Janwillem Soek (editors)**  
**ASSER International Sports Law Centre**

*With a Foreword by Roger Blanpain, Professor in Labour Law,  
Universities of Leuven (Belgium) and Tilburg (The Netherlands),  
and co-founder and first President of FIFPro.*

Publicly, at least, there appears to be a strong collective will within football to clean up the game, to make the work of players' agents more transparent and to allow a greater share of the game's profits to stay within the game. Privately, there seems to be unease that current agent regulation is out of step with football industry norms and that if the sector is to operate effectively, practices which are prohibited by the rules should in fact be tolerated. Here lies the problem. Stringent agent regulation may well look impressive but over-regulation will merely compound the problem of non-compliance and a lack of transparency. Finding the balance which not only addresses the problems facing football and satisfies the supporters and other interested stakeholders but which also satisfies the requirements of national, EU and international law is just one of the many challenges facing football's governing bodies.

What are players' agents? Why should they be regulated? How should they be regulated? These three apparently simple questions have been tackled throughout this book. The first question appears straightforward as agents perform similar functions throughout the world. However, as the contributions in the book reveal, the manner in which agents operate varies. The questions of why and how to regulate again reveals common themes but also considerable variations in patterns of regulation. In this connection, there are, in effect, three tiers of agent regulation: international law, national law and the law of the sports associations. This book covers the legal regulations governing players' agents in forty countries around the world, representing the major footballing constituencies including Argentina, Brazil, Mexico and Russia as well as the "Big Five" in Europe. Written by acknowledged experts, it provides a very useful and informative comparative survey. Indeed, this is a book, which all those involved in the administration of football clubs, particularly, coaches and managers, as well as players' agents themselves, and commercial, financial and legal advisers, can do hardly do without, as it will provide them with a constant and useful source of reference.

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## European Sports Law: Collected Papers

Stephen Weatherill

*With a Foreword by Maitre Jean-Louis Dupont, Avocat, Belgium.*

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The book's editing team consisted of Dr Robert Siekmann and Dr Janwillem Soek, ASSER International Sports Law Centre, The Hague, The Netherlands.

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# South African Measures to Combat Match Fixing and Corruption in Sport

by Steve Cornelius\*

## 1. Introduction

Although the problem of match fixing and corruption in sport is an international phenomenon,<sup>1</sup> it is also a matter which has become all too familiar in South African sport. It received public prominence in South Africa when the former captain of the South African national cricket team, Hansie Cronjé, admitted his involvement with certain unsavoury bookmakers in India, as well as attempts to manipulate the outcome of certain cricket matches.<sup>2</sup> However, contrary to popular belief, this was not the first instance in which the integrity of a South African sports event was compromised. Horse racing had long since suffered under the scourge of fixed races.<sup>3</sup> And Cronjé's exploits would not be the last. It was followed more recently by the arrest of almost all the premier league football referees and some team officials and the revelation that match fixing seemed to be rife in South African football. In 2004, the Organised Crime Unit of the South African Police Service launched "Operation Dribble", which led to the arrest of 20 football referees and two club managers on suspicion of match fixing in Professional Soccer League matches.<sup>4</sup>

Because of the public outcry which followed Hansie Cronjé's fall from grace, there was a feeling amongst South African lawyers and lawmakers, rightly or wrongly, that existing measures against corruption were not sufficient to deal with the unique problems encountered in sport.<sup>5</sup> And since Parliament was in any event reviewing the Corruption Act,<sup>6</sup> it was decided to include the so-called "Hansie-clause" into the new Prevention and Combatting of Corrupt Activities Act<sup>7</sup> (PreCCA).<sup>8</sup> This act came into operation on 27 April 2004.

## 2. Defining Corruption

Corruption, by definition, involves the improper prospect or passing of some monetary or other benefit, not ordinarily due, to direct the recipient's conduct in a certain way as directed by the person offering or passing the benefit. As a result, most provisions in PreCCA explain that corruption may consist of a situation where -

- a person accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, to act in a particular way or to refrain from acting; or
- a person gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, to act in a particular way or to refrain from acting.

For ease of reference, I will refer to these activities collectively as "inducing" a person to act or refrain from acting.

## 3. Corruption in Sporting Events

PreCCA now expressly provides for the offence of corrupt activities relating to sporting events.<sup>9</sup> Section 1 of PreCCA defines "sporting event" as any event or contest in any sport, between individuals or teams, or in which an animal competes, and which is usually attended by the public and is governed by rules which include the constitution, rules or code of conduct of any sporting body which stages any sporting event or of any regulatory body under whose constitution, rules or code of conduct the sporting event is conducted. This definition is clearly wide enough to include all organised sport, including sports such as horse racing, show jumping, polocrosse, pigeon racing<sup>10</sup> and even dog contests. Greyhound racing and some other sports involving animals, such as rodeos and blood sports, such as dog fighting, cock fighting and bull fighting, have been banned in South Africa.<sup>11</sup> Game hunting is still a major industry in South Africa, but even if it can be considered to be a sport, it is not governed by a constitution, rules or code of conduct of a sporting body, nor is it ordinarily attended by the public and will, therefore, not fall within the definition.<sup>12</sup>

In terms of s 15 of PreCCA, the offence of corrupt activities relating to sporting events can be committed in various ways. In the first instance, it is committed where a person is induced to perform any act which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event.<sup>13</sup> This provision is clearly aimed at match-fixing. It acknowledges the fact that match-fixing takes place not only when the final result is rigged. Punters often bet on the occurrence of particular events which may seem innocuous in the greater scheme of a match, such as when the first free kick will be awarded, or how many yellow cards will be awarded in a particular match, etcetera. Nevin<sup>14</sup> explains that

[w]ays of gambling on cricket are many and varied. Bets are placed on the outcome of the toss, the end from which the fielding captain will elect to bowl, a set number of wides or no-balls in a designated over, players being placed in unfamiliar fielding positions, individual batsmen scoring fewer runs than their opposite numbers who batted first, batsmen being out at a specific point in their innings, the total number of runs at which a batting captain will declare, the timing of a declaration, or the total runs scored in an innings. A bet can be laid on the outcome of virtually any aspect of the game. And that's what makes it so easy for players to fix a result, especially in the one-day matches.

The offence in s 15 is further committed if a person carries into effect any scheme which constitutes a threat to or undermines the integrity of any sporting event, including, in any way, influencing the run of play or the outcome of a sporting event.<sup>15</sup> At first glance, this provi-

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1 Cloete (ed) *Introduction to Sports Law in South Africa* (2005) 11 *et seq.* To cite only a few examples, see Nafziger *International Sports Law* 2 ed (2004) 30 *et seq.*; Kleinman "Can FIFA Keep Football as the Beautiful Game?" 6 June 2002 *Marketing* 9; Margolis "The Fall of Football: Crippled by a Loosing Streak

and Charges of Corruption, Brazilian Football is in Crisis" 15 January 2001 *Newsweek* 26; Anon "On the Game" 18 March 1995 *The Economist* 58 and Anon "On the Defense: The Trial of Three Football Players and a Malaysian Businessman" 31 January 1997 *Asiaweek* 1 concerning football, Anon "Ringleaders" 22 June 1996 *The Economist* 83 concerning sumo wrestling, Cochrane "Rigging the Races: Thai Horse Racing is Big Business - And Terribly Corrupt. Worse, No-one is Willing to Bet on Reform" 19 August 2002 *Newsweek* 24 concerning

horse racing, Newfield "The Shame of Boxing" 12 November 2001 *The Nation* 13

2 Cronje v United Cricket Board of South Africa 2001 4 SA 1361 T. See also the King Commission *Interim Report* dated 11 August 2000; Nafziger (2004) 33.

3 See for instance *Turner v Jockey Club of South Africa* 1974 3 SA 633 A.

4 Ndaba, Mamabolo, Matshe and Adams "Red Card for Refs" 14 June 2004 *The Star* 1.

5 Nevin "Rooting Out the Evil" September 2001 *African Business* 29.

6 94 of 1992.

7 12 of 2004.

8 Cloete (2005) 11.

9 s 15.

10 Pigeon racing has some of the richest prize money in South African sport.

11 See for instance *United Greyhound Racing and Breeders Society v Vrystaat Dobbelen en Wedren Raad en andere* 2003 (2) SA 269 (O).

12 Cloete (2005) 11.

13 s 15 (i) (aa) PCCA.

14 September 2001 *African Business* 29.

15 s 15 (c) PCCA.

sion also seems to deal with match-fixing in the sense discussed above. However, on closer analysis, the scope of this provision is actually extremely wide and could include conduct which one would not ordinarily have counted under the general heading of "match-fixing".

The offence created in terms of s 15 (c) consists of two distinct elements. Significantly, though, s 15 (c) does not contain the requirement of inducement which constitutes a vital element of almost all of the offences created in terms of PreCCA. As a result, it is irrelevant whether or not any monetary or other benefit changed hands in the process.

The first element in s 15 (c) is that there must be a "scheme". The *Oxford Dictionary* defines "scheme" as

1. a systematic plan or arrangement for attaining some particular object or putting a particular idea into effect... a particular ordered system or arrangement...
2. a secret or underhand plan; a plot.

Similarly, the *Webster's Unabridged Dictionary of the English Language*, defines "scheme" as

1. a plan, design, or program of action to be followed; project.
2. an underhand plot; intrigue...

Both these definitions seem to suggest that there are two requirements that have to be met before one could label certain conduct as a "scheme" - there must be some premeditated plan and there must be a plot or conspiracy which should essentially involve more than one person. This latter aspect also fits in with the general scope of PreCCA, since corruption, by definition, is not a crime which can be committed by one person acting individually.

The second element in s 15 (c), is that the particular scheme should threaten or undermine the integrity of a sporting event. According to Preston and Szymanski,<sup>16</sup> the integrity of a sporting event is undermined through cheating, which, they submit, can take three forms: sabotage, doping and match fixing. While this analysis poses some intriguing possibilities, a vital question in this regard is whether it is necessary to prove that the integrity of a particular sporting event was threatened or undermined, or whether it would suffice to prove that a sport or sports in general were under threat. The solution lies in s 6 (b) of the Interpretation Act,<sup>17</sup> which provides that in any legislation, words indicating the singular, also includes the plural and *vice versa*. It should therefore be sufficient to prove that sporting events were under threat without reference to any specific individual event.

When contemplating Preston and Szymanski's<sup>18</sup> analysis, the notion of sabotage invariably conjures up the tearful images of figure skater Nancy Kerrigan when, in an attempt to exclude her from participation in the 1992 Winter Olympics, her knee was shattered by an assailant who claimed to act on the instructions of someone in the

camp of rival skater Tonya Harding.<sup>19</sup> Conduct of this nature certainly constitutes a plot or scheme which threatens or undermines the integrity of a sporting event. If similar events should occur in South Africa or involve South Africans directly or indirectly, it would in all likelihood justify prosecution under s 15 (c) of PreCCA. On the other hand, random violence, such as attacks on match officials,<sup>20</sup> may threaten or undermine the integrity of a sports event, but usually lacks the premeditated conspiracy to categorise it as a "scheme". While such random acts of violence could constitute other crimes in appropriate circumstances,<sup>21</sup> it will probably not be an offence in terms of PreCCA. Of course, sabotage can take innumerable forms<sup>22</sup> and it will be impossible to create an exhaustive list of possible actions that can be labelled as sabotage.

Preston and Szymanski's<sup>23</sup> analysis poses another interesting question: Can doping constitute an offence under s 15 (c)? Again, the use of banned substances by an individual athlete will lack the element of conspiracy, even if it is premeditated, so that it will not constitute a contravention of this provision. However, where medical or coaching staff administer banned substances to athletes, this could indeed constitute a scheme which threatens or undermines the integrity of a sporting event. Similarly, operations such as the development, manufacture and distribution of anabolic steroids as in the recent Balco scandal,<sup>24</sup> will most likely be classified as schemes that threaten or undermine the integrity of sporting events if similar events should occur in South Africa or involve South Africans directly or indirectly.

Thirdly, the offence of corruption in sporting events is also committed if a person is induced to frustrate the reporting of a corrupt act contemplated in s 15, to the managing director, chief executive officer or to any other person holding a similar post in the sporting body or regulatory authority concerned or at his or her nearest police station.

#### 4. Other Offences

While s 15 of PreCCA provides expressly for the offence of corrupt activities relating to sporting activities, this is by no means the only provision in PreCCA which can be invoked to combat the problem of corruption in sports. PreCCA has also established a number of other offences that may be relevant in the context of sport. In fact, it is likely that any indictment under s 15, may include alternative charges under one or more of the other provisions contained in PreCCA.

##### 4.1 Corruption in General

Section 3 (i) (aa) of PreCCA provides that the general offence of corruption consists of inducing someone to act in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation. The general offence of corruption also consists of inducing someone to act in a manner that amounts to the abuse of a position of authority, a breach of trust or the violation of a legal duty or a set of rules,<sup>25</sup> that is designed to achieve an unjustified result<sup>26</sup> or that amounts to any other unauthorised or improper inducement to do or not to do anything.<sup>27</sup> Since most relationships in the world of sports are based on contract,<sup>28</sup> any instances of match-fixing, whether it consists of a player under-performing or a match official making false rulings, can also constitute an offence under s 3 of PreCCA.

Section 3 (i) (bb) of PreCCA further defines the general offence of corruption to include the illegal, dishonest, unauthorised, incomplete, or biased misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation. If one considers that a substantial element in the Hansie Cronjé case merely involved the passing of information to bookmakers and punters, as well as the fact that other cricketers world-wide have been implicated in similar dealings with gamblers,<sup>29</sup> this provision would be an appropriate measure to prosecute those involved.

##### 4.2 Corruption of Agents

The offence in respect of corrupt activities relating to agents is, in

16 "Cheating in Contests" 2003 *Oxford Review of Economic Policy* 612.

17 33 of 1957.

18 Supra.

19 Duffy and Thigpen "Why? It Hurts So Bad! Why Me?" 17 January 1994 *Time* 44.

20 Such as the incident reported in *The Sowetan* on 3 May 2007, where football coach Thabo Ndlela appeared in the Witbank Magistrates' Court charged with assaulting referee Siphon Mahlangu during a league game in March.

21 Such as the murder charges levelled against two rugby players, Ben Zimri and Wayne Matthee, from the Delicious Rugby Club in Ceres in the Western Cape following the death of Rawsonville rugby player Riaan Loots after a fight during a match between his team and Delicious in Ceres in June 2006. See also *R v Hillebrand* 1959 (3) SA 22 (T) 23D - F.

22 Such as giving key players yellow or red

cards, to name just one example - see Preston and Szymanski 2003 *Oxford Review of Economic Policy* 612.

23 Supra.

24 Sancetta "Scandal that could ruin Marion Jones" 19 May 2004 *The Star* 8.

25 s 3 (ii).

26 s 3 (iii).

27 s 3 (iv).

28 *Natal Rugby Union v Gould* 1998 4 All SA 258 A. See also Beloff, Kerr and Demetriou (n 8) 9, 22 *et seq.*, Weistart and Lowell *The Law of Sports* (1979) 196. See also Cornelius "How Final is the Final Whistle? Review of and Liability for Decisions taken by Officials at Sport Events" 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 628 and "Liability of Referees (Match Officials) at Sports Events" 2004/1-2 *International Sports Law Journal* 52.

29 Nafziger (2004) 33; Nevin September 2001 *African Business* 29.

terms of s 6 of PreCCA, committed where someone induces an agent or an agent induces someone to act in a manner that -

- amounts to the illegal, dishonest, unauthorised, incomplete, or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
- amounts to the misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
- amounts to the abuse of a position of authority, a breach of trust or the violation of a legal duty or a set of rules;
- is designed to achieve an unjustified result, or that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to agents.

#### 4.3 Disciplinary Proceedings

Section 8 of PreCCA deals with corruption of judicial officers. Section 1 defines "judicial officer" to include any arbitrator, mediator or umpire, who in terms of any law presides at arbitration or mediation proceedings for the settlement by arbitration or mediation of a dispute which has been referred to arbitration or mediation. It also includes any other person who presides at any trial, hearing, commission, committee or any other proceedings and who has the authority to decide causes or issues between parties and render decisions in a judicial capacity. This definition is clearly broad enough to include the chairperson and members of any disciplinary tribunal found in sport today.

Section 8 essentially defines the offence of corruption in respect of judicial officers in the same terms as s 6 defines the offence in respect of agents. However, s 8 (2) explains further that "to act" in this section includes performing or not adequately performing a judicial function, making decisions affecting life, freedoms, rights, duties, obligations and property of persons, delaying, hindering or preventing the performance of a judicial function, aiding, assisting or favouring any particular person in conducting judicial proceedings or judicial functions, showing any favour or disfavour to any person in the performance of a judicial function or exerting any improper influence over the decision making of any person, including another judicial officer or a member of the prosecuting authority, performing his or her official functions.

- Any person who induces another person to -
- testify in a particular way or fashion or in an untruthful manner;
  - withhold testimony or a record, document, police docket or other object;
  - give or withhold information relating to any aspect in a trial, hearing or other proceedings;
  - alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object;
  - evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object ;
  - be absent from such trial, hearing or proceedings;

before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony is guilty of the offence of corrupt activities relating to witnesses and evidential material during certain proceedings under section 11 of PreCCA. Likewise, it is an offence under section 18 of PreCCA for any person to intimidate or use physical force, or improperly persuade or coerce another person with the intent to interfere with testimony or evidence as set out above.

#### 4.4 Employment

In terms of section 10 of PreCCA, any person who is party to an employment relationship and who is induced or induces another person to perform any act in relation to the exercise, carrying out or per-

formance of that party's powers, duties or functions within the scope of that party's employment relationship, is guilty of the offence of receiving or offering an unauthorised gratification.

#### 4.5 Contracts

Section 12 of PreCCA provides that any person who is induced or who induces another person to improperly influence, in any way the promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution or the fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract, is guilty of the offence of corrupt activities relating to contracts.

#### 4.6 Gambling

In terms of section 16 of PreCCA, corruption in respect of gambling games or games of chance consist of inducement to engage in any conduct which constitutes a threat to or undermines the integrity of any gambling game or a game of chance, including, in any way, influencing the outcome of a gambling game or a game of chance.

### 5. Duty to Report

In terms of section 34 (1), any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offence under PreCCA, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official. Any person who fails to comply with this duty, is guilty of an offence.

For the purposes of section 34 (1), a person holds a position of authority if he or she is the manager, secretary or a director of a company or a member of a close corporation, a chief executive officer or an equivalent officer of any organisation, or the person responsible for the overall management and control of the business of an employer. This also includes any person who has been appointed in an acting or temporary capacity.

### 6. Extraterritorial Jurisdiction

Section 35 of PreCCA provides for extraterritorial jurisdiction. Even if the act alleged to constitute an offence under PreCCA occurred outside South Africa, a South African court shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged -

- is a South African citizen;
- is ordinarily resident in South Africa;
- was arrested in the territory of the South Africa, or in its territorial waters or on board a ship or aircraft registered or required to be registered in South Africa at the time the offence was committed;
- is a company, incorporated or registered as such under any law, in South Africa;
- any body of persons, corporate or unincorporated, in South Africa.

This provision closes a loophole in South African law which existed at the time of the Hansie Cronje scandal. Because the attempts by Cronjé to manipulate the outcome of cricket matches occurred in India,<sup>30</sup> no South African court would have had jurisdiction to try the matter. If a similar incident should occur in future, however, South African courts will now be competent to adjudicate the matter under South African law as if the offence has been committed in South Africa.

Section 35 does not stop there, however. A South African court will also have jurisdiction in respect of an offence committed outside South Africa if the -

- act affects or is intended to affect a public body, a business or any other person in the Republic;
- person is found to be in South Africa; and
- person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.

30 *Cronje v United Cricket Board of South Africa* 2001 4 SA 1361 T. See also the

King Commission *Interim Report* dated 11 August 2000; Nafziger (2004) 33.

The result is that, in future, where incidents similar to the Salt lake City scandal<sup>31</sup> should occur, the parties who indulge in corrupt activities could also face charges under PreCCA if they should find themselves in South Africa, since the decision to award the Olympic Games to a particular host city undoubtedly affects persons (or athletes) and businesses (sports organisations) in South Africa, even if no South African city submitted a competing bid. Similarly, future operations such as the development, manufacture and distribution of anabolic steroids as in the Balco scandal,<sup>32</sup> could also form the basis for prosecution under PreCCA if the perpetrators should find themselves in South Africa. In fact, due to the global nature of sport and the significance of world rankings in most sports, one could argue that almost any form of corruption in any sport could affect individual sports men and women or sports organisations in South Africa in one way or another, so that South African courts could have jurisdiction to try such matters under PreCCA if the perpetrators should find themselves in South Africa.

## 7. Penalties

In terms of section 26 of PreCCA, any person who is convicted of an offence under PreCCA, is liable -

- in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period of imprisonment for life;
- in the case of a sentence to be imposed by a regional court, to a fine not exceeding R360,000<sup>33</sup> or to imprisonment for a period not exceeding 18 years;<sup>34</sup>
- in the case of a sentence to be imposed by a magistrate's court, to a fine not exceeding R100,000<sup>35</sup> or to imprisonment for a period not exceeding five years.<sup>36</sup>

In addition to any fine a court may impose in terms of section 26, the court may also impose a fine equal to five times the value of the gratification involved in the offence.

## 8. Conclusion

The new act may have come just in time to assist prosecuting authorities in their campaign against match fixing and corruption in South African football. However, section 35 (3) (l) of the Constitution of the Republic of South Africa 1996, provides that every accused person has a right not to be tried for an offence in respect of an act or omission that was not an offence at the time when it was committed or omitted. As a result, the provisions of PreCCA only applies to transgressions which took place after its commencement on 27 April 2004.

Any corrupt activities preceding that date can only be prosecuted under the old Corruption Act<sup>37</sup> or the common law.

## 9. Epilogue

In October 2006, Premier Soccer League (PSL) referee Enoch Radebe became the first match official in South Africa to be convicted of match-fixing under PreCCA. He was charged on two counts of corruption under s 3 of PreCCA and in the alternative to each of the two charges, on corrupting a sporting event under section 15 of PreCCA.<sup>38</sup> The court found that PSL referee Harry Lekitlane received a call from Radebe offering to pay him and his assistant, Mantuso Nayo, R4,000<sup>39</sup> each to influence a PSL match between Golden Arrows and Ajax Cape Town. Both declined the "offer" and turned State witness. Radebe was convicted on the two alternative charges under s 15 of PreCCA and fined R150,000<sup>40</sup> or 10 years in prison, half of which was suspended for five years.<sup>41</sup> What was not established, though, was Radebe's motive in trying to affect the outcome of the match. As Radebe had very little to gain, there can be little doubt that he was not acting alone, but at the behest of someone else. The matter was, however, not investigated further and prosecuting authorities in South Africa may have lost a golden opportunity to get to the root of the problem in South African football.<sup>42</sup>

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<sup>30</sup> *Cronje v United Cricket Board of South Africa* 2001 4 SA 1361 T. See also the King Commission *Interim Report* dated 11 August 2000; Nafziger (2004) 33.

<sup>31</sup> Nafziger (2004) 31.

<sup>32</sup> Sancetta "Scandal that could ruin Marion Jones" 19 May 2004 *The Star* 8.

<sup>33</sup> Approximately 40,000.

<sup>34</sup> In terms of s 1 (1) (a) of the Adjustment of Fines Act 101 of 1991, read with GN R1411 of 30 October 1998 and s 92 (1) (b) of the Magistrates' Courts Act 32 of 1944.

<sup>35</sup> Approximately 12,000.

<sup>36</sup> In terms of s 1 (1) (a) of the Adjustment of Fines Act 101 of 1991, read with GN R1411 of 30 October 1998 and s 92 (1) (b) of the Magistrates' Courts Act 32 of 1944.

<sup>37</sup> 94 of 1992.

<sup>38</sup> It seems that the prosecutor in the *Radebe* case formulated the charge sheet

the wrong way around. One would have expected the specific offence under s 15 to have been the main charge, with the more general offence under s 3 as the alternative charge to act as a safety net if the main charge should for some reason fail.

<sup>39</sup> Approximately 450.

<sup>40</sup> Approximately 18,000.

<sup>41</sup> Anon "First referee fine for match-fixing" 19 October 2006 *The Star*. See also Kwenaite "Was ref Enoch Radebe acting alone?" on <http://www.supersoccer.co.za/default.asp?id=4924&des=sportstalk> accessed on 6 June 2007; Anon "PSL ref guilty of match-fixing" on [http://www.news24.com/News24/Sport/Soccer/0,9294,2-9-840\\_2016695,00.html](http://www.news24.com/News24/Sport/Soccer/0,9294,2-9-840_2016695,00.html) accessed on 6 June 2007.

<sup>42</sup> Kwenaite supra.

## Research Center for Sports Law of China University of Political Science and Law (CUPL)

The Research Center for Sports Law of CUPL is the first research institute in China on sports law from a professional perspective and it boasts a constellation of prestigious scholars.

The major research orientation of the Center is as follows: the origin and evolution of sports law, the sports industry, sports organizations, sports agents, sports contracts, sports lotteries, sports intellectual property, the rights and corresponding obligations of athlete and referee, as well as their respective legal status, competition rules, anti-doping, sports consumption, and damage compensation for sports facilities.

The main members of the Center are:

Honorary Director: Professor Jiang Ping (the "guru" of civil law, professor emeritus and doctorate tutor of CUPL)

Director: Professor Jiao Hongchang (doctorate tutor, Deputy Director of the Law Department, head of the instructors of the Constitution in the college of postgraduates)

Managing Deputy Director: Professor Wang Xiaoping (tutor for graduates, Director of the Department of Physical Education)

Deputy Director: Professor Ma Hongjun (tutor for graduates)

Secretary General: Associate Professor Zhang Xiaoshi (tutor for graduates).

During recent years, the Center has achieved impressive progress in terms of academic research, and the members of the Center are also involved in the formulation of a series of sports Acts, such as the Law of the People's Republic of

China on Physical Culture and Sports, the Regulation of the National Physical Fitness Program, and the Regulation of Sports Arbitration. Apart from that, they provide consultation services on sports law in connection with the media and sports institutes.

In terms of foreign exchanges, the Center carried out active exchange programs and reached agreement on the cultivation of talents in the sports law field with other research institutes and organizations, such as the Australian Griffith University, the Korean Sports Law Society, the Japanese Sports Law Society, and those from the HongKong and Taiwan regions. Members from the Center have been invited by the Korean Sports Law Society to deliver speeches on the Asian Sports Law Seminar held in Seoul. The Center is also involved in sponsoring the foundation of the Asian Sports Law Society in 2005.

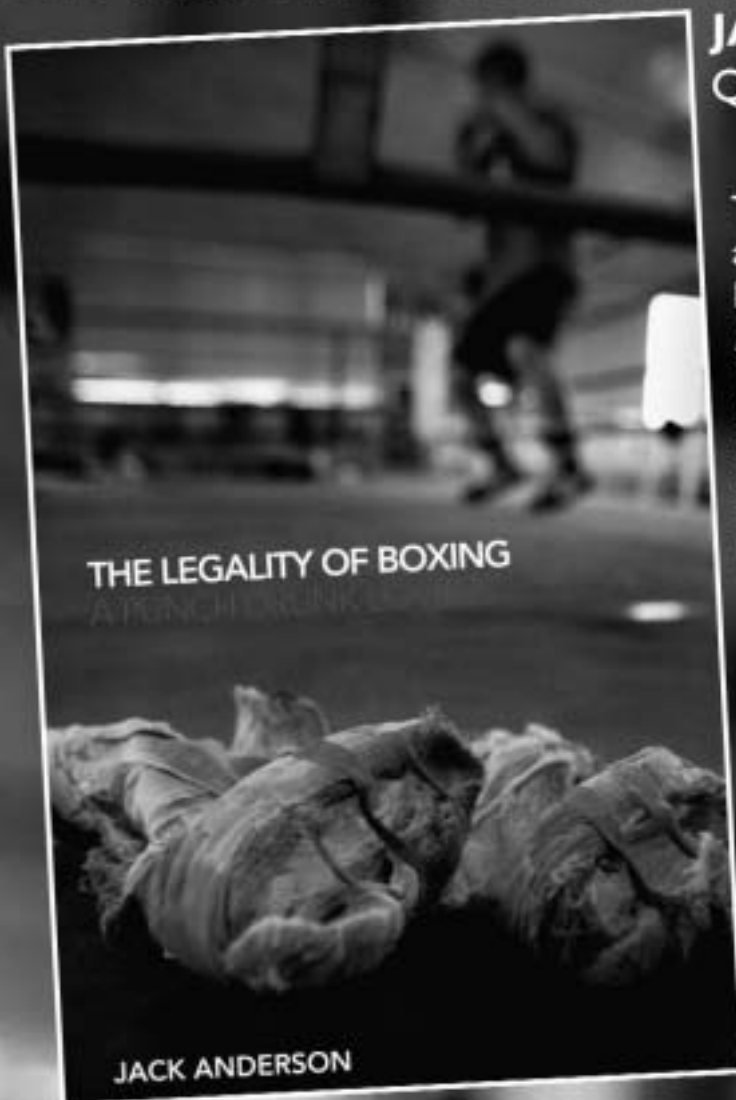
The development of the Center has attracted the attention and concern from various sections of the society, such as the State Sports General Administration, the Beijing Organizing Committee for the 29th Olympic Games (BOCOG), the Seminar on Sports Law of the China Law Society, etc. We have successfully held the First advanced forum on Sports Law in 2004, which has great influence and gave our Center the leading position in the domestic research on sports law. Aimed at the successful Olympic Games in 2008, and at the organization of the Seminar on Sports Law of the China Law Society, the Center will undertake the responsibility of organizing the Third Asian Sports Law Seminar to be held on November 11th, 2007.



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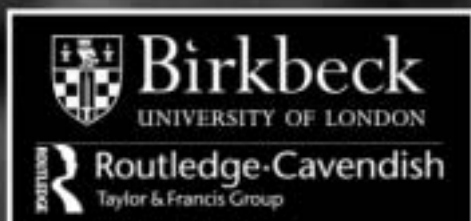
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# The European Commission's White Paper on Sport

by Michal Krejza\*

## 1. Introduction

The European Commission adopted the White Paper on Sport, its first comprehensive strategic initiative in the field of sport, at one of its last meetings before the summer break, on 11 July this year. It is a major piece of work, with a total length of approx. 200 pages (including all annexes). On average, the Commission adopts only two or three White Papers per year, and the fact that the communication on sport got this status is therefore an acknowledgement of the comprehensive nature, longer-term value and political weight of the document.

The White Paper has to be seen in the overall context in which sport has been addressed at EU level. It is the culmination of a long process: the Amsterdam Declaration of 1997, the Nice Declaration of 2000, and then the agreement of the Intergovernmental Conference in 2004 to include sport in the Treaty, coupled with the positive results of the European Year of Education through Sport 2004, all reflect the European framework that already existed for sport. This framework put the accent on the special characteristics of sport, and in particular its social and educational values.

In this political context and with the encouragement it had always received from Member States and the sports community, the Commission confirmed last year that momentum existed for a policy initiative on sport.

The consultation process for the White Paper lasted approximately two years. The Commission engaged in extensive consultations at different levels: with sport stakeholders, with national authorities, and internally among the various Commission services that deal to a greater or lesser extent with sport-related issues.

Consultations with sport stakeholders took the form of several consultation conferences as well as numerous meetings with sport federations, Olympic committees, and other interested parties ranging from e.g. umbrella organisations of sport NGOs to representatives of the sporting goods industry. Besides, a successful on-line consultation in the spring of 2007 gave all interested parties the opportunity to express views on the initiative. 777 replies were received, a higher number than is usual for this type of consultation. A detailed overview of the consultation process can be found in Annex III of the Staff Working Document "The EU and Sport: Background and Context" which accompanies the White Paper.

Consultations with Member States mainly took the form of regular meetings of Sport Directors and Sport Ministers, as well as exchanges of views in a number of Working Groups.

Internal consultations within the Commission were of particular importance in an area without explicit EU competence and were a key factor in determining the shape and content of the White Paper. The Commission's Sport Unit, part of the Directorate-General for Education and Culture, is one of very few policy units in the Commission whose activities are not based on any particular Treaty provision. This means that most issues the Unit deals with are ultimately the competence of other services within the Commission: DG Employment and Social Affairs for the free movement of sports persons, DG Internal Market for other Internal Market issues, DG Health and Consumer Protection for health-related issues, DG Competition for anti-trust and State aid issues, DG Justice, Freedom and Security for public order and the fight against crime, DG

External Relations and DG Development for sport relations with third countries, etc.

Only a year ago, each of these services was conducting its own actions in the sport area, without much effective coordination. This has changed thanks to the White Paper. An effective coordination mechanism has been set up among the approx. 15 Directorates-General that are concerned. This so-called Inter-Service Group "Sport" will keep functioning in the future and will play a key role in overseeing the implementation of the White Paper. The preparation of the White Paper has also encouraged the relevant services to make an effort at placing their sport-related activities in a wider, comprehensive, strategic context. The White Paper has thus contributed to the creation of a beneficial environment to prepare the next step forward, i.e. the implementation of the provisions on sport which will in all likelihood be included in the future Reform Treaty.

The White Paper has focus on three domains: the societal role of sport, the economic importance of sport, and the organisation of sport. The Commission's objective was to present a broad initiative, which would be able to address as many interests as possible. The choice of a holistic approach and a careful balance between the three domains was thus a response to the manifold - and often differing or even contradictory - requests and expectations from sport stakeholders.

The Commission is well aware that some actors, especially those representing professional sports, expected it to go further in terms of regulatory measures and seeking exemptions for the sport sector from the application of EU law.

It is important to point out that the White Paper respects the principle of subsidiarity, the autonomy of sport organisations and the current EU legal framework. When developing the concept of specificity of sport, the Commission could not go beyond the limits of existing EU competences.

The White Paper takes full account of this European context for sport: the initiative does not weaken the application of EU law to sport, but it provides further clarity on the application of EU legal provisions in this sector.

A comprehensive initiative on sport appeared to be appropriate at this particular point in time for several reasons. In general, the political landscape was favourable to the launch of a broad EU initiative on sport. Several processes took place during the last year in parallel with the preparation of the White Paper, such as notably the debate on governance in European football, which resulted in the Independent European Sport Review, and the European Parliament's reports on the future of professional football in Europe and on the role of sport in education.

The White Paper was driven by high expectations from sport stakeholders, who wished to see their concerns addressed in EU policy making, including the need to better promote sport and to achieve more legal certainty. Social and economic developments in and outside the field of sport have brought about new challenges for sport, some of which need European responses. Moreover, the potential that sport has to contribute to the EU's overall stated policy goals, such as the Lisbon Strategy, have remained largely invisible for far too long.

In the Commission's view, the White Paper had six overall objectives: (1) to provide strategic orientation on the role of sport in the EU; (2) to raise awareness of the needs and specificities of the sector; (3) to improve knowledge about the application of EU law to sport; (4) to enhance the visibility of sport in EU policies, programmes and actions, (5) to encourage debate on specific problems, and (6) to identify the appropriate level of further action at EU level.

\* M. Krejza is Head of the Sport Unit at the Directorate-General for Education and Culture of the European Commission. The present article is

based on the Asser-Clingendael International Sports Lecture, which he gave in The Hague on 6 September 2007.

The White Paper itself sets out the key ideas and provides the political messages. It contains 53 priority actions, to be implemented or supported by the Commission, which are brought together in an Action Plan named after Pierre de Coubertin.

A detailed Staff Working Document (“The EU and Sport: Background and Context”) explains the main underlying considerations and context for these actions. It includes annexes on the application of EU competition rules and internal market provisions to sport.

The White Paper proposes a mix of instruments to address the role of sport in Europe, such as studies and surveys, platforms and networks, enhanced cooperation dialogue structures, recommendations, and mobilisation of EU programmes. It should be stressed that the emphasis is on “soft” measures, not on regulatory or legislative action, for which there is no specific EU competence.

The following three sections describe in more detail the content of the White Paper, based on its three main thematic parts: the societal role of sport, the economic dimension of sport, and the organisation of sport.

## 2. The societal role of sport

To begin with there is the crucial area of sport and *public health*. The White Paper takes account of the fact that certain public health problems, in particular overweight and obesity, are not only about nutrition and consumer protection, but also about physical activity.

The White Paper complements another recent White Paper of the Commission, the “EU Strategy on Nutrition, Overweight and Obesity related health issues”, in order to help reverse the trend towards a decrease in physical activity. In this context, sport organisations are encouraged to take into account their potential for health-enhancing physical activity (HEPA) and to undertake activities for this purpose. Too many sport organisations appear to be focussing too narrowly on the organisation of competitions.

The Commission wishes to develop new physical activity guidelines with the Member States before the end of 2008 and make HEPA a cornerstone of its sport-related activities and programmes/actions. The promotion of a pluri-annual EU HEPA network should play a key role in this respect.

The *fight against doping* has a prominent place in this first part of the White Paper. Doping has left the narrow confines of top-level professional sport. It has become a societal problem and must be tackled by all relevant actors, including the EU.

The Commission will look at ways to strengthen cooperation at different levels, for instance between law enforcement agencies. In addition, the Commission is willing to play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States.

With regard to *education and training*, sport, through its role in both formal and non-formal education, reinforces Europe’s human capital. There is a citizenship aspect, in the sense of social values, and an economic aspect, in the sense of key competences. In this area, the Commission will better support sport and physical activity through the Lifelong Learning programme.

Moreover, the Commission will focus on activities to improve qualifications in the field of sport through the European Qualifications Framework (EQF) and the European Credit System for Vocational Education and Training (ECVET).

The White Paper also suggests the introduction of a European label for schools actively involved in supporting and promoting physical activities in a school environment.

*Volunteering* is essential for society and for sport, but volunteering in sport is changing due to societal developments and partly also to the commercialisation and professionalisation of sport. Volunteers and the structures in which they operate deserve to be valued.

The Commission will identify, together with Member States, key challenges for non-profit sport organisations and point to those EU programmes that are able to promote and support volunteering in sport.

In addition the White Paper will foster the exchange of informa-

tion and best practice on volunteering in sport involving Member States, sport organisations and local authorities. The Commission also commits itself to launching a European study on volunteering in sport.

In the field of *social inclusion, integration and equal opportunities*, the White Paper recognises that sport can make an important contribution to economic and social cohesion and more integrated societies. It states that all residents should have access to sport, including under-represented groups.

The White Paper proposes to mobilise an array of EU instruments and European funds to promote social inclusion through sport and to combat discrimination in sport.

The *fight against racism and violence* remains a challenging issue. Violence at sport events remains a disturbing problem. It has been shifting from inside stadiums to outside, including urban areas.

The Commission wishes to promote the exchange of operational information and practical know-how and experience on the prevention of violent and racist incidents between law enforcement services and with sport organisations.

Moreover, the White Paper announces action to promote a multi-disciplinary approach to preventing anti-social behaviour, with a special focus given to socio-educational actions such as fan-coaching.

The White Paper also calls for the use of EU programmes to contribute to the prevention of and fight against violence and racism in sport.

Sport also has an *external dimension*. It can play a role regarding different aspects of the EU’s external relations: as an element of external assistance programmes and of dialogue with partner countries, and as part of the EU’s public diplomacy.

The Commission will promote the use of sport as a tool in its development policy. In particular, it plans to promote sport and physical education as essential elements of quality education and as a means to make schools more attractive; to target action at improving access for girls and women to physical education and sport, with the objective to help them build confidence, improve social integration, overcome prejudices and promote healthy lifestyles; and to consider supporting health promotion and awareness-raising campaigns through sport.

The White Paper also puts sport in the context of *sustainable development*, because the practice of sport, sport facilities and sport events all have a significant impact on the environment.

The White Paper outlines the Commission’s intention to use its structured dialogue with leading international and European sport organisations and other sport stakeholders to encourage them to participate in existing voluntary schemes, such as the Eco Management Audit Scheme (EMAS), and promote these schemes during major sport events.

The Commission furthermore wishes to promote green procurement in its political dialogue with Member States. It also intends to raise awareness, through guidance developed in cooperation with relevant stakeholders, about the need to work together in partnership at the regional level to organise sport events in a sustainable way.

## 3. The economic dimension of sport

In the chapter on the economic dimension of sport, the White Paper gives due consideration to the economic importance of sport. It is estimated that sport accounts for approx. 3.5% of EU GDP and provides employment for as much as 5% of the labour force. It is thus a major economic sector, but is seldom recognised as such.

As a first priority, the White Paper points out that policy actions and enhanced cooperation on sport need to be underpinned by a *sound knowledge base*. The quality and comparability of data needs to be improved to allow for better strategic planning and policy-making in the field of sport.

This is why the Commission is developing, together with Member States, a European statistical method for measuring the economic impact of sport as a basis for national statistical accounts for sport, which could ultimately lead to a European Satellite Account for Sport.

The Commission will also ensure that specific sport-related European information surveys take place on a regular basis.

In addition, it intends to launch a study to assess the contribution of the sport sector to the Lisbon Agenda and to organise the exchange of best practices among national authorities and sports federations on the organisation of large sport events.

The White Paper also addresses the issue of *funding*. The Commission believes that - in addition to private funding - the public purse should support sport at the grassroots level, in particular to ensure equal opportunities and broad access to sport.

The White Paper invites Member States to reflect upon how to maintain and develop sustainable financing models for giving long-term support to sports organisations.

On its part, the Commission will carry out a study on public and private financing of grassroots sport across Europe. The study will also look at the impact of on-going changes in this area.

In the field of indirect taxation, the Commission will continue to make the case for the possibility of VAT exemptions or lower VAT rates for sport.

#### 4. The organisation of sport

The chapter of the White Paper on the organisation of sport addresses a number of aspects of the governance of sport and of the specificity of sport. This chapter contains only those priority topics where action at EU level is considered to be of potential added value.

Firstly, it should be noted that the word "*specificity*" as such does not appear in earlier official EU texts. In the Helsinki report of 1999 reference was made to the need to "take account of the specific characteristics" of sport, while in the Nice Declaration of 2000 reference was made to how the Community must take account of the functions which make sport "special".

The White Paper devotes a section to the issue of specificity, thus shedding light on the Commission's position regarding this concept. The annexes on competition and internal market rules of the accompanying Staff Working Document further clarify the Commission's views on the application of EU law to the sport sector.

Regarding the repeated requests by stakeholders for more legal 'certainty', it should be stressed that the White Paper text provides more legal clarity for European sport within the limits of the EU's current competencies. For the first time ever the Commission takes stock of the European Courts' case law and Commission Decisions in the area of sport.

However, in the current absence of a specific legal competence for sport, a case-by-case approach remains the basis for the Commission's control of the implementation of EU law in the sport sector, in line with the current Treaty provisions, and taking full account of the Nice Declaration.

One area of EU law which has been of particular importance for sport is the principle of the *free movement of citizens and workers* within the Union. Discrimination on grounds of nationality is prohibited in the Treaties.

However, by way of exception to this general prohibition of discrimination, it is recognised that national teams play an essential role not only in terms of identity but also to secure solidarity with grassroots sport, and therefore deserve to be supported.

The White Paper reiterates the call on Member States and sport organisations to address discrimination based on nationality in all sports. The Commission will combat discrimination in sport through political dialogue with Member States, recommendations, structured dialogue with sport stakeholders, and infringement procedures when appropriate.

The White Paper reaffirms that limited and proportionate restrictions to the principle of free movement of persons can be accepted, in particular as regards the right to select national athletes for national team competitions; the need to limit the number of participants in a competition; and the setting of deadlines for transfers of players in team sports.

Concerning access to individual competitions for non-nationals, the Commission will launch a study to analyse all aspects of this complex issue.

With regard to *transfers* the White Paper points out that FIFA's transfer system constitutes an example of good practice that ensures a competitive equilibrium between sport clubs while taking into account the requirements of EU law.

The transfer of players also gives rise to concerns about the legality of the financial flows involved. The Commission believes that in order to increase transparency in money flows related to transfers, an information and verification system for transfers, run by the relevant European sport organisation, or by national information and verification systems in the Member States, could be an effective solution.

It has been brought to the Commission's attention that there are bad practices in the activities of *players' agents* which have resulted in instances of corruption, money laundering and exploitation of underage players. These practices are damaging for sport in general and raise serious governance questions. The health and security of players, particularly minors, has to be protected and criminal activities fought against.

Agents are subject to differing national regulations. In addition, some international federations, e.g. FIFA and FIBA, have introduced their own regulations.

To get a clearer overview of the activities of players' agents in the EU, the Commission will carry out an impact assessment, which will aim at evaluating whether action at EU level is necessary.

To help *protect minors* in sport, the Commission will continue to monitor the implementation of EU legislation, in particular the Directive on the Protection of Young People at Work. The Commission has recently launched a study on child labour as a complement to its monitoring of the implementation of the Directive. The issue of young players falling within the scope of the Directive will be taken into account in this study.

The Commission considers it important that Member States and sport organisations cooperate on the protection of the moral and physical integrity of young people. The dissemination of information on existing legislation and exchange of best practices should be improved.

*Corruption, money laundering* and other forms of financial crime are unwelcome realities and must be addressed in a comprehensive policy document on sport.

The Commission intends to support the fight against corruption through public-private partnerships and assist in the development of effective preventive and repressive strategies. In addition, it will continue to monitor the implementation of EU anti-money laundering legislation in Member States with regard to the sport sector.

The White Paper also acknowledges the usefulness of robust *licensing systems for professional clubs* at European and national levels as tools for promoting good governance in sport.

It goes without saying that these systems must be compatible with EU law and may not go beyond what is necessary for the pursuit of a legitimate objective relating to the proper organisation and conduct of sport.

In this respect, the Commission will promote dialogue with sport organisations on the implementation and strengthening of self-regulatory licensing systems. Starting with football, it intends to organise a conference with UEFA, EPFL, Fifpro, national associations and national leagues on licensing systems and best practices in this field.

The final topic in this chapter of the White Paper, *media*, is no doubt a crucial issue for sport. In modern professional sports, TV rights have become the primary source of income and, conversely, sport is a crucial source of content for media operators.

The Commission will continue to support the citizens' right to information and broad access to broadcasts of sport events, which are seen as being of high interest or major importance for society.

The White Paper explains that, while joint selling of media rights raises competition concerns, the Commission has accepted it in the sport sector under certain conditions. Collective selling can be important for the redistribution of income and can thus be a tool for achieving greater solidarity within sports.

The keyword here is solidarity. Sport organisations should pay due attention to the creation and maintenance of robust solidarity mech-

anisms. As far as media rights are concerned, this can take the form of a system of collective or individual selling.

## 5. Follow-up

The Commission intends to follow-up on the 53 actions that are included in the Pierre de Coubertin Action Plan in the framework of three mechanisms: (1) improved structured dialogue with the sport movement; (2) enhanced cooperation with EU Member States; and (3) more social dialogue on sport at European level.

While acknowledging the complexity and diversity of the European sports landscape, the White Paper points out the need for more efficient *dialogue with sport stakeholders* at EU level.

The Commission intends to organise an EU Sport Forum every year, gathering all the main sport stakeholders, and also to have more frequent thematic discussions with fewer participants.

*Cooperation between the Member States and the Commission* needs to be put on a more solid footing.

The Commission and the Member States already have the Rolling Agenda for Sport, which was established in 2004 to define priority topics for discussion among the Member States. This mechanism could be reinforced. For instance, this could be done through jointly defined priorities for sport policy cooperation, as well as regular reporting by the Commission on progress.

The White Paper notes that EU Sport Ministers and Sport Directors should meet regularly under each six-monthly Presidency.

The White Paper announces that the Commission will report on the implementation of the Pierre de Coubertin Action Plan through the mechanism of the Rolling Agenda for sport.

Naturally, the work of existing working groups and networks will positively contribute to the strengthening of cooperation at this level. At present, there are three informal EU Working Groups on sport: one on Sport & Health, one on Sport & Economics, and one on Non-Profit Sport Organisations. Each of these Working Groups consists of 8-10 Member States, on a voluntary basis, and is chaired and

coordinated by the Commission. The Commission is willing to provide similar support in the field of anti-doping.

Finally, in light of the growing challenges to sport governance, *social dialogue* at European level could help to address common concerns.

The White Paper encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector. The Commission, to this end, will continue to give support to both employers and employees and it will pursue its open dialogue with all sport organisations on this matter.

## 6. Conclusion

At its meeting in June 2007, the European Council gave a mandate to the Intergovernmental Conference which is preparing the revision of the Treaties on which the EU is based. The Commission welcomes the fact that the mandate sets out that the provisions on sport agreed in the 2004 Inter-Governmental Conference will be inserted into the new Treaty. It can be expected that these provisions on sport, giving the Union "soft", supporting competences in this area, will be inserted into the text of the current Article 149 of the EC Treaty, which also deals with education, youth and vocational training.

It is the intention of the Member States to ratify the Reform Treaty by mid-2009. This means that it seems likely that additional important developments will occur at EU level in the area of sport in the next few years. Ratification of the Reform Treaty would give the EU the possibility to define a sport policy, to incorporate sport into the work of the Council of Ministers, and to create an EU Sport Programme.

The White Paper should thus be seen as an instrument to pave the way for the implementation of a possible future Treaty provision on sport. The White Paper will remain the basis for the Commission's involvement in the sport sector until after the entry into force of the Reform Treaty.

The International Sports Law Journal

# Mass Searches of Sports Spectators in the United States\*

by Cathryn L. Claussen\*\*

Major sports events have increasingly been viewed as likely terrorist targets, and event organizers have implemented heightened security measures. Spectators at sports events have been subjected to several types of searches, ranging from bag searches, to wand searches, to the pat-down searches now required at all National Football League games, to video surveillance at Super Bowl games. This paper outlines the legal issues implicated in various types of mass searches of sports spectators in the United States, and also mentions briefly some proposed changes to American law that would better protect the privacy of sports spectators given the increasingly intrusive potential brought by new developments in "high tech" searches.

In the United States, the legality of physical searches of sports spectators has been challenged in several recent lawsuits, which have relied upon the rationale in a recent federal court decision that was not, in

fact, a sport case. In *Bourgeois v. Peters* (2004), a federal appeals court ruled on the constitutionality of a warrantless, mass search of 15,000 non-violent protesters attending a political demonstration.<sup>1</sup> This was the 13th annual rally for this group and there had been no history of weapons or violence in all those years. Nevertheless, the city subjected the attendees to being searched with a magnetometer (wand) which identifies the presence of metal objects. If metal was detected, the person would then be subjected to a full-scale physical search of their person and possessions. The city justified this search by claiming that the terrorist threat since the attacks of September 11, 2001 made large gathering events likely targets for future acts of terrorism. The court ruled that this could not justify a mass search of spectators and that the search violated the Fourth Amendment.<sup>2</sup>

In the opinion, the Eleventh Circuit Court reviewed the relevant Fourth Amendment law. The general rule is that warrantless, suspicionless searches are unconstitutional unless they fit within certain recognized categories that are considered exceptions to this rule. There are three such categories: special needs beyond normal law enforcement (e.g., airport searches due to past hijackings); exigent circumstances (e.g., imminent destruction of evidence; danger to a police officer); and situations in which a diminished expectation of privacy exists (e.g., searches incident to arrest; searches of open fields

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1 *Bourgeois v. Peters*, 387 F3d 1303 (11th Cir. 2004)

2 *Ibid.*

or objects in plain view). In the court's view, the mass search of these protesters did not fall into any of these recognized exceptions.<sup>3</sup> First, preserving public safety is a normal law enforcement need. The generalized heightened threat of terrorism, without evidence of specific threats targeted at this particular event, did not, in the court's view, transform the normal need to preserve public safety into the "special needs justifying special measures" category.<sup>4</sup> Instead, the Department of Homeland Security's elevated threat levels had become "normal."<sup>5</sup>

Second, since there was no specific threat indicated for this political demonstration, there was no urgent need for immediate action without a search warrant, so exigent circumstances did not exist.<sup>6</sup> And finally, the court stated that attending a large public gathering may result in a diminished expectation of privacy in one's image or conversations, but not in one's person or possessions.<sup>7</sup> The court went on to state that fear of terrorism did not justify creating a new Fourth Amendment exception based on the size of a public gathering.<sup>8</sup> According to the court, such an exception could lead to viewpoint discrimination in violation of the First Amendment if local governments began selectively applying such an exception to certain political gatherings or music concerts or parades, but not to church picnics or fundraising walks, for example.<sup>9</sup>

In the eyes of the *Bourgeois* court, law enforcement personnel could conduct a pat-down search of an attendee if there was reasonable individualized suspicion that that person possessed a weapon.<sup>10</sup> And further, if there was probable cause to believe that a person was carrying a weapon, the law officer could conduct a full search incident to arrest or under the exigent circumstances exception described earlier.<sup>11</sup> Existing law already allows these enforcement efforts. The real question, and the real importance of the *Bourgeois* decision, is: after September 11, are these normal law enforcement measures enough?

The *Bourgeois* court answered with a resounding "yes." In the words of the court:

[I]t is quite possible that [we] would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches.... Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence - rather than potentially effective, broad, prophylactic dragnets - as the constitutional norm.... We cannot simply restrict civil liberties until the War on Terror is over, because [it] is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country.<sup>12</sup>

As stated earlier, this decision has been relied upon in subsequent litigation concerning the constitutionality of mass searches of sport spectators. Such searches have taken various forms in the United States, ranging from bag searches at the 1996 Atlanta Olympic Games and at many college and professional sports events, to wand searches at the 2002 Salt Lake City Winter Olympic Games, to the pat-down searches required at National Football League games beginning in 2005, to video surveillance with facial recognition scanning at the 2001, 2002, and 2006 Super Bowl games.<sup>13</sup>

Visual inspections of the contents of spectators' bags at a professional sports facility were upheld in 1982 in *Jensen v. Pontiac*.<sup>14</sup> The court found that there was a history of spectator injuries caused by

thrown objects, and that football spectators engage in violence with some regularity.<sup>15</sup> These facts supported the argument for the existence of a public necessity to implement a bag search.<sup>16</sup> The court also found that the number of projectile-related injuries had substantially decreased following implementation of the search policy.<sup>17</sup> Balancing these factors against the minimal intrusiveness of the purely visual inspection of the contents of spectators' bags, the court decided that the search procedure was reasonable.<sup>18</sup> An important feature of the policy was the requirement that the guards inform the spectators that they could either dispose of any prohibited items and then be admitted, or they could refuse to be searched and receive a refund.<sup>19</sup> In the court's view, these consent notifications minimized the potential invasiveness of the search.<sup>20</sup>

With regard to the more obtrusive searches by magnetometer or by facial recognition scanning video surveillance, there is as of yet no case law. Where the *Bourgeois* decision has been useful is in the recent litigation concerning the constitutionality of physical pat-down searches. Since 2005, four lawsuits have been brought to challenge pat-down policies at sports venues.<sup>21</sup> In two of these, the courts ruled that for various reasons the plaintiffs lacked standing to sue (*Sheehan* and *Chicago Park District*), but the other two have resulted in reported opinions that are instructive.

In *State of North Dakota v. Seglen*, a student attending a college ice hockey game was subjected to a pat-down search.<sup>22</sup> Although the game was played in a privately owned and operated arena, the court found that the search was conducted by a police officer so state action existed.<sup>23</sup> Signs were posted inside the arena warning patrons that they were subject to search, but the court found that this could not establish that spectators had actually impliedly consented to be searched.<sup>24</sup> The court also found that the pat-down search did not fall within the exigent circumstances exception nor the special needs exception to the warrant requirement.<sup>25</sup>

The state argued that since the occurrence of the terrorist events of 9/11 there is a greater need to conduct pat-down searches at spectator sports events.<sup>26</sup> The court disagreed, adopting the rationale of the *Bourgeois* court that the generalized threat of terrorism does not justify restricting Fourth Amendment protections at large public gatherings.<sup>27</sup> The court found that there was no evidence of a history of violence or injury at hockey games in that arena that would necessitate a mass suspicionless search of the spectators.<sup>28</sup> For these reasons, the pat-down search was ruled unconstitutional.<sup>29</sup>

Similar reliance was placed on the *Bourgeois* case by a federal court in *Johnston v. Tampa Sports Authority*.<sup>30</sup> The *Johnston* case arose after the National Football League (NFL) implemented a new rule requiring pat-down searches of spectators at all its professional football games, beginning with the 2005-06 season.<sup>31</sup> In announcing the new search policy, NFL Commissioner Paul Tagliabue stated, "This new requirement is not a result of any specific threat information. It is in recognition of the significant additional security that pat-downs offer, as well as the favorable experience that our clubs and fans have had using pat-downs as part of a comprehensive stadium security plan."<sup>32</sup> When the Tampa Sports Authority implemented the NFL's new rule at Tampa Bay Buccaneers football games, season-ticket holder Gordon Johnston sued, claiming his Fourth Amendment rights were violated.

In *Johnston v. Tampa Sports Authority*, the legal issues addressed were:

3 Ibid. at pp. 1311-1317.

4 Ibid.

5 Ibid.

6 Ibid. at pp. 1311, 1316.

7 Ibid. at pp. 1315-1316.

8 Ibid. at pp. 1310-1311.

9 Ibid.

10 Ibid. at p. 1316.

11 Ibid.

12 Ibid. at pp. 1311-1312.

13 Steinbach, P. (2006). Enemy at the gates. *Athletic Business*, 30(5), 36-47.

14 *Jensen v. Pontiac*, 317 N.W.2d 619 (Mich. App. 1982).

15 Ibid. at p. 623.

16 Ibid. at pp. 623-624.

17 Ibid. at p. 624.

18 Ibid.

19 Ibid.

20 Ibid.

21 *State of North Dakota v. Seglen*, 700 N.W.2d 702 (N.D. 2005); *Johnston v. Tampa Sports Authority*, 442 F. Supp. 2d 1257 (M.D. Fla. 2006); *Sheehan v. San Francisco 49ers* (N.D. Cal. 2006);

*Chicago Park District v. Chicago Bears Football Club*, 2006 U.S. Dist. LEXIS 58621 (N.D. Ill. 2006). The *Sheehan* case is now being litigated in the California state court system, with the plaintiff suing under the privacy provision in the California Constitution (*Sheehan v. San Francisco 49ers*, No. CGC-05-447679, (Superior Ct., San Francisco County), complaint filed December 15, 2005).

22 *Seglen*, at p. 706.

23 Ibid.

24 Ibid. at p. 709.

25 Ibid. at pp. 706-708.

26 Ibid. at p. 708.

27 Ibid.

28 Ibid.

29 Ibid.

30 *Johnston v. Tampa Sports Authority*, 442 F. Supp. 2d 1257 (M.D. Fla. 2006).

31 Fans will be subject to pat-downs, *Washington Post*, 26 August, 2005, p. E06.

32 Ibid.

- the requirement of state action in the deprivation of a fundamental right
- implied consent and the doctrine of unconstitutional conditions
- the reasonableness of the search

The U.S. Constitution protects citizens from abusive government. Thus, in order to establish a violation of one's constitutional rights, one must establish that the state was indeed the bad actor that accomplished that violation. The *Johnston* court found that state action existed in this case because the Tampa Sports Authority (TSA), which implemented the search policy, was a public agency created by Florida law with responsibility for operating the publicly owned stadium in which the Buccaneers play.<sup>33</sup> Further, the private security company that conducted the searches was hired by, paid by, and was acting as an instrument of the TSA. In the court's eyes, these facts were sufficient to establish state action.<sup>34</sup>

With regard to implied consent, the court held that, in Fourth Amendment cases like these, consent must be freely given and truly voluntary.<sup>35</sup> Here, Johnston consistently expressed his lack of consent to be searched when he attended Buccaneers games.<sup>36</sup> Additionally, the court ruled that under the doctrine of unconstitutional conditions, the TSA could not legally condition the exercise of a benefit or privilege, in this case the use of Johnston's non-refundable season tickets, on his relinquishment of his constitutional right to be free from unreasonable searches.<sup>37</sup>

Finally, in balancing the intrusiveness of the pat-down searches against the TSA's need to conduct the search, the court ruled that this search was not justified under the special needs exception to the search warrant requirement.<sup>38</sup> In doing so, the court relied on the *Bourgeois* rationale that, without evidence of real and concrete danger at the football games, the generalized fear of terrorism was an insufficient justification for a special needs search.<sup>39</sup> The *Johnston* court further relied on the *Bourgeois* ruling that attending a public event did not diminish the plaintiff's expectation of privacy in his person and possessions.<sup>40</sup> The court reiterated precedent establishing that pat-down searches are considered gross invasions of personal privacy; therefore, the intrusiveness of the search outweighed the justification for the search.<sup>41</sup> Thus, the search was held to be unreasonable.<sup>42</sup>

Based on the recent decisions in *Bourgeois*, *Seglen*, and *Johnston*, the trend in the United States seems to be that mass pat-down searches of sports spectators will be held to violate the Fourth Amendment. However, the *Johnston* case is currently on appeal to the 11<sup>TH</sup> Circuit Court of Appeals, and the *Sheehan* case (as mentioned above) is currently being litigated in the California courts - so the potential for different outcomes remains a possibility. The U.S. Department of Justice (DOJ) has filed a brief in support of the TSA in the *Johnston* case, arguing, among other things, that Congress determined that NFL football games are likely terrorist targets when it instituted "no-fly" zones over stadiums during games, and therefore a real, particularized threat does indeed exist.<sup>43</sup> DOJ is also arguing that the government must be the entity denying the benefit in order for the doctrine of unconstitutional conditions to apply, claiming that in *Johnston* it was a private football club that sold the plaintiff his season tickets.<sup>44</sup> And finally, the DOJ argues that Johnston's verbalized non-consent to be searched was insufficient because he impliedly consented to the search

by deciding to enter the stadium despite being searched.<sup>45</sup> It remains to be seen whether these arguments will persuade the 11<sup>TH</sup> Circuit Court, since after all that is the same court that decided the *Bourgeois* case in 2004.

The as yet unlitigated issue of the constitutionality of facial recognition scanning video surveillance searches may be the next frontier for litigation in this area of mass spectator searches. The video surveillance at the Super Bowl football games mentioned earlier was used to compare images of spectators' faces with database images of known terrorists and other criminals, resulting in a virtual "digital pat-down."<sup>46</sup>

The central question raised by such "high tech" searches is - does facial recognition scanning and comparison with stored database information invade possession of one's person instead of just one's image? If so, we may need to update Fourth Amendment analysis in light of merging surveillance and information technologies because current case law suggests a diminished expectation of privacy regarding one's image when one is out in public view<sup>47</sup> (e.g., my face as I enter a sports facility to attend a game). However, the use of the information gleaned from my face and compared to information stored in financial, criminal, and health databases, for example, could be very invasive of my privacy. Current case law also requires a plaintiff to prove both an objective and a subjective expectation of privacy,<sup>48</sup> but in a merged surveillance/information technology search, a person might be completely unaware that they have been searched and thus be unable to assert a subjective expectation of privacy.<sup>49</sup>

Thus, in the future courts may need to fashion new analyses to deal with these new means of privacy invasion. One commentator has suggested strengthening a constitutional right to privacy in one's personal information.<sup>50</sup> Another possibility is to establish a rebuttable presumption that if a person sues for a violation of privacy, then filing the claim constitutes an assertion of a subjective expectation of privacy.<sup>51</sup> If the law does not change to meet changes in technology that may be used to intrude into personal privacy, our long-cherished rights may be gradually eroded away.

33 *Johnston v. Tampa Sports Authority*, 442 F. Supp. 2d 1257 (M.D. Fla. 2006), at p. 1263.

34 *Ibid.*

35 *Ibid.* at pp. 1271-1272.

36 *Ibid.*

37 *Ibid.* at p. 1271.

38 *Ibid.* at pp. 1265-1269.

39 *Ibid.*

40 *Ibid.* at pp. 1269-1271.

41 *Ibid.* at p. 1270.

42 *Ibid.* at p. 1271.

43 Amicus Curiae Brief for the United States Supporting Defendants-Appellants and Arguing for Reversal, at pp. 7-10. 2006 WESTLAW 3522638 (11th Cir.).

44 *Ibid.* at pp. 5-6.

45 *Ibid.* at p. 5.

46 Elmore, L. "Tampa police made it the Snooper Bowl, but high-tech spying's a low-level sin." *Street & Smith's SportsBusiness Journal*, 12-18 February

2001, p. 34; Kappstatter, B. "Tampa cops recorded every fan's face - Snooper Bowl." *Daily News*, 2 February 2001, p. 1; "Uncle Sam and the watching eye." *The Economist*, 22 September 2001.

47 *California v. Ciraolo*, 476 U.S. 207 (1986); *Dow Chemical v. United States*, 476 U.S. 227 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

48 *Katz v. United States*, 389 U.S. 347 (1967), at p. 361, Harlan, J., concurring.

49 Kearns, T.B. (1999). Technology and the right to privacy: The convergence of surveillance and information privacy concerns. *William and Mary Bill of Rights Journal*, 7, 975-1011.

50 *Ibid.*

51 Claussen, C.L. (2006). The constitutionality of mass searches of sports spectators. *Journal of Legal Aspects of Sports*, 16(2), 153-175, at p. 170.

# Female Sport Participation in America: The Effectiveness of Title IX after 35 Years\*

by Cathryn L. Claussen\*\*

There are few opportunities for women to participate in sport at the professional level, with the primary exceptions of tennis and golf. In the United States, professional team sport opportunities for women in other sports are struggling. The Women's National Basketball Association (WNBA) has experienced some success, but similar efforts in the sports of softball, boxing, volleyball, American-style football, and soccer have not been as successful. In the U.S., college sports teams typically serve as the training ground for professional sport athletes, so this paper is focused on school sport because this is where the majority of participation opportunities for women currently exist. This paper examines how effective Title IX, an American law that was passed in 1972 to achieve gender equity in educational settings, has been in promoting the participation of girls and women in sport.

## 1. Sport in America

In America, participation opportunities in organized sport are predominantly offered for the most elite athletes, and are located in school settings (junior high and high schools and colleges) and in the professional sport entertainment business. Outside of those settings, there is little organized sport (particularly in team sports) for non-elite adults. There are city and county sponsored recreational sports programs for children as well as adults, but these also have tended to offer more activities for males. Additionally, the notion of gender-appropriate sports activities lingers today, although certain activities have become (in varying degrees) more acceptable for females than they were in the past.

Historically, the American people have held strong views about which sports activities were appropriate for women to participate in and which were not. Sports activities that were traditionally considered appropriate for females included

- Individual sports that were aesthetically appealing and did not involve physical contact with an opponent or propelling heavy objects
- Team sports that did not involve physical contact<sup>1</sup>

Examples of these traditionally acceptable activities for females include gymnastics, figure skating, diving, swimming, tennis, golf, and volleyball.

Examples of sports activities that are still "on the fringes" of acceptability include ice hockey, tackle football, boxing, martial arts, and baseball. Fast-pitch softball is more acceptable these days, although the sexual orientation of softball players is still called into question

frequently. In America, females who participate in sports activities considered more appropriate for males than females are thought to be manly or lesbians - and this is still a slur used to intimidate females who might otherwise be interested in participating in some of these activities.

The image of the ideal American girl is best personified by the popular Barbie Doll, which embodies a non-muscled, slender yet large-breasted, beautiful and feminine woman. Such images are regularly reinforced by the media with desirable models imitating the Barbie Doll "look." However, looking like Barbie and being healthy, fit and strong is almost impossible to achieve for the typical female. This idealized image has contributed to anorexic and bulimic eating disorders, as well as to a fear of getting too many muscles if one works out too much. It has also contributed to the practice of "cosmetic fitness," in which American women will diet and work out only to look good instead of to be truly fit. Once their goal of looking good is accomplished, they will often stop participating in physical activity.<sup>2</sup>

## 2. Title IX

Into this historical and socio-cultural context, and brought on in part by the women's rights movement that occurred in America in the 1960s, came the enactment of Title IX of the Education Amendments of 1972. Title IX was passed to improve educational opportunities for females in general, and was not focused on sports participation per se. In fact, early on there was some debate as to whether or not it applied to athletics, but the fact that athletics regulations were promulgated in 1974 by the Department of Health, Education, and Welfare (the precursor to the current Department of Education) demonstrates that many congressional representatives believed it would apply to all educational offerings, including sports activities offered in the schools and universities.<sup>3</sup>

The law itself is a simple one and reads as follows:

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.*<sup>4</sup>

After its passage, the question remained, how should the concept of prohibiting sex discrimination in education programs be applied to the context of school and college athletics? To flesh this out, the U.S. Department of Education's Office for Civil Rights put forth regulations that provide more specific guidance.<sup>5</sup> These regulations focus on three aspects of school athletics:

- Athletics scholarships
- Participation opportunities
- Other athletics benefits (i.e., provision of equipment and supplies; provision of locker rooms, practice and competitive facilities; publicity; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; scheduling of games and practice time; travel and per diem allowance; provision of medical and training facilities and services; provision of housing and dining facilities and services)

Subsequently, in 1979 the Office for Civil Rights issued a Policy Interpretation that was intended to further clarify how schools and universities could comply with the regulations.<sup>6</sup> This Policy Interpretation contained a three-part test for compliance on the issue of equitable participation opportunities. A school would be considered to be in compliance with Title IX if it could satisfy any one of the three

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1 Metheny, E. (1965). *Connotations of Movement in Sport and Dance*. Dubuque, IA: Wm. C. Brown Co.

2 Coakley, J. (2007). *Sports in Society: Issues & Controversies*, 9th ed. Boston: McGraw-Hill, p. 241

3 See Draft Regulations for Interscholastic

and Intercollegiate Athletics, June 20, 1974, 39 *Federal Register* 120, at 22236; see also Hearings before the Subcommittee on Education of the Committee on Labor and Public Welfare, United States Senate, 94th Congress, 1st Session, September 16 & 18, 1975.

4 Title IX of the Education Amendments of 1972, 20 United States Code § 1681 34 Code of Federal Regulations § 106.37(c) and § 106.41

6 U.S. Department of Education. (1979). *Policy Interpretation: Title IX and Intercollegiate Athletics - The three-part test for compliance regarding equity in participation opportunities*, 44 *Federal Register* 239, December 11, 1979, at 71417-71418.



# Football “Hooliganism”, Policing and the War on the “English Disease”

by **Dr. Clifford Stott and Dr. Geoff Pearson**

*A Powerful Exporation of the Policing and Legal Methods  
Used to Combat Football Hooliganism Involving English  
Supporters Travelling Abroad.*

As the disorder in Rome, Seville, Athens and Lens during the 2006 campaign of Champions League demonstrate, the problem of hooliganism among English football supporters travelling abroad remains an endemic and intractable problem. This groundbreaking new book provides a radically different analysis of the ‘English Disease’ based upon seventeen years of leading edge peer reviewed scientific research. Combining the disciplines of law and crowd psychology, the authors provide the most comprehensive analysis of the problem to date. The authors expose how the media, government and academics have converged upon an assumption that the English Disease is primarily the outcome of the presence of English hooligans. They show how this assumption has played a pivotal role in legal and policing solutions that are, at best, ineffective and at worst counter-productive.

The central thesis of the book is that the causes of football hooliganism involving English fans abroad have been completely misunderstood. To underpin their argument the authors draw upon extensive scientific data draw from the Football World Cup Finals in Italy in 1990 to Germany in 2006. But rather than simply providing an academic critique the authors go on to demonstrate how this different way of looking at the problem is playing a major role in international projects aimed at reshaping and developing the policing of football. By drawing upon the data derived from collaborative research on the European Championships in Portugal in 2004 this book sets the most convincing case yet that society has to reshape its understanding and response to the English Disease.

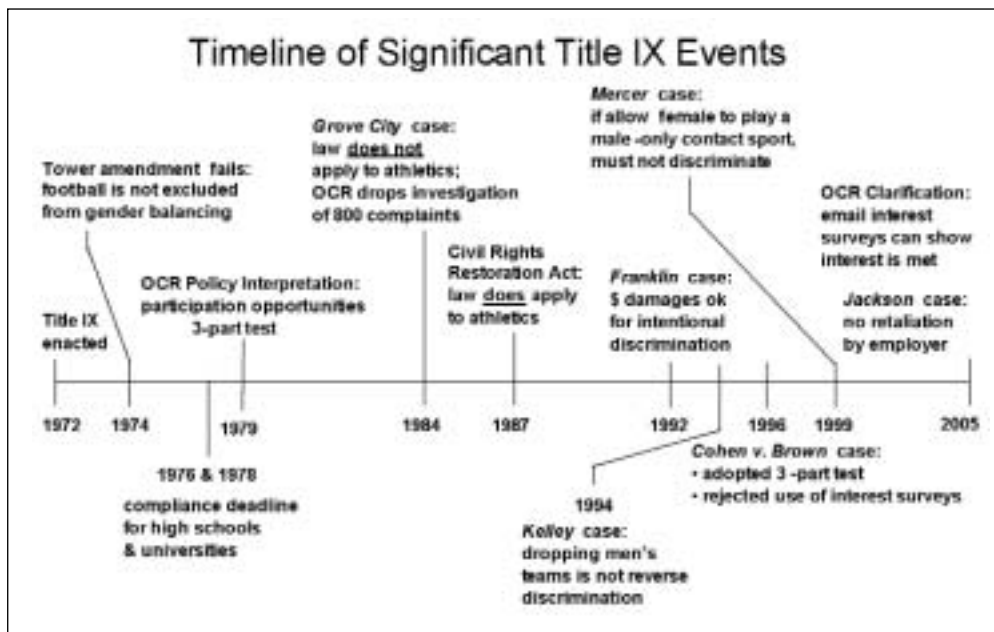
In addition the book takes a thorough and critical look at the evolution and effectiveness of legislative and judicial responses to football crowd disorder abroad, in particular focusing on Football Banning Orders. Are Banning Orders for supporters who have not been convicted of a criminal offence legal under E.U. and E.C.H.R. law and are they effective in preventing disorder abroad? Having assessed the successes and failures of crowd control methods throughout Europe, the authors then put forward their solutions to the problem of football hooliganism abroad, solutions which are highly critical of many of the policies undertaken both in the UK and abroad. This book is an essential read for anyone with an interest in hooliganism, sports law, event management, crowd psychology and civil liberties.

#### **Key Selling Points:**

- **Dr Clifford Stott is a Senior Lecturer in Social Psychology and Dr Geoff Pearson is a lecturer at the Football Industry Group, both at the University of Liverpool.**
- **Published by Cass Pennant who himself is a high profile media hooliologist and wide review coverage for this title expected.**
- **Spans 4 book categories, Sport, Social Sciences, Psychology and Law.**
- **The book will be promoted in both general interest and academic markets.**

Dr Clifford Stott is a Senior Lecturer in Social Psychology and Dr Geoff Pearson is a lecturer in Law at the Football Industry Group, both at the University of Liverpool. Both are leading academic experts who have written extensively on crowd control and legal/policing responses to Football Hooliganism which have seen them called upon to advise important bodies such as Home Office, FA, UEFA and FIFA.

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parts of this test. The three-part test is structured as follows, with an illustration of proper compliance included below each of the parts:

1. Substantial proportionality of female athletes to female undergraduate students  
[If women are 50% of students, they should be close to 50% of athletes.]
2. History & continuing practice of improving opportunities for females  
[If a school added 1 sport for females every 3-5 years within past 15 years, it has made a good faith effort and will be considered in compliance.] Full & effective accommodation of interests & abilities of females
3. [If there is an existing varsity team, it is best not to eliminate it; if there is an existing club team, a school should consider elevating it to varsity status upon justified request.]<sup>7</sup>

This three-part test has generated much controversy, and has been challenged as unfair by male football and wrestling coaches associations and male college athletics directors. They have argued that the first prong of the test is an unfair quota system that constitutes improper affirmative action for females, and has led to existing men's teams being eliminated. But of course, in order to know whether equity has been achieved, there must be some way to measure it. This first part of the test is intended to provide athletics administrators with an objective, measurable way to know if they are complying with the law. It is not a quota system, because if a school cannot meet this safe harbor, the test provides other options for demonstrating compliance with the law. Also, blaming Title IX for the elimination of non-revenue-generating men's sports such as wrestling, gymnastics, and swimming is simply wrong. Title IX does not require athletic departments to eliminate men's teams to bring the participation ratio into substantial proportionality. Athletic departments can find other ways to do so, for example by cutting unnecessary costs and raising new funds. That they have chosen to eliminate minor men's sports teams is simply evidence that universities are prioritizing football over the other men's sports.

If not in compliance as measured by the first prong, a school can always attempt to satisfy the law by demonstrating compliance as

measured by the second or third parts of the test. Most of the lawsuits so far have been won by the plaintiffs, and have rested on prong one because most universities could not satisfy the second or third prongs. However, some schools are beginning to show evidence of sufficient improvements in female participation opportunities over time that they can now satisfy prong two.

A big controversy still exists over how to satisfy prong three. Title IX opponents often argue that women are not as interested in participating in athletics as men are, and therefore do not deserve equal participation opportunities. This ignores the reality that a history of discrimination in providing opportunities will depress interest until opportunities have been put in place for a sufficient time for interest to develop. For example, if I had grown up in Africa in the Sahara desert, it is unlikely that I would have a current interest in participating in ice hockey. As another example, young girls have never had the opportunity to participate in tackle football, and so would obviously not have had the chance to develop an interest in playing that sport. Compare these situations with the situation of the relatively recent widespread introduction of youth soccer in America. From the beginning, opportunities were provided for both sexes and now we see both sexes quite interested in participating in soccer. The principle here is that "If you build it, they will come." Opportunity dictates interest - but it does take time for interest to develop.

The following timeline displays the most significant events in the 30-plus years since Title IX was passed.

As is shown in the timeline, football and other revenue-producing sports were not intended to be excluded from the gender balancing required by Title IX. When Senator John Tower attempted to amend the law to exclude football, Congress refused to approve the proposed change.<sup>8</sup> Also, in 1992 a new remedy for intentional sex discrimination was added by the Supreme Court - monetary damages for successful plaintiffs.<sup>9</sup> The original remedy - loss of all federal funding by the school found to be in violation - has never been ordered by a court and was thus an ineffective threat. Monetary damages, on the other hand, provide an incentive for lawyers (who get a percentage of the damages award) to take Title IX cases and fight hard to win them.

In 1996, the *Cohen v. Brown University* case was the landmark case that essentially adopted into law the three-part test that the Office of Civil Rights had proposed.<sup>10</sup> The court in that case also rejected the university's attempt to use an interest survey (which it used to show that current male students were more interested in sports participation than current female students) to justify fewer opportunities for females. According to the court, such a use would perpetuate discrimination by allowing the results of past discrimination to dictate availability of participation opportunities.<sup>11</sup> Nevertheless, in 2005, the

<sup>7</sup> See *Cook v. Colgate University*, 992 F.2d 17, (2nd Cir. 1993).

<sup>8</sup> See Hearings before the Subcommittee on Education of the Committee on Labor and Public Welfare, United States Senate, 94th Congress, 1st Session, September 16 & 18, 1975.

<sup>9</sup> *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992)

<sup>10</sup> *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), cert. denied, 117 S.Ct. 1469 (1997)

<sup>11</sup> *Ibid.*

Office for Civil Rights (currently staffed by politically conservative appointees) issued a policy clarification letter indicating that the government will allow the use of interest surveys as evidence of compliance under prong three of the three-part test.<sup>12</sup> Moreover, the clarification letter indicates that non-responses to the survey may count as indications of lack of interest in participating in sport.<sup>13</sup> Title IX advocates are understandably angry about the invalidity of the government's approach to non-responses, and are currently appealing to the Office for Civil Rights and to congressional representatives to overturn this policy.

### 3. Positive Effects of Title IX

Despite setbacks like the 2005 policy, Title IX has contributed to some positive changes in opportunities for girls and women. Prior to the passage of Title IX, women earned very few of the advanced degrees awarded by universities. For example, in 1971, women earned 1% of the dental degrees, 7% of the law degrees, 9% of the medical degrees, and 14% of the doctoral degrees awarded.<sup>14</sup> This is an indication that many professions were not considered viable options for women.

With regard to sport participation opportunities for females prior to Title IX, only 295,000 girls played high school sports compared to 3.7 million boys. That means that only 7.4% of high school athletes were female in 1971, and their sports programs received only 1% of the athletics budget. Females in college sports did not fare much better back then. In 1971, 32,000 women participated in college athletics compared to 180,000 men.<sup>15</sup> Thus, only 15% of college athletes were female, and their programs received only 2% of the athletics operating budget.<sup>16</sup>

The situation is now much different. In terms of advanced degrees awarded to women, in 2003 women earned 39% of dental degrees, 49% of law degrees, 45% of medical degrees, and 47% of doctoral degrees,<sup>17</sup> and virtually any career (with the exceptions of certain military positions and professional sports) is open to women.

With regard to high school and college athletics, in 2004 42% of high school athletes and 43% of college athletes were female; moreover, the female share of the college athletics budget had increased to 37% of the operating budget, 45% of the athletic scholarship dollars, and 33% of the recruiting budget.<sup>18</sup> Particularly impressive is the dramatic increase in numbers of female high school athletes - from 295,000 in 1971 to 2.95 million in 2004. Because the opportunities for both males and females are so limited at the college level, this large change at the high school level has been very important in providing competitive sport opportunities for large numbers of females.

Increased sport participation also seems to contribute to a better life for women after their school days are over. One research study conducted by the National Center for Education Statistics followed up on a set of 1992 high school graduates to examine their status in the year 2000, eight years after graduation. 72% of the males and 49% of the females reported having participated in athletics back when they were in high school. Regardless of sex, compared to non-participants those who had participated in high school athletics were more likely to have completed an undergraduate college degree, be earning a higher annual income, and be participating currently in fitness or group sports or recreation activities.<sup>19</sup>

Furthermore, of women in this age cohort, the women that completed high school in the years after Title IX was enacted participated in sport in significantly greater numbers. A 1992 study that compared

white collar working women from the pre-Title IX age generation to those who had attended high school after Title IX was in place found that while 48% of the pre-Title IX age group had participated in youth sport, 64% of those working women from the post-Title IX age group had done so. Similarly, 36% of the pre-Title IX generation had participated in high school sport, whereas 55% of the post-Title IX group had done so.<sup>20</sup>

Additionally, in a 2001 survey of high-level female business executives, a majority of those women credited their past sport participation with helping to develop their business skills.<sup>21</sup> 86% said sport participation helped improve their self-discipline, 81% their teamwork, 69% their leadership skills, and 59% their competitiveness. Of these women, 82% reported participating on organized sports teams after elementary school age, and 81% reported that they were currently participants in sport and/or physical activity. 66% said they exercised at least three times per week - compared to one-third of women in the general American population. 75% said they preferred an athletic body over a thin "model" body.<sup>22</sup> These data, while not capable of describing a causal relationship, do suggest that for women there is some positive correlation between sport participation and later success as a career professional.

### 4. Remaining Gender Inequity

In spite of great improvements due at least partly to Title IX, several areas of gender inequity in sport participation remain. While females represent 42% of high school athletes, they are 47% of the high school student body.<sup>23</sup> And while females represent 43% of college athletes, they are 57% of the university undergraduate student body.<sup>24</sup> Additionally, while female college athletes receive a much larger share of the athletics operating budget than in the past (37% compared to 2% in 1971), they still receive less than an equitable share given their proportional representation in the student body.<sup>25</sup> One way of understanding the inequity of this situation is to use a role reversal mental exercise. If male and female participants were to trade places, would the males be happy with what they would then have?

Other continuing concerns include: continuing inequities in numbers of coaches for female teams and inequities in salaries for coaches of women's teams doing comparable jobs as coaches of men's teams; a lack of government support for investigative and enforcement efforts; persistent conflict over the three-part test and the appropriate means for assessing equity; a perception that females are less interested in sport than males; and the almost sacred status of American football. Some people are still calling for football to receive special treatment and not be included as a male sport when trying to balance participation opportunities for males and females. Why this should be so remains unclear unless football players constitute a third sex!

In addition to the inequities that have been consistently observed through the past 30 years, some new problems with the implementation of Title IX have been identified recently. One is that except for cross-country running and indoor track, the sports most frequently added for females in the post-Title IX era tend to be activities in which students from ethnic minority and lower socio-economic groups are not highly represented. These sports include soccer, softball, golf, lacrosse, rowing, water polo, equestrian, rifle, and ice hockey.<sup>26</sup>

Another is that some of the sports being added for women, such as bowling, equestrian, and rifle, are not activities that promote better physical fitness very well. If fitness is meant to be an important factor in school sports, then this issue should receive consideration

12 U.S. Department of Education. (2005). Additional clarification of intercollegiate athletics policy guidance: Three-part test - part three.

13 Ibid.

14 Digest of Education Statistics 2004, retrieved September 14, 2006 from www.nces.gov

15 Coakley, J. (2007). Sports in Society: Issues and Controversies, 9th ed. Boston: McGraw-Hill.

16 Title IX and Women's Athletic

Opportunity: A Nation's Promise Yet to be Fulfilled. National Women's Law Center website (www.nwlc.org)

17 Digest of Education Statistics 2004, retrieved Sept. 14, 2006, from www.nces.gov

18 Mind the Gap: Women Still Underrepresented in High School Athletics, retrieved April 17, 2006, from www.womenssportsfoundation.org; Gender Equity in High School and College Athletics: Most Recent

Participation and Budget Statistics; retrieved August 21, 2006, from www.womenssportsfoundation.org

19 National Center for Education Statistics (NCES - U.S. Dept of Education) Statistics In Brief - September 2005 - What is the Status of High School Athletes 8 Years After Their Senior Year?, retrieved from www.nces.gov

20 Miller Lite Report on Sports & Fitness in the Lives of Working Women (March 8, 1993). Published in cooperation with the

Women's Sports Foundation and Working Woman Magazine.

21 Research conducted by Mass Mutual and Oppenheimer Funds. Retrieved Sept. 14, 2006, from www.massmutual.com/mmfg/pdf/boardroom.pdf.

22 Ibid.

23 www.womenssportsfoundation.org, retrieved August 2006.

24 Ibid.

25 Ibid.

in determinations about which sports to add for females in the future.

Recent data illustrate the need to be concerned about the fitness of American females. Only 51% of high school females have participated on at least one sports team.<sup>27</sup> Only 55% get twenty minutes three times per week of vigorous physical activity (compared to 70% of males).<sup>28</sup> Only 53% attend physical education classes at least once per week.<sup>29</sup> Only 20.3% eat the recommended five servings of fruits/vegetables daily.<sup>30</sup> 37% of high school females watch more than three hours of television daily.<sup>31</sup> 8.3% are overweight and another 15.3% are at risk of being overweight, adding up to nearly a quarter of high school females in an unhealthy state of physical fitness.<sup>32</sup>

Research has shown that there are positive correlations between female participation in school athletics and positive educational and social outcomes. For example, female participants are less likely than female non-athletes to smoke or use drugs, have lower rates of sexual activity and pregnancy, and have higher grades and a higher graduation rate.<sup>33</sup> Female sports participants also learn how to work as a team, perform better under pressure, set goals, and take criticism constructively.<sup>34</sup> Additionally, they develop better self-confidence, perseverance, and the ability to perform in a competitive environment.<sup>35</sup> Finally, female participants have lower rates of heart disease, osteoporosis, breast cancer, depression, and negative body image.<sup>36</sup>

One reason that inequities are slow to be overcome despite the good reasons for doing so is that the law does not exist in a vacuum, but exists in a state of mutual interaction with the larger society. Part of the problem for female sport has been the reluctance of the media to print stories about it and televise it - for fear it won't sell as well as men's sports. As of 2004, women's sport received only 6% of airtime on televised sports news.<sup>37</sup> And in 2005, 50% of print media editors surveyed said they believed that Title IX has hurt men's sports, and 25% thought women are naturally less athletic than men.<sup>38</sup>

Additionally, the media often give unwarranted attention to the sex appeal of certain female athletes (for example, tennis player Maria Sharapova), which diminishes and trivializes their athleticism. The resulting limited coverage of female sports perpetuates a lack of female athlete role models and contributes to a failure to legitimize sport for girls and women as being as important as sports for males.

Another reason for continuing gender inequities in sport is that a change in the law cannot change attitudes over night. However, 35 years have now passed since Title IX was enacted, and a new generation of parents who have grown up with Title IX in place is starting to bring a new attitude with higher expectations for participation opportunities for females. Attitude change and improvement in the general skill level of females who have finally been accorded more participation opportunities occurs slowly over time. As the overall quality of skill development and play improves, spectatorship and media coverage should improve, which in turn ought to lead to increased resource allocations for female sports. We are just recently beginning to see this occur with women's basketball.

Although Title IX has been a strong force for increasing sport participation opportunities for girls and women, inequities remain on many levels. The importance of ensuring that females have a fair opportunity to participate in sport cannot be overstated. Eliminating gender inequity in sport participation can make a significant contribution to the fitness and general well-being of girls and women. In America, Title IX advocacy groups are committed to remain focused on achieving that goal.

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26 Suggs, W. (November 30, 2005). Title IX has done little for minority female athletes - because of socioeconomic and cultural factors, and indifference. *Chronicle of Higher Education*, p. 35. See also the Women's Sports Foundation Report: Title IX and Race in Intercollegiate Sport (2003), retrieved from [www.womenssportsfoundation.org](http://www.womenssportsfoundation.org). See also the GAO-01-297 report: Intercollegiate athletics: Four-year colleges' experiences adding and discontinuing teams (March 2001), retrieved from [www.gao.gov](http://www.gao.gov).  
27 The Women's Sports Foundation Report: The Status of Health and Physical Activity in Chicago Hispanic Girls, November 30, 2005.

28 Ibid.  
29 Ibid.  
30 Ibid.  
31 Ibid.  
32 Ibid.  
33 Title IX and Women's Athletic Opportunity: A Nation's Promise Yet to Be Fulfilled; retrieved Sept. 15, 2006, from [www.nwlc.org](http://www.nwlc.org)  
34 Ibid.  
35 Ibid.  
36 Ibid. 7 State of Women's Sports, retrieved August 31, 2006, from [www.womenssportsfoundation.org](http://www.womenssportsfoundation.org)  
38 Ibid.

## Sports Law Center of Shandong University, China

The Sports Law Center of Shandong University ([www.sportslaw.cn](http://www.sportslaw.cn)) was established in July 2006, and it is the first teaching and research institute to focus specifically on the research of international sports law in China. Its objective is to promote the development of China sports law; and to invite renowned domestic and foreign sports law experts to visit and give lectures; and to promote the international exchanges and cooperation in the area of sports law.

Its mission includes:

1. from the perspective of comparative law, to carry out theoretical and practical research on sports law about the EU and its member countries, the United States, Australia, Canada and South Korea, and other countries and regions;
2. to carry out special studies on international sports legal issues, including the basic theory of international sports law, the International Olympic Committee's legal status, international sports issues of public law and private law (for example, how to avoid double taxation, intellectual property rights, etc.), international sports doping issues and the mechanism for sports-related disputes settlement, etc;
3. to carry out special studies of the legal issues relating to the Beijing 2008 Olympic Games, including the host city contract, Green Olympics, Olympic terrorism, human rights dimensions of the Olympics, Olympics dispute arbitration system, etc;
4. to plan and organize Sports Law Symposia, academic forums and to establish a sports law website ([www.sportslaw.cn](http://www.sportslaw.cn));
5. to edit a sports law textbook as early as possible on the basis of foreign sports law books and articles;

6. and to recruit and cultivate graduates mainly major in sports law, etc.

Board members of the Centre:

Director: Dr. Huang Shixi ( Juris Doctor of Law, Sports Postdoctoral)  
Dr. Wang Xiaobing (Juris Doctor of Law);  
Dr. Zhang Shijun (Juris Doctor of Law);  
Dr. Chi Deqiang, Lecturer ( Juris Doctor of Law);  
Dr. Xu Qingkun, Lecturer ( Juris Doctor of Law );  
Dr. Li Weihua, Lecturer ( Juris Doctor );  
Tian Yu, Lecturer ( LLM )  
Liu Qiyao, Lecturer ( LLM )

At the end of May 2007, Sports Law Center of Shandong University successfully held a national sports law conference, and more than 60 sports law experts attended this meeting, including university professors, lawyers, J.D and LLM candidates, and governmental officials in charge of sports legislation.

As to publications, the Center's members have published three books, that is: Olympic-Related Disputes and Arbitration, published by Law Press Inc., 2005; Olympic Games Disputes and Arbitration, published by Law Press Inc., 2006; and Research on International Sports Disputes Resolution, by University of Wuhan Press, 2007. Furthermore, the Centre members have also published at least more than 40 sports law articles in Chinese and foreign journals.

# Manifesto: “Stop the Doping Inquisition!”

The upright citizen is bombarded with information about profitable forms of criminality from all sides. They are the subject of discussion in the pub, at parties and in the media. Fraud just is an integral part of human life. Our upright citizen finds solace in the hope that such criminals will get their just deserts. This is cold comfort, however, because many get away with their crimes, as he knows from the news. But if he keeps to the straight and narrow, he will not become victim of allegations and prosecution.

This may be a simplistic portrayal of social relationships, but in its simplicity it seems to reflect the actual situation.

However, there is one category of citizens to which this situation does not apply: professional athletes. In the above paragraph, replace ‘upright citizen’ by ‘honest professional athlete’ and the comparison concerning allegations falls short, particularly with regard to the most deadly sin known to sport, alleged doping. Every (professional) athlete is treated like a potential fraudster, a suspect - by the IOC, the doping authorities and the sports federations involved. Tackling doping use has degenerated into a witch hunt on all top athletes. The individual and his personal and working environment are put in the pillory at the slightest suspicion.

As we said above: fraud is part of life. Take the number of IOC members who have had to resign from the organisation in recent years for transgressions of this kind. In terms of percentages, many more IOC members than top athletes have been caught at fraud. But the IOC does not subject its honourable members to the same suspicion as it does those ordinary top athletes.

Worldwide, all organisations which represent sport in some form or other seem to have forgotten that sport had begun with sports men and women, which then spawned the need for associations, umbrella organisations and event organisers. Furthermore, the competition between these bodies to be or become the biggest, most powerful and richest has created an unhealthy rivalry which has relegated the interests of the athletes in question to the background. The fact that, for example, without athletes the IOC, ASO and UCI would be redundant, is no longer realised in these circles. Top athletes concerned should also draw this rather simple conclusion. They are the most important party to shape the top sport sector. In this respect, they should follow their recreationally-minded brothers and sisters who have turned their backs *en masse* on organised sport. “The wheels can stop turning if your powerful arm wants them to!” If there is one professional group that can prove that solidarity criterion in practice, top athletes can.

## Chain gangs

When we mention the International Cycling Union (UCI) and the organisers of the Tour de France (ASO) the last reader will realise what was the direct motive for our message. Although the abuses described here are not limited to cycling, let us focus now on the Tour de France, the arena for the chain gangs of the road and the shop window for parties who want to spread their power over cycling as widely as possible. Most worryingly, they present themselves as moral crusaders claiming that if they come to power or remain in power, an atmosphere of purity will be created. The last Tour de France offered a taste of the meaning and consequences of this ambition.

Doping tests before and during the Tour have made clear that cyclists can claim no rights whatsoever. The inspectors are known as ‘doping hunters’. Every cyclist is suspect. Anyone who proves his innocence today must be available tomorrow for the next test. Anyone caught by the doping hunters was and is treated like dirt by them, the sporting organisations and their employers (sponsors). The devastating result was the disqualification of the yellow jersey rider for allegedly telling lies, without taking into consideration the seventeen recent tests which had all showed that the victim had not used doping. Obviously, regulations have become more important than their aim.

Thus far the ‘new Tour’, which the present authorities are planning. A new future based on a scandalous past. Because the treatment of athletes by doping hunters bears a strong resemblance to the inquisition which victimised so many people eight hundred years ago. Replace the term ‘doping’ by ‘heresy’, inspectors by inquisitors and church authorities by IOC, doping authorities, sports associations and organisations like ASO, and you have your comparison.

## Medieval practices

Of course the situation back in the Middle Ages was even worse; every citizen was a suspect. Failing to attend an interrogation, giving a hesitant answer, making one suspect move and you were found to be a heretic. And heretics were severely punished. Burning heretics at the stake was a popular public spectacle for those who did not yet stand accused, because even then there was no solidarity among cyclists, sorry, citizens.

Let us look more closely at the parallels between the medieval ‘legal’ practices and the ‘pure’ intentions of modern-day sports governing bodies with regard to the doping problem. The top athlete is a citizen without rights in the field of doping. The way in which he is treated violates fundamental human rights. There is no precise jurisprudence because of the illegal entwinement of the functions of law maker, law enforcer and judge. The obligation of top athletes to make themselves available to inspectors all over the world is disproportionate to the nature and extent of the doping problem. For top athletes, there is no privacy; by definition they are suspects. The *presumptio innocentia* does not exist: people are guilty in advance and in doubt one must prove one’s innocence. And on this weighty note: “*in dubio pro reo*” is never permitted in the procedures and that also applies to “*ne bis in idem*” (‘strict liability’: no defence possible). Any mitigating circumstances or other nuances are excluded from the judicial proceedings. The discrepancy between punishment and offence also belongs to this summary. A long-term *Berufsverbot* (restraint of trade) is the imminent penalty which for many athletes means the end of their chosen career. And then there is the parallel with the people’s court: the media serve its customers by eagerly hanging athletes based on allegations; in the Middle Ages, people flocked to executions carried out on the same flimsy basis.

The media’s approach to the doping problem moves between rousing public opinion and an inquisition. Press conferences become tribunals in which the athlete has to defend himself. There is often no insight into the material, leaving everything to overblown tabloid journalism.

For the sake of clarity: we are not appealing for the liberalisation of doping. We consider doping as one of the areas which requires regulation and sanctioning, but then contemporary, modern regulation. With the right of the accused to be able to defend him/herself like any other citizen. And with a proportional punishment, as opposed to dangerous manoeuvres during sports, for example, which are much less severely punished.

## Perspective

Sporting organisations defend themselves against criticism with the argument that sport sets its own rules. But that time has gone, because current legislation offers perspectives against medieval practices. For example, the Belgian lawyer Jean-Louis Dupont - famous on account of the Bosman case which led to the breaking open of the transfer system in professional football - says that the so-called sports exception is ‘dead and buried’. He came to this conclusion after last July’s judgement of the European Court of Justice in Luxembourg in the Meca-Medina case. A judgement which Frank Kuitenbrouwer, legal correspondent of the NRC-Handelsblad, reviewed in detail on 7 August of this year under the title ‘The new cycling’. The case was about the 4-year suspension (later reduced to 2 years) for doping of two professional long-distance swimmers. The swimmers contended that this

punishment was in conflict with the EU Law regarding the freedom to provide services.

The Court rejected the argument that the doping prohibition solely relates to the sporting world, which falls outside the rules for economic activity. The court does have the competence to judge whether the repressive measures are really necessary in relation to sports competitions. The Court highlighted two problem areas: the definition of prohibited substances and the extremely severe punishments.

It was a judgement that reinforced the argument of Dr Janwillem Soek, associated with the T.M.C. Asser International Sports Law Centre. In his thesis *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*, Soek opposes the excessive risk liability of athletes in doping cases. In fact, it is impossible for them to defend themselves. In addition, he realises that an appeal to an athlete's sense of responsibility will not always be sufficient. Rules are required. But in the current situation, the relationship between accuser and defendant is completely unequal, to the disadvantage of the latter. That is contrary to the European Convention on Human Rights, which plays a role in the Court in Luxembourg.

To conclude this legally tinted section of our manifesto, we will quote from Kuitenbrouwer's column: 'a modern inquisition forms a shaky basis for the new cycling.'

### Monitoring task

The show of strength from the new inquisitors during the Tour should create the momentum for a strong union of athletes, their employers and their sponsors to defend themselves and achieve the liquidation of the inquisition. This union should point out to nation-

al and European governments that they completely fail to monitor violations of basic human rights. When will they decide the time is right for a modern sports policy? The aim of those signing this manifesto is to create that perspective.

By the way: in the year 2000, the Pope asked people's forgiveness for the mistakes made by the Catholic Church in the distant past. But the Olympic inquisition led by Pope Pount of WADA and all the cardinals in the international sports associations does not consider itself obliged to justify itself to modern society. We do not want to let that continue for 800 years.

**Paul Ruijsenaars**, former basketball international, owner of a coaching and advisory agency in Utrecht, board member of ProProf, professional footballers' union, secretary Marathon department, KNSB; **Hidde van der Ploeg** former volleyball international and former coach of the national men's volleyball team, as (sports) correspondent of the *NRC-Handelsblad* he was closely involved in the theme of doping in sport; **Henk Kraaijenhof**, top sports coach; **Egbert Lambers**, solicitor, cycling fan; **Loek Jorritsma**, former chief officer Sports department, Ministry VWS; **Dr. Janwillem Soek**, researcher, associated with the ASSER International Sports Law Centre in The Hague and author of the dissertation "*The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*" (enthusiastic archer); **Jan Rijpstra**, Mayor and former member of the Dutch House of Representatives, sports director; **Harm Swierenga**, senior managing consultant Berenschot, board member of ProProf, professional footballers' union; **Peter Winnen**, former professional cyclist, publicist; **Frank van den Wall Bake**, sports marketing expert.

The International Sports Law Journal



## Sports Law - Worldwide Enforcement Power Switzerland?

### Comments on the Decision of the Swiss Federal Court of 5 January 2007 (SpuRt 2007, S. 63)

by **Georg Engelbrecht\***

1. With its decision of 5 January 2007, the Swiss Federal Court has given the FIFA's all-embracing power to impose sanctions its definitive blessing. The decision is short, only three pages long. The sentence, which is unspectacular in itself, reads: "It is acknowledged by Swiss Association Law that the violation of members' duties may incur sanctions such as punishments for clubs or associations". To this end the Federal Court appeals to an article by Riemer. Professor Hans Michael Riemer is Full Professor at the Jurisprudential Institute of the University of Zurich, editor of the association law Article 60 - 79 Swiss Civil Code in the *Berner Commentary*<sup>1</sup> on Swiss civil law, a judge at the Federal Court (2nd Civil Section) in addition to his official duties and Member of the Court of Cassation of the District of Zurich. Riemer's article bears the title: "Sports Law - World Power Switzerland"<sup>2</sup> - without a question mark.

2. The sanction monopoly of federations, whose members voluntarily or less voluntarily submit to them, also comprises, according to the decision of the Federal Court, of the mandatory implementation of the sanctions: "That the enforcement-like effect of an intended sanction possibility can be produced within an association structure, because the member concerned is required to observe its obligations, cannot be faulted if there are sufficient statutory grounds and does not mean that the association law sanctions violate the state's monopoly on levying execution"<sup>3</sup>.

That is the accolade. Through its highest court, the Swiss state gives the football World Power, FIFA, residing on its sovereign territory, the right, otherwise reserved for the state, to exercise a monopoly on judicial enforcement towards its football subjects, and it does so on a worldwide basis.

3. By this accolade, both national and international hurdles for prosecution and enforcement of contractual agreements in civil law contracts will be mastered - not conquered, but rather knocked down. A normal creditor goes to the national court, makes his claim and consequently orders the bailiff to levy attachment on effects in the house of his debtor, or the Court of Execution to levy attachment and carry out collection of debtor's claims or other rights. The creditor secures the right in arbitral procedures to an arbitral decision, for the implementation of which it requires an enforceability statement from the national Court concerned, both for national cases as well as in international areas.

All this also applies in Switzerland. The Swiss state also claims the official right to the allocated monopoly on levies of execution<sup>4</sup>. The Federal Court does not dispute this, but rather leaves open the still undecided issue of whether a monopoly on levies of execution by the state is part of public order.<sup>5</sup>

4. According to the principles of German law, the matter has always been clear-cut. There is no private enforcement<sup>6</sup>. Enforcement is state responsibility<sup>7</sup>. Only the state is entitled to enforce. It alone assumes

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1 The Federal Court refers in particular to N. 205 et seq. to Article 70 Swiss Civil Code.

2 Sports Law - World Power Switzerland. International Sport Federations and Swiss Law, in: Causa Sport, Die Sport-Zeitschrift für nationales und interna-

tionales Recht sowie für Wirtschaft (CaS) 2004, S. 106 f.

3 Agreeing with Netzele, SpuRt 2007, S. 64, but (still) without own examination of the problem: "The Federal Court has rightly established that this sanction authority of a sport federation has nothing to do with the state's monopoly on levying execution".

the implementation of involuntary fulfilment by enforcement<sup>8</sup>. As a correlation to this the private creditor has a corresponding claim for enforcement against the state for the enforcement of the execution measures applied for and legally permitted<sup>9</sup>. As a matter of principle, the parties are prohibited from making agreements on requirements and limits of state enforcement actions<sup>10</sup>.

5. What defence could have prevented the Spanish debtor (Rayo Vallecano de Madrid S.A., hereafter: "R.V.") from the contractual obligation of having to pay the Brazilian club (Asociación Deportiva Sao Caetano, hereafter: "S.C.") transfer damages? S.C. had used the regulations provided by FIFA concerning status and transfer of players<sup>11</sup> and had obtained a legally enforceable instrument for the money claim by a decision from the committee for the status of players (FIFA Players' Status Committee) of 15 February 2005.

An appeal to CAS against this first FIFA decision would have been possible. R.V. failed to do so in time however, so that the decision of the FIFA Committee was declared definitive. Since the FIFA Players' Status Committee is indisputably not an independent court of arbitration, but merely an internal federation board, the creditors did not have any real "title" with which they could have carried out judicial enforcement. It would have been different if R.V. had filed the first appeal with CAS and the panel there had partially or fully confirmed the FIFA decision by arbitral award. Then the way to cancellation for R.V. to recognition for S.C. and a statement of enforcement of this CAS arbitral award by the national court in Spain (or wherever) according to the New York agreement<sup>12</sup> would have been open. With such a, be it national, executory title, S.C. could have carried out national enforcement against R.V. in Spain. The other way around R.V. would have had the chance that the Spanish Court might reverse the arbitral award, for example due to breach of public order.

6. Instead S.C. employed an internal FIFA means of exerting pressure, namely calling on the FIFA Disciplinary Committee.<sup>13</sup> According to Article 57 section 3 FIFA Statute in relation to Article 68 of the FIFA Disciplinary Regulations<sup>14</sup>, a party who has been ordered by a FIFA body to pay another party (e.g. player, trainer or club) a sum of money, and withholds payment fully or partially, will be sanctioned. The sanctions, according to Article 55 of the FIFA Statutes, range from monetary fines<sup>15</sup>, via deduction of points to relegation to a lower division. In this case the Disciplinary Committee ordered the Spanish club to pay a fine of CHF 25,000. In the event of non-payment of the main claim as well as interest within 30 days of notification, it was

threatened with a 6 point deduction for the 1<sup>ST</sup> team in the home Champions League and thereafter even relegation to the 2<sup>ND</sup> league. The Spanish Football Association was required to implement these measures nationally.

7. R.V. appealed against this sanction decision by the FIFA Disciplinary Committee to CAS and lost. The CAS Panel rejected this appeal by decision of 21 August 2006<sup>16</sup>. In this decision the Panel contented itself<sup>17</sup> with a reference to Article 68 FIFA Disciplinary Regulations, which imposes a disciplinary duty on football clubs to comply with the decisions of FIFA bodies.<sup>18</sup> After confirmation of this arbitrary award by the Swiss Federal Court, the Spanish club<sup>19</sup> had no choice left but to pay up.<sup>20</sup>

8. The Spanish football club finds itself in good company with its defeat before the Swiss Federal Court. So far no athlete, club or association was permitted the pleasure of having a CAS Decision reversed there, not for the repeatedly discussed issue of the arbitral independence of the CAS<sup>21</sup>, nor for its jurisdiction in individual cases<sup>22</sup>, nor due to other possible breaches of public order<sup>23</sup>. Therefore the most recent sports law decision of the Federal Court of 22 March 2007<sup>24</sup> should be considered as almost sensational, being the first time that a CAS award was annulled due to breach of the right to be heard. The stronghold of Sports Law World Power Switzerland, however, will not be shaken to bits.

9. Whether the decision to allow the football world power, FIFA, based in Switzerland, a monopoly on judicial enforcement will stand up in foreign court cases, is worth examining.

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4 The claimant in the case here refers to - not rejected by the Federal Court - Walder-Richli, *Zivilprozessrecht*, 4th edition Zürich 1996, § 41 N 1; Vogel/Spühler, *Grundriss des Zivilprozessrechts*, 8th edition Bern 2006, S. 40 N 34 et seq.; especially on the execution of arbitral decisions Rüede/Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht*, 2nd edition Zürich 1993, S. 51 and 55, 314, 316 and 320; Burkhalter/Grell, *Schiedsgerichtsbarkeit der Schweizer Immobilienwirtschaft*, Zürich 2005, S. 50; Bucher, *Die neue internationale Schiedsgerichtsbarkeit in der Schweiz*, Basel 1989, N 97-98 and 411 et seq.; Vischer in: *Zürcher IPRG-Kommentar*, 2nd edition Zürich 2004, N 17 - 20 to Art. 177 IPRG; ders. in: *Panchaud/Caprez*, 2nd edition Zürich 1980, *Die Rechtsöffnung*, §§ 49/1 and 150/9, *Zeitschrift für Walliser Rechtsprechung* 1987 S. 184; *Decision of the District Court of 22 March 1987*; *Solothurnische Gerichtspraxis* 1996 No 14; *Decision of the Supreme Court of 8 January 1996*.

5 The claimant, however, refers to Vischer in: *Zürcher IPRG-Kommentar*, N 17 - 20

to Art. 177 IPRG and Bucher, see footnote 3.

6 Wieczorek, 2nd edition 1997, § 704 Code of Civil Procedure, marginal number A I a.

7 Stein-Jonas/Münzberg, 21st edition 2002, § 704 Code of Civil Procedure, marginal number 16.

8 Wieczorek, aaO.

9 Stein-Jonas/Münzberg, aaO; BGHZ 3, 82 = NJW 1951, S. 886.

10 Stein-Jonas/Münzberg, 21st edition 1995, for § 704, marginal number 100; RGZ 128, S. 85; Gaul JuS 1971, S. S. 347 f.: this is derived from the interest of the state that the enforcement "is steered in the legal direction".

11 Then as amended on 4 December 2003.

12 Since 1 July 2005, the new version, approved by the FIFA Executive Committee on 18 December 2004, applies; according to article 26 section 1 the old transfer regulations still applied for cases submitted to the FIFA before the new regulations took effect.

13 On 10 June 1958, signed inter alia also by Brazil, Switzerland and Spain.

14 Whether the FIFA means of exerting pressure mentioned by Netze (SpuRt 2007, S. 64) (Decision of the FIFA

Executive Committee, Circular no. 674 of 23 March 1999) of deducting the amount not paid by the convicted club from the FIFA account of the National Football Association would stand up to legal examination is questionable. In another current CAS case, however, this matter will not be resolved either.

14 As valid from 1 September 2005 and amended on 29 June 2005.

15 Although the FIFA Statutes (Art. 55 section 1 lit. c) say nothing about the amount of the monetary fines, the FIFA Disciplinary Regulations set them at an amount of CHF 5,000 (Art. 68 section 1. lit. a) up to CHF 1 million (Art. 16 section 2).

16 CAS 2006/A/1008 Rayo Vallecano de Madrid SAD v/ FIFA

17 Marginal number 43

18 Literally: "...that Art. 68 FDC allows a sanction to be imposed on a club that has failed to pay entirely its debts to another subject. The provision is intended to confirm that it is a disciplinary duty of clubs to fully comply with the decisions of the bodies of FIFA".

19 At the time of writing this article, Rayo Vallecano was competition leader

in the Segunda División B, according to [www.lfp.es/competiciones/2004-05/otrascompeticiones/2divisionb/main1.asp](http://www.lfp.es/competiciones/2004-05/otrascompeticiones/2divisionb/main1.asp). Before this the club had played for four years in the 1st division until the end of the 2004 season.

20 As far as the author knows, both clubs have now come to an understanding, so that there is no further cause for FIFA to impose sanctions.

21 Commencing with the Federal Court Decision of 15 March 1993 in: *Recueil des sentences du TAS* I p. 545/561; later confirmed by Federal Court Decision of 27 May 2003 - 4P.267-270/2002 in: *TAS-Recueil III*, p. 651/674.

22 Federal Court Decision of 7 February 2001 - 4P.230/2000 (cf. [relevancy.bger.ch/php/aza/http/index.php?lang=de&type=high](http://relevancy.bger.ch/php/aza/http/index.php?lang=de&type=high))

23 Cf. the list under [relevancy.bger.ch](http://relevancy.bger.ch) keyword "tribunal arbitral du sport" published Federal Court Decisions.

24 4P.172/2006.

# The 'Specificity of Sport' and the EU White Paper on Sport: Some Comments

by Ian Blackshaw\*

## Introductory

The long-awaited European Union (EU) 'White Paper on Sport' was published by the European Commission on 11 July, 2007 (COM(2007) 391 Final). Not least by the major International Sports Federations, including FIFA and UEFA, who will, no doubt, be disappointed by its contents, mainly because it does not provide for an exemption of sport from EU Law in general and Competition Law in particular (see later), for which they have been lobbying hard. In fact, sport is subject to the '*acquis communautaire*' - the body of law that has grown up and developed by the Community Institutions, not least the rulings of the European Court of Justice, the guardian of the EC Treaty.

In the 'White Paper', the Commission has adopted the Council of Europe definition of "sport", contained in its *European Sports Charter* of 15 May, 1992, which provides as follows:

*"Sport comprises all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels."*

Furthermore, the 'White Paper' acknowledges in its Introduction (para. 1) the importance of sport as "*a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity.*" Indeed, it also quotes the famous dictum of Baron Pierre de Coubertin, the founder of the modern Olympic Games:

*"Sport is part of every man and woman's heritage and its absence can never be compensated for."*

The purpose of the 'White Paper' is expressed in the following terms (para. 1):

*"This initiative marks the first time that the Commission is addressing sport-related issues in a comprehensive manner. Its overall objective is to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making and to raise public awareness of the needs and specificities of sector. The initiative aims to illustrate important issues such as the application of EU law to sport. It also seeks to set out further sports-related action at EU level."*

According to Mr Michal Krejza, the Head of the Sport Unit of the European Commission in Brussels, who for the past year has been putting together the 'White Paper', speaking at the Seventh Annual Asser-Clingendael International Sports Lecture given in The Hague, The Netherlands, on 6 September, 2007, and organised by Dr Robert Siekmann, the Director of the TMC Asser Instituut International Sports Law Centre, in The Hague, this Action Plan, named after Pierre de Coubertin, is a 5-year programme, and that the Reform Treaty, which is expected to be ratified by the Summer of 2009, to coincide with the next European Parliament Elections, is likely to contain a provision on sport, giving the EU a legal basis for the first time in the sports sector.

In this article, we will concentrate on a new section in the 'White Paper' dealing with the important concept of the so-called 'specificity of sport', which has crept into EU jargon, and has recently been and continues to be the subject of consideration by the Commission and

the European Court of Justice in several cases, as well as debate in sporting circles.

## The 'Specificity of Sport'

Over the years, the EU has produced some colourful jargon to describe various concepts and operating principles, such as the principle of '*subsidiarity*', whereby matters, so far as possible are dealt with not at the Commission level, but at the National States' level. For example, Competition matters are being dealt with more and more by National Competition Authorities, such as the UK Office of Fair Trading, rather than by the Competition Directorate of the European Commission.

The term 'specificity of sport' has entered into common parlance, in practice, to refer to the special characteristics of sport recognised in the Nice Declaration on Sport of December 2000. Paragraph 1 of this Declaration includes the following important passage recognising the special nature of sport:

*"Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured."*

Paragraph 4.1 of the 'White Paper' contains, for the first time, according to Dr Krejza, when pressed on the subject during the above-mentioned Lecture, some guidelines - but not exhaustive ones - on the meaning of the 'specificity of sport', based on the case law of the European Court of Justice and the decisions of the European Commission in previous cases. In the drafting of these guidelines, the hand of the Competition Directorate can be clearly seen.

Before setting out these guidelines, it should be noted that the subparagraph clearly states in its first sentence that "*Sport activity is subject to the application of EU Law.*" Particularly, in so far as it constitutes an economic activity (echoing the decision of the European Court of Justice in the landmark case of *Walrave and Koch v. Union Cycliste Internationale* (Case 36/74 [1974] ECR 1405)). In practice, it is difficult to make the distinction between economic and sporting matters. Take the football transfer rules, for example: they are designed to achieve sporting objectives, but clearly also have economic consequences. The subparagraph in the 'White Paper' goes on to state that

*"Sport is also subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of nationality, provisions on regarding citizenship of the Union and equality between men and women in employment."*

According to the 'White Paper', the specificity of European sport can be approached through "*two prisms*":

- The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;
- The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.

The 'White Paper' points out that the specificity of sport has been recognised and taken into account in various decisions of the European Court of Justice and the European Commission over the

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\*\* The Editors proudly confirm that it was the first time after its publication that the White Paper on Sport was presented at a seminar to a wider audience.



years. Take *Bosman* (Case C-415/93 [1995] ECR I-4921), for example, the European Court of Justice stated (para. 106) that:

*“In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.”*

And the ‘White Paper’ adds that, in line with the established case law, the specificity of sport will continue to be so recognised, but it cannot be construed so as to justify a general exemption of sport from the application of EU Law.

The ‘White Paper’ then goes on to give some examples of organisational sporting rules - the so-called ‘rules of the game’ - that are not likely to offend EU Competition Law, provided that their anti-competitive effects, if any, are inherent and proportionate to the legitimate objectives pursued:

- rules fixing the length of matches or the number of players on the field of play;
- rules concerning the selection criteria for sporting competitions;
- rules on ‘at home’ and ‘away from home’ matches;
- rules preventing multiple ownership in club competitions;
- rules concerning the composition of national teams;
- rules against doping; and
- rules concerning transfer periods.

The ‘White Paper’ adds that, in determining whether a certain sporting rule is compatible with EU Competition Law, an assessment can only be made on a case-by-case basis, as confirmed recently by the European Court of Justice in the *Meca-Medina* case (Case C-519/04P, *Meca-Medina and Majcen v. Commission*, ECR 2006, I-6991). In that case, the Court recognised that the specificity of sport must be taken into account in the sense that the restrictive effects of competition inherent in the organisation and proper conduct of competitive sport

are not in breach of the EU Anti-Trust Rules, where these effects are proportionate to the legitimate genuine sporting interest pursued. In other words, the proportionality test requires that each case is assessed on its own merits according to its own particular features or characteristics. Thus, it is not possible to formulate general guidelines on the application of EU Competition Law to the sports sector. In other words, EU Competition Law takes a ‘rule of reason’ approach, rather than following a ‘*per se*’ doctrine (cf US Anti-Trust Law).

## Conclusion

It is clear from the terms and the tenor of the EU ‘White Paper’ on Sport that a general exemption of the sports sector from EU Law is not on the cards for the foreseeable future - if ever. Indeed, many would argue that the sports industry, which is significant as it accounts for 2% of the combined GNP of the 27 EU Member States, notwithstanding the ‘specificity’ of sport, should, like other industries operating in the Single European Market, be subject to EU Law and not exempt from it. Otherwise, there will be special pleading from other industry sectors, which may be equally deserving - at least in their own eyes - of special treatment.

Also, the distinction made by the European Court of Justice between the business/economic and the social sides of sport will remain (described by Prof Stephen Weatherill of Oxford University as “*unfortunate*”) and be reflected in the treatment of sport under EU Law.

The likely introduction in two years’ time of a so-called ‘sport article’ in the EU Reform Treaty is to be welcomed and will give the EU a clear legal basis for intervening in the sporting arena. However, the line to be drawn between sporting rules of a non-economic and those of an economic nature will continue to be a source of friction between the International Sports Federations and the EU, and will not necessarily provide legal certainty, despite the fact that the ‘White Paper’ recognises the specificity of sport and includes some guidelines on what it means in theory and in practice.

The future is always interesting, even though rather unpredictable!

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# Formula One in New Legal Battles Off the Track

by Ian Blackshaw\*

Formula One is never far from the sporting headlines. Not least, because it is a lucrative and popular sport in which sporting and financial fortunes can be won and lost. And, from time to time, Formula One generates as much interest off the track as on it.

The sporting headlines have recently been dominated by what has come to be known as the McLaren Spy case, in which the McLaren team received a record and unprecedented fine of \$100 million and a loss of all their points gained in the current Formula One season’s Constructors’ Championship for, in effect, cheating. These penalties were imposed on McLaren by the sport’s governing body, the FIA (Fédération Internationale de l’Automobile), for having in their possession and allegedly using confidential technical information obtained by one of the members of their team from their rivals Ferrari. McLaren are reportedly appealing against this ruling, mainly, it would appear, on the grounds that they did not use this information to enhance their performance and thereby gain an unfair competitive advantage over other Formula One teams. Surprisingly, perhaps, the McLaren team’s drivers, Fernando Alonso and Lewis Hamilton, were not penalised in any way and allowed to keep their

points in this year’s Formula One Championship. Many commentators have put this decision of the FIA down to politics and finances. These two drivers, especially Hamilton, who is successfully making his debut in Formula One this season, are attracting public interest and drawing additional television audiences, the life blood of any sport. Added to which the Agreement - the so-called ‘*Concorde Agreement*’ - under which the sport is run, expires and is due for renewal next year, against the background of the possibility of a number of the major teams breaking away and organising and running their own competition in future.

Formula One has also been in the news recently in relation to a trademark application to the UK Trademarks Registry, which failed. The Management of Formula One tried to register as a trademark the abbreviation ‘F1’. This was rejected by the Registry on the ground that the letter and the numeral together do not satisfy the definition of a trademark under English Law, because the mark consists exclusively of an abbreviation describing a form of motor sport. In other words, the mark lacks distinctiveness and is purely descriptive.

The Law on these matters is contained in the UK Trade Marks Act of 1994. Section 1(1) of the Act defines a trade mark in the following broad terms:

*“.....any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of*

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*other undertakings. A trademark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.”*

On this definition alone, the letter and numeral comprising the mark ‘Fr’ should satisfy this legal requirement. And that was the basis of the Formula One argument for registration of this mark. However, as will be seen from the above statutory provision, there is also a need for distinctiveness. On this basis, it is arguable that the mark ‘Fr’ refers to or distinguishes the goods and services of Formula One. But the mark consists of a common letter and numeral - hardly distinctive perhaps. But, whether or not the mark is distinctive, for such legal purposes, this is not the only criterion for registration under UK Trademark Law (and indeed under other legal systems too). A mark may be refused registration at the UK Trade Marks Registry in certain circumstances laid down in section 3 of the Act. Section 3(1)(c) covers the case of descriptiveness. According to the UK Registry, the mark, which includes a letter and numeral in common use, is descriptive of a *genre* or discipline of motor sport, namely, the sport carried on under the name of Formula One. And is not, therefore, capable of registration.

The decision by the UK Trade Marks Registry to refuse the registration of the mark ‘Fr’ is consistent with decisions by other quasi judicial bodies. For example, the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), a specialised agency of the UN based in Geneva, Switzerland, in a domain name

dispute disallowed a complaint made by a group of companies involved in the organisation of the Formula One Grand Prix Motor Racing Championship against the use of the domain name ‘fr.com’. The complainants claimed that the domain name consisted of their famous trademark ‘Fr’, an abbreviation of the mark ‘Formula 1’. The WIPO Panel, charged with the resolution of the case, held that, because the trademark ‘Fr’ consisted merely of a single letter and numeral, it was not sufficiently distinctive and, therefore, did not satisfy the requirement under paragraph 4(a)(i) of the ICAAN (Internet Corporation for Assigned Names and Numbers) UDRP (Uniform Domain Name Dispute Resolution Policy) that the domain name in dispute is identical or confusingly similar to a trademark or service mark of the complainants.

In order to claim a monopoly right - and that, in effect, is what a registered trademark confers on its owner provided the mark is used in the course of business and registration renewed - over the use of the abbreviation ‘Fr’, proof of considerable commercial use of this mark would need to be adduced. In the instant case, although the complainants were able to establish some reputation in this mark, they were not able to show that its use was so widespread as to be able to claim that any commercial use of it implied a connection with their activities.

In other words, the abbreviation ‘Fr’ has not yet acquired a so-called ‘secondary meaning’ for trademark registration and protection purposes. But it is probably only a matter of time before it does.

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# International Sports Law Review

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# Conclusions of the 12th IASL Conference

## Ljubljana, Slovenia, 23-25 November 2006

I. The 12th IASL Conference on Legal Aspects of Professional Sport was held from 23 to 25 November 2006 in Ljubljana. The conference was attended by most members of the Board of Directors and many members of the IASL. Over the two days of the conference proceedings (Friday 24 and Saturday 25 November) 22 speakers addressed the conference, providing an in-depth presentation of developments in the academic discipline of sports law and the wider area of law which touches upon sporting and competitive activities from both an international viewpoint and the national perspective of the legal order the speakers represented.

II. The conference proceedings opened with an address entitled 'Lex Sportiva and its application to the national framework of Sports Law' by Asst. Professor of Sports Law and Secretary General of IASL, Dimitrios Panagiotopoulos. Key points of his presentation were an explanation of the nature of Lex Sportiva as the law of international sporting and competitive activity which develops within the context of the private autonomy of sporting bodies, coupled with an exploration of the interface between, and parallel implementation of, that law and traditional legal orders: namely those of international law, European law and individual national legal orders.

Following that on the first day of the conference Janwillem Soek talked about the results of a comparative survey of the sports legislation and the meaning given to the term 'sport' in various national legal orders while Cathryn Claussen examined issues of equality in US school sports. Luc Silance explored the issue of rights and obligations of athletes from various legal orders and then Prof. James Nafziger, IASL President, set forth the differences between the US model on the one hand and the European model of professional sport on the other, while Prof. Gerard Auneau, President of the IASL Scientific Committee, explored the influence of the special features of sport - and in particular professional sport - on shaping national and Community law. Prof. András Nemes presented a recent case brought before the Hungarian National Olympic Committee related to a claim for autonomy of the sports associations while the first day proceeded with papers covering issues such as taxation of the sale by an athlete of the right to commercially exploit his image (Jernej Podlipnik), the security of sports events and individual rights of spectators (Cathryn Clausen), compliance with contractual obligations to participate in events where there are security shortcomings (Urvasi Naidoo) and the EU policy on preventing violence in sport seen from the perspective of the British experience (Jack Anderson).

Prof. Klaus Vieweg, Vice President of IASL, opened the second day of proceedings by analysing the issue of protecting and utilising the right to commercially exploit athletes' names and images under German and US law. Jean-Christian Drolet talked about the new FIFA transfer rules in the post-Bosman era and about the developments in NHL and modern professional hockey. Prof. Brian Brooks explored the commercialisation of sport in the Republic of South Africa. The scandal in Italian football was analysed and presented in comparison to similar disciplinary provisions in other countries by Lucio Colantuoni, while Simon Gardiner talked about issues of corruption in British football, Tone Jagodic explored sponsorship agreements in modern sport, Vesna Bergant Rako\_evi\_ talked about the commercial exploitation of sporting venue names and \_pelca Me\_nar examined the trademarks of international sports events.

Towards the end of the second day of proceedings and the thematic unit entitled 'Jurisdiction systems in professional sport' two recent cases from the French and Greek sporting legal orders were examined: one case which was brought before CAS concerning a dispute between a footballer and his team presented by Giangiacomo Bausone, and an extremely interesting case about the temporary expulsion of the Hellenic Football Federation from FIFA due to fail-

ure to comply with the provisions of the latter's statutes on the independence of national federations presented by Dimitrios Panagiotopoulos and Ioannis Mourniannakis). The impact of European competition law on sporting activity was then examined in the light of the recent ECJ judgement in the Meca-Medina case by Alexandros Rammos (and presented by Panos Panagiotopoulos) and in the light of EU Council Regulation (EC) No 1/2003 on application of the provisions of the treaty to protect competition (Ioannis Mourniannakis). The conference proceedings drew to a close with a series of presentations on specific topics such as the anti-doping legislation and an evaluation of state policy (Simona Kustec Lipicer) and the option for social dialogue between employers and employees in professional football based on the procedures followed for enacting Community labour law (Robert Siekmann).

III. The issues explored by the delegates during the two days of the conference proceedings are of particular importance both from a theoretical perspective since they relate to fundamental concepts of the academic discipline of sports law, and from a practical viewpoint for implementers of the specific branch of law. The issues expounded upon in his paper by University of Athens Asst. Professor and Secretary General of IASL, Dimitrios Panagiotopoulos, deserve particular attention. One illustrative extract from his paper reads as follows: 'The particular features of the sports legal order (Lex Sportiva) are of definitive importance for providing a wide-ranging definition of the particular legal nature of this field. It is a legal order which incorporates state-adopted law and the law adopted by the national and international bodies representing organised sport. These bodies operate to the standards of unions and in the context of the autonomy granted to such bodies and operate within states in a pyramid-like fashion and at international level in the form of a special relationship linking them to the relevant international sports federation or the IOC. The law produced in this manner is thus a law which is, in essence non-national law, which claims for itself direct and preferential application within national sports legal orders and the par excellence law in sports life.'

IV. The overall picture emerging from the conference proceedings is that sports law as an academic discipline has a strong dynamic. As a relatively new academic discipline, based on developments in the field of professional sport, it would appear that sports law is constantly expanding its scope and penetrating further into the extensive field of what we call financial law. However, despite that, key theoretical concerns in the field are open for discussion and in particular the relationship between the autonomous system of Lex Sportiva rules and traditional legal orders, and resolution of problems which arise where several rules of law may apply, possibly from several legal systems, to the same true facts of a case.

Resolution of such problems will prove to be of vital importance for the further development of sports law as a branch of knowledge.

The term 'sport' in various national legal orders takes on a different meaning and there the issue of the rights and obligations of athletes from various legal orders becomes an academic problem.

The impact of the special features of sport -and professional sport in particular- is definitive in shaping national and Community law where the impact of European competition law on sports activity after the recent ECJ judgement in the Meca-Medina case has become extremely clear. Sporting activity raises particular issues especially in relation to matters such as the taxation of the sale by athletes of the right to commercially exploit their image, the safety of sporting events and the individual rights of spectators, compliance with contractual obligations to participate in events and preventing violence in sport, sponsorship agreements, the commercial exploitation of the names of

sporting venues, and international sporting event trademarks. The major differences that exist between legal orders can be seen in the US model on the one hand and the European model for professional sport on the other, and in the relevant disciplinary provisions for competitive and sporting disputes within legal orders or disputes in professional football which follow the procedures for adopting rules on the labour law model.

Disputes often arise from the application of the rules of the *Lex Sportiva* within states as was the case with the temporary expulsion of the Hellenic Football Federation from FIFA due to failure to comply with the provisions of the latter's Statutes on the independence of national federations. Many of these disputes are brought before the CAS while others are brought before national bodies and where there are major problems of conflict between the rules of the *Lex Sportiva* and national rules in the EU before the European court.

V. The specific conclusions from the issues discussed at the conference can be summarised as follows:

- a. The *Lex Sportiva* is a legal order which incorporates law adopted by states and law adopted by national and international sporting bodies and is an issue of fundamental importance for the academic discipline of sports law.
- b. The law contained in the *Lex Sportiva* rules (in other words the rules of sports organisations internationally) is at heart non-national, which claims direct, preferential application in national sporting legal orders as the primary law of sporting life.
- c. The institutional autonomy of international sports federations and

the problem of reviewing the legitimacy of the provisions of the *Lex Sportiva* in terms of the legal regime and the body exercising review are the key problems in the academic discipline of sports law.

- d. Recording, studying, investigating and utilising the international legislation and case law on sporting and competitive activity is vital and the establishment of an International Institute of Sports Law under the aegis of IASL and the UN would make a special contribution in this regard.
- e. It is vital that states adopt an international sports charter to establish a truly international *Lex Sportiva*, a framework supporting the institutional autonomy and operation of international sporting bodies which provide international judicial review.
- f. The resolution of disputes which arise is still not governed by the principles of a fair trial, and the solution to this problem would appear to be the prospect of establishing an International Sports Court with special rules of procedure and various chambers.

*Dimitrios Panagiotopoulos and Ioannis Mournianakis\**

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\* LL.M. Heidelberg.

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## International Conference: "Sports Law - A Review of Developments" Moscow, Russia, 29 June 2007

More than sixty scholars and practitioners of sports law attended the first Moscow International Conference entitled "Sports Law - A Review of Developments" held at the Moscow State Academy of Law on 29 June 2007. The organisers of this conference were the Moscow State Academy of Law, the Russian Olympic Committee, the Russian Football Association, the Russian Federation for Employment Law and Social Security, the Russian Sports Law Association, and the Youth Sports Commission. It was chaired by Professor Dr. K.N. Gusov and Associate Professor Dr. D.I. Rogachov (both members of the Moscow State Academy of Law).

The conference opened with two main presentations. Professor Klaus Vieweg, Vice President of the International Association of Sports Law, talked about "Sponsoring and the Olympics", while A.V. Shapovalov, Chair of the Federal Agency for Physical Culture and Sports, discussed aspects of the new draft bill on physical culture and sports.

Professor Vieweg first drew attention to the fact that Russia - although undoubtedly a major player among sports countries - tended to be underrepresented at international conferences and in existing literature on sports law. This conference was therefore a welcome step and gave out an important signal. In his presentation, Professor Vieweg discussed the increasing commercialisation and problems of the Olympic Games and detailed the complex relations between the IOC, the national Olympic committees, the national organising committees, the sponsors and the media. While the financial input of sponsors opened up new and interesting opportunities, he felt that it also involved a real risk of loss of independence. His concluding wish that Russia might once again host the Olympic Games came true only a few days later when the city of Sochi was chosen to host the 2014 Winter Olympic Games.

The second main speaker, A.V. Shapovalov, gave a detailed account of the new draft bill "On Physical Culture and Sports." In adopting this law, Russia will be joining a band of countries endeavouring to resolve central sports law issues by means of legislation.

In the ensuing presentation on "Regulatory and Organisational Problems of Sports Events", D.I. Rogachov discussed a range of issues, from developing rules for sports events to problems of admission, security measures, arbitration, transport, ticketing and funding.

Dr. A.A. Voitik (Faculty of Law, State University of Belarus, Minsk) discussed the problems faced by professional athletes wishing to complete their university education at the same time. His discussion of Russian employment law provisions for athletes and their coaches sparked off a lively discussion. While the draft bill was criticised, most participants were in favour of introducing the relevant sections.

The final speakers were Dr. I.V. Sitkovskij (in-house lawyer with the television channel "Sports"), who talked about "The Problems of Organising TV Broadcasts of Sports Events", V. Berjzov (Russian National Olympic Committee), who spoke on "Regulating the Fight Against Doping" and M.A. Prokopec (Russian Football Association), who focused on "Law and Sports Sanctions." The conference closed with a presentation by A.A. Gugev (Moscow State Academy of Law) on "The status of Sports Agents." Among other things, he focused on the problems of signing employment contracts by proxy and on matters of agents' liability.

The presentations are due to be published in book form shortly. We look forward to another equally impressive conference next year.

*Renata Enikeeva\**

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\* LL.M., University of Erlangen, Germany.

## European Sports Law - Collected Papers

By Stephen Weatherill 2007, T.M.C. Asser Press, The Hague, The Netherlands, 2007, pp. 379 + XIII, ISBN 978-90-6704-243-7, Price: GBP 60.00 / USD 110.00

This Book comprises the Collected Papers of Stephen Weatherill, Jacques Delors Professor of European Community Law at Oxford University, United Kingdom, covering the period 1989 - 2006. Weatherill has established himself as a leading expert and author in the field of European Union Law and Sport. He has gained admirers not only for his academic rigorousness but also for his practical and pragmatic approach to this evolving branch of EU Law.

In this Book, the author traces the evolution of EU Sports Law, dealing with such landmark decisions as *Walrave and Koch* in 1974, which drew a distinction between sport as an economic activity and sport as a sporting activity, and *Bosman* in 1995, which revolutionised the international football transfer rules and to which he devotes an entire Chapter analysing and annotating this important decision of the European Court of Justice. Writing the Foreword to the Book, Bosman's lawyer, Maître Jean-Louis Dupont, not only recognises Weatherill's scholarship, but also reminds readers that in the Civil Law tradition, "the opinions of textbook writers and academics, such as Stephen Weatherill, are one of the sources of the law - and an important one at that." The Book is clearly an important resource.

Weatherill also deals with equally important topics, such as discrimination in sport, the sale of sports broadcasting rights, the cultural side of sport, and doping. Regarding the latter, he brings us right up to date with an analysis of the *Meca-Medina and Majcen* case, pos-

ing the question whether, as a result of the ruling by the full European Court of Justice on 18 July, 2006, the so-called 'sporting exception' is now dead. His conclusion is illustrative of his ability to combine the academic with the practical side of tantalising legal issues: "... there remains scope for sport to protect its right to assert internal expertise in taking decisions that have both sporting and economic implications. The ECJ has collapsed the idea that there are purely sporting practices unaffected by EC law despite their economic effect, but it has not refused to accept that sport is special. Its message to governing bodies - explain how!"

As your reviewer, writing the Concluding Remarks to this remarkable Book, noted, perhaps the true value of this Book can best be summed up as being "...testimony to the great scholarship and learning of Prof. Stephen Weatherill, based on his in depth knowledge, understanding and appreciation of EU Competition Law (as evidenced by his excellent and erudite Book 'Cases and Materials on EU Law', which is now in its seventh edition!)."

The Book is completed with a Table of Contents, List of Abbreviations and Acronyms, Tables of National and International Legislation and Cases and a Subject Index.

All in all, this Book is a welcome and distinguished addition to the ASSER International Sports Law Series - under the editorship of Dr Robert Siekmann and Dr Janwillem Soek - and one that your reviewer can wholeheartedly recommend to all those involved in international sport in any way, who need to have a thorough understanding of the relationship between sport and EU Law in general and EU Competition Law in particular, both of which continue to have a significant and developing impact on the practice and administration of international sport in a global context well beyond the twenty-seven Member States that currently comprise the European Union.

Ian Blackshaw

### Sports Law Conference on the Increasing Globalization of Sports, Milwaukee, United States, 28 September 2007

On Friday, September 28, 2007 the National Sports Law Institute of Marquette University Law School hosted a conference on *The Increasing Globalization of Sports: Olympic, International and Comparative Law & Business Issues* at the Hilton Milwaukee City Center in downtown Milwaukee, Wisconsin, USA.

Four conference panels composed of leading sports lawyers, sports law professors, and industry professionals, addressed cutting edge legal and business issues related to the global expansion of sports and its implications, global sports marketing and legal protection of intellectual property, resolution of international sports disputes, and a comparative analysis of sports league structure, governance and player restraints. The conference also featured the presentation of the Master of the Game Award to Michael Conley, Gold Medalist, 1992 Olympic Games and Executive Director, World Sport Chicago, during the conference lunch. Conference sponsors included Foley & Lardner LLP, Greenberg & Hoeschen, LLC, and the Sports & Entertainment Law Section of the State Bar of Wisconsin.

**Contact for information on the Conference: Professor Paul Anderson, the Associate Director of the National Sports Law Institute, by email at [paul.anderson@mu.edu](mailto:paul.anderson@mu.edu)**

# A Law Unto Himself

## The Lawyer Who Changed the Face of Football\*

It was not until a rather unremarkable Belgium footballer teamed up with an hitherto unremarkable young lawyer also from Belgium, that a remarkable change in the way football and ultimately all sport is run was made - all due to his girlfriend living a few doors down from the footballer's parents.

Take a walk in the thriving Brussels legal district, and head down one of the smart, fashionable but quiet streets, and you will come to the law office of the smart, fashionable but quiet Jean-Louis Dupont. Tall and slim in his early thirties, sporting trendy designer glasses, he has more the appearance of a town-planner than one of the most influential law brains on the Continent.

It is this man that the European Commission credits with the foresight and courage to change the way sport now operates.

Inside, his high-ceiling office is sparse, with a few modest cuttings and pictures illustrating the impact Dupont has made on the world of football. Opposite his large desk are shelves with football magazines from around the world, testament to the game's rise in popularity and profile over the past few years.

Although it is the name Bosman that is now as famous in world football as Pele's, Beckenbauer's and Maradona's, it is undoubtedly Dupont who was the architect of the victory. Dupont, though, candidly admits that as a young lawyer, fresh out of university, his involvement in the case is no more than a lucky coincidence.

"I had mastered in European Law while my future wife was living a few doors down from Bosman's parents' house. And when Bosman had the problem, he decided rather than go to his parents' lawyer - he understood that it was something about European Law, a French club, and a Belgium club, and UEFA regulations - he knocked at my door, and we went to the law firm and looked at the problem."

Despite the fact that Jean-Marc Bosman was no longer under contract with his former Belgian club, it took four years to finally settle 'the problem' with the Belgium football authorities, after the European Court of Justice agreed that it was illegal to prohibit him from moving to Dunkirk of France from his then club RC Liege of Belgium.

The logic of the case obviously appealed to the young lawyer, understandably keen to make an impact.

After an initial look at the facts he was confident the case was black and white, and there was no chance of the court finding any middle ground, as long as they tackled it from what he calls 'the European dimension'. Dupont admits that they were fully aware even at that early stage that their journey would end in some sort of football revolution.

"We tried for a couple of hours to make phone calls to settle the matter in a friendly way. But we are talking about Belgium at the beginning of the 1990s when sport was one world and law another, and the answer we got was "Who is that lawyer who thinks he can ring up our club?" These regulations are world regulations, what are you talking about?"

After a long and costly legal battle, on 15 December 1995, the transfer system in football was shattered by the European Courts of Justice, as Jean-Marc Bosman stepped out of the courtroom victorious.

Technically the football authorities were in breach of Articles 48, 85 and 86 of the 1957 Treaty of Rome. Simply: no worker is bound to an employer when a contract has ended, so why should he as a footballer be bound to a club when his contract has ended?

Many in England feared the implications. Some felt that the smaller clubs would be left to die as the bigger clubs spied their better players. Also there was to be a lifting of the quotas of overseas players so

there would be a flood of cheaper foreign players into the game, not all of them an improvement on the homegrown talent already available.

So far the latter is certainly true, but what has also emerged is that the power in the game has now shifted from the boardroom to the dressing-room. Players such as Liverpool's Steve McManaman, have used the new laws to engineer lucrative moves abroad, taking full advantage of the fact that the buying club has no fee to pay and the players' existing employers have no hold on them.

One of the first players to benefit from 'The Bosman Ruling' was Scotland's Paul Lambert. Once a reliable, but hardly spectacular midfielder with Motherwell, he was out of contract and went on a trial with Borussia Dortmund in Germany, where he impressed the manager.

"Motherwell offered me a contract at the end of my three years which I didn't think was suitable for my family so, as I had nothing in Britain at all, I had to take the chance, and the next best thing was abroad. I had a week at PSV with Dick Advocaat and although that went very well, he said he wanted a wide-right player to take people on and that wasn't my game, so that was fair enough. I had another opportunity at Dortmund and after Dortmund if that hadn't worked out then I was coming back to Motherwell. Things went well at Dortmund and I was a very lucky person to get what I did."

The move abroad certainly worked for Lambert. In his one season in the Bundesliga he was a European Cup winner after Dortmund beat Juventus in the final, and was well liked by the fans, who demanded a lap of honour from him after his last game.

Now one of the most respected midfielders in Britain, Lambert says he is grateful to Bosman for prizing open the gates for players like him.

"I went abroad and nobody had to pay a transfer fee and any money I was going to make was going to be my own, so from that point of view it was important for me and my family. I had a young son at that time, and had to look after them as well, so from that point of view the Bosman ruling was the best option for me."

The gratitude of the numerous footballers across the world who benefited from his legal handiwork, as well as the sacrifices Bosman made to have a transfer technicality in football named after him, is all very well according to Dupont.

"It's nice to hear that there are people who are grateful because a lot of people multiplied their salaries by three or five times. If there is somebody to thank here it is Bosman, yet I can tell you that not one single footballer in Europe has made a financial gesture in his favour. If you gave me the right numbers of the lottery I would give you something in return, so that's surprising."

In spring 1999 Bosman eventually received £350,000 from the Belgian Football Association. His football career is now over, and he plays a lot of tennis. Jean-Louis Dupont's reward is that he is now one of the most sought after sports lawyers in Europe.

Dupont's reputation stretched to the impressive European Council buildings a short walk from his chambers, where former Wimbledon tennis player Angela Billingham was a MEP at the time. As secretary of the EC's all-party sports group she was heavily involved in the Commission's sports policy, before losing her seat in the 1999 Euro elections. She fully recognizes the impact of the Bosman case.

"One commentator has described it as a release from slavery. I wouldn't put it quite like that but these people had been tied in a grossly unfair way and, as their advocate, he put their case superbly. The rest is history."

The fact that the EC now has a group dedicated to sport, and with such influence, is again in part a result of Dupont's work. It's remarkable in itself that sport is now seen as a political issue, and will form a significant part of any future European Treaty.

\* Taken from: Ian Bent, Richard Mellroy, Kevin Mousley and Peter Walsh, *Football Confidential*, London 2000, pp. 9-22.

Only time will tell what the structure of the treaty - and the role of sports in it - will be, but there is no doubt that the Bosman case has shown that the governing bodies of sport no longer rule with an almost 'Papal Infallibility' who never have their authority challenged.

In this country the recent case involving the Office of Fair Trading, and its failed challenge to the Premier League's television deal is a prime example. The question being: is sport a cultural and recreational activity that benefits millions of people, or a huge business generating millions of pounds and therefore subject to the same laws and business practices as any corporation?

The Bosman ruling places sport firmly in the latter category. But if sport, and football as its most lucrative concern, is to follow the letter of the law, as practised by Jean-Louis Dupont and the many other lawyers now beavering away in this area, much of what we know and take for granted will simply not have a place.

Years after they left Plough Lane, Wimbledon Football Club, having lodged unsatisfactorily at several grounds in London while trying to find permanent base, is still searching for a home to call its own. When the idea was mooted that the club may move from South London and relocate to Clondalkin on the outskirts Dublin while still keeping their Premiership place, it not surprisingly caused an outcry amongst the loyal Dons fans.

For Sam Hamman, the club's flamboyant Chairman, frustrated in his attempts to find a new home, the move made sense. His club needs a home and Dublin was offering one, plus a huge fan base built on the success of the Jack Charlton years. Most importantly, Dublin is the only capital city in Europe without a top-class team; the one thing that was missing was a big club that the Irish people could call their own.

The opposition from the Wimbledon fans who held up 'Dublin = Death' banners at home games, was matched by that of the Irish Football Authorities and UEFA, fearful of damage to the existing leagues. The task of navigating Wimbledon's passage across the Irish Sea fell to Jean-Louis Dupont.

The question for Dupont was as simple as when he took on the Bosman case. Do the Irish Football authorities have the power to stop a company trading within the country's borders? Again, just like his early meetings with Bosman, the implications fascinated him.

Sam Hamman has an incredible enthusiasm and when you see someone like that you feel like getting involved. But what is very interesting about the Wimbledon case is that it's a very simple one. On the one hand you have Wimbledon saying: I can move to Dublin, I can have my stadium there, my Premiership colleagues have agreed to play me there so I can do that. There is the Treaty of Rome and I am a company - I can move. On the other hand, you have the Irish federation saying: No, you're not just another company, this is about sport and we are in the territory of strictly sports issues, and there is a rule that says, here is Ireland and we have monopoly on that territory and we don't want you here.'

If Sam Hamman does get his way and Dublin is placed on the Premiership map then Dupont says he sees even more far-reaching implications for the game.

'My conviction is that if Wimbledon is found right it could open a new perspective for football which is not a European Super League that everyone mentions, but the fact that we would have redefinition of the European map in order to have a strong domestic football. Take a look at Dublin. The problem of Dublin is that because they don't have a real European Club they're out of the map. I'm sure that if you go to Ireland you will find fan clubs of Manchester United and Liverpool not Anderlecht. Why? Because culturally we are talking about the same football market. That's why it makes sense for a Dublin club to play with English clubs. We're talking here about taking a broad-view look at the map and realizing that when it comes to football the British Islands are a natural market and that it makes sense to have a British Islands league. Call it whatever.'

A somewhat frightening prospect for football, although not for Dupont, is that if he did want Real Madrid to take on Arsenal scheduled by television executives then he would doubtless find a way to do it.

'For me there is just one thing that is really scary in the future of football and that is hiding your head in the sand only to wake up in five years time with a permanent Super League where Arsenal, Liverpool and Manchester United play out of their domestic market. Personally, I think that is what really concerns football fans. If nothing is done we will end up with that kind of American way of life when it comes to European Football. So when there is an opportunity for a brainstorming on these issues, I think we should welcome it at this stage.'

The more realistic vision Dupont has for football is not as an extension of the current European Champions League, with its blue-chip sponsors and carefully scheduled and immovable ad breaks, but as a Benelux League involving the better clubs in the Low Countries, a Central European League or Scandinavian Championships. In July 1999 the Scottish FA were quick to dismiss the idea that Celtic and Rangers in Scotland may see their future outside their domestic league and look to joining an English competition, but the 'Old Firm' will watch this especially closely. Although a puzzling notion to many, to the man whose vision of football is based on the make-up of European law, it is very simple.

From a plush office based in a rather unattractive part of Brussels' legislative area, Karel Van Miert once presided over the European Commission's Competition policy. He left in 1999 to take up an academic post in the Netherlands. His term in office saw him take on many of the world's biggest companies which, according to European Law, were acting unfairly. It also coincided with the rise in the profile of sport and the EC's interest in it.

Before Dupont's missionary zeal he had little or no involvement in sport, but that then changed so much that he had dozens of cases awaiting his attention at any one time. It was his job to make sure that big business acted fairly and in his view professional sport was now big business. Mr Van Miert's position as Competitions Commissioner has been called the most powerful in Europe as well as possibly the busiest.

'In the first instance the European Union became a reality with specific rules and a specific law system and rules which needed to be enforced concerning free circulation of people, including sportsman and sportswomen, freedom of establishment, freedom of service and so on. So that's one side of the changed circumstances; on the other hand, the fact that professional sports became so commercial, so business like, meant that there was no way to escape the competition rules.'

Van Miert says he recognized early on the work of the new breed of lawyers, especially Dupont, who spotted dozens of glaring anomalies in the way that sport operates.

'Before the Bosman judgment there were only a few lawyers who were interested in trying to change things and bring cases before the institutions including the Commission, and Mr Dupont was one of the most active and most dedicated ones in this area. But then it was revolutionary work - outside the accepted structures, outside the sports world and mixed up with politicians and political life. Nowadays it's different because a lot of lawyers now think they can file any complaint to the Commission and get away with it.'

Angela Billingham, a member of the EC's cross-party sports group at the time of the Bosman case, shares Mr Van Miert's appreciation of Jean-Louis Dupont and his work

'I think he was a very special sort of lawyer - a lawyer with great clarity of thought - and a very persuasive, powerful man. But he also had one good thing going for him: he had an absolutely solid and proper case to propose. When you have fairness, justice and right on your side, it's pretty easy to be impressive.'

It is clear that Mr Dupont, as the man who lit the fuse for many cases involving Brussels and sport, is held in high regard. And, according to Karel Van Miert, such a radical concept could only have been brought to light by a radical mind.

'In the first instance as a young lawyer who knew a lot about European and competition law, he had the courage to go for it where perhaps better paid, well-established lawyers would not have been interested. Given all the pressures involved, it needed a young, brilliant person with a lot of courage.'



The pressure that Van Miert, during his tenure, along with Dupont and other lawyers, put on sport has prompted some of the biggest names and organisations to fight back. Led by the International Olympic Committee, and including Formula One's Bernie Ecclestone, Athletics Primo Nebiolo and UEFA's Lennart Johansen, a group met in Lausanne 'to confer on areas of common interest with a view to seeking the best solutions to the problems raised'. It was so wary of how far Dupont's passion might lead, that it demanded that sport be excluded from European commercial regulations.

Such is the confidence the EG has, it has already investigated one of the Lausanne group, and one of the most powerful at that, Bernie Ecclestone. The man who controls motor racing was challenged about the broadcasting contract he holds which reportedly allows TV companies which do not show any other motor races a 33 per cent discount on the fee they pay for the rights to show Formula One, which they consider 'uncompetitive'.

According to the EG, Dupont himself took on Ecclestone on behalf of the fans of the Spa Francorchamps motor racing circuit in Belgium, after they complained that their race might be moved to China due to the rules on tobacco advertising.

For the administrators of sport who have long held power and influence without any interference, there is no doubt that this is a shock to the system. But, according to Karel Van Miert, it is the responsibility of the individual federations to change rather than the laws being altered to fit the needs of individuals such as Bernie Ecclestone.

'Professional sport has become big business. Football clubs are floated on the stock market, broadcasting rights are sold for amounts of money which could only be dreamt of fifteen years ago, and there is no way we can escape that. One of the reasons is that since everything is now so commercial, we get complaints not from people outside the sports world, but from people inside the sports world. In this business the interests are now such, that if a club or league or other involved company feels that it is being unfairly treated, it will go to a lawyer and file a complaint with the EG. It's not because we get up in the morning and decide to go after cases in the sports sector, it's just that they land on our table.'

One case of interest to the European Commission involves Royal Excelsior Mouscron, a small club on the French-Belgian border. In a case closely watched by Wimbledon, the Belgian first division club attempted to play a home UEFA Cup tie at a nearby stadium because its home ground was too small.

Although on the surface this doesn't seem to be problematic, the bigger stadium nearby was across the border in Lille in France, which despite the difference in nationalities includes the town of Mouscron as one of its suburbs. UEFA laws do not allow clubs to play home games in other countries. The man called on to take up the case of the minnows against UEFA, with the hope he could cause a giant killing, was Jean-Louis Dupont.

After playing Cypriot club Limasol in the first round, Mouscron was drawn against the French team Metz, and the club decided it needed more seats to match the interest of fans. To this end, it played the game at the 'Stadium Nord' in Lille, 12 miles over the border.

The people of Lille used the reasoning behind the Bosman case to argue that football is an economic activity and therefore UEFA should abide by EC law, which the town said it was breaking on two counts. Firstly, that it was abusing its dominant position in the market, and secondly illegally interfering in the right of one enterprise to offer a service to a fellow member of the Community.

The portly and friendly Jean-Pierre Detremmerie can justifiably call himself Monsieur Mouscron. He is the town's Mayor, MP and Chairman of the Football club. According to Mr Detremmerie, when they were looking to fight UEFA's decision, Dupont was the obvious choice to represent them, and in his opinion, the benefits were mutually attractive. He explained his club's position on a snow-covered night in a hotel in Mouscron's twin town - Rochdale.

'Of course, we knew him because of Bosman. He came and asked the people of Lille to fight against UEFA because for him as a lawyer it was a good thing. It was a case of, if he could win a second time

against UEFA, it would be good publicity for him and good for his business.'

It is hard to imagine that the modest, quiet Jean-Louis Dupont would ever blatantly court publicity, but there could have been some appeal in taking what is essentially a small, local dispute and using it to take on the might of European Football's governing body, with the possibility that the case could turn football on its head, just as the Jean-Marc Bosman case had done.

'What was very appealing was that it's not about the club claiming it lost money or the chance of qualification. It's about two public bodies, the city of Lille and the city of Mouscron, that considered they had to fight a legal battle in order to make it clear that they are just one economic and social region, and that they couldn't accept a ruling from a sport governing body that would re-introduce a border that they had been working so hard for years to make disappear. So it's interesting that after one player - Bosman - public bodies were ready to challenge the rulings of governing bodies, when those decisions were not right.'

The repercussions of the case involving Mouscron will be watched by many in sport who are fearful of Jean-Louis Dupont's activities. Paradoxically though, he sees that the implications could be good for football.

'The Mouscron-Lille case is very interesting one for UEFA because I am sure that for the first time the EC will have the opportunity to recognize that some of the UEFA rules, even if they have economic consequences against the Treaty of Rome, can be deemed legal.'

He feels it is vital that UEFA, in arguing this case, do so with the commissions laws very much in mind.

'If you want to play football, want to take part in European competitions, you need a stadium, and the basic rule is that you have to play in your stadium. And that rule as such violates European law in that you could say "No, I will play where I want". But because it is about football - because you need an identification between the club, the players and a region - I am sure the commission will deem the UEFA rule that says you have to play in your stadium, legal. Now there is an exception to that rule and it's a logical exception. This is that, if for a good reason you can't play in your own stadium, you can play in another stadium. UEFA, however, says you have to play in another stadium within your country, and that's where the violation of European law comes in.'

Dupont denies that he is driven by a personal vendetta against UEFA, but admits that he enjoys the worldwide recognition that he gets for winning the Bosman case - and one of the mementoes on his office wall is a picture of himself with Pele. In fact, far from wanting to crush the governing bodies of sport, he says that UEFA and the other governing bodies are necessary.

'The football world is not going to be nicer if it is only ruled by club owners and top TV moguls, and that's why I am very happy that UEFA is there. But I am sure that UEFA has to evolve, to have not a revolution but a dramatic adjustment to new times, and I really hope that it will manage that soon and in the best possible way.'

It is difficult to imagine a facet of off-the-pitch sport that lawyers or politicians, spurred on by the Bosman case, will not wish to involve themselves in. The ticketing policy of the World Cup Finals in 1998 led Karel Van Miert to accuse the French organizers of being 'anti-competitive'. In his opinion, tickets were not made available to all member states, and forced a climbdown. British MEPs took up the case of British ski-instructors who felt they were being unfairly treated in French resorts; BSKyB's attempt to buy Manchester United was thwarted by the Monopoly and Mergers Commission after much political lobbying, because that, too, was seen as uncompetitive.

The whole issue of TV rights in Football and Formula 1, for example, is one area where broadcasters can expect interference. According to Commissioner Van Miert, multi-year deals, such as the last two involving the FA Premier League and BSKyB, would now be illegal due to the advances in technology. In the future, shorter one-year contracts will be the norm.

Karel Van Miert can now look over the Commission from a distance, but admits that over half of the complaints that found their

way to his office were football related with many of those hoping for a ruling to match Bosman. Since that historic 1995 judgment the knock-on effect has been such that the ruling has been extended. Players from outside the EC are now subject to the same laws and, if the EC has its way, the transfer system could be scrapped all together to allow footballers to move jobs and clubs, when, and if they like, just as thousands of other European workers do every day. Again the issue started in Belgium where the country's FA tried to stop players simply walking away from clubs by imposing a new type of transfer agreement. This was quickly deemed illegal by the EC.

The intervention and interference of the Brussels bureaucrats in sport looks set to continue. Before leaving office, Van Miert asked the world-governing body, FIFA, to explain its powers and criticized it for being undemocratic.

It is though, not just the governing bodies of world sport who have come under Jean Louis Dupont's legal microscope. Spain's main provinces could compete on the world sporting stage under their own flags. The Catalonian regional parliament called Dupont in after passing a bill allowing the region's teams and individuals to represent them rather than Spain. It could pave the way for the Basque and other regions to follow, meaning dozens of Spain's top sports stars would swap allegiances.

It seems that only now are sports bodies catching on to the power and influence coming from Brussels. In Karel Van Miert's opinion they will only have themselves to blame if they take their eyes off the ball.

'They were very reluctant to draw the conclusions from the existence of the European Union - for instance, about the free circulation of players, yet, on the other hand, continued to pretend that sport was so specific that it should be, for instance, kept out of the implementation of competition rules. They were to some extent above the common law. Even today it seems to be very difficult for the sports bodies and others concerned to accept that logic.'

It is by rapidly accepting that simple logic that Jean-Louis Dupont has successfully carved himself a niche as one of European law's

brightest stars and one of the most sought after legal brains in sport. The harder the governing bodies of sport find it to accept the laws, the easier it is for him to challenge the long held status quo that has kept the governing bodies in power for decades. This notoriety, he says, means that he now has the chance to cherry-pick the best cases around the Continent.

Cases like, for instance, the farcical saga involving Arsenal striker Nicholas Anelka. In the summer of 1999, after an unhappy spell at Highbury, he turned to Dupont to release him from his contract. Putting the theory in to practice, Dupont pronounced, to general amazement in the football world, that with a £900,000 'compensation' payment, Anelka could wipe his tears and be on his way. Again his theory is based on the rules that govern thousands of EG workers, who every day hand in their notices to employers. This is as blindingly simple to him as it is seemingly confusing to sport.

'I am happy that it gives me the opportunity to take nice cases where I can really show some imagination,' he says, 'not just reproduce something - that's the great thing. Logically I have people coming from the major European sport which is football, but 95 per cent of cases are now coming from sports like Basketball and Volleyball. Then, all of a sudden, Formula One fans want their claims heard, or trampolinists, or people that come from a more discreet area. Obviously it's always easier to solve problems when you are talking about a small sportsman in a small sport, because European law is about economy and the basis of European law is talk about economic criteria.'

The track record that Jean-Louis Dupont brings from the Bosman case suggests that many of his ideas will come to fruition: teams will soon play in a Benelux or Scandinavian League; clubs will relocate American style to take advantage of an untapped market; and if an area can provide a service to a football club then this will be allowed.

In the next few years Dupont says he foresees half a dozen landmark cases, which will at last help to bring about what he calls 'a sense of balance' to European Sport. All achieved in a simple way with a simple mix of sport with European law and economic logic.

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# WHITE PAPER ON SPORT

Brussels, 11.7.2007\*  
(presented by the Commission)

## 1. INTRODUCTION

*“Sport is part of every man and woman’s heritage and its absence can never be compensated for.”*

Pierre de Coubertin<sup>1</sup>

Sport<sup>2</sup> is a growing social and economic phenomenon which makes an important contribution to the European Union’s strategic objectives of solidarity and prosperity. The Olympic ideal of developing sport to promote peace and understanding among nations and cultures as well as the education of young people was born in Europe and has been fostered by the International Olympic Committee and the European Olympic Committees.

Sport attracts European citizens, with a majority of people taking part in sporting activities on a regular basis. It generates important values such as team spirit, solidarity, tolerance and fair play, contributing to personal development and fulfilment. It promotes the active contribution of EU citizens to society and thereby helps to foster active citizenship. The Commission acknowledges the essential role of sport in European society, in particular when it needs to bring itself closer to citizens and to tackle issues that matter directly to them.

However, sport is also confronted with new threats and challenges which have emerged in European society, such as commercial pressure, exploitation of young players, doping, racism, violence, corruption and money laundering.

This initiative marks the first time that the Commission is addressing sport-related issues in a comprehensive manner. Its overall objective is to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making and to raise public awareness of the needs and specificities of the sector. The initiative aims to illustrate important issues such as the application of EU law to sport. It also seeks to set out further sports-related action at EU level.

This White Paper is not starting from scratch. Sport is subject to the application of the *acquis communautaire* and European policies in a number of areas already have a considerable and growing impact on sport.

The important role of sport in European society and its specific nature were recognised in December 2000 in the European Council’s Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies (the “Nice Declaration”). It points out that sporting organisations and Member States have a primary responsibility in the conduct of sporting affairs, with a central role for sports federations. It clarifies that sporting organisations have to exercise their task to organise and promote their particular sports “with due regard to national and Community legislation”. At the same time, it recognises that, “even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be

respected and nurtured.” The European institutions have recognised the specificity of the role sport plays in European society, based on volunteer-driven structures, in terms of health, education, social integration, and culture.

The European Parliament has followed the various challenges facing European sport with keen interest and has regularly dealt with sporting issues in recent years.

In preparing this White Paper, the Commission has held numerous consultations with sport stakeholders on issues of common interest as well as an on-line consultation. They have demonstrated that considerable expectations exist concerning the role of sport in Europe and EU action in this area.

This White Paper focuses on the societal role of sport, its economic dimension and its organisation in Europe, and on the follow-up that will be given to this initiative. Concrete proposals for further EU action are brought together in an Action Plan named after Pierre de Coubertin which contains activities to be implemented or supported by the Commission. A Staff Working Document contains the background and context of the proposals, including annexes on Sport and EU Competition Rules, Sport and Internal Market Freedoms, and on consultations with stakeholders.

## 2. THE SOCIETAL ROLE OF SPORT

Sport is an area of human activity that greatly interests citizens of the European Union and has enormous potential for bringing them together, reaching out to all, regardless of age or social origin. According to a November 2004 Eurobarometer survey<sup>3</sup>, approximately 60% of European citizens participate in sporting activities on a regular basis within or outside some 700,000 clubs, which are themselves members of a plethora of associations and federations.

The vast majority of sporting activity takes place in amateur structures. Professional sport is of growing importance and contributes equally to the societal role of sport. In addition to improving the health of European citizens, sport has an educational dimension and plays a social, cultural and recreational role. The societal role of sport also has the potential to strengthen the Union’s external relations.

### 2.1 Enhancing public health through physical activity

Lack of physical activity reinforces the occurrence of overweight, obesity and a number of chronic conditions such as cardio-vascular diseases and diabetes, which reduce the quality of life, put individuals’ lives at risk and are a burden on health budgets and the economy.

The Commission’s White Paper “A Strategy for Europe on Nutrition, Overweight and Obesity related health issues”<sup>4</sup> underlines the importance of taking pro-active steps to reverse the decline in physical activity, and actions suggested in the area of physical activity in the two White Papers will complement each other.

As a tool for health-enhancing physical activity, the sport movement has a greater influence than any other social movement. Sport is attractive to people and has a positive image.

However, the recognised potential of the sport movement to foster health-enhancing physical activity often remains under-utilised and needs to be developed.

The World Health Organisation (WHO) recommends a minimum of 30 minutes of moderate physical activity (including but not limited to sport) per day for adults and 60 minutes for children. Public authorities and private organisations in Member States should all contribute to reaching this objective. Recent studies tend to show that sufficient progress is not being made.

\* COM(2007) 391 final

1 1 Pierre de Coubertin (1863-1937), French pedagogue and historian, founder of the modern Olympic Games.

2 For the sake of clarity and simplicity, this White Paper will use the definition of “sport” established by the Council of Europe: “all forms of physical activity which, through casual or organised par-

icipation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.”

3 Special Eurobarometer (2004): The Citizens of the European Union and Sport.

4 COM(2007)279 final of 30.5.2007.

- (1) The Commission proposes to develop new physical activity guidelines with the Member States before the end of 2008.

The Commission recommends strengthening the cooperation between the health, education and sport sectors to be promoted at ministerial level in the Member States in order to define and implement coherent strategies to reduce overweight, obesity and other health risks. In this context, the Commission encourages Member States to examine how to promote the concept of active living through the national education and training systems, including the training of teachers.

Sport organisations are encouraged to take into account their potential for health-enhancing physical activity and to undertake activities for this purpose. The Commission will facilitate the exchange of information and good practice, in particular in relation to young people, with a focus on the grassroots level.

- (2) The Commission will support an EU Health-Enhancing Physical Activity (HEPA) network and, if appropriate, smaller and more focussed networks dealing with specific aspects of the topic.
- (3) The Commission will make health-enhancing physical activity a cornerstone of its sport-related activities and will seek to take this priority better into account in relevant financial instruments, including:
- The 7th Framework Programme for Research and Technological Development (lifestyle aspects of health);
  - The Public Health Programme 2007-2013;
  - The Youth and Citizenship programmes (cooperation between sport organisations, schools, civil society, parents and other partners at local level);
  - The Lifelong Learning Programme (teacher training and cooperation between schools).

## 2.2 Joining forces in the fight against doping

Doping poses a threat to sport worldwide, including European sports. It undermines the principle of open and fair competition. It is a demotivating factor for sport in general and puts the professional under unreasonable pressure. It seriously affects the image of sport and poses a serious threat to individual health. At European level, the fight against doping must take into account both a law-enforcement and a health and prevention dimension.

- (4) Partnerships could be developed between Member State law enforcement agencies (border guards, national and local police, customs etc.), laboratories accredited by the World Anti-Doping Agency (WADA) and INTERPOL to exchange information about new doping substances and practices in a timely manner and in a secure environment. The EU could support such efforts through training courses and networking between training centres for law enforcement officers.

The Commission recommends that trade in illicit doping substances be treated in the same manner as trade in illicit drugs throughout the EU.

The Commission calls on all actors with a responsibility for public health to take the health hazard aspects of doping into account. It calls on sport organisations to develop rules of good practice to ensure that young sportsmen and sportswomen are better informed and educated of doping substances, prescription medicines which may contain them, and their health implications.

The EU would benefit from a more coordinated approach in the fight against doping, in particular by defining common positions in relation to the Council of Europe, WADA and UNESCO, and through the exchange of information and good practice between Governments, national anti-doping organisations and laboratories. Proper implementation of the UNESCO Convention against Doping in Sport by the Member States is particularly important in this context.

- (5) The Commission will play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States.

## 2.3 Enhancing the role of sport in education and training

Through its role in formal and non-formal education, sport reinforces Europe's human capital. The values conveyed through sport help develop knowledge, motivation, skills and readiness for personal effort. Time spent in sport activities at school and at university produces health and education benefits which need to be enhanced.

Based on experience gained during the 2004 European Year of Education through Sport, the Commission encourages support for sport and physical activity through various policy initiatives in the field of education and training, including the development of social and civic competences in accordance with the 2006 Recommendation on key competences for lifelong learning.<sup>5</sup>

- (6) Sport and physical activity can be supported through the Lifelong Learning programme. Promoting participation in educational opportunities through sport is thus a priority topic for school partnerships supported by the Comenius programme, for structured actions in the field of vocational education and training through the Leonardo da Vinci programme, for thematic networks and mobility in the field of higher education supported by the Erasmus programme, as well as multilateral projects in the field of adult training supported by the Grundtvig programme.

- (7) The sport sector can also apply for support through the individual calls for proposals on the implementation of the European Qualifications Framework (EQF) and the European 5 Recommendation of the European Parliament and of the Council, of 18 December 2006, on key competences for lifelong learning (Official Journal L 394 of 30.12.2006).

Credit System for Vocational Education and Training (ECVET). The sport sector has been involved in the development of the EQF and has been selected for financial support in 2007/2008. In view of the high professional mobility of sportspeople, and without prejudice to Directive 2005/36/EC on the mutual recognition of professional qualifications, it may also be identified as a pilot sector for the implementation of ECVET to increase the transparency of national competence and qualification systems.

- (8) The Commission will introduce the award of a European label to schools actively involved in supporting and promoting physical activities in a school environment.

In order to ensure the reintegration of professional sportspeople into the labour market at the end of their sporting careers, the Commission emphasises the importance of taking into account at an early stage the need to provide "dual career" training for young sportsmen and sportswomen and to provide high quality local training centres to safeguard their moral, educational and professional interests.

The Commission has launched a study on the training of young sportsmen and sportswomen in Europe, the results of which could feed into the abovementioned policies and programmes. Investment in and promotion of training of young talented sportsmen and sportswomen in proper conditions is crucial for a sustainable development of sport at all levels. The Commission stresses that training systems for talented young sportsmen and sportswomen should be open to all and must not lead to discrimination between EU citizens based on nationality.

- (9) Rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players. The ongoing study on the training of young sportsmen and sportswomen in Europe will provide valuable input for this analysis.

<sup>5</sup> Recommendation of the European Parliament and of the Council, of 18 December 2006, on key competences for

lifelong learning (Official Journal L 394 of 30.12.2006).

#### 2.4 Promoting volunteering and active citizenship through sport

Participation in a team, principles such as fair-play, compliance with the rules of the game, respect for others, solidarity and discipline as well as the organisation of amateur sport based on non-profit clubs and volunteering reinforce active citizenship. Volunteering in sport organisations provides many occasions for non-formal education which need to be recognised and enhanced. Sport also provides attractive possibilities for young people's engagement and involvement in society and may have a beneficial effect in helping people steer away from delinquency.

There are, however, new trends in the way people, particularly the young, practice sport. There is a growing tendency to practise sport individually, rather than collectively and in an organised structure, which is resulting in a declining volunteer base for amateur sport clubs.

- (10) Together with the Member States, the Commission will identify key challenges for non-profit sport organisations and the main characteristics of services provided by these organisations.
- (11) The Commission will support grassroots sport through the Europe for Citizens programme.
- (12) The Commission will furthermore propose to encourage young people's volunteering in sport through the Youth in Action programme in fields such as youth exchanges and voluntary service for sporting events.
- (13) The Commission will further develop exchange of information and best practice on volunteering in sport involving Member States, sport organisations and local authorities. (14) In order to understand better the specific demands and needs of the voluntary sport sector in national and European policy making, the Commission will launch a European study on volunteering in sport.

#### 2.5 Using the potential of sport for social inclusion, integration and equal opportunities

Sport makes an important contribution to economic and social cohesion and more integrated societies. All residents should have access to sport. The specific needs and situation of underrepresented groups therefore need to be addressed, and the special role that sport can play for young people, people with disabilities and people from less privileged backgrounds must be taken into account. Sport can also facilitate the integration into society of migrants and persons of foreign origin as well as support inter-cultural dialogue.

Sport promotes a shared sense of belonging and participation and may therefore also be an important tool for the integration of immigrants. It is in this context that making available spaces for sport and supporting sport-related activities is important for allowing immigrants and the host society to interact together in a positive way.

The Commission believes that better use can be made of the potential of sport as an instrument for social inclusion in the policies, actions and programmes of the European Union and of Member States. This includes the contribution of sport to job creation and to economic growth and revitalisation, particularly in disadvantaged areas. Non-profit sport activities contributing to social cohesion and social inclusion of vulnerable groups can be considered as social services of general interest.

The Open Method of Coordination on social protection and social inclusion will continue to include sport as a tool and indicator. Studies, seminars, conferences, policy proposals and action plans will include access to sport and/or belonging to social sport structures as a key element for analysis of social exclusion.

- (15) The Commission will suggest to Member States that the PROGRESS programme and the Lifelong Learning, Youth in Action and Europe for Citizens programmes support actions promoting social inclusion through sport and combating discrimination in sport. In the context of cohesion policy, Member States should consider the role of sports in the field of social inclusion, integration and equal opportunities as part of their

programming of the European Social Fund and the European Regional Development Fund, and they are encouraged to promote action under the European Integration Fund.

The Commission furthermore encourages Member States and sport organisations to adapt sport infrastructure to take into account the needs of people with disabilities. Member States and local authorities should ensure that sport venues and accommodations are accessible for people with disabilities. Specific criteria should be adopted for ensuring equal access to sport for all pupils, and specifically for children with disabilities. Training of monitors, volunteers and host staff of clubs and organisations for the purpose of welcoming people with disabilities will be promoted. In its consultations with sport stakeholders, the Commission takes special care to maintain a dialogue with representatives of sportspeople with disabilities.

- (16) The Commission, in its Action Plan on the European Union Disability Strategy, will take into account the importance of sport for disabled people and will support Member State actions in this field.
- (17) In the framework of its Roadmap for Equality between Women and Men 2006-2010, the Commission will encourage the mainstreaming of gender issues into all its sports-related activities, with a specific focus on access to sport for immigrant women and women from ethnic minorities, women's access to decision-making positions in sport and media coverage of women in sport.

#### 2.6 Strengthening the prevention of and fight against racism and violence

Violence at sport events, especially at football grounds, remains a disturbing problem and can take different forms. It has been shifting from inside stadiums to outside, including urban areas. The Commission is committed to contributing to the prevention of incidents by promoting and facilitating dialogue with Member States, international organisations (e.g. Council of Europe), sport organisations, law enforcement services and other stakeholders (e.g. supporters' organisations and local authorities). Law enforcement authorities cannot deal with the underlying causes of sport violence in isolation.

The Commission also encourages the exchange of best practice and of operational information on risk-supporters among police services and/or sport authorities. Particular importance will be given to police training on crowd management and hooliganism. Sport involves all citizens regardless of gender, race, age, disability, religion and belief, sexual orientation and social or economic background. The Commission has repeatedly condemned all manifestations of racism and xenophobia, which are incompatible with the values of the EU.

- (18) As regards racist and xenophobic attitudes, the Commission will continue to promote dialogue and exchange of best practices in existing cooperation frameworks such as the Football against Racism in Europe network (FARE).

The Commission recommends sport federations to have procedures for dealing with racist abuse during matches, based on existing initiatives. It also recommends strengthening provisions regarding discrimination in licensing systems for clubs (see section 4.7).

The Commission will:

- (19) Promote, in accordance with the domestic and EU rules applicable, the exchange of operational information and practical know-how and experience on the prevention of violent and racist incidents between law enforcement services and with sport organisations;
- (20) Analyse possibilities for new legal instruments and other EU-wide standards to prevent public disorder at sport events;
- (21) Promote a multidisciplinary approach to preventing anti-social behaviour, with a special focus given to socio-educational actions such as fan-coaching (long-term work with supporters to develop a positive and non-violent attitude);
- (22) Strengthen regular and structured cooperation among law enforcement services, sport organisations and other stakeholders;

- (23) Encourage the use of the following programmes to contribute to the prevention of and fight against violence and racism in sport: Youth in Action, Europe for Citizens, DAPHNE III, Fundamental Rights and Citizenship and Prevention and Fight against Crime;
- (24) Organise a high level conference to discuss measures to prevent and fight violence and racism at sport events with stakeholders.

### 2.7 Sharing our values with other parts of the world

Sport can play a role regarding different aspects of the EU's external relations: as an element of external assistance programmes, as an element of dialogue with partner countries and as part of the EU's public diplomacy.

Through concrete actions, sport has a considerable potential as a tool to promote education, health, inter-cultural dialogue, development and peace.

- (25) The Commission will promote the use of sport as a tool in its development policy. In particular, it will:
- Promote sport and physical education as essential elements of quality education and as a means to make schools more attractive and improve attendance;
  - Target action at improving access for girls and women to physical education and sport, with the objective to help them build confidence, improve social integration, overcome prejudices and promote healthy lifestyles as well as women's access to education;
  - Support health promotion and awareness-raising campaigns through sport.

When addressing sport in its development policies, the EU will make its best effort to create synergies with existing programmes of the United Nations, Member States, local authorities and private bodies. It will implement actions that are complementary or innovative with respect to existing programmes and actions. The memorandum of understanding signed between the Commission and FIFA in 2006 to make football a force for development in African, Caribbean and Pacific countries is an example in this respect.

- (26) The EU will include, wherever appropriate, sport-related issues such as international players' transfers, exploitation of underage players, doping, money-laundering through sport, and security during major international sport events in its policy dialogue and cooperation with partner countries.

Rapid visa and immigration procedures for, in particular, elite sportspersons from non-EU countries are an important element to enhance the EU's international attractiveness. In addition to the on-going process of concluding visa facilitation agreements with third countries and the consolidation of the visa regime applicable to members of the Olympic family during Olympic Games, the EU needs to develop further (temporary) admission mechanisms for sportspersons from third countries.

The Commission will pay particular attention to the sport sector:

- (27) When implementing the recently presented Communication on circular migration and mobility partnerships with third countries;
- (28) When elaborating harmonised schemes for the admission of various categories of third country nationals for economic purposes on the basis of the 2005 Policy Plan on Legal Migration.

### 2.8 Supporting sustainable development

The practice of sport, sport facilities and sport events all have a significant impact on the environment. It is important to promote environmentally sound management, fit to address *inter alia* green procurement, greenhouse gas emissions, energy efficiency, waste disposal and the treatment of soil and water. European sport organisations and

sport event organisers should adopt environmental objectives in order to make their activities environmentally sustainable. By improving their credibility on environmental matters, responsible organisations could expect specific benefits while bidding to host sport events as well as economic benefits related to a more rationalised use of natural resources.

The Commission will:

- (29) Use its structured dialogue with leading international and European sport organisations and other sport stakeholders to encourage them and their members to participate in the Eco Management Audit Scheme (EMAS) and Community Eco-Label Award schemes, and promote these voluntary schemes during major sport events;
- (30) Promote green procurement in its political dialogue with Member States and other concerned parties;
- (31) Raise awareness, through guidance developed in cooperation with relevant stakeholders (policy makers, SMEs, local communities), about the need to work together in partnership at the regional level to organise sport events in a sustainable way;
- (32) Take sport into account as part of the "Information and Communication" component of the new LIFE+ programme.

## 3. THE ECONOMIC DIMENSION OF SPORT

Sport is a dynamic and fast-growing sector with an underestimated macro-economic impact, and can contribute to the Lisbon objectives of growth and job creation. It can serve as a tool for local and regional development, urban regeneration or rural development. Sport has synergies with tourism and can stimulate the upgrading of infrastructure and the emergence of new partnerships for financing sport and leisure facilities.

Although sound and comparable data on the economic weight of sport are generally lacking, its importance is confirmed by studies and analyses of national accounts, the economics of large-scale sporting events, and physical inactivity costs, including for the ageing population.

A study presented during the Austrian Presidency in 2006 suggested that sport in a broader sense generated value-added of 407 billion euros in 2004, accounting for 3.7% of EU GDP, and employment for 15 million people or 5.4% of the labour force.<sup>6</sup> This contribution of sport should be made more visible and promoted in EU policies.

A growing part of the economic value of sports is linked to intellectual property rights. These rights relate to copyright, commercial communications, trademarks, and image and media rights. In an increasingly globalised and dynamic sector, the effective enforcement of intellectual property rights around the world is becoming an essential part of the health of the sport economy. It is also important that recipients are guaranteed the possibility to have distance access to sport events at cross-border level within the EU.

On the other hand, notwithstanding the overall economic importance of sport, the vast majority of sporting activities takes place in non-profit structures, many of which depend on public support to provide access to sporting activities to all citizens.

### 3.1 Moving towards evidence-based sport policies

The launch of policy actions and enhanced cooperation on sport at EU level needs to be underpinned by a sound knowledge base. The quality and comparability of data need to be

improved to allow for better strategic planning and policy-making in the area of sport. Governmental and non-governmental stakeholders have repeatedly called upon the Commission to develop a European statistical definition of sport and to coordinate efforts to produce sport and sport-related statistics on that basis.

- (33) The Commission, in close cooperation with the Member States, will seek to develop a European statistical method for measuring the economic impact of sport as a basis for national statistical accounts for sport, which could lead in time to a European satellite account for sport.

<sup>6</sup> D. Dimitrov / C. Helmenstein / A. Kleissner / B. Moser / J. Schindler: *Die makroökonomischen Effekte des Sports in*

*Europa*, Studie im Auftrag des Bundeskanzleramts, Sektion Sport, Wien, 2006.

- (34) In addition, specific sport-related information surveys should continue to take place once every few years (e.g. Eurobarometer polls), in particular to provide non-economic information which cannot be provided on the basis of national statistical accounts for sport (e.g. participation rates, data on volunteering, etc.).
- (35) The Commission will launch a study to assess the sport sector's direct contribution (in terms of GDP, growth and employment) and indirect contribution (through education, regional development and higher attractiveness of the EU) to the Lisbon Agenda.
- (36) The Commission will organise the exchange of best practices among Member States and sports federations concerning the organisation of large sport events, with a view to promoting sustainable economic growth, competitiveness and employment.

### 3.2 Putting public support for sport on a more secure footing

Sport organisations have many sources of income, including club fees and ticket sales, advertising and sponsorship, media rights, re-distribution of income within the sport federations, merchandising, public support etc. However, some sport organisations have considerably better access to resources from business operators than others, even if in some cases a well-functioning system of redistribution is in place. In grassroots sport, equal opportunities and open access to sporting activities can only be guaranteed through strong public involvement. The Commission understands the importance of public support for grassroots sport and sport for all, and is in favour of such support provided it is granted in accordance with Community law.

In many Member States sport is partly financed through a tax or levy on state-run or state-licensed gambling or lottery services. The Commission invites Member States to reflect upon how best to maintain and develop a sustainable financing model for giving long-term support to sports organisations.

- (37) As a contribution to the reflection on the financing of sport, the Commission will carry out an independent study on the financing of grassroots sport and sport for all in the Member States from both public and private sources, and on the impact of ongoing changes in this area.
- In the field of indirect taxation, the EU's VAT legislation is laid down in Council Directive 2006/112/EC, which aims at ensuring that the application of Member State legislation on VAT does not distort competition or hinder the free movement of goods and services. The Directive provides for both the possibility for Member States to exempt certain sport-related services and, where exemption does not apply, the possibility to apply reduced rates in some cases.
- (38) Given the important societal role of sport and its strong local anchoring, the Commission will defend maintaining the existing possibilities of reduced VAT rates for sport.

## 4. THE ORGANISATION OF SPORT

The political debate on sport in Europe often attributes considerable importance to the so-called "European Sport Model". The Commission considers that certain values and traditions of European sport should be promoted. In view of the diversity and complexities of European sport structures it considers, however, that it is unrealistic to try to define a unified model of organisation of sport in Europe. Moreover, economic and social developments that are common to the majority of the Member States (increasing commercialisation, challenges to public spending, increasing numbers of participants and stagnation in the number of voluntary workers) have resulted in new challenges for the organisation of sport in Europe. The emergence of new stakeholders (participants outside the organised disciplines, profession-

al sports clubs, etc.) is posing new questions as regards governance, democracy and representation of interests within the sport movement.

The Commission can play a role in encouraging the sharing of best practice in sport governance. It can also help to develop a common set of principles for good governance in sport, such as transparency, democracy, accountability and representation of stakeholders (associations, federations, players, clubs, leagues, supporters, etc.). While doing so the Commission will draw on previous work<sup>7</sup>. Attention should also be paid to the representation of women in management and leadership positions.

The Commission acknowledges the autonomy of sporting organisations and representative structures (such as leagues). Furthermore, it recognises that governance is mainly the responsibility of sports governing bodies and, to some extent, the Member States and social partners. Nonetheless, dialogue with sports organisations has brought a number of areas to the Commission's attention, which are addressed below. The Commission considers that most challenges can be addressed through self-regulation respectful of good governance principles, provided that EU law is respected, and is ready to play a facilitating role or take action if necessary.

### 4.1 The specificity of sport

Sport activity is subject to the application of EU law. This is described in detail in the Staff Working Document and its annexes. Competition law and Internal Market provisions apply to

sport in so far as it constitutes an economic activity. Sport is also subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of nationality, provisions regarding citizenship of the Union and equality between men and women in employment.

At the same time, sport has certain specific characteristics, which are often referred to as the "specificity of sport". The specificity of European sport can be approached through two prisms:

- The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;
- The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport; The case law of the European courts and decisions of the European Commission show that the specificity of sport has been recognised and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law.

As is explained in detail in the Staff Working Document and its annexes, there are organisational sporting rules that - based on their legitimate objectives - are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued. Examples of such rules would be "rules of the game" (e.g. rules fixing the length of matches or the number of players on the field), rules concerning selection criteria for sport competitions, "at home and away from home" rules, rules preventing multiple ownership in club competitions, rules concerning the composition of national teams, anti-doping rules and rules concerning transfer periods. However, in respect of the regulatory aspects of sport, the assessment whether a certain sporting rule is compatible with EU competition law can only be made on a case-by-case basis, as recently confirmed by the European Court of Justice in its Meca-Medina ruling.<sup>8</sup> The Court provided a clarification regarding the impact of EU law on sporting rules. It dismissed the notion of "purely sporting rules" as irrelevant for the question of the applicability of EU competition rules to the sport sector.

6 D. Dimitrov / C. Helmenstein / A. Kleissner / B. Moser / J. Schindler: *Die makroökonomischen Effekte des Sports in Europa*, Studie im Auftrag des Bundeskanzleramts, Sektion Sport, Wien, 2006.

7 E.g. the "Rules of the Game" conference

organised in 2001 by FIA and the EOC and the Independent European Sport Review carried out in 2006.

8 Case C-519/04P, *Meca Medina v. Commission*, ECR 2006, I-6991. For more details, see the Staff Working Document.



The Court recognised that the specificity of sport has to be taken into consideration in the sense that restrictive effects on competition that are inherent in the organisation and proper conduct of competitive sport are not in breach of EU competition rules, provided that these effects are proportionate to the legitimate genuine sporting interest pursued. The necessity of a proportionality test implies the need to take into account the individual features of each case. It does not allow for the formulation of general guidelines on the application of competition law to the sport sector.

#### 4.2 Free movement and nationality

The organisation of sport and of competitions on a national basis is part of the historical and cultural background of the European approach to sport, and corresponds to the wishes of European citizens. In particular, national teams play an essential role not only in terms of identity but also to secure solidarity with grassroots sport, and therefore deserve to be supported.

Discrimination on grounds of nationality is prohibited in the Treaties, which establish the right for any citizen of the Union to move and reside freely in the territory of the Member States. The Treaties also aim to abolish any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The same prohibitions apply to discrimination based on nationality in the provision of services. Moreover, membership of sports clubs and participation in competitions are relevant factors to promote the integration of residents into the society of the host country.

Equal treatment also concerns citizens of States which have signed agreements with the EU that contain non-discrimination clauses, and who are legally employed in the territory of the Member States.

(39) The Commission calls on Member States and sport organisations to address discrimination based on nationality in all sports. It will combat discrimination in sport through political dialogue with the Member States, recommendations, structured dialogue with sport stakeholders, and infringement procedures when appropriate.

The Commission reaffirms its acceptance of limited and proportionate restrictions (in line with EU Treaty provisions on free movement and European Court of Justice rulings) to the principle of free movement in particular as regards:

- The right to select national athletes for national team competitions;
- The need to limit the number of participants in a competition;
- The setting of deadlines for transfers of players in team sports.

(40) As regards access to individual competitions for non-nationals, the Commission intends to launch a study to analyse all aspects of this complex issue.

#### 4.3 Transfers

In the absence of transfer rules, the integrity of sport competitions could be challenged by clubs recruiting players during a given season to prevail upon their competitors. At the same time, any rule on the transfer of players must respect EU law (competition provisions and rules on the free movement of workers).

In 2001, in the context of the pursuit of a case concerning alleged infringements of EC competition law and after discussions with the Commission, football authorities undertook to revise FIFA Regulations on international football transfers, based on compensation for training costs incurred by sports clubs, the creation of transfer periods, the protection of school education of underage players, and guaranteed access to national courts.

The Commission considers such a system to constitute an example of good practice that ensures a competitive equilibrium between sport clubs while taking into account the requirements of EU law.

The transfer of players also gives rise to concerns about the legality of the financial flows involved. To increase transparency in money flows related to transfers, an information and verification system for

transfers could be an effective solution. The Commission considers that such a system should only have a control function; financial transactions should be conducted directly between the parties involved. Depending on the sport, the system could be run by the relevant European sport organisation, or by national information and verification systems in the Member States.

#### 4.4 Players' agents

The development of a truly European market for players and the rise in the level of players' salaries in some sports has resulted in an increase in the activities of players' agents. In an increasingly complex legal environment, many players (but also sport clubs) ask for the services of agents to negotiate and sign contracts.

There are reports of bad practices in the activities of some agents which have resulted in instances of corruption, money laundering and exploitation of underage players. These practices are damaging for sport in general and raise serious governance questions. The health and security of players, particularly minors, has to be protected and criminal activities fought against.

Moreover, agents are subject to differing regulations in different Member States. Some Member States have introduced specific legislation on players' agents while in others the applicable law is the general law regarding employment agencies, but with references to players' agents. Moreover, some international federations (FIFA, FIBA) have introduced their own regulations.

For these reasons, repeated calls have been made on the EU to regulate the activity of players' agents through an EU legislative initiative.

(41) The Commission will carry out an impact assessment to provide a clear overview of the activities of players' agents in the EU and an evaluation of whether action at EU level is necessary, which will also analyse the different possible options.

#### 4.5 Protection of minors

The exploitation of young players is continuing. The most serious problem concerns children who are not selected for competitions and abandoned in a foreign country, often falling in this way in an irregular position which fosters their further exploitation. Although in most cases this phenomenon does not fall into the legal definition of trafficking in human beings, it is unacceptable given the fundamental values recognised by the EU and its Member States. It is also contrary to the values of sport. Protective measures for unaccompanied minors in Member State immigration laws need to be applied rigorously. Sexual abuse and harassment of minors in sport must also be fought against.

(42) The Commission will continue to monitor the implementation of EU legislation, in particular the Directive on the Protection of Young People at Work. The Commission has recently launched a study on child labour as a complement to its monitoring of the implementation of the Directive. The issue of young players falling within the scope of the Directive will be taken into account in the study.

(43) The Commission will propose to Member States and sport organisations to cooperate on the protection of the moral and physical integrity of young people through the dissemination of information on existing legislation, establishment of minimum standards and exchange of best practices.

#### 4.6 Corruption, money laundering and other forms of financial crime

Corruption, money laundering and other forms of financial crime are affecting sport at local, national and international levels. Given the sector's high degree of internationalisation, corruption in the sport sector often has cross-border aspects. Corruption problems with a European dimension need to be tackled at European level. EU anti-money laundering mechanisms should apply effectively also in the sport sector.

- (44) The Commission will support public-private partnerships representative of sports interests and anti-corruption authorities, which would identify vulnerabilities to corruption in the sport sector and assist in the development of effective preventive and repressive strategies to counter such corruption.
- (45) The Commission will continue to monitor the implementation of EU anti-money laundering legislation in the Member States with regard to the sport sector.

#### 4.7 Licensing systems for clubs

The Commission acknowledges the usefulness of robust licensing systems for professional clubs at European and national levels as a tool for promoting good governance in sport. Licensing systems generally aim to ensure that all clubs respect the same basic rules on financial management and transparency, but could also include provisions regarding discrimination, violence, protection of minors and training. Such systems must be compatible with competition and Internal Market provisions and may not go beyond what is necessary for the pursuit of a legitimate objective relating to the proper organisation and conduct of sport.

Efforts need to concentrate on the implementation and gradual reinforcement of licensing systems. In the case of football, where a licensing system will soon be compulsory for clubs entering European competitions, action needs to concentrate on promoting and encouraging the use of licensing systems at national level.

- (46) The Commission will promote dialogue with sport organisations in order to address the implementation and strengthening of self-regulatory licensing systems.
- (47) Starting with football, the Commission intends to organise a conference with UEFA, EPFL, Fifpro, national associations and national leagues on licensing systems and best practices in this field.

#### 4.8 Media

Issues concerning the relationship between the sport sector and sport media (television in particular) have become crucial as television rights are the primary source of income for professional sport in Europe. Conversely, sport media rights are a decisive source of content for many media operators.

Sport has been a driving force behind the emergence of new media and interactive television services. The Commission will continue to support the right to information and wide access for citizens to broadcasts of sport events, which are seen as being of high interest or major importance for society.

The application of the competition provisions of the EC Treaty to the selling of media rights of sport events takes into account a number of specific characteristics in this area. Sport media rights are sometimes sold collectively by a sport association on behalf of individual clubs (as opposed to clubs marketing the rights individually). While joint selling of media rights raises competition concerns, the Commission has accepted it under certain conditions. Collective selling can be important for the redistribution of income and can thus be a tool for achieving greater solidarity within sports.

The Commission recognises the importance of an equitable redistribution of income between clubs, including the smallest ones, and between professional and amateur sport.

- (48) The Commission recommends to sport organisations to pay due attention to the creation and maintenance of solidarity mechanisms. In the area of sports media rights, such mechanisms can take the form of a system of collective selling of media rights or, alternatively, of a system of individual selling by clubs, in both cases linked to a robust solidarity mechanism.

### 5. FOLLOW-UP

The Commission will follow up on the initiatives presented in this White Paper through the implementation of a structured dialogue with sport stakeholders, cooperation with the Member States, and the promotion of social dialogue in the sport sector.

#### 5.1 Structured dialogue

European sport is characterised by a multitude of complex and diverse structures which enjoy different types of legal status and levels of autonomy in Member States. Unlike other sectors and due to the very nature of organised sport, European sport structures are, as a rule, less well developed than sport structures at national and international levels. Moreover, European sport is generally organised according to continental structures, and not at EU level.

Stakeholders agree that the Commission has an important role to play in contributing to the European debate on sport by providing a platform for dialogue with sport stakeholders. Wide consultation with “interested parties” is one of the Commission’s duties according to the Treaties.

In view of the complex and diverse sports culture in Europe, the Commission intends to involve notably the following actors in its structured dialogue:

- European Sport Federations;
- European umbrella organisations for sport, notably the European Olympic Committees (EOC), the European Paralympic Committee (EPC) and European non-governmental sport organisations;
- National umbrella organisations for sport and national Olympic and Paralympic Committees;
- Other actors in the field of sport represented at European level, including social partners;
- Other European and international organisations, in particular the Council of Europe’s structures for sport and UN bodies such as UNESCO and the WHO.

- (49) The Commission intends to organise the structured dialogue in the following manner:

- EU Sport Forum: an annual gathering of all sport stakeholders;
  - Thematic discussions with limited numbers of participants.
- (50) The Commission will also seek to promote greater European visibility at sporting events. The Commission supports the further development of the European Capitals of Sport initiative.

#### 5.2 Cooperation with Member States

Cooperation among Member States on sport at EU level takes place in informal ministerial meetings, as well as at the administrative level by Sport Directors. A Rolling Agenda for sport was adopted by EU Sport Ministers in 2004 to define priority themes for discussions on sport among the Member States.

- (51) In order to address the issues listed in this White Paper, the Commission proposes to strengthen existing cooperation among the Member States and the Commission.

Based on a proposal from the Commission, Member States may wish to reinforce the mechanism of the Rolling Agenda, for example:

- To jointly define priorities for sport policy cooperation;
- To report regularly to EU Sport Ministers on progress.

Closer cooperation will require the regular organisation of Sport Ministers and Sport Directors meetings under each Presidency, which should be taken into account by future 18-month Presidency teams.

- (52) The Commission will report on the implementation of the “Pierre de Coubertin” Action Plan through the mechanism of the Rolling Agenda.

#### 5.3 Social dialogue

In the light of a growing number of challenges to sport governance, social dialogue at European level can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions.

The Commission has been supporting projects for the consolidation of social dialogue in the sport sector in general as well as in the football sector. These projects have created a basis for social dialogue

at European level and the consolidation of European-level organisations. A Sectoral Social Dialogue Committee can be established by the Commission on the basis of a joint request by social partners. The Commission considers that a European social dialogue in the sport sector or in its sub-sectors (e.g. football) is an instrument which would allow social partners to contribute to the shaping of employment relations and working conditions in an active and participative way. In this area, such a social dialogue could also lead to the establishment of commonly agreed codes of conduct or charters, which could address issues related to training, working conditions or the protection of young people.

- (53) The Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector. It will continue to give support to both employers and employees and it will pursue its open dialogue with all sport organisations on this issue.
- The support that the Member States should make available for capacity building and joint actions of social partners through the European Social Fund in the convergence regions should also be

used for capacity building of the social partners in the sport sector.

## 6. CONCLUSION

The White Paper contains a number of actions to be implemented or supported by the Commission. Together, these actions form the “Pierre de Coubertin” Action Plan which will guide the Commission in its sport-related activities during the coming years.

The White Paper has taken full advantage of the possibilities offered by the current Treaties.

A mandate has been given by the European Council of June 2007 for the Intergovernmental Conference, which foresees a Treaty provision on sport. If necessary, the Commission may return to this issue and indicate further steps in the context of a new Treaty provision.

The Commission will organise a conference to present the White Paper to sport stakeholders in the autumn of 2007. Its findings will be presented to EU Sport Ministers by the end of 2007. The White Paper will also be presented to the European Parliament, the Committee of the Regions and the Economic and Social Committee.

The International Sports Law Journal

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## *Independent European Sport Review*

# Executive Summary, October 2006

Report by: **José Luis Arnaut**

### 1. Introduction

The European Union Constitution would have been the first EC Treaty with an article dedicated to sport. Whilst the Treaty will not enter into effect (at least for some time) it does not follow that there is nothing the political leaders of Europe can do to tackle the increasing problems that sport continues to face. To the contrary, recent events demonstrate an even more urgent need for clear political leadership to stabilise and enhance the European Model of Sport.

We cannot ignore the rapid and seemingly irreversible trend towards over-commercialisation of sport and the fact that this has occurred against the background of the European Union developing into a wider political, economic and, in particular, legal structure that now extends to 25 Member States.

It is no secret that sport, and especially team sports such as football, face significant challenges in this new environment. These challenges are not going to go away. There is increasing concern, both on the part of the sport authorities and on the part of the public, as to how these challenges should be faced.

Against this background, the Sports Ministers of France, Germany, Italy, Spain and the UK recognised the need for political action. The UK Presidency of the European Union took the initiative to set up an Independent Review on sport, divided into two main parts, one dealing with the specific nature of sport in EU law generally, and the other using European football as a case study, to investigate and suggest certain practical solutions.

A great deal of detailed research and analysis was undertaken by technical experts. Specialist groups were appointed to examine legal, economic and political matters and a wide-ranging consultation was held with all interested parties. The overall objective of the Review, as expressed in its terms of reference, was to implement the Nice Declaration on sport.

That Declaration, adopted by the European Council in 2000, set out a number of specific characteristics of sport that are considered to be of value and importance to European society as a whole. Nevertheless, the Declaration is not legally binding and only offers a broad indication of how certain issues should be addressed. In other words, it does not offer the level of detail or provide the degree of legal

security that sport needs to have, particularly in these increasingly turbulent times.

The objective of our Review was to consider certain concrete issues facing sport, using football as a case study, and to adopt a series of Recommendations setting out how the EU institutions, the EU Member States and the European football authorities could all play their own part in resolving these issues - and thus implement the Nice Declaration at both European and national level. Interpreting and applying existing jurisprudence together with the policy principles set out in the Nice Declaration, our aim was to provide a comprehensive and robust legal framework for European sport in general and football in particular.

In the Review we have tried to articulate the real meaning of sporting “specificity”, to describe and understand the nature of the European sports “pyramid” and also to consider how improvements could be made to this structure to ensure that it is best equipped to serve the needs of European sport in the years to come. For these purposes, the essence of the pyramid structure is the unbreakable link between the grassroots and top professional level of sport, which is a concrete illustration of solidarity in practice. Of equal importance is the wider social function performed by clubs and regional associations in their local communities.

The terms of reference required us to consider all relevant issues of corporate governance in football, which could be of equal significance to other (team) sports. These include matters such as the ownership, control and management of clubs; regulatory issues such as club licensing, the player transfer system, the regulation of players’ agents and salary cost controls; corporate governance issues for the football authorities themselves (at both national and European level); criminal activities around football, including money laundering and trafficking of young players; the incidence of racism and xenophobia; gambling activities and, in particular, the implications for match-fixing, corruption and illegal betting; and safety and security in stadia.

The detailed work undertaken has - unfortunately - demonstrated that sport in general and football in particular are not in good health. In this sense, our work has confirmed many of the concerns held by the public, the political authorities and the sports governing bodies themselves.

The good news, however, is that it *is* possible to do something about this! Consequently, in the Review not only have we analysed the problem areas but we have also investigated the means to address them and, in particular, the legal instruments that are available to do so. The choice of instrument may depend on the precise issue to be addressed and in the table annexed we set out a detailed list of instruments that can be employed to recognise the specificity of sport.

Concretely, we have proposed a number of recommendations addressed to (1) the EU institutions, in particular, the European Commission and the Member States; (2) the European football authorities; and (3) to the EU institutions and European football authorities jointly.

We are of the opinion that the European Model of Sport should be preserved and protected. A key feature of the model is the overall pyramid structure, underpinned by the principles of financial solidarity (funding of grass-roots) and the concept of promotion and relegation (openness). As the economic dimension of sport comes more to the fore (driven, in particular, by the development of new media markets) it is important that these key principles - which are of wider importance to European society - continue to be respected.

The fact that the top end of the sports' pyramid, developed into a "business", especially in football, has increased the tendency towards legal disputes with the result that sport now exists in an environment of legal uncertainty. In particular, it cannot be denied that EU law has had a major impact on the structure and organisation of sport. Following the *Bosman* case in 1995, there have been more and more disputes involving issues of Bi law. Among other things, this resulted in a first reference to sport in the Treaty of Amsterdam (in 1997) followed by the Helsinki Report on Sport of 1999 and the Nice Declaration in 2000. In the meantime, both the European Courts and the European Commission have considered many sports related cases, often under the competition and free movement rules of the EC Treaty. Whilst there are some important principles to be drawn from the resulting case law, a more stable environment is needed for the healthy development of sport in Europe. This fact has only been underlined by the very recent ruling of the European Court of Justice in the *Meca-Medina* case (18 July 2006) which shows the degree of legal uncertainty that still exists as regards the relationship between EU law and sporting regulation and which emphasises the need for an urgent and clearer delineation between the two.

## 2. Working Process and Methodology

Having said this, the Review is not merely a dry legal analysis. A wide reaching consultation process was organised so that the views of all stakeholders could be taken fully into account, not only in analysing problems but also in considering possible solutions. It is fair to say, therefore, that the authors of the Review have had the benefit of receiving input from a wide variety of expert sources and informed commentators. This consultative process was invaluable for the purposes of framing constructive solutions (see Annex 4).

## 3. European Law and the Specific Nature of Sport

Without question, a key aspect of sport is the legitimate autonomy of sports governing bodies and this feature is recognised in the Nice Declaration itself. This does not mean that sport is above the law: rather it means that, in certain areas, the discretion of the sporting regulator should be respected. Moreover, where the general law does apply, the particular features of sport should also be recognised. In other words, just because sport has an economic dimension this does not mean that it should be treated in the same way as any other "business", from a legal point of view. This is where we enter the discussion of sporting "specificity."

In this connection, it is important to emphasise that the European Heads of Government have already recognised the specificity of sport in the Nice Declaration. Consequently, the debate is no longer about whether sport has a specific nature: it is about the practical measures that need to be implemented to take account of this specific nature as a matter of European law.

Existing jurisprudence shows that the specific nature of sport has

been taken into account by the European Courts and the European Commission, albeit on a case-by-case and rather haphazard basis. Whilst it is possible to draw some policy conclusions from these cases, it would be preferable to have a more predictable legal environment, giving sport the stability that it needs. Broadly speaking, our analysis suggests that the specificity of sport can be grouped under three major headings, relating to rules and practices which concern: (1) the regularity and functioning of competitions; (2) the integrity of sport; and (3) competitive balance.

Heading number (1) - regularity and functioning of competitions - would include matters such as field-of-play rules and the structure of championships and sporting calendars. These are matters that should fall within the sole discretion of the governing body. Similarly, rules concerning the composition of national teams or relating to the national territorial organisation of sport should not be called into question by European Union law. Cases such as *Delière* and *Mouscron* provide support for this.

As noted, the pyramid structure is an important feature of European sport and establishes the inter-relationship between organisations and competitions both on national and international level. This is an indivisible structure, in some ways representing a co-operative. The rules that bind together the pyramid and which require clubs to commit to participation in the overall structure are also compatible with EU law principles.

Other rules required to maintain the regularity and proper functioning of competition (such as transfer deadlines) are also in line with EU law. Such rules give sport an essential stability. The same could be said of measures needed to regulate the transfer of players, which are indispensable to protect the interests of players, clubs and the sport itself. Further reflection is also needed as regards a dear definition of "nationality" for the special situation of sport.

Measures may also be needed to encourage the attendance of spectators at matches and participation in amateur sport. Whilst such measures may entail a form of "restriction" (i.e. on television coverage) they can still be seen as in the best interests of sport.

It is also legitimate for sports governing bodies to take steps to ensure that the best teams are available to contest the most prestigious competitions, in the case of football, the World Cup and European Football Championships. This is where the "player release" rule becomes an issue. The measure is, above all, aimed at protecting the efficient functioning of such championships, safeguarding the position of smaller and less wealthy nations and also the interests of the public who want to see the best available players representing their respective countries. There is no conflict between rules of this nature and European Union law.

Finally, all sports must take the necessary steps to combat cheating in all forms, including matters relating to anti-doping control. These are pure sports matters that should be left in the hands of the expert sporting regulator and where a wide margin of discretion should be recognised.

Turning to heading number (2) - integrity - it is important that policy makers allow and encourage sports governing bodies to take the necessary steps in this vital area as well. The UEFA club licensing system is a good example of sport acting proactively to improve overall standards of governance, transparency and financial integrity.

Sport also needs to be protected from improper influence, or even the perception of improper influence. This is where it is necessary to have adequate controls regarding ownership and control of clubs. These matters cannot be left to chance but need to be monitored and properly regulated.

The activities of players' agents have also, from time to time, raised questions as regards ethical standards and matters of integrity in sport. Consequently, a proper system for regulation in this area is also inherent to the organisation of sport and something that should fall within the natural competence of the relevant governing body.

The third heading under sporting specificity is competitive balance. Sport is nothing without exciting and varied competition and so it is always legitimate for the governing bodies to be thinking about steps that can be taken to protect and enhance competition. If mat-

ters are left entirely to normal “market forces” then there is a risk that the outcome of a sporting competition will be determined solely by money. We do not think this is the way forward.

Consequently, the UEFA proposal on home-grown players, which encourages player training and, at least to some extent, limits the “trading” of players is a measure to be welcomed. A rule imposing a maximum squad size limit has proved to be of similar value.

Turning to more commercial matters, the central marketing of commercial (particularly media) rights is also a useful mechanism to achieve a measure of financial re-distribution and thereby reinforce the competitive structure of European sport. The central marketing system of the UEFA Champions League can be seen as a model in this respect, a fact that was also recognised by the Advocate-General back in the *Bosman* case. It is therefore to be welcomed that the European Commission has also approved this central marketing system and has now followed a similar approach in national cases in both the German Bundesliga and the English Premier League.

Falling under the heading of competitive balance we would also place the issue of salary *cost control*. It should be noted that the aim here is not to place an upper limit on what players can earn but simply to prevent those with the deepest pockets buying all the best players and therefore dominating competition, contrary to the interests of the sport and the public. Whilst this is a complex subject that requires further study, one possible approach would be to limit overall salary spending levels to a percentage of club turnover and this would also require clear rules to govern how turnover (“earned income”) is calculated. Finally, we consider that a form of “payroll tax”, requiring clubs to pay a “redistribution levy” if they exceed the relevant limit on salaries, warrants particular attention.

In all these areas where we consider the specificity of sport, it is necessary, when applying the law, to take into account the legitimate autonomy or degree of discretion to be enjoyed by the sports governing body and also the particular features of sport that contribute to make it different from other forms of business.

#### 4. The European Sports Model: The Example of Football

The constitutional model of sport in Europe is based on the pyramid structure. At the top of the pyramid are the European federations, themselves formed by national associations. These national associations are, in turn, typically formed by regional associations and/or leagues, followed by the clubs and players. Financial redistribution and promotion/relegation are important elements in this structure as is the principle of a single federation with responsibility for the whole sport.

However, it is also important that the governing body itself complies with certain key principles recognised by political institutions more generally, including democratic accountability, transparency and the separation of powers. The current structures of UEFA, for example, which provide for a devolution of functions from the Congress to the Executive Committee, Chief Executive, President and Organs for the Administration of Justice, conforms to this wider principle. The right of appeal to the Court of Arbitration for Sport (CAS) is an additional safeguard.

Nevertheless, these structures are not set in stone: they must evolve, as in other democratic institutions. Similarly, again with regard to football, we see greater involvement of a variety of stakeholders in the UEFA institutions and decision-making processes. There are a number of manifestations of this, including the European Professional Football Leagues (EPFL), the Professional Football Committee, the European Club Forum, the Club Competitions Committee, and the tripartite football dialogue, involving UEFA, the European leagues, and the international players union (FIFPro). Last but not least, supporters are also key stakeholders, and it is desirable that their views be represented in a true pan-European context as well.

The principle of promotion and relegation, which is a practical illustration of the open nature of the European Model of Sport and which distinguishes it, for example, from the US model is a feature that must be preserved. Similarly, financial re-distribution to the grassroots is vital for the healthy development of football in Europe

and should be protected and even enhanced. The European Football Championships and the UEFA Champions League show what can be achieved in this respect. Equally important, however, is transparency and accountability as to how re-distributed money is spent.

Turning to the area of dispute resolution, the system of sports-related arbitration may be seen as another aspect of the European model and a feature that should be encouraged. There is obvious merit in achieving consistency of decision-making in sports matters, in a speedy way before arbitration panels composed of experts. Furthermore, there is no EU legal objection to this mechanism, though it must also be ensured that all arbitral bodies are genuinely independent and recognised as such by the civil courts.

Finally, and for the avoidance of doubt, there is no legal objection to the combination of regulatory activity and commercial functions in a sports governing body. This fact was already implicitly recognised by the European Commission when it approved the central marketing of the commercial rights of the UEFA Champions League. Nevertheless, as mentioned above, it is also important that the governing body continues to evolve and be properly accountable to all interested stakeholders, so there can be no questions as regards possible abuse of regulatory powers for commercial ends.

It needs to be emphasised, however, that the governing body - in the case of European football, UEFA - is not a stakeholder itself but rather an institution charged with the job of reconciling the various (and sometimes competing) interests of all stakeholders, in a manner that meets the overall interests of the sport on European level. This is an onerous task, so all European sports governing bodies must ensure that they are properly equipped to discharge this function, to remain transparent and accountable in their decision making procedures and to move with the times, as their respective sports continue to evolve.

#### 5. Corporate Governance Issues: The Example of European Football

Corporate governance relates to various issues: governance of clubs, internal governance of football authorities themselves (both national and international) and the efficient functioning of the overall football regulatory system.

A critical issue is the question of ownership, management and control of clubs. There is probably no particular ownership model that is preferable: each has advantages and disadvantages. Moreover, it is not feasible to seek to impose a particular ownership structure that would work uniformly across Europe. As such, the focus should be on encouraging principles of sound financial management and transparency in clubs, irrespective of their particular legal form. Similarly, it would be desirable to exclude inappropriate or unsuitable persons from involvement in clubs, though it has to be accepted that this also presents certain challenges.

As regards the issue of club ownership, it may be worth exploring the possibility of new structures that offer an increased opportunity for active supporter involvement. The Supporters Direct movement in the UK is an interesting model in this respect.

Turning to the issue of financial management of clubs, it has to be recognised that there have been deficiencies in the past. The UEFA club licensing system is an important step forward to introduce greater financial and business disciplines in the running of football clubs. It may also be possible to envisage a code of corporate governance to sit alongside the licensing system or at least a system of benchmarking, to encourage financial best practice.

The question of salary cost control is also related to financial management, as it is widely accepted that the player wage spiral has contributed to the financial plight of many clubs in recent years. Whilst there are significant administrative challenges to be faced with any attempt at pan-European regulation in this area, it is becoming possible to envisage how such a system might work in conjunction with reporting requirements already put into place with the club licensing system. It would be important to thoroughly research any cost-control model so it is best attuned to the needs of European football and, of equal importance, be capable of effective monitoring and enforcement. Whilst this is admittedly a complex subject, the *status quo* does not appear to be an attractive option, and the matter merits further detailed analysis.

Just as important as governance issues for clubs are governance issues for the sports authorities themselves. Both national and international associations are role models and will not be in a position to criticise clubs for failures if they have not addressed the same issues “in house”. The message is simple: there is an on-going need to maintain and increase levels of democracy, transparency, and professionalism across the board. In other words, to lead by example.

As another aspect of governance, it is clearly desirable that the rules and regulations of sport be implemented and enforced by the most appropriate body, whether national or international. The international transfer system for football players is a case in point, where the scope and content of the system has been heavily influenced by European law because of the specific European legal environment. As a first observation, it is important to point out that it is not necessarily appropriate or desirable to “export” the European system to other continental confederations, who have different traditions and legal circumstances.

However, given the situation in Europe we believe the most logical devolution of tasks would be for national football associations to deal with purely domestic transfers, for UEFA to deal with international transfers in the European area, and for FIFA to establish certain base level principles that could be equally applicable throughout the world. We have noted that other requirements (such as the club licensing system) also make it easier for a body such as UEFA to monitor and enforce the system of international transfer regulation in the European space. Similar considerations apply in relation to player agent regulation (a matter that has been considered by the European Commission and by the European Courts) and to most labour-related matters that have to be considered against the particular background of European law.

Regrettably, there seems to be increased evidence of criminal activities around football, as a result of the current lack of regulation and also perhaps as a consequence of its growing commercial importance. For example, there is a risk of money-laundering and here the football governing bodies should work together with political authorities (and the police) to combat the problem. There are also concerns about the “trafficking” of young players and this is another area where a combined response is needed from football and governments working together.

The issue of racism and xenophobia is a wider problem in society but is also seen in football. The European Parliament, UEFA, associations, leagues, clubs and player unions have taken important steps to stamp this out but the process must be continued.

Gambling is also a subject that is frequently of concern to football and to sport in general. It cannot be ignored that gambling activities are growing and are increasingly international, with the development of the internet. At the same time, betting has always been an important source of funding for sport. In this respect, there is some concern that the move away from state-owned lotteries in Europe could have the potential to damage income streams to sport. As regards the risks associated with betting, in particular match-fixing or other forms of corruption, a multi-tiered response is needed. For example, strong controls of common ownership/control of clubs would help, as would measures to protect intellectual property rights in fixture lists, to permit more effective monitoring and the detection of unusual betting patterns.

Lastly, the issue of safety and security in stadia is always present. This is a prime example of where effective cooperation between the football authorities and the political authorities can provide solutions. Improved pan-European coordination is essential to combat the problems posed by hooliganism. A more effective legal regime to deal with the problem of black market ticket sales would also contribute to tackling this issue.

In conclusion, and in accordance with the general methodology we have adopted for the purposes of the Review we believe that the corporate governance issues we have analysed in this chapter specifically in relation to football are of wider relevance for sport in general. Consequently, it may be instructive for other sports, in particular team sports, to consider and assess how some of the above mentioned

corporate governance principles might apply in the context of their own sport, against the background of their own specific needs and circumstances.

## 6. Instruments

Our analysis shows that the current legal environment does not provide sport with the stability it needs for its future healthy development. Sport is generally subject to EU law, even though there is no identified legal basis in the Treaty for it. Consequently, we have considered a number of legal instruments that could serve to improve this situation and therefore given practical and concrete expression to the policy principles set out in the Nice Declaration.

As many sports-related cases have involved matters of competition law, we have considered certain generic competition law instruments that could help to offer solutions. However, we have also considered other legal instruments in appropriate cases.

A so-called Block Exemption Regulation is an instrument that typically offers legal protection for certain categories of agreement under competition law. We believe that such a Regulation could be envisaged, for example, in relation to the central marketing of television rights. Important policy principles for central marketing have already been established by the European Commission in a number of individual cases and these could be extracted and usefully consolidated in such a Block Exemption.

Another approach would be to consider “Guidelines”, that could identify rules and practices that fall outside the sphere of competition law altogether, and other rules those that can be approved as a matter of competition law, subject to certain conditions. In this sphere, inspiration may be drawn from existing jurisprudence in the area of competition law, particularly as regards regulation of professional activities (*Wouters* case) and also concerning the characteristics of cooperatives, collecting societies, and the treatment of labour relations matters (collective bargaining agreements) under competition law.

We believe that “Guidelines” could be the appropriate instrument to address a variety of issues in sport, including central marketing of commercial (in particular media) rights, rules regarding the training of young players, rules regarding the release of players for the national team, salary caps, and club licensing systems.

We also observe that, given the particular features of sports governing bodies, they may be recognised as fulfilling a task of general economic interest, within the meaning of Article 86 of the EC Treaty. Similarly, given the financing structure in sport, it may be envisaged that certain derogations from the standard Treaty rules on state aid may be applied.

Away from the particular area of competition law, we note that rules and practices in sport often need to be assessed under the free movement provisions of the EC Treaty as well. Consequently, “Guidelines” (as opposed to Block Exemptions) might be the more appropriate instrument to provide legal security under all relevant Community legal norms.

Other EU legal instruments are also available and might be used to tackle particular issues in sport. For example, it is possible to envisage EU Directives for the protection of minors in sport, for the establishment of a pan-European bargaining contract, to regulate the activities of player agents, and also to deal with issues in relation to betting. Lastly, certain “soft law” instruments are also available which could be of assistance in particular cases. Even though not included in the Terms of Reference, it is also relevant to mention the wider European context. In this respect, initiatives such as the Enlarged Partial Agreement on Sport (EPAS) of the Council of Europe (another positive and constructive example of the Council of Europe initiatives on sport) have to be applauded, as they should help to achieve similar objectives to those targeted by the Review.

We propose that a European Sports Agency be created which could act as a liaison entity with sports bodies in Europe. The purpose of such an agency is simply to act as a repository for information but not in any way or form to threaten the legitimate autonomy of recognised sports governing bodies.

In relation to enforcement and implementation of this Review



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itself, we propose that an agreement or memorandum of understanding be signed by the relevant parties (EU institutions, Member States, European football authorities in the case of football) in which they commit themselves to a detailed plan of action with designated time frames. For the future, we believe that it would for example be appropriate for the EU to enter into a formal agreement with UEFA, clarifying the nature of the bilateral relationship between the two bodies and providing a stable backdrop for on-going cooperation in all matters relevant to football and EU law and policy.

## 7. Recommendations

### (a) To the EU institutions and EU Member States

The Review recognises the urgent need for the EU institutions to adopt a more pro-active and comprehensive approach to provide greater *legal certainty* for sport and to provide clearer guidance as to those practices that are acceptable and/or which fall within the *legitimate scope of autonomy of the sports governing bodies*.

It is necessary to clarify the type of “sports rules” that are automatically compatible with Community law (either because they fall outside the scope of EU law entirely or because they are inherent to the proper functioning of sporting competition) and to identify other “sports related rules” where Community law applies, albeit subject to the need to take the specificity of sport into account.

The Review concludes that “sports rules” cover rules relating to the regularity, proper functioning and integrity of competition, such as: the “rules of the game”, the structure of championships and calendars; the composition of national teams; the national organisation of sport in Europe, e.g. “home and away rule”; the organisation of competition within the European sports pyramid structure; rules relating to transfer deadlines; rules concerning the release of players for national teams; rules concerning the transfer of players; rules to encourage the attendance of spectators at sporting events and participation in amateur sport; rules on the good governance of clubs, such as the club licensing system; rules relating to the ownership/control/influence of clubs; rules concerning players agents; and rules concerning doping.

At the same time, “sports related rules” cover matters such as rules relating to competitive balance, including: the “home-grown” players rule, the central marketing of commercial rights, and salary cost control.

Legal security should be provided using the most appropriate legal instruments, including directives, block exemption regulations, guidelines or other national or European legislative instruments. We recommend that the EU institutions employ the relevant instrument(s) to provide legal certainty and coverage in relation to the following matters:

- An effective club licensing system, based on the minimum standards introduced in 2004 by all European football associations;
- Central marketing of commercial rights in accordance with the principles established by the European Commission;
- A European system of player transfer regulations in accordance with the principles agreed with European Commission on 5 March 2001;
- A European players’ agents directive including clauses providing for:

strict examination criteria, greater transparency, minimum standards for agents contracts, effective monitoring and disciplinary sanctions by European sports governing bodies, the introduction of an “agents licensing system”, prohibition on “dual representation” and other conflicts of interests, and a system based on payment of agents by players;

- An effective system for encouraging local education of players, based on the obligation for all clubs to have a certain number of home-grown players in their squads and a squad size limit;
- An effective system for maintaining competitive balance through cost control (in particular, as regards the possible introduction of a salary cost control mechanism administered by European and national sports governing bodies, subject to detailed analysis of feasibility);

- Legal protection for the player release rule, obliging clubs to release players for the national team without entitlement to compensation;
- Endorsement of the pyramid structure of European football and official recognition of national sports governing bodies by Member States and of European sports governing bodies by the European Union institutions;
- Appropriate national or Community legislation to secure the protection of intellectual property rights for sports and football fixture lists;
- Appropriate corrective mechanisms to secure the financing of sport in general and football in particular in the event of a liberalized betting market, e.g. through the payment of a “tax”;
- Appropriate national or Community legislation to combat the threat and incidence of “ambush marketing” and legal protection of intellectual property rights to major sporting events;
- Review of existing EU proposals regarding “news access” to guard against any unfair prejudice to the interests of sports events organisers;
- Enactment of appropriate legal framework to combat the practice of ticket touting in Europe;
- Harmonization of the legal approach to issues of hooliganism and to institutionalise cooperation between police authorities in this respect;
- Enactment of appropriate (national) legislation recognising the role and function of sports governing bodies, in particular, regarding their capacity to represent the interests of their sport and their ownership of commercial rights in the competitions that they organise.

In addition to these specific matters, we also recommend that the EU institutions take this Review into account for the purposes of elaborating a “White Paper” on European Sport and, in addition, that a “European Sports Agency” be established as a monitoring and information centre with comprehensive data.

### (b) To the European football authorities

For the purposes of the Review, the term “European football authorities” refers to both UEFA (at the European level) and national football associations (at the national level). In this connection, we fully support the devolution of tasks to the most appropriate level in the football regulatory structure, in accordance with the concept of subsidiarity, a principle that the authors of the Review wholeheartedly endorse, in particular insofar as it applies to sport.

The result of our analysis shows that there are numerous issues that need to be tackled by the football authorities directly. Among other things, we have identified improvements that could be made in the internal system of football governance, the need to address issues of competitive imbalance and also the need to take further steps to encourage player training.

All governing bodies in sport, including those in football, need to continually re-examine their structures and institutions to ensure that they are sufficiently democratic and representative and also reflect the realities of their particular sports. In addition, the football authorities in particular must re-consider the most efficient organisational structure for the administration of football regulatory matters in Europe. The current division of tasks (for example, in relation to the player transfer system) is not ideal.

Our analysis leads to the conclusion that the club licensing system can be considered as a good start on the road to better governance and financial management of football in Europe. Nevertheless, improvements can and should be made.

Furthermore, there is a need for on-going and more structured cooperation between the European political institutions and the European governing body for football, in particular, to combat illegal activities associated with sport.

In sum, we conclude that a holistic approach is the only effective means to tackle the problems of European football and to provide a solid foundation for its future healthy development.

Against this background, we recommend that UEFA should review, improve and enforce the club licensing system across Europe, in particular by:



- Ensuring that national associations implement the system effectively;
- Publishing reports on compliance;
- Establishing an independent body to monitor overall compliance, including more extensive use of spot-checking;
- Establishing a European Code of Corporate Governance for clubs;
- Elaborating benchmarking procedures to help establish best practice for clubs;
- Introducing additional measures to achieve competitive balance in European football, including some form of salary cost control;
- Implementing a European “clearing house system” for transactions related to the transfer of players;
- Improving the system of regulations designed to ensure the independence of clubs (multi-club ownership/control).

As regards internal governance, we recommend that IJEFA examine its own structures to ensure they are appropriate and representative given contemporary developments in football. In particular, we recommend that UEFA grant official recognition as advisory bodies to the European Club Forum, the European Professional Football Leagues (EPFL), the players union (FIFPro or its European members), the tripartite European Football Dialogue (involving FIFPro, the EPFL and UEFA). These structural adaptations (where necessary by appropriate statutory amendment) will help to ensure a well-ordered and continuous consultation of all stakeholders.

We also recommend that UEFA consider further structural improvements to reflect new developments, including for example, the creation of a “strategy board” comprising representatives of the Executive Committee of UEFA, the leagues and the clubs. This should help to establish an efficient consultation process on matters related to professional club football, which is the area that gives rise to most of the contentious issues in practice.

Generally, we recommend that UEFA consider establishing additional advisory bodies, to improve the quality of decision-making. In particular, it would be desirable to involve supporters’ organisations as stakeholders when they are organised at European level and, in this connection, we recommend that UEFA examine the feasibility of establishing a European “Supporters Direct” body.

The Review recommends that, in the interests of administrative efficiency, it is desirable to re-align current organisational functions in football, so that UEFA assumes responsibility for European related matters and can therefore effectively discharge its full statutory duties. In accordance with this, we recommend that UEFA should administer a Europe-wide player transfer system responding to the conditions prevailing in Europe (both sporting and legal). Similarly, UEFA should review, improve and administer an effective system to regulate the activities of players’ agents in Europe.

Given the existing (and increasing) financial imbalance in football, we recommend that UEFA review and update the financial solidarity system of the UEFA Champions League to protect the good health of the European football family and, in particular, to provide for the further education and development of young players. In this respect, it is desirable to reserve a higher proportion of the Champions League revenue for distribution to the grassroots.

Whilst the Review concludes that legal protection should be given to the player release rule, it also recommends that UEFA introduce a collective insurance coverage for players during the final round of the European Football Championships.

To address issues relating to gambling and the risk of match-fixing, the Review recommends that UEFA establish European-wide agreements with betting companies providing for “early warning” systems to detect irregular gaming activities. In addition, UEFA and national associations should examine and implement a “fit and proper person test” for all those involved in football, including owners of clubs, managers and referees. These rules must, in particular, address any area where there might be a risk of conflict of interests.

We recommend that UEFA and national football associations in Europe introduce and respect “minimum standards for good governance of national associations”. The objective must be to achieve maximum

transparency and accountability, and this should include publication of statutes and relevant decisions, respect for the principle of separation of powers, free elections and so on. As a related matter, both UEFA and the national associations should continually review the professionalism and efficiency of their own administrative structures.

Given the regrettable incidence of certain forms of racism and xenophobia in football, we recommend that (JEFA and the national associations review their current disciplinary systems and enact strict rules, with appropriate sanctions, in order to deter this problem.

In light of the on-going need to address governance issues and the increasing risk of financial impropriety associated with football, we recommend that UEFA and national associations establish dedicated internal governance units, including specialised and independent anti-fraud bodies within their structures.

Finally, we recommend that both UEFA and national associations ensure that they have appropriate arbitration clauses in their Statutes as an alternative to ordinary state court jurisdictions.

Consistent with the approach we have taken throughout the Review we consider that many of the recommendations addressed to the European football authorities could also be usefully taken on board by other sports governing bodies across Europe.

### (c) To the EU institutions and the European Football Authorities jointly

One of the most significant conclusions of the Review is that, in certain areas, it is only joint co-operation between the European football authorities and the EU institutions that will provide efficient solutions to the problems facing European football.

Accordingly, there are a number of matters that need to be tackled in a co-ordinated manner by the relevant authorities working together. We believe, for example, that it is desirable to establish a formal consultation process as a means to confirm which “sports rules” and practices fall outside the scope of Community law altogether.

We recommend that the parties work in cooperation with the immigration and national labour inspection services, in particular, to examine the issuance of short-term visas and related international transfer certificates to deter “trafficking” of young players.

We recommend cooperation to the maximum extent possible (including with the police) to detect and deter criminal activities around football and in particular to prevent match-fixing, fraud, money-laundering or any other form of corrupt or criminal activity.

We recommend that the parties cooperate in all matters relating to safety and security at stadia for the maximum protection of the public and further develop the partnership between EU Institutions, Member States and football authorities in the process.

As a general principle, we recommend that the EU Institutions grant official recognition to UEFA as the governing body for European football and as the counterpart of the EU when dealing with football-related issues in Europe. As indicated above, in return UEFA must ensure respect for the principles of transparency and democracy and must assume its full responsibility for all relevant football-related issues in Europe.

To achieve these objectives, we recommend the conclusion of a Formal Agreement between the EU and UEFA setting out the framework for bilateral relations between the parties and agreeing on a model of cooperation to safeguard the interests of sport within the context of Community law.

Again, we consider that many of the recommendations addressed to the EU institutions and European football authorities jointly could be equally applicable to other sports in Europe.

## 8. Conclusion

The findings of this Report demonstrate that there is a crucial need to have a formal structure for the relationship between the EU institutions and the European governing body for football.

In the last few months alone, several European countries (such as Belgium, Finland, Germany, Italy, Portugal etc.) have been shaken by match-fixing and corruption scandals, often linked to betting and to players’ agents.

In addition, the financial situation of many European clubs is perilous, with bankruptcy cases and deficits of hundreds of millions of Euros.

Furthermore, there has been a consistent series of legal challenges to fundamental sports rules and practices that only serves to undermine confidence in the system and creates a climate of instability.

Against this background, a comprehensive and proactive approach is needed by both the EU institutions and the football authorities in order to deliver greater legal certainty in football and also to protect the European Model of Sport.

UEFA is the football authority with responsibility for the European area and therefore it falls to UEFA, in dialogue with the European Commission, to work on the legal framework needed to deliver security to football whilst respecting Community law. It is therefore indispensable that the EU enter into a formal agreement with UEFA which defines the nature of the legal relationship between the parties and clarifies that IJFEA is the relevant interlocutor for the EU institutions on all matters relating to European football. This agreement should foresee a duty of mutual consultation between UEFA and the EU regarding all relevant football related matters in Europe and provide an established procedure for cooperation between the parties.

It is clear to us that the problems experienced in football are common to many sports across Europe and the jurisprudence we have discussed is by no means limited to football. The European Court of Justice has for example reached decisions in cases dealing with cycling,

basketball, handball, swimming, judo as well as football. Furthermore, all sports face governance issues which are largely similar to those confronted by football. Consequently, the conclusions and recommendations reached in this Review should be of considerable relevance to sport generally and not only football. Therefore, we believe there should also be no obstacle to other European sports governing bodies having similar relationships with the European Union, provided they also respect the principles of democracy and transparency.

We conclude by recalling that the European Model of Sport has delivered success and earned respect around the world as a system based on social inclusion, financial solidarity and true sporting values. Nevertheless, we face significant challenges in Europe and only the direct involvement of political leaders, working together with the sports authorities in general and the football authorities in particular, can protect this model and secure a healthy future for sport in Europe. If we fail to take our responsibilities there is a real risk that the true values of sport will be eroded, and the public will become increasingly disaffected as a result.

The UK Presidency has taken the initiative and recognised that the political will on both sides exists to find solutions to the challenges we face. We must step up to the task and recognise that responsibility to tackle these issues rests not solely with sports authorities: political bodies have both the duty and the legal means to play their part in finding the necessary solutions.

It's time to act.

The International Sports Law Journal



## European Parliament Resolution of 29 March 2007 on the Future of Professional Football in Europe

*The European Parliament,*

- having regard to the Helsinki Report of 10 December 1999<sup>1</sup> and to the Nice Declaration of 8 December 2000<sup>2</sup> on the specific characteristics of sport and its social function in Europe,
- having regard to Articles 17 and III-282 of the Treaty establishing a Constitution for Europe (the Constitutional Treaty),
- having regard to the UK Presidency initiative on European football, which resulted in the "Independent European Sport Review 2006",
- having regard to the case-law of the Court of Justice of the European Communities (the Court of Justice), the Court of First Instance and the Commission's decisions in sports-related matters,
- having regard to Rule 45 of its Rules of Procedure,
- having regard to the report of the Committee on Culture and Education and the opinions of the Committee on Economic and Monetary Affairs, the Committee on Employment and Social Affairs, the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs (A6-0036/2007),

- A. whereas the Commission has underlined in the Helsinki Report the need for a partnership between football's governing bodies and public authorities for the good governance of the game, which fully respects the self-regulatory nature of professional sport,
- B. whereas European sport, and football in particular, is an inalienable part of European identity, European culture and citizenship, and the European Football Model, characterised by open sports competitions within a pyramid structure in which several hundred thousand amateur clubs and millions of volunteers and players form the base for the top professional clubs, is the result of longstanding democratic tradition and grass-roots support in the community as a whole;

- C. whereas football plays an important social and educational role, and is an effective instrument for social inclusion and multicultural dialogue, and needs to play an active part in counteracting discrimination, intolerance, racism and violence, as many of such incidents are still taking place in and around stadiums, and whereas professional football clubs and leagues also play a vital social and cultural role in their local and national communities;
- D. whereas professional football has both an economic and a non-economic dimension,
- E. whereas the economic aspects of professional football are subject to Community law, and the case-law recognises the specificity of sport and the social and educational role played by football in Europe,
- F. whereas it is thus the responsibility of the national and European political and sports authorities to ensure that, when Community law is applied to professional football, it does not compromise its social and cultural purposes, by developing an appropriate legal framework, which fully respects the fundamental principles of specificity of professional football, autonomy of its bodies and subsidiarity,
- G. whereas it was decided, in view of the growing importance of sport in the European Union's various policies (freedom of movement, recognition of qualifications, competition, health and audiovisual policies), to include sport in the Constitutional Treaty as an area of EU competence (under Articles 17 and III-282); and whereas the Constitutional Treaty has not been ratified by all of the Member States, and the Nice Declaration on sport in the EU alone is not sufficient to deal with the current problems, which go beyond national dimensions and accordingly call for European solutions,
- H. whereas the greater professionalisation and commercialisation of sport in general and football in particular has made EC law much more relevant in this area, a fact reflected in the growing number of cases pending before the Court of Justice and the Commission,
  - this has greatly exacerbated the problem of legal uncertainty and the sectors concerned increasingly see an approach based solely

<sup>1</sup> COM(1999)0644.

<sup>2</sup> Presidency Conclusions, Nice European

Council Meeting 7-9 December 2000, Annex IV.

- on treating cases individually as inadequate, a view also documented in the study commissioned by a number of sports ministers in the EU Member States and recently published under the title 'Independent European Sport Review 2006',
- it is not clear, for example, whether the Union of European Football Associations (UEFA) rule stipulating that teams must contain a minimum number of home-grown players, a provision which is extremely important for youth development, would, if it were reviewed by the Court of Justice, prove to be consistent with Article 12 of the EC Treaty,
  - I. whereas as a result of this legal uncertainty, it is not clear either how much autonomy self-regulating bodies, such as UEFA, national associations and national leagues, enjoy and to what extent they are bound, when exercising their right to self-regulation and performing their regulatory function, by certain principles of Community law such as free movement, non-discrimination and competition rules,
  - J. whereas this legal uncertainty is not only problematic in economic terms, but in particular in terms of the social, cultural and educational functions of football, and at the same time reduces the interest of fans and efforts to improve support, and undermines the principle of fair play,
  - K. whereas a decision has been taken to include sport in the Constitutional Treaty as a matter of EU competence (Articles 17 and III-282) in order to give the EU powers to develop its European dimension,
  - L. whereas professional football does not function like a typical sector of the economy and whereas professional football clubs cannot operate under the same market conditions as other economic sectors, because of the interdependence between sports opponents and the competitive balance needed to preserve the uncertainty of results, and whereas its various actors, including supporters, players, clubs, leagues and associations, do not operate as normal consumers or enterprises,
  - M. whereas the future of professional football in Europe is threatened by the growing concentration of economic wealth and sports power,
  - N. whereas the growing importance of revenues from the sale of broadcasting rights may undermine the competitive balance between clubs from different countries, as such revenues are largely determined by the size of national broadcasting markets,
  - O. whereas for many decades professional football has increasingly been characterised by an international dimension and has equally been affected by different international regulatory and legislative regimes,
  - P. whereas diverging national legislation and licensing criteria in Europe cause an uneven playing field, economically and legally, and this situation seriously hampers fair sports competition between teams in European leagues, and hence also between national teams,
  - Q. whereas the participation of women in sport in general is still far below the level of men, whereas women are still under-represented in the sports decision-making bodies and whereas there are still cases of gender-discrimination in the remuneration of sports professionals,
  - R. whereas, despite the fact that the *Bosman* ruling in 1995 had a positive effect on players' contracts and players' mobility - though a lot of employment-related and social problems remain to be solved - it also had several negative consequences for the sport, including an increased ability on the part of the richest clubs to sign up the best players, a stronger link between financial power and sporting success, an inflationary spiral in players' salaries, reduced opportunities for locally-trained players to express their talent at the highest level and reduced solidarity between professional and amateur sport,
  - S. whereas many criminal activities (match fixing, corruption, etc.) are the result of the spiral of spending, salary inflation and the subsequent financial crises faced by many clubs,
  - T. whereas the Commission has confirmed in formal decisions the

compatibility of the collective selling of media rights with EC competition law,

### General context

1. Stresses its attachment to the European Football Model, with its symbiotic relationship between amateur and professional football;
2. Points out the importance of the inter-linked national pyramid structures of European football, which nurture grassroots talent and competition because national leagues and competitions are also the route to European competitions, and a proper balance needs to be struck between the national foundation of the game and the European level to enable football leagues and associations to co-operate efficiently;
3. Recognises the need for a joint effort by football governing bodies and political authorities at several levels to counter certain negative developments, such as excessive commercialisation and unfair competition, in order to ensure a positive future for professional football with exciting competitions, a high degree of identification of supporters with their clubs and wide public access to competitions by means of, among others, special ticket prices for young people and families, especially for major international matches;
4. Welcomes the work of the above-mentioned Independent European Sport Review 2006 and of the study commissioned by the European Parliament on "Professional Sport in the Internal Market", and calls on the Member States, European and national football governing bodies and the Commission in its forthcoming White Paper on Sport to continue the efforts initiated by the UK Presidency to assess the need for policy measures with due respect for the principle of subsidiarity by considering the principles and main recommendations of that Review;
5. Expresses its desire to avoid the future of professional football in Europe being solely determined on a case-by-case basis and to enhance legal certainty;
6. Agrees with the basic principle that the economic aspects of professional sport do fall within the scope of the EC Treaty, taking into account the specificity of sport as set out in the Nice Declaration; and considers that in this respect the consequential restrictive effects of a sporting rule are compatible with EU law, provided that the rule pursues a legitimate objective related to the nature and purpose of sport and that its restrictive effects are inherent in the pursuit of that objective and proportionate to it;
7. Calls on the Commission to develop guidance on how to apply this principle, and to start a consultation process with the European and national football authorities with the aim of setting up a formal framework agreement between the EU and the European and national football governing bodies;
8. Asks the Commission, in partnership with Parliament, the Member States and the European and national football governing bodies and other stakeholders, to include the principles and recommendations contained in this resolution in its forthcoming White Paper, and to establish an action plan for European sport in general and football in particular which sets out the issues for the Commission to deal with and the instruments to be used in order to enhance legal certainty and a level playing-field;
9. Asks the Commission to continue a structured dialogue with the football governing bodies, including national associations and leagues, and other stakeholders in order to overcome the problem of legal uncertainty;
10. Welcomes the success of and great interest in women's football in Europe and draws attention to its growing social significance;

### Governance

11. Calls on all football governing bodies to better define and coordinate their competences, responsibilities, functions and decision-making procedures in order to increase their democracy, transparency and legitimacy, for the benefit of the entire football sector; invites the Commission to provide guidance on which legitimate and adequate self-regulation is supported, with due regard to national legislation and financial support for federations and asso-

- ciations which aims at developing and cultivating young footballers and the national team;
12. Calls on UEFA to involve representation organisations representing players, clubs and leagues in the decision-making process;
  13. Believes that improved governance leading to more concerted self-regulation at national and European level will reduce the tendency to have recourse to the Commission and the Court of Justice;
  14. Recognises the expertise and legitimacy of sporting tribunals insofar as they address citizens' right to a fair hearing, as laid down in Article 47(2) of the Charter of Fundamental Rights of the European Union;
  15. Takes the view that applying to the civil courts, even when not justified in sports terms, cannot be penalised by disciplinary regulations; and condemns the arbitrary decisions by the Federation of International Football Association (FIFA) in this respect;
  16. Asks UEFA and FIFA to accept in their statutes the right of recourse to ordinary courts, but recognises however that the principle of self-regulation implies and justifies the structures of the European sports model and the fundamental principles governing the organisation of sporting competitions, including anti-doping regulations and disciplinary sanctions;
  17. Insists that the principle of proportionality is essential to all football governing bodies when exercising their self-regulatory power; and asks the Commission to ensure that this principle is applied in legal cases concerning sport;
  18. Calls on FIFA to increase its internal democracy and the transparency of its structures;
  19. Believes that the *Charleroi* case currently before the Court of Justice could seriously undermine the ability of small and medium-sized national football associations to take part in international competitions and threaten the vital investment in grassroots football made by national associations; in this respect, believes that clubs should release their players for national team duty without entitlement to compensation; encourages UEFA and FIFA, together with the European clubs and leagues, to reach an agreement on the conditions applicable to players who are injured while representing their countries and on a system of collective insurance being put into place;
  20. Supports the UEFA club licensing system, which aims at ensuring a level playing-field between clubs and contributing to their financial stability, and calls on UEFA to further develop this licensing system in compliance with Community law in order to guarantee financial transparency and proper management;
  21. Recommends a vigorous campaign by the national and European political and sports authorities to establish greater transparency and good governance in European professional football;
  22. Supports efforts to protect the integrity of the game by ruling out conflicts of interests of major stakeholders in clubs or governing bodies;
  23. Calls on the Commission to reflect, in consultation with football governing bodies, leagues and clubs, on the introduction of a European legal status for sports companies to take account of the economic activities of major football clubs whilst preserving their specific sports-related characteristics; such a status would make it possible to establish rules for monitoring the economic and financial activities of such companies; and for the involvement of supporters and community participation;
  24. Asks Member States and football governing bodies to actively promote the social and democratic role of football fans who support the principles of fair play, by supporting the creation and development of Supporters' Trusts (in recognition of their responsibility) which could then be involved in the ownership and management of clubs, or through the appointment of a football ombudsman and specifically through extending the model of Supporters Direct at European level;
  25. Asks UEFA to examine how supporters' organisations could be involved as important stakeholders when they are organised at European level and to examine the feasibility of a European Supporters Direct body;
  26. Considers that professional footballers, their trade-union representatives and the clubs and leagues should be more closely involved in the governance of football through a better social dialogue;
- Fight against criminal activities**
27. Supports the efforts of the European and national football governing bodies to introduce greater transparency in the ownership structures of clubs and asks the Council to develop and adopt measures for the fight against the criminal activities that haunt professional football, including money laundering, illegal betting, doping and match fixing, and enforced prostitution on the sidelines of major football events;
  28. Emphasises the need to ensure full compliance with transparency and money-laundering legislation by entities involved in the football sector;
  29. Calls on Member States to introduce mechanisms fostering cooperation between clubs, the police and supporters' organisations, with a view to combating violence and hooliganism and other forms of delinquent behaviour before, during and after football matches and to exchange best practices;
  30. Asks the Council to strengthen the coordination of preventive measures and sanctions concerning hooligans, also in relation to national games; calls in this respect on the Council to implement its Decision 2002/348/JHA concerning security in connection with football matches with an international dimension and if necessary to approve additional measures following recent violent incidents in and outside football stadiums;
  31. Calls on Member States, Europe's footballing authorities and associations and leagues to conduct a major European-wide campaign to raise awareness among supporters, with a view to curbing violence inside and outside football grounds;
- Social, cultural and educational role of football**
32. Highlights the importance of education through sport and the potential of football to help get socially vulnerable youngsters back on track and asks Member States, national associations, leagues and clubs to exchange best practices in this regard;
  33. Calls on the Commission and Member States also to support social inclusion projects by football clubs;
  34. Expresses its clear support for the UEFA measures to encourage the education of young players by requiring a minimum number of home-grown players in a professional club's squad and by placing a limit on the size of the squads; believes that such incentive measures are proportionate and calls on professional clubs to strictly implement this rule;
  35. Is convinced that additional arrangements are necessary to ensure that the home-grown players initiative does not lead to child trafficking, with some clubs giving contracts to very young children (below 16 years of age);
  36. Points out that young players must be given the opportunity for a general education and vocational training, in parallel with their club and training activities and that the clubs should ensure that young players from third countries return safely home if their career does not take off in Europe;
  37. Insists that immigration law must always be respected in relation to the recruitment of young foreign talent and calls on the Commission to tackle the problem of child trafficking in the context of Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings<sup>3</sup> and / or in the context of the implementation of Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work<sup>4</sup>; points out that young players must be given the opportunity for a general education and vocational training in parallel with their club and training activity, so that they do not depend entirely on the clubs; calls for action to prevent the social exclusion of young people who are ultimately not selected;

3 OJ L 203, 1.8.2002, p. 1.

4 OJ L 216, 20.8.1994, p. 12.

38. Calls on the football governing bodies and the clubs to engage in the fight against human trafficking by
  - subscribing to a European charter for solidarity in football, that commits subscribers to respect good practices concerning the discovery, recruitment and reception of young foreign football players;
  - the creation of a Solidarity Fund that would finance prevention programmes in countries most affected by human trafficking;
  - reviewing Article 19 of the FIFA Regulations for the Status and Transfer of Players in relation to the protection of minors;
39. Underlines the important social and educational role of training centres and the vital role which they play in both the well-being of clubs and the future development of football talent, supports financial incentives for clubs with a training centre, provided such incentives are compatible with the Treaty rules on State aid, and asks the Commission to recognise this crucial role when developing guidelines on State aid;
40. Stresses the need for an environment to be created in which young players can develop and be brought up in a spirit of honesty and fair play;
41. Urges the Member States to introduce a gender perspective in all aspects of sports policies, with the aim of further reducing the continuing difference between men and women both in representation on sports bodies and in remuneration, as well as in actual participation in sport, thus equalising the personal and social benefits flowing from sport;

#### **Employment and social issues**

42. Regrets the differences in social and fiscal legislation between Member States, which cause imbalances between clubs, and the lack of willingness of Member States to solve this at European level;
43. Emphasises the importance of the mutual recognition of professional qualifications gained in another Member State in allowing the free movement of workers;
44. Believes that the current economic reality surrounding players' agents requires that football governing bodies at all levels, in consultation with the Commission, improve the rules governing players' agents; in this respect calls on the Commission to support UEFA's efforts to regulate players' agents, if necessary by presenting a proposal for a directive concerning players' agents which would include: strict standards and examination criteria before anyone could operate as a football players' agent; transparency in agents' transactions; minimum harmonised standards for agents' contracts; an efficient monitoring and disciplinary system by the European governing bodies; the introduction of an "agents' licensing system" and agents' register; and ending "dual representation" and payment of agents by the player;
45. Calls on UEFA and the Commission to intensify their efforts to strengthen the social dialogue at European level on issues such as the duration of contracts, the definition of the transfer window, possibilities for terminating a contract early and compensation for trainer clubs, as it can prevent and overcome tensions between players and employers;
46. Welcomes the move by FIFPro, UEFA and the European Professional Football Leagues (EPFL) to further players' rights by ensuring that players always are given written contracts with certain minimum requirements;
47. Acknowledges the need to implement employment legislation more effectively in all Member States to ensure that professional players are granted the rights they are entitled to and fulfil the obligations they comply with as employees;
48. Asks the Commission actively to support initiatives and campaigns to fight child labour in football-related industries and examine all political and legal possibilities to ensure that the rights of all workers, including children, are respected;

#### **Fight against violence, racism, other forms of discrimination**

49. Asks the Commission, the Member States and all those involved in professional football to accept, since the legal entitlement to a

- workplace free of racism and other forms of discrimination also applies to footballers, their responsibility for continuing and intensifying the fight against racism and xenophobia by condemning all forms of discrimination inside and outside the stadium; asks for stricter sanctions against any kind of discriminatory acts in football; asks UEFA and the national associations and leagues to apply disciplinary rules in a coherent, firm and coordinated manner, without neglecting the financial situation of clubs;
50. Also calls in this connection on the Commission, UEFA and other interested parties to take action on Parliament's Declaration of 14 March 2006 on tackling racism in football<sup>5</sup>; compliments UEFA and FIFA on the tougher sanctions being incorporated in their statutes and for the measures being taken, and looks forward to further action by all the parties concerned in the football sector;
  51. Calls on the Commission, UEFA and other interested parties not to allow other forms of discrimination, such as discrimination on grounds of sex, origin, sexual orientation or otherwise, to go unpunished inside and outside the football stadium;
  52. Condemns all forms of violent behaviour in football stadiums, encourages Member States to apply the strictest measures at their disposal in order to reduce and eliminate all forms of violence on the sports field and expresses its support for the UEFA measures seeking to eradicate it;

#### **Competition law and the internal market**

53. Strongly believes that the introduction of a modulated cost-control system could be a way of enhancing financial stability and the competitive balance between teams, for instance when integrated into an updated club licensing system;
54. Considers that football must ensure the interdependence of competitors and the need to guarantee the uncertainty of results of competitions, which could serve as a justification for sports organisations to implement a specific framework on the market for the production and the sale of sport events; however, considers that such specific features do not warrant an automatic exemption from the Community competition rules for any economic activities generated by professional football, owing to the increasing economic weight of such activities;
55. Asks the Commission to draw up clear guidelines on the application of the State aid rules, indicating what kind of public support is acceptable and legitimate in order to fulfil the social, cultural and educational role played by football, such as financial or other support granted by public authorities for the provision or updating of football stadiums or facilities;
56. Asks the Commission and the Member States to work closely with the international, European and national football governing bodies to reflect on the consequences of a possible liberalisation of the betting market and on mechanisms to secure the financing of sport in general and football in particular, and to look into measures which would protect the integrity of national and European football competitions;
57. Recognises the importance of trade marks in the sports industry except where they are used to impede the free movement of goods;
58. Notes that there is often a mismatch between the supply of, and demand for, tickets for major football events, which is beneficial to sponsors but detrimental to consumers; stresses that the interests of consumers should be fully taken into account when it comes to the distribution of tickets and that non-discriminatory and fair ticket sales should be guaranteed at all levels; acknowledges however that the distribution of tickets may, where appropriate, be restricted to members of supporters clubs, travel clubs or similar schemes, membership of which is available on a non-discriminatory basis;

#### **Selling of television rights and competition law**

59. Maintains that collective selling in all competitions is fundamental to protecting the financial solidarity model of European foot-

<sup>5</sup> OJ C 291 E, 30.11.2006, p. 143.

- ball; welcomes a public debate on and further investigation by the Commission into whether this model should be adopted across Europe for both pan-European and domestic competitions, as suggested by the Independent Sport Review 2006; in this respect, calls on the Commission to provide a detailed evaluation of the economic and sports impact of its relevant media rights decisions and the extent to which they have or have not worked;
60. Stresses that the sale of media rights vested in the European national football leagues should always comply with EC competition law, taking into account the specificity of sport, and be negotiated and completed in a transparent manner; but with that proviso believes that football broadcasts should be accessible to the widest possible range of people including through free-to-air channels;
61. Stresses that the merit of Article 3a of the current "Television without Frontiers Directive" 97/36/EC<sup>6</sup> can hardly be overestimated;
62. Points out that it is vital for professional football that the revenues from television rights be distributed in a fair way that ensures solidarity between the professional and amateur games, and between competing clubs in all competitions; notes that the current distribution of television revenues in the UEFA Champions League to a significant degree reflects the size of the clubs' national television markets; notes that this favours big countries, thereby diminishing the power of clubs from smaller countries;

63. Therefore invites UEFA together with the Commission to continue to examine mechanisms to create a more competitive balance in this field by increased redistribution;
64. Points out that the televised broadcasting of sports competitions is increasingly taking place on encrypted and pay TV channels, and that such competitions are thus becoming inaccessible to a number of consumers;

#### Doping

65. Recommends that the prevention of and fight against doping should constitute an important concern for the Member States; calls for a policy aimed at preventing and combating doping and stresses the need to fight irregularities through checks, research, testing, long-term monitoring by independent doctors and through education and, at the same time, prevention and training; calls on professional clubs to adopt a pledge to combat doping and to monitor compliance through internal checks;
66. Instructs its President to forward this resolution to the Council, the Commission, the governments and the parliaments of the Member States, UEFA, FIFA, EPFL, European Club Forum and FIFPro.

<sup>6</sup> OJ L 202, 30.7.1997, p. 60.



## Resolution CM/Res(2007)8

# Establishing the Enlarged Partial Agreement on Sport (EPAS)



*(Adopted by the Committee of Ministers on 11 May 2007 at its 117th Session)*

The representatives on the Committee of Ministers of Andorra, Azerbaijan, Bosnia and Herzegovina, Cyprus, Denmark, France, Hungary, Iceland, Latvia, Luxembourg, Netherlands, Norway, San Marino, Slovenia, "the former Yugoslav Republic of Macedonia", and United Kingdom,

Recognising that the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideas and principles which are their common heritage and of facilitating their economic and social progress, in particular by pursuing common objectives designed to protect and promote European culture;

Having regard to Statutory Resolution (93) 28 of the Committee of Ministers on Partial and Enlarged Agreements;

Having regard to Resolution (96) 36 of the Committee of Ministers establishing the criteria for partial and enlarged agreements of the Council of Europe;

Having regard to the resolutions adopted by the Conferences of European Ministers Responsible for Sport since 1975, and in particular to Resolution No. I on the Future Pan-European Sports Co-operation adopted at the 17th informal meeting of European Sports Ministers (Moscow, 20-21 October 2006);

Having regard to the substantial work done since 1977 by the Committee for the Development of Sport (CDDS) in developing policies designed to promote sport in the member states of the Council of Europe;

Having regard to the European Cultural Convention of 19 December 1954 (ETS No. 018);

Having regard to the European Convention on Spectator Violence

and Misbehavior at Sports Events and in particular at Football Matches (ETS No. 120), to the Anti-Doping Convention (ETS No. 135) and its Additional Protocol (ETS No. 188);

Having regard to the recommendations of the Committee of Ministers to member states on the Revised European Sports Charter (Recommendation R (92) 13 rev) and the Revised Code of Sports Ethics (Recommendation R (92) 14 rev);

Considering the conclusions of the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), which recommended "the continuation of Council of Europe activities which serve as references in the field of sport";

Considering that the natural values of sport such as respect, mutual understanding and fair play, are excellent tools for the promotion of the values and the goals of the Council of Europe;

Aware of the unique place that sport has in modern society underpinning democracy, participation, involvement, motivation, inclusiveness and social cohesion;

Stressing the importance and significance of sport in modern society, notably from political, social, cultural and economic perspectives;

Aware of the role of sport in promoting social integration, particularly among young people, and in safeguarding the health of the population;

Having regard to the decision of 9 May 2007 whereby the Committee of Ministers authorised the member states who so wish to pursue this objective within the Council of Europe by means of an Enlarged Partial Agreement;

HEREBY,

RESOLVE to establish the Enlarged Partial Agreement on Sport (EPAS), governed by the Statute appended thereto;

AGREE that the EPAS is established for an initial period of three years;

AGREE to review the functioning of the EPAS, with a view to continuing its operation, by the end of the initial period of three years; EXPRESS the wish that all Council of Europe member states and other States Party to the European Cultural Convention become members of the Enlarged Partial Agreement on Sport (EPAS) in the near future.

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## Statute of the Enlarged Partial Agreement on Sport (EPAS)

### Article 1 - Tasks

1.1 The EPAS shall perform the following tasks:

#### *Policy-making and standard setting*

- Develop sports policy strategies and set appropriate standards, reflecting the importance of sport in modern society, in co-operation and dialogue with all parties concerned;
- stimulate and provide the co-ordination of sports policies and standards within and among the States Party, notably with a view to making the safe practice of ethical sport as widely available as possible;
- propose policies necessary to deal with topical issues in international sport;
- promote the development of sports, as a means to foster healthy lifestyles.

#### *Monitoring*

- Monitor the application of the European Sports Charter (Recommendation No. R (92) 13 rev) and of the Code of Sports Ethics (Recommendation No. R (92) 14 rev) in the States members of the Agreement.

#### *Capacity building*

- Pursue actions for capacity building in the field of "Sports for All".

#### *Programme of Activities*

- Implement intergovernmental sports co-operation activities as decided by the Governing Board.

#### *Ministerial meetings*

- Prepare meetings at Ministerial level, open to both the members of the EPAS and all the other states Parties to the European Cultural Convention, at regular intervals and ensure the appropriate follow-up thereto.

1.2 To that end, it shall in particular:

- co-operate, as necessary, in these matters with the Standing Committee of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (T-RV), the Monitoring Group of the Anti-Doping Convention (T-DO), and with the Ad Hoc Committee European Co-ordination Forum for the World Anti-Doping Agency (CAHAMA), and in particular, consider including work linked to the development of either convention in its programme of activities;
- co-ordinate its work with that of the other sectors of the Council of Europe and contribute to multi-sectoral initiatives and other joint programmes defined by the Secretary General;
- develop, as appropriate, co-operation with the European Community;
- develop co-operation with international, regional and national non-governmental sports organisations and anti-doping structures.

### Article 2 - Accession and Membership

2.1 Any state which is a member of the Council of Europe or a Contracting Party to the European Cultural Convention may join the Enlarged Partial Agreement by notification addressed to the Secretary General of the Council of Europe.

2.2 The Committee of Ministers, in its composition restricted to the representatives of the member states of the Enlarged Partial Agreement, may, by the majority stipulated in Article 20.d of the Statute of the Council of Europe, invite any other non-member

state of the Council of Europe to join the Enlarged Partial Agreement, following consultation of the non-member states already participating. A non-member state which receives such an invitation shall notify the Secretary General of its intention to become a member of the EPAS.

- 2.3 Member states of the Council of Europe and other Parties to the European Cultural Convention not joining the Enlarged Partial Agreement on Sport may request the status of observer with EPAS. Decisions in such matters will be made by the Governing Board of EPAS.
- 2.4 The Parliamentary Assembly of the Council of Europe and the Congress of Local and Regional Authorities of the Council of Europe, may participate in the work of EPAS without the right to vote.
- 2.5 The European Community shall be entitled to participate in the work of the EPAS without the right to vote. It may become a member of the EPAS according to modalities agreed with the Committee of Ministers.
- 2.6 The Committee of Ministers, in its composition restricted to the representatives of the States members of the Enlarged Partial Agreement, may, by the majority stipulated in Article 20.d of the Statute of the Council of Europe, authorise the EPAS to invite international organisations, NGOs or other bodies to participate in its work as observers without the right to vote.

### Article 3 - Governing Board

- 3.1 The Governing Board of the EPAS shall be composed of one representative appointed by the government of each member of the Enlarged Partial Agreement. The European Non-Governmental Sports Organisation (ENGSO) shall be represented on the Governing Board, without the right to vote.
- 3.2 The Governing Board shall elect from among its members a bureau comprised of a chair, one vice-chair, four other members, and one representative of the European Non-Governmental Sports Organisation (ENGSO) without the right to vote, for a term of office of two years, renewable only once.
- 3.3 The Governing Board shall:
  - be responsible for the general implementation of the tasks conferred to the EPAS;
  - adopt the draft annual programme of activities of the EPAS and submit, in conformity with the Financial Regulations of the Council of Europe, proposals to the Secretary General of the Council of Europe relating to the elaboration of the draft annual budget, prior to its transmission to the Statutory Committee set up under Article 5 below;
  - decide on pilot projects consistent with the Council of Europe's political priorities, and draw up the relevant budgets;
  - monitor the implementation of the programme of activities and the management of the EPAS' funds;
  - adopt and transmit an annual activity report to the Committee of Ministers.
- 3.4 The Governing Board shall meet once a year at the Council of Europe. It may invite representatives of the relevant Council of Europe bodies to attend its meetings, without voting rights, according to the items on its agenda.
- 3.5 The Governing Board may assign operational tasks to its Bureau. The Bureau shall be convened by the Chair of the Governing Board at least once a year.
- 3.6 The Governing Board shall adopt its decisions by a two-thirds majority of the votes cast, with each member having one vote. Procedural matters shall be settled by a majority of the votes cast. In all other matters, the Governing Board shall adopt its own rules of procedure and any other arrangements for the implementation of its activities.
- 3.7 A Consultative Committee on the programme of activities of EPAS, comprising members of international organisations, NGOs or bodies participating in the work of the Enlarged Partial Agreement in accordance with the provisions of Article 2.6 shall be created. The Consultative Committee, as a partner-

ship body, shall give an opinion on the programme of activities and provide advice for the decisions of the Governing Board. The Governing Board shall appoint the Consultative Committee and define its mandate.

#### Article 4 - Budget

- 4.1 The EPAS' resources shall comprise:
- annual contributions from each member joining the EPAS;
  - any other payment, donation or bequest, subject to the provisions of paragraph 4.3 below.
- 4.2 Expenditure related to the implementation of the programme of activities and common secretariat expenditure shall be covered by a partial agreement budget funded by the member states and non-member states participating in the Enlarged partial agreement.
- 4.3 The EPAS may also receive voluntary and other contributions connected with the work of the agreement, subject to the authorisation of the Governing Board prior to their acceptance. In exceptional circumstances, the Secretary General may consult the Statutory Committee prior to the acceptance of a voluntary contribution. These contributions shall be paid into a special account, opened under the terms of Article 4.2 of the Financial Regulations of the Council of Europe, monitored by the Governing Board in consultations with the Consultative Committee and shall be earmarked for the objectives and tasks specified, provided that they are consistent with the aims of the statute.
- 4.4 The EPAS' financial resources shall benefit from the dispositions of the General Agreement on Privileges and Immunities of the Council of Europe.
- 4.5 Travel and subsistence expenses of persons attending meetings of the Governing Board, of the Consultative Committee and, where appropriate, of the Statutory Committee shall be borne by the state or the organisation concerned.
- 4.6 The Financial Regulations of the Council of Europe shall apply, *mutatis mutandis*, to the adoption and management of the EPAS budget.

#### Article 5 - Statutory Committee

- 5.1 The Statutory Committee shall be composed of the representatives on the Committee of Ministers of the member states of the Council of Europe which are participating in the EPAS and of representatives specifically designated to that effect by the non-member states participating in the EPAS.
- 5.2 The Statutory Committee shall determine every year the total of members' compulsory contributions to the EPAS and the scale of contributions according to which that total shall be apportioned between the participating states; as a general rule, that scale shall conform to the criteria for the determination of the scale of contributions to the general budget of the Council of Europe.

- 5.3 The Statutory Committee shall adopt every year the budget of the EPAS on expenditure relating to the implementation of the programme of activities and common secretariat expenditure.
- 5.4 The Statutory Committee shall approve every year the annual accounts of the EPAS, which shall be drawn up by the Secretary General of the Council of Europe in accordance with the Financial Regulations of the Council of Europe and submitted to the Statutory Committee accompanied by the report of the External Auditor, as provided for in the Financial Regulations. In order to discharge the Secretary General from responsibility for the management of the financial year in question, the Statutory Committee shall transmit to the Committee of Ministers the annual accounts, together with its approval or any comments, and the report drawn up by the External Auditor, as provided for in the Financial Regulations.

#### Article 6 - Secretariat

- 6.1 The Secretariat of the Enlarged Partial Agreement, headed by an Executive Secretary, shall be provided by the Secretary General of the Council of Europe.
- 6.2 The Executive Secretary may call on institutions and independent experts in the areas concerned by the programme.
- 6.3 The EPAS will be located at the headquarters of the Council of Europe.

#### Article 7 - Amendments

The Committee of Ministers, in its composition restricted to the representatives of the States members of the Enlarged Partial Agreement and after consultation with the other members defined in Article 2, may adopt amendments to this Statute by the majority provided for under Article 20.d of the Statute of the Council of Europe.

#### Article 8 - Withdrawal

- 8.1 Any member may withdraw from the EPAS by means of a declaration sent to the Secretary General of the Council of Europe.
- 8.2 The Secretary General shall acknowledge receipt of the declaration and so inform the members of the EPAS.
- 8.3 By analogy with Article 7 of the Statute of the Council of Europe, withdrawal shall take effect:
- at the end of the financial year in which it is notified, if such notification is given during the first nine months of that financial year;
  - at the end of the following financial year, if notification of withdrawal is given in the last three months of the financial year.
- 8.4 In accordance with Article 18 of the Council of Europe's Financial Regulations, the Governing Board shall examine the financial consequences of the withdrawal of a member and shall make the appropriate arrangements.
- 8.5 The Secretary General shall immediately inform the member concerned of the consequences for it of its withdrawal.



## UNESCO International Convention against Doping in Sport

Paris, 19 October 2005

The General Conference of the United Nations Educational, Scientific and Cultural Organization, hereinafter referred to as "UNESCO", meeting in Paris, from 3 to 21 October 2005, at its 33rd session, Considering that the aim of UNESCO is to contribute to peace and security by promoting collaboration among nations through education, science and culture, Referring to existing international instruments relating to human rights, Aware of resolution 58/5 adopted by the General Assembly of the United Nations on 3 November 2003, concerning sport as a means to

promote education, health, development and peace, notably its paragraph 7, Conscious that sport should play an important role in the protection of health, in moral, cultural and physical education and in promoting international understanding and peace, Noting the need to encourage and coordinate international cooperation towards the elimination of doping in sport, Concerned by the use of doping by athletes in sport and the consequences thereof for their health, the principle of fair play, the elimination of cheating and the future of sport,



Mindful that doping puts at risk the ethical principles and educational values embodied in the International Charter of Physical Education and Sport of UNESCO and in the Olympic Charter, Recalling that the Anti-Doping Convention and its Additional Protocol adopted within the framework of the Council of Europe are the public international law tools which are at the origin of national anti-doping policies and of intergovernmental cooperation, Recalling the recommendations on doping adopted by the second, third and fourth International Conferences of Ministers and Senior Officials Responsible for Physical Education and Sport organized by UNESCO at Moscow (1988), Punta del Este (1999) and Athens (2004) and 32 C/Resolution 9 adopted by the General Conference of UNESCO at its 32nd session (2003), Bearing in mind the World Anti-Doping Code adopted by the World Anti-Doping Agency at the World Conference on Doping in Sport, Copenhagen, 5 March 2003, and the Copenhagen Declaration on Anti-Doping in Sport, Mindful also of the influence that elite athletes have on youth, Aware of the ongoing need to conduct and promote research with the objectives of improving detection of doping and better understanding of the factors affecting use in order for prevention strategies to be most effective, Aware also of the importance of ongoing education of athletes, athlete support personnel and the community at large in preventing doping, Mindful of the need to build the capacity of States Parties to implement anti-doping programmes, Aware that public authorities and the organizations responsible for sport have complementary responsibilities to prevent and combat doping in sport, notably to ensure the proper conduct, on the basis of the principle of fair play, of sports events and to protect the health of those that take part in them, Recognizing that these authorities and organizations must work together for these purposes, ensuring the highest degree of independence and transparency at all appropriate levels, Determined to take further and stronger cooperative action aimed at the elimination of doping in sport, Recognizing that the elimination of doping in sport is dependent in part upon progressive harmonization of anti-doping standards and practices in sport and cooperation at the national and global levels, Adopts this Convention on this nineteenth day of October 2005.

## I. Scope

### Article 1 - Purpose of the Convention

The purpose of this Convention, within the framework of the strategy and programme of activities of UNESCO in the area of physical education and sport, is to promote the prevention of and the fight against doping in sport, with a view to its elimination.

### Article 2 - Definitions

These definitions are to be understood within the context of the World Anti-Doping Code. However, in case of conflict the provisions of the Convention will prevail.

For the purposes of this Convention:

1. "Accredited doping control laboratories" means laboratories accredited by the World Anti Doping Agency.
2. "Anti-doping organization" means an entity that is responsible for adopting rules for initiating, implementing or enforcing any part of the doping control process. This includes, for example, the International Olympic Committee, the International Paralympic Committee, other major event organizations that conduct testing at their events, the World Anti-Doping Agency, international federations and national anti-doping organizations.
3. "Anti-doping rule violation" in sport means one or more of the following:
  - (a) the presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen;
  - (b) use or attempted use of a prohibited substance or a prohibited method;

- (c) refusing, or failing without compelling justification, to submit to sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection;
  - (d) violation of applicable requirements regarding athlete availability for out-of-competition testing, including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules;
  - (e) tampering, or attempting to tamper, with any part of doping control;
  - (f) possession of prohibited substances or methods;
  - (g) trafficking in any prohibited substance or prohibited method;
  - (h) administration or attempted administration of a prohibited substance or prohibited method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.
4. "Athlete" means, for the purposes of doping control, any person who participates in sport at the international or national level as defined by each national anti-doping organization and accepted by States Parties and any additional person who participates in a sport or event at a lower level accepted by States Parties. For the purposes of education and training programmes, "athlete" means any person who participates in sport under the authority of a sports organization.
  5. "Athlete support personnel" means any coach, trainer, manager, agent, team staff, official, medical or paramedical personnel working with or treating athletes participating in or preparing for sports competition.
  6. "Code" means the World Anti-Doping Code adopted by the World Anti-Doping Agency on 5 March 2003 at Copenhagen which is attached as Appendix 1 to this Convention.
  7. "Competition" means a single race, match, game or singular athletic contest.
  8. "Doping control" means the process including test distribution planning, sample collection and handling, laboratory analysis, results management, hearings and appeals.
  9. "Doping in sport" means the occurrence of an anti-doping rule violation.
  10. "Duly authorized doping control teams" means doping control teams operating under the authority of international or national anti-doping organizations.
  11. "In-competition" testing means, for purposes of differentiating between in-competition and out-of-competition testing, unless provided otherwise in the rules of an international federation or other relevant anti-doping organization, a test where an athlete is selected for testing in connection with a specific competition.
  12. "International Standard for Laboratories" means the standard which is attached as Appendix 2 to this Convention.
  13. "International Standard for Testing" means the standard which is attached as Appendix 3 to this Convention.
  14. "No advance notice" means a doping control which takes place with no advance warning to the athlete and where the athlete is continuously chaperoned from the moment of notification through sample provision.
  15. "Olympic Movement" means all those who agree to be guided by the Olympic Charter and who recognize the authority of the International Olympic Committee, namely the international federations of sports on the programme of the Olympic Games, the National Olympic Committees, the Organizing Committees of the Olympic Games, athletes, judges and referees, associations and clubs, as well as all the organizations and institutions recognized by the International Olympic Committee.
  16. "Out-of-competition" doping control means any doping control which is not conducted in competition.
  17. "Prohibited List" means the list which appears in Annex I to this Convention identifying the prohibited substances and prohibited methods.

18. "Prohibited method" means any method so described on the Prohibited List, which appears in Annex I to this Convention.
19. "Prohibited substance" means any substance so described on the Prohibited List, which appears in Annex I to this Convention.
20. "Sports organization" means any organization that serves as the ruling body for an event for one or several sports.
21. "Standards for Granting Therapeutic Use Exemptions" means those standards that appear in Annex II to this Convention.
22. "Testing" means the parts of the doping control process involving test distribution planning, sample collection, sample handling and sample transport to the laboratory.
23. "Therapeutic use exemption" means an exemption granted in accordance with Standards for Granting Therapeutic Use Exemptions.
24. "Use" means the application, ingestion, injection or consumption by any means whatsoever of any prohibited substance or prohibited method.
25. "World Anti-Doping Agency" (WADA) means the foundation so named established under Swiss law on 10 November 1999.

#### **Article 3 - Means to achieve the purpose of the Convention**

In order to achieve the purpose of the Convention, States Parties undertake to:

- (a) adopt appropriate measures at the national and international levels which are consistent with the principles of the Code;
- (b) encourage all forms of international cooperation aimed at protecting athletes and ethics in sport and at sharing the results of research;
- (c) foster international cooperation between States Parties and leading organizations in the fight against doping in sport, in particular with the World Anti-Doping Agency.

#### **Article 4 - Relationship of the Convention to the Code**

1. In order to coordinate the implementation, at the national and international levels, of the fight against doping in sport, States Parties commit themselves to the principles of the Code as the basis for the measures provided for in Article 5 of this Convention. Nothing in this Convention prevents States Parties from adopting additional measures complementary to the Code.
2. The Code and the most current version of Appendices 2 and 3 are reproduced for information purposes and are not an integral part of this Convention. The Appendices as such do not create any binding obligations under international law for States Parties.
3. The Annexes are an integral part of this Convention.

#### **Article 5 - Measures to achieve the objectives of the Convention**

In abiding by the obligations contained in this Convention, each State Party undertakes to adopt appropriate measures. Such measures may include legislation, regulation, policies or administrative practices.

#### **Article 6 - Relationship to other international instruments**

This Convention shall not alter the rights and obligations of States Parties which arise from other agreements previously concluded and consistent with the object and purpose of this Convention. This does not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

## **II. Anti-doping activities at the national level**

#### **Article 7 - Domestic coordination**

States Parties shall ensure the application of the present Convention, notably through domestic coordination. To meet their obligations under this Convention, States Parties may rely on anti-doping organizations as well as sports authorities and organizations.

#### **Article 8 - Restricting the availability and use in sport of prohibited substances and methods**

1. States Parties shall, where appropriate, adopt measures to restrict

the availability of prohibited substances and methods in order to restrict their use in sport by athletes, unless the use is based upon a therapeutic use exemption. These include measures against trafficking to athletes and, to this end, measures to control production, movement, importation, distribution and sale.

2. States Parties shall adopt, or encourage, where appropriate, the relevant entities within their jurisdictions to adopt measures to prevent and to restrict the use and possession of prohibited substances and methods by athletes in sport, unless the use is based upon a therapeutic use exemption.
3. No measures taken pursuant to this Convention will impede the availability for legitimate purposes of substances and methods otherwise prohibited or controlled in sport.

#### **Article 9 - Measures against athlete support personnel**

States Parties shall themselves take measures or encourage sports organizations and anti-doping organizations to adopt measures, including sanctions or penalties, aimed at athlete support personnel who commit an anti-doping rule violation or other offence connected with doping in sport.

#### **Article 10 - Nutritional supplements**

States Parties, where appropriate, shall encourage producers and distributors of nutritional supplements to establish best practices in the marketing and distribution of nutritional supplements, including information regarding their analytic composition and quality assurance.

#### **Article 11 - Financial measures**

States Parties shall, where appropriate:

- (a) provide funding within their respective budgets to support a national testing programme across all sports or assist sports organizations and anti-doping organizations in financing doping controls either by direct subsidies or grants, or by recognizing the costs of such controls when determining the overall subsidies or grants to be awarded to those organizations;
- (b) take steps to withhold sport-related financial support to individual athletes or athlete support personnel who have been suspended following an anti-doping rule violation, during the period of their suspension;
- (c) withhold some or all financial or other sport-related support from any sports organization or anti-doping organization not in compliance with the Code or applicable anti-doping rules adopted pursuant to the Code.

#### **Article 12 - Measures to facilitate doping control**

States Parties shall, where appropriate:

- (a) encourage and facilitate the implementation by sports organizations and anti-doping organizations within their jurisdiction of doping controls in a manner consistent with the Code, including no-advance notice, out-of-competition and in-competition testing;
- (b) encourage and facilitate the negotiation by sports organizations and anti-doping organizations of agreements permitting their members to be tested by duly authorized doping control teams from other countries;
- (c) undertake to assist the sports organizations and anti-doping organizations within their jurisdiction in gaining access to an accredited doping control laboratory for the purposes of doping control analysis.

## **III. International cooperation**

#### **Article 13 - Cooperation between anti-doping organizations and sports organizations**

States Parties shall encourage cooperation between anti-doping organizations, public authorities and sports organizations within their jurisdiction and those within the jurisdiction of other States Parties in order to achieve, at the international level, the purpose of this Convention.

#### **Article 14 - Supporting the mission of the World Anti-Doping Agency**

States Parties undertake to support the important mission of the World Anti-Doping Agency in the international fight against doping.

#### **Article 15 - Equal funding of the World Anti-Doping Agency**

States Parties support the principle of equal funding of the World Anti-Doping Agency's approved annual core budget by public authorities and the Olympic Movement.

#### **Article 16 - International cooperation in doping control**

Recognizing that the fight against doping in sport can only be effective when athletes can be tested with no advance notice and samples can be transported in a timely manner to laboratories for analysis, States Parties shall, where appropriate and in accordance with domestic law and procedures:

- (a) facilitate the task of the World Anti-Doping Agency and anti-doping organizations operating in compliance with the Code, subject to relevant host countries' regulations, of conducting in- or out-of-competition doping controls on their athletes, whether on their territory or elsewhere;
- (b) facilitate the timely movement of duly authorized doping control teams across borders when conducting doping control activities;
- (c) cooperate to expedite the timely shipping or carrying across borders of samples in such a way as to maintain their security and integrity;
- (d) assist in the international coordination of doping controls by various anti-doping organizations, and cooperate to this end with the World Anti-Doping Agency;
- (e) promote cooperation between doping control laboratories within their jurisdiction and those within the jurisdiction of other States Parties. In particular, States Parties with accredited doping control laboratories should encourage laboratories within their jurisdiction to assist other States Parties in enabling them to acquire the experience, skills and techniques necessary to establish their own laboratories should they wish to do so;
- (f) encourage and support reciprocal testing arrangements between designated anti-doping organizations, in conformity with the Code;
- (g) mutually recognize the doping control procedures and test results management, including the sport sanctions thereof, of any anti-doping organization that are consistent with the Code.

#### **Article 17 - Voluntary Fund**

1. A "Fund for the Elimination of Doping in Sport", hereinafter referred to as "the Voluntary Fund", is hereby established. The Voluntary Fund shall consist of funds-in-trust established in accordance with the Financial Regulations of UNESCO. All contributions by States Parties and other actors shall be voluntary.
2. The resources of the Voluntary Fund shall consist of:
  - (a) contributions made by States Parties;
  - (b) contributions, gifts or bequests which may be made by:
    - (i) other States;
    - (ii) organizations and programmes of the United Nations system, particularly the United Nations Development Programme, as well as other international organizations;
    - (iii) public or private bodies or individuals;
  - (c) any interest due on the resources of the Voluntary Fund;
  - (d) funds raised through collections, and receipts from events organized for the benefit of the Voluntary Fund;
  - (e) any other resources authorized by the Voluntary Fund's regulations, to be drawn up by the Conference of Parties.
3. Contributions into the Voluntary Fund by States Parties shall not be considered to be a replacement for States Parties' commitment to pay their share of the World Anti-Doping Agency's annual budget.

#### **Article 18 - Use and governance of the Voluntary Fund**

Resources in the Voluntary Fund shall be allocated by the Conference of Parties for the financing of activities approved by it, notably to assist States Parties in developing and implementing anti-doping programmes, in accordance with the provisions of this Convention, taking into consideration the goals of the World Anti-Doping Agency, and may serve to cover functioning costs of this Convention. No political, economic or other conditions may be attached to contributions made to the Voluntary Fund.

### **IV. Education and training**

#### **Article 19 - General education and training principles**

1. States Parties shall undertake, within their means, to support, devise or implement education and training programmes on anti-doping. For the sporting community in general, these programmes should aim to provide updated and accurate information on:
  - (a) the harm of doping to the ethical values of sport;
  - (b) the health consequences of doping.
2. For athletes and athlete support personnel, in particular in their initial training, education and training programmes should, in addition to the above, aim to provide updated and accurate information on:
  - (a) doping control procedures;
  - (b) athletes' rights and responsibilities in regard to anti-doping, including information about the Code and the anti-doping policies of the relevant sports and anti-doping organizations. Such information shall include the consequences of committing an anti-doping rule violation;
  - (c) the list of prohibited substances and methods and therapeutic use exemptions;
  - (d) nutritional supplements.

#### **Article 20 - Professional codes of conduct**

States Parties shall encourage relevant competent professional associations and institutions to develop and implement appropriate codes of conduct, good practice and ethics related to anti-doping in sport that are consistent with the Code.

#### **Article 21 - Involvement of athletes and athlete support personnel**

States Parties shall promote and, within their means, support active participation by athletes and athlete support personnel in all facets of the anti-doping work of sports and other relevant organizations and encourage sports organizations within their jurisdiction to do likewise.

#### **Article 22 - Sports organizations and ongoing education and training on anti-doping**

States Parties shall encourage sports organizations and anti-doping organizations to implement ongoing education and training programmes for all athletes and athlete support personnel on the subjects identified in Article 19.

#### **Article 23 - Cooperation in education and training**

States Parties shall cooperate mutually and with the relevant organizations to share, where appropriate, information, expertise and experience on effective anti-doping programmes.

### **V. Research**

#### **Article 24 - Promotion of research in anti-doping**

States Parties undertake, within their means, to encourage and promote anti-doping research in cooperation with sports and other relevant organizations on:

- (a) prevention, detection methods, behavioural and social aspects, and the health consequences of doping;
- (b) ways and means of devising scientifically-based physiological and psychological training programmes respectful of the integrity of the person;
- (c) the use of all emerging substances and methods resulting from scientific developments.

#### Article 25 - Nature of anti-doping research

When promoting anti-doping research, as set out in Article 24, States Parties shall ensure that such research will:

- (a) comply with internationally recognized ethical practices;
- (b) avoid the administration to athletes of prohibited substances and methods;
- (c) be undertaken only with adequate precautions in place to prevent the results of anti-doping research being misused and applied for doping.

#### Article 26 - Sharing the results of anti-doping research

Subject to compliance with applicable national and international law, States Parties shall, where appropriate, share the results of available anti-doping research with other States Parties and the World Anti-Doping Agency.

#### Article 27 - Sport science research

States Parties shall encourage:

- (a) members of the scientific and medical communities to carry out sport science research in accordance with the principles of the Code;
- (b) sports organizations and athlete support personnel within their jurisdiction to implement sport science research that is consistent with the principles of the Code.

### VI. Monitoring of the Convention

#### Article 28 - Conference of Parties

1. A Conference of Parties is hereby established. The Conference of Parties shall be the sovereign body of this Convention.
2. The Conference of Parties shall meet in ordinary session in principle every two years. It may meet in extraordinary session if it so decides or at the request of at least one third of the States Parties.
3. Each State Party shall have one vote at the Conference of Parties.
4. The Conference of Parties shall adopt its own Rules of Procedure.

#### Article 29 - Advisory organization and observers to the Conference of Parties

The World Anti-Doping Agency shall be invited as an advisory organization to the Conference of Parties. The International Olympic Committee, the International Paralympic Committee, the Council of Europe and the Intergovernmental Committee for Physical Education and Sport (CIGEPS) shall be invited as observers. The Conference of Parties may decide to invite other relevant organizations as observers.

#### Article 30 - Functions of the Conference of Parties

1. Besides those set forth in other provisions of this Convention, the functions of the Conference of Parties shall be to:
  - (a) promote the purpose of this Convention;
  - (b) discuss the relationship with the World Anti-Doping Agency and study the mechanisms of funding of the Agency's annual core budget. States non-Parties may be invited to the discussion;
  - (c) adopt a plan for the use of the resources of the Voluntary Fund, in accordance with Article 18;
  - (d) examine the reports submitted by States Parties in accordance with Article 31;
  - (e) examine, on an ongoing basis, the monitoring of compliance with this Convention in response to the development of anti-doping systems, in accordance with Article 31. Any monitoring mechanism or measure that goes beyond Article 31 shall be funded through the Voluntary Fund established under Article 17;
  - (f) examine draft amendments to this Convention for adoption;
  - (g) examine for approval, in accordance with Article 34 of the Convention, modifications to the Prohibited List and to the Standards for Granting Therapeutic Use Exemptions adopted by the World Anti-Doping Agency;

(h) define and implement cooperation between States Parties and the World Anti-Doping Agency within the framework of this Convention;

- (i) request a report from the World Anti-Doping Agency on the implementation of the Code to each of its sessions for examination.
2. The Conference of Parties, in fulfilling its functions, may cooperate with other intergovernmental bodies.

#### Article 31 - National reports to the Conference of Parties

States Parties shall forward every two years to the Conference of Parties through the Secretariat, in one of the official languages of UNESCO, all relevant information concerning measures taken by them for the purpose of complying with the provisions of this Convention.

#### Article 32 - Secretariat of the Conference of Parties

1. The secretariat of the Conference of Parties shall be provided by the Director-General of UNESCO.
2. At the request of the Conference of Parties, the Director-General of UNESCO shall use to the fullest extent possible the services of the World Anti-Doping Agency on terms agreed upon by the Conference of Parties.
3. Functioning costs related to the Convention will be funded from the regular budget of UNESCO within existing resources at an appropriate level, the Voluntary Fund established under Article 17 or an appropriate combination thereof as determined every two years. The financing for the secretariat from the regular budget shall be done on a strictly minimal basis, it being understood that voluntary funding should also be provided to support the Convention.
4. The secretariat shall prepare the documentation of the Conference of Parties, as well as the draft agenda of its meetings, and shall ensure the implementation of its decisions.

#### Article 33 - Amendments

1. Each State Party may, by written communication addressed to the Director-General of UNESCO, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, at least one half of the States Parties give their consent, the Director-General shall present such proposals to the following session of the Conference of Parties.
2. Amendments shall be adopted by the Conference of Parties with a two-thirds majority of States Parties present and voting.
3. Once adopted, amendments to this Convention shall be submitted for ratification, acceptance, approval or accession to States Parties.
4. With respect to the States Parties that have ratified, accepted, approved or acceded to them, amendments to this Convention shall enter into force three months after the deposit of the instruments referred to in paragraph 3 of this Article by two thirds of the States Parties. Thereafter, for each State Party that ratifies, accepts, approves or accedes to an amendment, the said amendment shall enter into force three months after the date of deposit by that State Party of its instrument of ratification, acceptance, approval or accession.
5. A State that becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention, be considered:
  - (a) a Party to this Convention as so amended;
  - (b) a Party to the unamended Convention in relation to any State Party not bound by the amendments.

#### Article 34 - Specific amendment procedure for the Annexes to the Convention

1. If the World Anti-Doping Agency modifies the Prohibited List or the Standards for Granting Therapeutic Use Exemptions, it

- may, by written communication addressed to the Director-General of UNESCO, inform her/him of those changes. The Director-General shall notify such changes as proposed amendments to the relevant Annexes to this Convention to all States Parties expeditiously. Amendments to the Annexes shall be approved by the Conference of Parties either at one of its sessions or through a written consultation.
2. States Parties have 45 days from the Director-General's notification within which to express their objection to the proposed amendment either in writing, in case of written consultation, to the Director-General or at a session of the Conference of Parties. Unless two thirds of the States Parties express their objection, the proposed amendment shall be deemed to be approved by the Conference of Parties.
  3. Amendments approved by the Conference of Parties shall be notified to States Parties by the Director-General. They shall enter into force 45 days after that notification, except for any State Party that has previously notified the Director-General that it does not accept these amendments.
  4. A State Party having notified the Director-General that it does not accept an amendment approved according to the preceding paragraphs remains bound by the Annexes as not amended.

## VII. Final clauses

### Article 35 - Federal or non-unitary constitutional systems

The following provisions shall apply to States Parties that have a federal or non-unitary constitutional system:

- (a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States;
- (b) with regard to the provisions of this Convention, the implementation of which comes under the jurisdiction of individual constituent States, counties, provinces or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, counties, provinces or cantons of the said provisions, with its recommendation for their adoption.

### Article 36 - Ratification, acceptance, approval or accession

This Convention shall be subject to ratification, acceptance, approval or accession by Members States of UNESCO in accordance with their respective constitutional procedures. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director-General of UNESCO.

### Article 37 - Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession.
2. For any State that subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of deposit of its instrument of ratification, acceptance, approval or accession.

### Article 38 - Territorial extension of the Convention

1. Any State may, when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories for whose international relations it is responsible and to which this Convention shall apply.
2. Any State Party may, at any later date, by a declaration addressed to UNESCO, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of

a period of one month after the date of receipt of such declaration by the depositary.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to UNESCO. Such withdrawal shall become effective on the first day of the month following the expiration of a period of one month after the date of receipt of such a notification by the depositary.

### Article 39 - Denunciation

Any State Party may denounce this Convention. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of UNESCO. The denunciation shall take effect on the first day of the month following the expiration of a period of six months after the receipt of the instrument of denunciation. It shall in no way affect the financial obligations of the State Party concerned until the date on which the withdrawal takes effect.

### Article 40 - Depositary

The Director-General of UNESCO shall be the Depositary of this Convention and amendments thereto. As the Depositary, the Director-General of UNESCO shall inform the States Parties to this Convention, as well as the other States Members of the Organization of:

- (a) the deposit of any instrument of ratification, acceptance, approval or accession;
- (b) the date of entry into force of this Convention in accordance with Article 37;
- (c) any report prepared in pursuance of the provisions of Article 31;
- (d) any amendment to the Convention or to the Annexes adopted in accordance with Articles 33 and 34 and the date on which the amendment comes into force;
- (e) any declaration or notification made under the provisions of Article 38;
- (f) any notification made under the provisions of Article 39 and the date on which the denunciation takes effect;
- (g) any other act, notification or communication relating to this Convention.

### Article 41 - Registration

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General of UNESCO.

### Article 42 - Authoritative texts

1. This Convention, including its Annexes, has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.
2. The Appendices to this Convention are provided in Arabic, Chinese, English, French, Russian and Spanish.

### Article 43 - Reservations

No reservations that are incompatible with the object and purpose of the present Convention shall be permitted.

Annex I - The Prohibited List - International Standard

Annex II - Standards for Granting Therapeutic Use Exemptions

Appendix 1 - World Anti-Doping Code

Appendix 2 - International Standard for Laboratories

Appendix 3 - International Standard for Testing

Depositary :  
UNESCO

Entry into force :  
1 February 2007, according to its Article 37.

Authoritative texts :  
Arabic, English, Chinese, French, Spanish and Russian

Registration at the UN :  
On 6 March 2007 under certificate n°55048 dated of 15 March 2007

States Parties  
List in alphabetical order  
List in chronological order

#### Declarations and Reservations :

##### Argentina

The instrument of ratification contained the following declaration:  
“ La REPUBLICA ARGENTINA rechaza la pretensión de extender la aplicación de la Convención Internacional contra el Dopaje en el Deporte, adoptada en París el 19 de octubre de 2005 por la Conferencia General de la UNESCO, a las Islas Malvinas, de la cual el Director General de la UNESCO fue notificado por el REINO UNIDO DE GRAN BRETAÑA E IRLANDA DEL NORTE el 25 de abril de 2006, y reafirma sus derechos de soberanía sobre les Islas Malvinas, Georgias del Sur y Sandwich del Sur, que forman parte integral de su territorio nacional, y estando ilegítimamente ocupados por el REINO UNIDO DE GRAN BRETAÑA E IRLANDA DEL NORTE, son objeto de una disputa de soberanía entre ambos países, la cual es reconocida por diversas Organizaciones Internacionales.

En este sentido, la Asamblea General de las Naciones Unidas adoptó las Resoluciones 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19 y 43/25, en las cuales reconoce la existencia de una disputa de soberanía en relación con la cuestión de las Islas Malvinas e insta a la REPUBLICA ARGENTINA y al REINO UNIDO DE GRAN BRETAÑA E IRLANDA DEL NORTE a entablar negociaciones con el fin de encontrar a la mayor brevedad posible una solución pacífica y duradera de la disputa de soberanía. Por su parte el Comité Especial de Descolonización de las Naciones Unidas se ha

pronunciado reiteradamente en igual sentido, más recientemente a través de la Resolución adoptada el 15 de junio de 2006. Asimismo la Asamblea General de la Organización de los Estados Americanos, adoptó el 6 de junio de 2006 un nuevo pronunciamiento sobre la cuestión.” [original: Spanish]

##### Denmark

The instrument of ratification contained the following declaration:  
“Jusqu'à décision ultérieure, la Convention ne s'appliquera pas aux îles Féroé et au Groenland.” [original : french]”

##### New-Zealand

The instrument of acceptance contained the following declaration:  
“AND DECLARES that, consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this acceptance shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory;” [original: english]

#### Territorial Application :

Notification by	United Kingdom of Great Britain and Northern Ireland
Date of receipt of notification	25 April 2006
Extension to	Bailiwick of Jersey, Guernsey and Alderney, Isle of Man, Bermuda, Cayman Islands and Falkland Islands



# Council of Europe Anti-Doping Convention

European Treaty Series - No. 135  
Strasbourg, 16.XI.1989

#### Preamble

The member States of the Council of Europe, the other States party to the European Cultural Convention, and other States, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress;

Conscious that sport should play an important role in the protection of health, in moral and physical education and in promoting international understanding;

Concerned by the growing use of doping agents and methods by sportsmen and sportswomen throughout sport and the consequences thereof for the health of participants and the future of sport;

Mindful that this problem puts at risk the ethical principles and educational values embodied in the Olympic Charter, in the International Charter for Sport and Physical Education of Unesco and in Resolution(76)41 of the Committee of Ministers of the Council of Europe, known as the “European Sport for All Charter”;

Bearing in mind the anti-doping regulations, policies and declarations adopted by the international sports organisations;

Aware that public authorities and the voluntary sports organisations have complementary responsibilities to combat doping in sport, notably to ensure the proper conduct, on the basis of the principle of fair play, of sports events and to protect the health of those that take part in them;

Recognising that these authorities and organisations must work together for these purposes at all appropriate levels;

Recalling the resolutions on doping adopted by the Conference of European Ministers responsible for Sport, and in particular Resolution No.1 adopted at the 6th Conference at Reykjavik in 1989;

Recalling that the Committee of Ministers of the Council of Europe has already adopted Resolution(67)12 on the doping of athletes, Recommendation No. R(79)8 on doping in sport, Recommendation No. R(84)19 on the “European Anti-doping Charter for Sport”, and Recommendation No. R(88)12 on the institution of doping controls without warning outside competitions;

Recalling Recommendation No.5 on doping adopted by the 2nd International Conference of Ministers and Senior Officials responsible for Sport and Physical Education organised by Unesco at Moscow (1988);

Determined however to take further and stronger co-operative action aimed at the reduction and eventual elimination of doping in sport using as a basis the ethical values and practical measures contained in those instruments,

Have agreed as follows:

**Article 1 - Aim of the Convention**  
The Parties, with a view to the reduction and eventual elimination of doping in sport, undertake, within the limits of their respective constitutional provisions, to take the steps necessary to apply the provisions of this Convention.

#### Article 1 - Aim of the Convention

The Parties, with a view to the reduction and eventual elimination of doping in sport, undertake, within the limits of their respective constitutional provisions, to take the steps necessary to apply the provisions of this Convention.

#### Article 2 - Definition and scope of the Convention

1 For the purposes of this Convention:

a “doping in sport” means the administration to sportsmen or

sportswomen, or the use by them, of pharmacological classes of doping agents or doping methods;

- b “pharmacological classes of doping agents or doping methods” means, subject to paragraph 2 below, those classes of doping agents or doping methods banned by the relevant international sports organisations and appearing in lists that have been approved by the monitoring group under the terms of Article 11.1.b;
  - c “sportsmen and sportswomen” means those persons who participate regularly in organised sports activities.
- 2 Until such time as a list of banned pharmacological classes of doping agents and doping methods is approved by the monitoring group under the terms of Article 11.1.b, the reference list in the appendix to this Convention shall apply.

#### Article 3 - Domestic co-ordination

- 1 The Parties shall co-ordinate the policies and actions of their government departments and other public agencies concerned with combating doping in sport.
- 2 They shall ensure that there is practical application of this Convention, and in particular that the requirements under Article 7 are met, by entrusting, where appropriate, the implementation of some of the provisions of this Convention to a designated governmental or non-governmental sports authority or to a sports organisation.

#### Article 4 - Measures to restrict the availability and use of banned doping agents and methods

- 1 The Parties shall adopt where appropriate legislation, regulations or administrative measures to restrict the availability (including provisions to control movement, possession, importation, distribution and sale) as well as the use in sport of banned doping agents and doping methods and in particular anabolic steroids.
- 2 To this end, the Parties or, where appropriate, the relevant non-governmental organisations shall make it a criterion for the grant of public subsidies to sports organisations that they effectively apply anti-doping regulations.
- 3 Furthermore, the Parties shall:
  - a assist their sports organisations to finance doping controls and analyses, either by direct subsidies or grants, or by recognising the costs of such controls and analyses when determining the overall subsidies or grants to be awarded to those organisations;
  - b take appropriate steps to withhold the grant of subsidies from public funds, for training purposes, to individual sportsmen and sportswomen who have been suspended following a doping offence in sport, during the period of their suspension;
  - c encourage and, where appropriate, facilitate the carrying out by their sports organisations of the doping controls required by the competent international sports organisations whether during or outside competitions; and
  - d encourage and facilitate the negotiation by sports organisations of agreements permitting their members to be tested by duly authorised doping control teams in other countries.
- 4 Parties reserve the right to adopt anti-doping regulations and to organise doping controls on their own initiative and on their own responsibility, provided that they are compatible with the relevant principles of this Convention.

#### Article 5 - Laboratories

- 1 Each Party undertakes:
  - a either to establish or facilitate the establishment on its territory of one or more doping control laboratories suitable for consideration for accreditation under the criteria adopted by the relevant international sports organisations and approved by the monitoring group under the terms of Article 11.1.b; or
  - b to assist its sports organisations to gain access to such a laboratory on the territory of another Party.
- 2 These laboratories shall be encouraged to:
  - a take appropriate action to employ and retain, train and retrain qualified staff;

- b undertake appropriate programmes of research and development into doping agents and methods used, or thought to be used, for the purposes of doping in sport and into analytical biochemistry and pharmacology with a view to obtaining a better understanding of the effects of various substances upon the human body and their consequences for athletic performance;
- c publish and circulate promptly new data from their research.

#### Article 6 - Education

- 1 The Parties undertake to devise and implement, where appropriate in co-operation with the sports organisations concerned and the mass media, educational programmes and information campaigns emphasising the dangers to health inherent in doping and its harm to the ethical values of sport. Such programmes and campaigns shall be directed at both young people in schools and sports clubs and their parents and at adult sportsmen and sportswomen, sports officials, coaches and trainers. For those involved in medicine, such educational programmes will emphasise respect for medical ethics.
- 2 The Parties undertake to encourage and promote research, in co-operation with the regional, national and international sports organisations concerned, into ways and means of devising scientifically-based physiological and psychological training programmes that respect the integrity of the human person.

#### Article 7 - Co-operation with sports organisations on measures to be taken by them

- 1 The Parties undertake to encourage their sports organisations and through them the international sports organisations to formulate and apply all appropriate measures, falling within their competence, against doping in sport.
- 2 To this end, they shall encourage their sports organisations to clarify and harmonise their respective rights, obligations and duties, in particular by harmonising their:
  - a anti-doping regulations on the basis of the regulations agreed by the relevant international sports organisations;
  - b lists of banned pharmacological classes of doping agents and banned doping methods on the basis of the lists agreed by the relevant international sports organisations;
  - c doping control procedures;
  - d disciplinary procedures, applying agreed international principles of natural justice and ensuring respect for the fundamental rights of suspected sportsmen and sportswomen; these principles will include:
    - i the reporting and disciplinary bodies to be distinct from one another;
    - ii the right of such persons to a fair hearing and to be assisted or represented;
    - iii clear and enforceable provisions for appealing against any judgment made;
  - e procedures for the imposition of effective penalties for officials, doctors, veterinary doctors, coaches, physiotherapists and other officials or accessories associated with infringements of the anti-doping regulations by sportsmen and sportswomen;
  - f procedures for the mutual recognition of suspensions and other penalties imposed by other sports organisations in the same or other countries.
- 3 Moreover, the Parties shall encourage their sports organisations:
  - a to introduce, on an effective scale, doping controls not only at, but also without advance warning at any appropriate time outside, competitions, such controls to be conducted in a way which is equitable for all sportsmen and sportswomen and which include testing and retesting of persons selected, where appropriate, on a random basis;
  - b to negotiate agreements with sports organisations of other countries permitting a sportsman or sportswoman training in another country to be tested by a duly authorised doping control team of that country;
  - c to clarify and harmonise regulations on eligibility to take part in sports events which will include anti-doping criteria;

- d to promote active participation by sportsmen and sportswomen themselves in the anti-doping work of international sports organisations;
- e to make full and efficient use of the facilities available for doping analysis at the laboratories provided for by Article 5, both during and outside sports competitions;
- f to study scientific training methods and to devise guidelines to protect sportsmen and sportswomen of all ages appropriate for each sport.

#### Article 8 - International co-operation

- 1 The Parties shall co-operate closely on the matters covered by this Convention and shall encourage similar co-operation amongst their sports organisations.
- 2 The Parties undertake:
  - a to encourage their sports organisations to operate in a manner that promotes application of the provisions of this Convention within all the appropriate international sports organisations to which they are affiliated, including the refusal to ratify claims for world or regional records unless accompanied by an authenticated negative doping control report;
  - b to promote co-operation between the staffs of their doping control laboratories established or operating in pursuance of Article 5; and
  - c to initiate bilateral and multilateral co-operation between their appropriate agencies, authorities and organisations in order to achieve, at the international level as well, the purposes set out in Article 4.1.
- 3 The Parties with laboratories established or operating in pursuance of Article 5 undertake to assist other Parties to enable them to acquire the experience, skills and techniques necessary to establish their own laboratories.

#### Article 9 - Provision of information

Each Party shall forward to the Secretary General of the Council of Europe, in one of the official languages of the Council of Europe, all relevant information concerning legislative and other measures taken by it for the purpose of complying with the terms of this Convention.

#### Article 10 - Monitoring group

- 1 For the purposes of this Convention, a monitoring group is hereby set up.
- 2 Any Party may be represented on the monitoring group by one or more delegates. Each Party shall have one vote.
- 3 Any State mentioned in Article 14.1 which is not a Party to this Convention may be represented on the monitoring group by an observer.
- 4 The monitoring group may, by unanimous decision, invite any non-member State of the Council of Europe which is not a Party to the Convention and any sports or other professional organisation concerned to be represented by an observer at one or more of its meetings.
- 5 The monitoring group shall be convened by the Secretary General. Its first meeting shall be held as soon as reasonably practicable, and in any case within one year after the date of the entry into force of the Convention. It shall subsequently meet whenever necessary, on the initiative of the Secretary General or a Party.
- 6 A majority of the Parties shall constitute a quorum for holding a meeting of the monitoring group.
- 7 The monitoring group shall meet in private.
- 8 Subject to the provisions of this Convention, the monitoring group shall draw up and adopt by consensus its own Rules of Procedure.

#### Article 11

- 1 The monitoring group shall monitor the application of this Convention. It may in particular:
  - a keep under review the provisions of this Convention and examine any modifications necessary;
  - b approve the list, and any revision thereto, of pharmacological

classes of doping agents and doping methods banned by the relevant international sports organisations, referred to in Articles 2.1 and 2.2, and the criteria for accreditation of laboratories, and any revision thereto, adopted by the said organisations, referred to in Article 5.1.a, and fix the date for the relevant decisions to enter into force;

- c hold consultations with relevant sports organisations;
  - d make recommendations to the Parties concerning measures to be taken for the purposes of this Convention;
  - e recommend the appropriate measures to keep relevant international organisations and the public informed about the activities undertaken within the framework of this Convention;
  - f make recommendations to the Committee of Ministers concerning non-member States of the Council of Europe to be invited to accede to this Convention;
  - g make any proposal for improving the effectiveness of this Convention.
- 2 In order to discharge its functions, the monitoring group may, on its own initiative, arrange for meetings of groups of experts.

#### Article 12

After each meeting, the monitoring group shall forward to the Committee of Ministers of the Council of Europe a report on its work and on the functioning of the Convention.

#### Article 13 - Amendments to the Articles of the Convention

- 1 Amendments to the articles of this Convention may be proposed by a Party, the Committee of Ministers of the Council of Europe or the monitoring group.
- 2 Any proposal for amendment shall be communicated by the Secretary General of the Council of Europe to the States mentioned in Article 14 and to every State which has acceded to or has been invited to accede to this Convention in accordance with the provisions of Article 16.
- 3 Any amendment proposed by a Party or the Committee of Ministers shall be communicated to the monitoring group at least two months before the meeting at which it is to be considered. The monitoring group shall submit to the Committee of Ministers its opinion on the proposed amendment, where appropriate after consultation with the relevant sports organisations.
- 4 The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the monitoring group and may adopt the amendment.
- 5 The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 4 of this article shall be forwarded to the Parties for acceptance.
- 6 Any amendment adopted in accordance with paragraph 4 of this article shall come into force on the first day of the month following the expiration of a period of one month after all Parties have informed the Secretary General of their acceptance thereof.

#### Final clauses

##### Article 14

- 1 This Convention shall be open for signature by member States of the Council of Europe, other States party to the European Cultural Convention and non-member States which have participated in the elaboration of this Convention, which may express their consent to be bound by:
  - a signature without reservation as to ratification, acceptance or approval, or
  - b signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
- 2 Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

##### Article 15

- 1 The Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date on which five States, including at least four member States of the



Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of Article 14.

- 2 In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of signature or of the deposit of the instrument of ratification, acceptance or approval.

#### Article 16

- 1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Parties, may invite to accede to the Convention any non-member State by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.
- 2 In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of the deposit of the instrument of accession with the Secretary General of the Council of Europe.

#### Article 17

- 1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
- 2 Any State may, at any later date, by a declaration addressed to the Secretary General, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of one month after the date of receipt of such declaration by the Secretary General.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory mentioned in such declaration, be withdrawn by a notification addressed to the Secretary General. Such withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

#### Article 18

- 1 Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
- 2 Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

#### Article 19

The Secretary General of the Council of Europe shall notify the Parties, the other member States of the Council of Europe, the other States party to the European Cultural Convention, the non-member States which have participated in the elaboration of this Convention and any State which has acceded or has been invited to accede to it of:

- a any signature in accordance with Article 14;
- b the deposit of any instrument of ratification, acceptance, approval or accession in accordance with Article 14 or 16;
- c any date of entry into force of this Convention in accordance with Articles 15 and 16;
- d any information forwarded under the provisions of Article 9;
- e any report prepared in pursuance of the provisions of Article 12;
- f any proposal for amendment or any amendment adopted in accordance with Article 13 and the date on which the amendment comes into force;
- g any declaration made under the provisions of Article 17;
- h any notification made under the provisions of Article 18 and the date on which the denunciation takes effect;
- i any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, the 16th day of November 1989, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the other States party to the European Cultural Convention, to the non-member States which have participated in the elaboration of this Convention and to any State invited to accede to it.

#### APPENDIX

ANTI-DOPING CONVENTION (ETS No. 135)

AMENDMENT TO THE APPENDIX 1

approved by the Monitoring Group

under Article 11.1.b of the Convention

at its 24th meeting (Strasbourg, 14-15 November 2006)

THE 2007 PROHIBITED LIST

WORLD ANTI-DOPING CODE

DATE OF ENTRY INTO FORCE : 1 JANUARY 2007

[...]

# World Anti-Doping Code 2003

## Part One - Doping Control

### Introduction

Part One of the Code sets forth specific anti-doping rules and principles that are to be followed by organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority - - e.g., the International Olympic Committee, International Paralympic Committee, International Federations, Major Event Organizations, and National Anti-Doping Organizations. All of these organizations are collectively referred to as Anti-Doping Organizations.

Part One of the Code does not replace, or eliminate the need for, comprehensive anti-doping rules adopted by each of these Anti-Doping Organizations. While some provisions of Part One of the Code must be incorporated essentially verbatim by each Anti-Doping Organization in its own anti-doping rules, other provisions of Part One establish mandatory guiding principles that allow flexibility in

the formulation of rules by each Anti-Doping Organization or establish requirements that must be followed by each Anti-Doping Organization but need not be repeated in its own anti-doping rules. The following Articles, as applicable to the scope of anti-doping activity which the Anti-Doping Organization performs, must be incorporated into the rules of each Anti-Doping Organization without any substantive changes (allowing for necessary non-substantive editing changes to the language in order to refer to the organization's name, sport, section numbers, etc.): Articles 1 (Definition of Doping), 2 (Anti-Doping Rule Violations), 3 (Proof of Doping), 9 (Automatic Disqualification of Individual Results), 10 (Sanctions on Individuals), 11 (Consequences to Teams), 13 (Appeals) with the exception of 13.2.2, 17 (Statute of Limitations) and Definitions.

Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played. Athletes accept these rules as a condition of participation. Anti-doping rules are not intended to

be subject to or limited by the requirements and legal standards applicable to criminal proceedings or employment matters. The policies and minimum standards set forth in the Code represent the consensus of a broad spectrum of stakeholders with an interest in fair sport and should be respected by all courts and adjudicating bodies.

Participants shall be bound to comply with the anti-doping rules adopted in conformance with the Code by the relevant Anti-Doping Organizations. Each Signatory shall establish rules and procedures to ensure that all Participants under the authority of the Signatory and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant Anti-Doping Organizations.

#### Article 1: Definition of Doping

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code.

#### Article 2: Anti-Doping Rule Violations

The following constitute anti-doping rule violations:

- 2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen.
  - 2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.
  - 2.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.
  - 2.1.3 As an exception to the general rule of Article 2.1, the Prohibited List may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.
- 2.2 Use or Attempted Use of a Prohibited Substance or a Prohibited Method.
  - 2.2.1 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.
- 2.3 Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection.
- 2.4 Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules.
- 2.5 Tampering, or Attempting to tamper, with any part of Doping Control.
- 2.6 Possession of Prohibited Substances and Methods:
  - 2.6.1 Possession by an Athlete at any time or place of a substance that is prohibited in Out-of-Competition Testing or a Prohibited Method unless the Athlete establishes that the Possession is pursuant to a therapeutic use exemption granted in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.
  - 2.6.2 Possession of a substance that is prohibited in Out-of-Competition Testing or a Prohibited Method by Athlete Support Personnel in connection with an Athlete, Competition or training, unless the Athlete Support Personnel establishes that the Possession is pursuant to a therapeutic use exemption granted to an Athlete in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.

- 2.7 Trafficking in any Prohibited Substance or Prohibited Method.
- 2.8 Administration or Attempted administration of a Prohibited Substance or Prohibited Method to any Athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted violation.

#### Article 3: Proof of Doping

- 3.1 Burdens and Standards of Proof.

The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.
- 3.2 Methods of Establishing Facts and Presumptions.

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases.
- 3.2.1 WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for laboratory analysis. The Athlete may rebut this presumption by establishing that a departure from the International Standard occurred. If the Athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.
- 3.2.2 Departures from the International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete establishes that departures from the International Standard occurred during Testing then the Anti-Doping Organization shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.

#### Article 4: The Prohibited List

- 4.1 Publication and Revision of the Prohibited List.

WADA shall, as often as necessary and no less often than annually, publish the Prohibited List as an International Standard. The proposed content of the Prohibited List and all revisions shall be provided in writing promptly to all Signatories and governments for comment and consultation. Each annual version of the Prohibited List and all revisions shall be distributed promptly by WADA to each Signatory and government and shall be published on WADA's website, and each Signatory shall take appropriate steps to distribute the Prohibited List to its members and constituents. The rules of each Anti-Doping Organization shall specify that, unless provided otherwise in the Prohibited List or a revision, the Prohibited List and revisions shall go into effect under the Anti-Doping Organization's rules three months after publication of the Prohibited List by WADA without requiring any further action by the Anti-Doping Organization.
- 4.2 Prohibited Substances and Prohibited Methods Identified on the Prohibited List.

The Prohibited List shall identify those Prohibited Substances and Prohibited Methods which are prohibited as doping at all times (both In-Competition and Out-of

- 4.3 Criteria for Including Substances and Methods on the Prohibited List.  
WADA shall consider the following criteria in deciding whether to include a substance or method on the Prohibited List.
- 4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following three criteria:
- 4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to enhance or enhances sport performance;
- 4.3.1.2 Medical or other scientific evidence, pharmacological effect, or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete;
- 4.3.1.3 WADA's determination that the Use of the substance or method violates the spirit of sport described in the Introduction to the Code.
- 4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances and Prohibited Methods.
- 4.3.3 WADA's determination of the Prohibited Substances and Prohibited Methods that will be included on the Prohibited List shall be final and shall not be subject to challenge by an Athlete or other Person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk, or violate the spirit of sport.
- 4.4 Therapeutic Use  
WADA shall adopt an International Standard for the process of granting therapeutic use exemptions.  
Each International Federation shall ensure, for International-Level Athletes or any other Athlete who is entered in an International Event, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption. Each National Anti-Doping Organization shall ensure, for all Athletes within its jurisdiction that are not International-Level Athletes, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption. Such requests shall be evaluated in accordance with the International Standard on therapeutic use. International Federations and National Anti-Doping Organizations shall promptly report to WADA the granting of therapeutic use exemptions to any International-Level Athlete or national-level Athlete that is included in his or her National Anti-Doping Organization's Registered Testing Pool.  
WADA, on its own initiative, may review the granting of a therapeutic use exemption to any International-Level Athlete or national-level Athlete that is included in his or her National Anti-Doping Organization's Registered Testing Pool. Further, upon the request of any such Athlete that has been denied a therapeutic use exemption, WADA may review such denial. If WADA determines that such granting or denial of a therapeutic use exemption did not comply with the International Standard for therapeutic use exemptions, WADA may reverse the decision.
- 4.5 Monitoring Program  
WADA, in consultation with other Signatories and governments, shall establish a monitoring program regarding substances which are not on the Prohibited List, but which WADA wishes to monitor in order to detect patterns of misuse in sport. WADA shall publish, in advance of any Testing, the substances that will be monitored. Laboratories will report the instances of reported Use or detected presence of these substances to WADA periodically on an aggregate basis by

sport and whether the Samples were collected In-Competition or Out-of-Competition. Such reports shall not contain additional information regarding specific Samples. WADA shall make available to International Federations and National Anti-Doping Organizations, on at least an annual basis, aggregate statistical information by sport regarding the additional substances. WADA shall implement measures to ensure that strict anonymity of individual Athletes is maintained with respect to such reports. The reported use or detected presence of the monitored substances shall not constitute a doping violation.

#### Article 5: Testing

- 5.1 Test Distribution Planning. Anti-Doping Organizations conducting Testing shall in coordination with other Anti-Doping Organizations conducting Testing on the same Athlete pool:
- 5.1.1 Plan and implement an effective number of In-Competition and Out-of-Competition tests. Each International Federation shall establish a Registered Testing Pool for International-Level Athletes in its sport, and each National Anti-Doping Organization shall establish a national Registered Testing Pool for Athletes in its country. The national-level pool shall include International-Level Athletes from that country as well as other national-level Athletes. Each International Federation and National Anti-Doping Organization shall plan and conduct In-Competition and Out-of-Competition Testing on its Registered Testing Pool.
- 5.1.2 Make No Advance Notice Testing a priority.
- 5.1.3 Conduct Target Testing.
- 5.2 Standards for Testing  
Anti-Doping Organizations conducting Testing shall conduct such Testing in conformity with the International Standard for Testing.

#### Article 6: Analysis of Samples

Doping Control Samples shall be analyzed in accordance with the following principles:

- 6.1 Use of Approved Laboratories  
Doping Control Samples shall be analyzed only in WADA-Accredited laboratories or as otherwise approved by WADA. The choice of the WADA-accredited laboratory (or other method approved by WADA) used for the Sample analysis shall be determined exclusively by the Anti-Doping Organization responsible for results management.
- 6.2 Substances Subject to Detection  
Doping Control Samples shall be analyzed to detect Prohibited Substances and Prohibited Methods identified on the Prohibited List and other substances as may be directed by WADA pursuant to Article 4.5 (Monitoring Program).
- 6.3 Research on Samples  
No Sample may be used for any purpose other than the detection of substances (or classes of substances) or methods on the Prohibited List, or as otherwise identified by WADA pursuant to Article 4.5 (Monitoring Program), without the Athlete's written consent.
- 6.4 Standards for Sample Analysis and Reporting  
Laboratories shall analyze Doping Control Samples and report results in conformity with the International Standard for laboratory analysis.

#### Article 7: Results Management

Each Anti-Doping Organization conducting results management shall establish a process for the pre-hearing administration of potential anti-doping rule violations that respects the following principles:

- 7.1 Initial Review Regarding Adverse Analytical Findings  
Upon receipt of an A Sample Adverse Analytical Finding, the Anti-Doping Organization responsible for results management shall conduct a review to determine whether: (a) an applicable therapeutic use exemption has been granted, or (b)

there is any apparent departure from the International Standards for Testing or laboratory analysis that undermines the validity of the Adverse Analytical Finding.

#### 7.2 Notification After Initial Review

If the initial review under Article 7.1 does not reveal an applicable therapeutic use exemption or departure that undermines the validity of the Adverse Analytical Finding, the Anti-Doping Organization shall promptly notify the Athlete, in the manner set out in its rules, of: (a) the Adverse Analytical Finding; (b) the anti-doping rule violated, or, in a case under Article 7.3, a description of the additional investigation that will be conducted as to whether there is an anti-doping rule violation; (c) the Athlete's right to promptly request the analysis of the B Sample or, failing such request, that the B Sample analysis may be deemed waived; (d) the right of the Athlete and/or the Athlete's representative to attend the B Sample opening and analysis if such analysis is requested; and (e) the Athlete's right to request copies of the A and B Sample laboratory documentation package which includes information as required by the International Standard for laboratory analysis.

#### 7.3 Further Review of Adverse Analytical Finding Where Required by Prohibited List

The Anti-Doping Organization or other reviewing body established by such organization shall also conduct any follow-up investigation as may be required by the Prohibited List. Upon completion of such follow-up investigation, the Anti-Doping Organization shall promptly notify the Athlete regarding the results of the follow-up investigation and whether or not the Anti-Doping Organization asserts that an anti-doping rule was violated.

#### 7.4 Review of Other Anti-Doping Rule Violations

The Anti-Doping Organization or other reviewing body established by such organization shall conduct any follow-up investigation as may be required under applicable anti-doping policies and rules adopted pursuant to the Code or which the Anti-Doping Organization otherwise considers appropriate. The Anti-Doping Organization shall promptly give the Athlete or other Person subject to sanction notice, in the manner set out in its rules, of the anti-doping rule which appears to have been violated, and the basis of the violation.

#### 7.5 Principles Applicable to Provisional Suspensions

A Signatory may adopt rules, applicable to any Event for which the Signatory is the ruling body or for any team selection process for which the Signatory is responsible, permitting Provisional Suspensions to be imposed after the review and notification described in Articles 7.1 and 7.2 but prior to a final hearing as described in Article 8 (Right to a Fair Hearing). Provided, however, that a Provisional Suspension may not be imposed unless the Athlete is given either: (a) an opportunity for a Provisional Hearing either before imposition of the Provisional Suspension or on a timely basis after imposition of the Provisional Suspension; or (b) an opportunity for an expedited hearing in accordance with Article 8 (Right to a Fair Hearing) on a timely basis after imposition of a Provisional Suspension.

If a Provisional Suspension is imposed based on an A Sample Adverse Analytical Finding and a subsequent B Sample analysis does not confirm the A Sample analysis, then the Athlete shall not be subject to any further disciplinary action and any sanction previously imposed shall be rescinded. In circumstances where the Athlete or the Athlete's team has been removed from a Competition and the subsequent B Sample analysis does not confirm the A Sample finding, if, without otherwise affecting the Competition, it is still possible for the Athlete or team to be reinserted, the Athlete or team may continue to take part in the Competition.

### Article 8: Right to a Fair Hearing

Each Anti-Doping Organization with responsibility for results man-

agement shall provide a hearing process for any Person who is asserted to have committed an anti-doping rule violation. Such hearing process shall address whether an anti-doping violation was committed and, if so, the appropriate Consequences. The hearing process shall respect the following principles:

- a timely hearing;
- fair and impartial hearing body;
- the right to be represented by counsel at the Person's own expense;
- the right to be fairly and timely informed of the asserted antidoping rule violation;
- the right to respond to the asserted anti-doping rule violation and resulting Consequences;
- the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission);
- the Person's right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost, of the interpreter; and
- a timely, written, reasoned decision;

Hearings held in connection with Events may be conducted by an expedited process as permitted by the rules of the relevant Anti-Doping Organization and the hearing body.

### Article 9: Automatic Disqualification of Individual Results

An anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes.

### Article 10: Sanctions on Individuals

#### 10.1 Disqualification of Results in Event During which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

#### 10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

#### 10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Articles 2.1 (presence of Prohibited Substance or its Metabolites or Markers), 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and 2.6 (Possession of Prohibited Substances and Methods) shall be:

- First violation: Two (2) years' Ineligibility.
- Second violation: Lifetime Ineligibility.

However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5

#### 10.3 Specified Substances

The Prohibited List may identify specified substances which are particularly susceptible to unintentional antidoping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

- First violation: At a minimum, a warning and reprimand

and no period of Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility.

- Second violation: Two (2) years' Ineligibility.
- Third violation: Lifetime Ineligibility.

However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5.

#### 10.4 Ineligibility for Other Anti-Doping Rule Violations

The period of Ineligibility for other anti-doping rule violations shall be:

10.4.1 For violations of Article 2.3 (refusing or failing to submit to Sample collection) or Article 2.5 (Tampering with Doping Control), the Ineligibility periods set forth in Article 10.2 shall apply.

10.4.2 For violations of Articles 2.7 (Trafficking) or 2.8 (administration of Prohibited Substance or Prohibited Method), the period of Ineligibility imposed shall be a minimum of four (4) years up to lifetime Ineligibility. An anti-doping rule violation involving a Minor shall be considered a particularly serious violation, and, if committed by Athlete Support Personnel for violations other than specified substances referenced in Article 10.3, shall result in lifetime Ineligibility for such Athlete Support Personnel. In addition, violations of such Articles which also violate non-sporting laws and regulations, may be reported to the competent administrative, professional or judicial authorities.

10.4.3 For violations of Article 2.4 (whereabouts violation or missed test), the period of Ineligibility shall be at a minimum 3 months and at a maximum 2 years in accordance with the rules established by the Anti-Doping Organization whose test was missed or whereabouts requirement was violated. The period of Ineligibility for subsequent violations of Article 2.4 shall be as established in the rules of the Anti-Doping Organization whose test was missed or whereabouts requirement was violated.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.

#### 10.5.1 No Fault or Negligence

If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.

#### 10.5.2 No Significant Fault or Negligence

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is

a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

10.5.3 Athlete's Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations by Athlete Support Personnel and Others.

An Anti-Doping Organization may also reduce the period of Ineligibility in an individual case where the Athlete has provided substantial assistance to the Anti-Doping Organization which results in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person involving Possession under Article 2.6.2 (Possession by Athlete Support Personnel), Article 2.7 (Trafficking), or Article 2.8 (administration to an Athlete). The reduced period of Ineligibility may not, however, be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years.

#### 10.6 Rules for Certain Potential Multiple Violations

10.6.1 For purposes of imposing sanctions under Articles 10.2, 10.3 and 10.4, a second anti-doping rule violation may be considered for purposes of imposing sanctions only if the Anti-Doping Organization can establish that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice, or after the Anti-Doping Organization made a reasonable Attempt to give notice, of the first antidoping rule violation; if the Anti-Doping Organization cannot establish this, the violations shall be considered as one single violation, and the sanction imposed shall be based on the violation that carries the more severe sanction.

10.6.2 Where an Athlete, based on the same Doping Control, is found to have committed an anti-doping rule violation involving both a specified substance under Article 10.3 and another Prohibited Substance or Prohibited Method, the Athlete shall be considered to have committed a single anti-doping rule violation, but the sanction imposed shall be based on the Prohibited Substance or Prohibited Method that carries the most severe sanction.

10.6.3 Where an Athlete is found to have committed two separate anti-doping rule violations, one involving a specified substance governed by the sanctions set forth in Article 10.3 (Specified Substances) and the other involving a Prohibited Substance or Prohibited Method governed by the sanctions set forth in Article 10.2 or a violation governed by the sanctions in Article 10.4.1, the period of Ineligibility imposed for the second offense shall be at a minimum two years' Ineligibility and at a maximum three years' Ineligibility. Any Athlete found to have committed a third anti-doping rule violation involving any combination of specified substances under Article 10.3 and any other anti-doping rule violation under 10.2 or 10.4.1 shall receive a sanction of lifetime Ineligibility.

#### 10.7 Disqualification of Results in Competitions Subsequent to Sample Collection

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other doping violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

- 10.8 **Commencement of Ineligibility Period**  
The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.
- 10.9 **Status During Ineligibility**  
No Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory or Signatory's member organization. In addition, for any anti-doping rule violation not involving specified substances described in Article 10.3, some or all sport-related financial support or other sport-related benefits received by such Person will be withheld by Signatories, Signatories' member organizations and governments. A Person subject to a period of Ineligibility longer than four years may, after completing four years of the period of Ineligibility, participate in local sport events in a sport other than the sport in which the Person committed the anti-doping rule violation, but only so long as the local sport event is not at a level that could otherwise qualify such Person directly or indirectly to compete in (or accumulate points toward) a national championship or International Event.
- 10.10 **Reinstatement Testing**  
As a condition to regaining eligibility at the end of a specified period of Ineligibility, an Athlete must, during any period of Provisional Suspension or Ineligibility, make him or herself available for Out-of-Competition Testing by any Anti-Doping Organization having testing jurisdiction, and must, if requested, provide current and accurate whereabouts information. If an Athlete subject to a period of Ineligibility retires from sport and is removed from Out-of-Competition Testing pools and later seeks reinstatement, the Athlete shall not be eligible for reinstatement until the Athlete has notified relevant Anti-Doping Organizations and has been subject to Out-of-Competition Testing for a period of time equal to the period of Ineligibility remaining as of the date the Athlete had retired.

#### Article 11 Consequences to Teams

Where more than one team member in a Team Sport has been notified of a possible anti-doping rule violation under Article 7 in connection with an Event, the Team shall be subject to Target Testing for the Event. If more than one team member in a Team Sport is found to have committed an anti-doping rule violation during the Event, the team may be subject to Disqualification or other disciplinary action. In sports which are not Team Sports but where awards are given to teams, Disqualification or other disciplinary action against the team when one or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation.

#### Article 12 Sanctions against Sporting Bodies

Nothing in this Code precludes any Signatory or government accepting the Code from enforcing its own rules for the purpose of imposing sanctions on another sporting body over which the Signatory or government has authority.

#### Article 13 Appeals

- 13.1 **Decisions Subject to Appeal**  
Decisions made under the Code or rules adopted pursuant to

the Code may be appealed as set forth below in Articles 13.2 through 13.4. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any postdecision review provided in the Anti-Doping Organization's rules must be exhausted, provided that such review respects the principles set forth in Article 13.2.2 below.

- 13.2 **Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions**  
A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that an Anti-Doping Organization lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension as a result of a Provisional Hearing or in violation of Article 7.5 may be appealed exclusively as provided in this Article 13.2.
- 13.2.1 **Appeals Involving International-Level Athletes**  
In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.
- 13.2.2 **Appeals Involving National-Level Athletes**  
In cases involving national-level Athletes, as defined by each National Anti-Doping Organization, that do not have a right to appeal under Article 13.2.1, the decision may be appealed to an independent and impartial body in accordance with rules established by the National Anti-Doping Organization. The rules for such appeal shall respect the following principles:
- A timely hearing;
  - Fair, impartial and independent hearing body;
  - The right to be represented by counsel at the Person's own expense; and
  - A timely, written, reasoned decision.
- 13.2.3 **Persons Entitled to Appeal**  
In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation and any other Anti-Doping Organization under whose rules a sanction could have been imposed; (d) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (e) WADA. In cases under Article 13.2.2, the parties having the right to appeal to the national-level reviewing body shall be as provided in the National Anti-Doping Organization's rules but, at a minimum, shall include: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; and (d) WADA. For cases under Article 13.2.2, WADA and the International Federation shall also have the right to appeal to CAS with respect to the decision of the national-level reviewing body.
- Notwithstanding any other provision herein, the only Person that may appeal from a Provisional Suspension is the Athlete or other Person upon whom the Provisional Suspension is imposed.
- 13.3 **Appeals from Decisions Granting or Denying a Therapeutic Use Exemption**  
Decisions by WADA reversing the grant or denial of a therapeutic use exemption may be appealed exclusively to CAS by the Athlete or the Anti-Doping Organization whose decision was reversed. Decisions by Anti-Doping Organizations other

than WADA denying therapeutic use exemptions, which are not reversed by WADA, may be appealed by International-Level Athletes to CAS and by other Athletes to the national level reviewing body described in Article 13.2.2. If the national level reviewing body reverses the decision to deny a therapeutic use exemption, that decision may be appealed to CAS by WADA.

13.4 Appeals from Decisions Imposing Consequences under Part Three of the Code

With respect to consequences imposed under Part Three (Roles and Responsibilities) of the Code, the entity upon which consequences are imposed under Part Three of the Code shall have the right to appeal exclusively to CAS in accordance with the provisions applicable before such court.

13.5 Appeals from Decisions Suspending or Revoking Laboratory Accreditation

Decisions by WADA to suspend or revoke a laboratory's WADA accreditation may be appealed only by that laboratory with the appeal being exclusively to CAS.

### Article 14 Confidentiality and Reporting

The Signatories agree to the principles of coordination of anti-doping results, public transparency and accountability and respect for the privacy interests of individuals alleged to have violated anti-doping rules as provided below:

14.1 Information Concerning Adverse Analytical Findings and Other Potential Anti-Doping Rule Violations

An Athlete whose Sample has resulted in an Adverse Analytical Finding, or an Athlete or other Person who may have violated an anti-doping rule, shall be notified by the Anti-Doping Organization with results management responsibility as provided in Article 7 (Results Management). The Athlete's National Anti-Doping Organization and International Federation and WADA shall also be notified not later than the completion of the process described in Articles 7.1 and 7.2. Notification shall include: the Athlete's name, country, sport and discipline within the sport, whether the test was In-Competition or Out-of-Competition, the date of Sample collection and the analytical result reported by the laboratory. The same Persons and Anti-Doping Organizations shall be regularly updated on the status and findings of any review or proceedings conducted pursuant to Articles 7 (Results Management), 8 (Right to a Fair Hearing) or 13 (Appeals), and, in any case in which the period of Ineligibility is eliminated under Article 10.5.1 (No Fault or Negligence), or reduced under Article 10.5.2 (No Significant Fault or Negligence), shall be provided with a written reasoned decision explaining the basis for the elimination or reduction. The recipient organizations shall not disclose this information beyond those persons within the organization with a need to know until the Anti-Doping Organization with results management responsibility has made public disclosure or has failed to make public disclosure as required in Article 14.2 below.

14.2 Public Disclosure

The identity of Athletes whose Samples have resulted in Adverse Analytical Findings, or Athletes or other Persons who were alleged by an Anti-Doping Organization to have violated other anti-doping rules, may be publicly disclosed by the Anti-doping Organization with results management responsibility no earlier than completion of the administrative review described in Articles 7.1 and 7.2. No later than twenty days after it has been determined in a hearing in accordance with Article 8 that an anti-doping rule violation has occurred, or such hearing has been waived, or the assertion of an anti-doping rule violation has not been timely challenged, the Anti-Doping Organization responsible for results management must publicly report the disposition of the anti-doping matter.

14.3 Athlete Whereabouts Information

Athletes who have been identified by their International Federation or National Anti-Doping Organization for inclusion in an Out-of-Competition Testing pool shall provide accurate, current location information. The International Federations and National Anti-Doping Organizations shall coordinate the identification of Athletes and the collecting of current location information and shall submit it to WADA. WADA shall make this information accessible to other Anti-Doping Organizations having authority to test the Athlete as provided in Article 15. This information shall be maintained in strict confidence at all times; shall be used exclusively for purposes of planning, coordinating or conducting Testing; and shall be destroyed after it is no longer relevant for these purposes.

14.4 Statistical Reporting

Anti-Doping Organizations shall, at least annually, publish publicly a general statistical report of their Doping Control activities with a copy provided to WADA.

14.5 Doping Control Information Clearing House

WADA shall act as a central clearing house for Doping Control Testing data and results for International-Level Athletes and national-level Athletes that have been included in their National Anti-Doping Organization's Registered Testing Pool. To facilitate coordinated test distribution planning and to avoid unnecessary duplication in Testing by the various Anti-Doping Organizations, each Anti-Doping Organization shall report all In-Competition and Out-of-Competition tests on such Athletes to the WADA clearing-house as soon as possible after such tests have been conducted. WADA shall make this information accessible to the Athlete, the Athlete's National Federation, National Olympic Committee or National Paralympic Committee, National Anti-Doping Organization, International Federation, and the International Olympic Committee or International Paralympic Committee. Private information regarding an Athlete shall be maintained by WADA in strict confidence. WADA shall, at least annually, publish statistical reports summarizing such information.

### Article 15: Clarification of Doping Control Responsibilities

15.1 Event Testing

The collection of Samples for Doping Control does and should take place at both International Events and National Events. However, only a single organization should be responsible for initiating and directing Testing during an Event. At International Events, the collection of Doping Control Samples shall be initiated and directed by the international organization which is the ruling body for the Event (e.g., the IOC for the Olympic Games, the International Federation for a World Championship, and PASO for the Pan American Games). If the international organization decides not to conduct any Testing at such an Event, the National Anti-Doping Organization for the country where the Event occurs may, in coordination with and with the approval of the international organization or WADA, initiate and conduct such Testing. At National Events, the collection of Doping Control Samples shall be initiated and directed by the designated National Anti-Doping Organization of that country.

15.2 Out-of-Competition Testing

Out-of-Competition Testing is and should be initiated and directed by both international and national organizations. Out-of-Competition Testing may be initiated and directed by: (a) WADA; (b) the IOC or IPC in connection with the Olympic Games or Paralympic Games; (c) the Athlete's International Federation; (d) the Athlete's National Anti-Doping Organization; or (e) the National Anti-Doping Organization of any country where the Athlete is present. Out-of-Competition Testing should be coordinated through

WADA in order to maximize the effectiveness of the combined Testing effort and to avoid unnecessary repetitive Testing of individual Athletes.

15.3 Results Management, Hearings and Sanctions  
Except as provided in Article 15.3.1 below, results management and hearings shall be the responsibility of and shall be governed by the procedural rules of the Anti-Doping Organization that initiated and directed Sample collection (or, if no Sample collection is involved, the organization which discovered the violation). Regardless of which organization conducts results management or hearings, the principles set forth in Articles 7 and 8 shall be respected and the rules identified in the Introduction to Part One to be incorporated without substantive change must be followed.

15.3.1 Results management and the conduct of hearings for an anti-doping rule violation arising from a test by, or discovered by, a National Anti-Doping Organization involving an Athlete that is not a citizen or resident of that country shall be administered as directed by the rules of the applicable International Federation. Results management and the conduct of hearings from a test by the International Olympic Committee, the International Paralympic Committee, or a Major Event Organization, shall be referred to the applicable International Federation as far as sanctions beyond Disqualification from the Event or the results of the Event.

15.4 Mutual Recognition  
Subject to the right to appeal provided in Article 13, the Testing, therapeutic use exemptions and hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory's authority, shall be recognized and respected by all other Signatories. Signatories may recognize the same actions of other bodies which have not accepted the Code if the rules of those bodies are otherwise consistent with the Code.

#### Article 16: Doping Control for Animals Competing in Sport

16.1 In any sport that includes animals in competition, the International Federation for that sport shall establish and implement anti-doping rules for the animals included in that sport. The anti-doping rules shall include a list of Prohibited Substances, appropriate Testing procedures and a list of approved laboratories for Sample analysis.

16.2 With respect to determining anti-doping rule violations, results management, fair hearings, Consequences, and appeals for animals involved in sport, the International Federation for that sport shall establish and implement rules that are generally consistent with Articles 1, 2, 3, 9, 10, 11, 13 and 17 of the Code.

#### Article 17: Statute of Limitations

No action may be commenced against an Athlete or other Person for a violation of an anti-doping rule contained in the Code unless such action is commenced within eight years from the date the violation occurred.

### Part Two - Education and Research

#### Article 18: Education

18.1 Basic Principle and Primary Goal  
The basic principle for information and education programs shall be to preserve the spirit of sport as described in the Introduction to the Code, from being undermined by doping. The primary goal shall be to dissuade Athletes from using Prohibited Substances and Prohibited Methods.

18.2 Program and Activities  
Each Anti-Doping Organization should plan, implement and monitor information and education programs. The programs should provide Participants with updated and accurate information on at least the following issues:

- Substances and methods on the Prohibited List
- Health consequences of doping
- Doping Control procedures
- Athletes' rights and responsibilities

The programs should promote the spirit of sport in order to establish an anti-doping environment which influences behaviour among Participants.

Athlete Support Personnel should educate and counsel Athletes regarding anti-doping policies and rules adopted pursuant to the Code.

#### 18.3 Coordination and Cooperation

All Signatories and Participants shall cooperate with each other and governments to coordinate their efforts in anti-doping information and education.

### Article 19: Research

#### 19.1 Purpose of Anti-Doping Research

Anti-doping research contributes to the development and implementation of efficient programs within Doping Control and to anti-doping information and education.

#### 19.2 Types of Research

Anti-doping research may include, for example, sociological, behavioural, juridical and ethical studies in addition to medical, analytical and physiological investigation.

#### 19.3 Coordination

Coordination of anti-doping research through WADA is encouraged. Subject to intellectual property rights, copies of anti-doping research results should be provided to WADA.

#### 19.4 Research Practices

Anti-doping research shall comply with internationally recognized ethical practices.

#### 19.5 Research Using Prohibited Substances and Prohibited Methods

Research efforts should avoid the administration of Prohibited Substances or Prohibited Methods to Athletes.

#### 19.6 Misuse of Results

Adequate precautions should be taken so that the results of anti-doping research are not misused and applied for doping.

### Part Three - Roles & Responsibilities

#### Article 20: Additional Roles and Responsibilities of Signatories

##### 20.1 Roles and Responsibilities of the International Olympic Committee

20.1.1 To adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code.

20.1.2 To require as a condition of recognition by the International Olympic Committee, that International Federations within the Olympic Movement are in compliance with the Code.

20.1.3 To withhold some or all Olympic funding of sport organizations that are not in compliance with the Code.

20.1.4 To take appropriate action to discourage non compliance with the Code as provided in Article 23.5.

20.1.5 To authorize and facilitate the Independent Observer Program.

##### 20.2 Roles and Responsibilities of the International Paralympic Committee

20.2.1 To adopt and implement anti-doping policies and rules for the Paralympic Games which conform with the Code.

20.2.2 To require as a condition of recognition by the International Paralympic Committee, that National Paralympic Committees within the Olympic Movement are in compliance with the Code.

20.2.3 To withhold some or all Paralympic funding of sport organizations that are not in compliance with the Code.

20.2.4 To take appropriate action to discourage non-compliance with the Code as provided in Article 23.5.

20.2.5 To authorize and facilitate the Independent Observer Program.



- 20.3 Roles and Responsibilities of International Federations
- 20.3.1 To adopt and implement anti-doping policies and rules which conform with the Code.
- 20.3.2 To require as a condition of membership that the policies, rules and programs of National Federations are in compliance with the Code.
- 20.3.3 To require all Athletes and Athlete Support Personnel within their jurisdiction to recognize and be bound by anti-doping rules in conformance with the Code.
- 20.3.4 To require Athletes who are not regularly members of the International Federation or one of its member National Federations to be available for Sample collection and provide accurate and up-to-date whereabouts information if required by the conditions for eligibility established by the International Federation or, as applicable, the Major Event Organization.
- 20.3.5 To monitor the anti-doping programs of National Federations.
- 20.3.6 To take appropriate action to discourage noncompliance with the Code as provided in Article 23.5.
- 20.3.7 To authorize and facilitate the Independent Observer program at International Events.
- 20.3.8 To withhold some or all funding to its member National Federations that are not in compliance with the Code.
- 20.4 Roles and Responsibilities of National Olympic Committees and National Paralympic Committees
- 20.4.1 To ensure that their anti-doping policies and rules conform with the Code.
- 20.4.2 To require as a condition of membership or recognition that National Federations' anti-doping policies and rules are in compliance with the applicable provisions of the Code.
- 20.4.3 To require Athletes who are not regular members of a National Federation to be available for Sample collection and provide accurate and up-to-date whereabouts information on a regular basis if required during the year before the Olympic Games as a condition of participation in the Olympic Games.
- 20.4.4 To cooperate with their National Anti-Doping Organization.
- 20.4.5 To withhold some or all funding, during any period of his or her Ineligibility, to any Athlete or Athlete Support Personnel who has violated anti-doping rules.
- 20.4.6 To withhold some or all funding to its member or recognized National Federations that are not in compliance with the Code.
- 20.5 Roles and Responsibilities of National Anti-Doping Organizations
- 20.5.1 To adopt and implement anti-doping rules and polices which conform with the Code.
- 20.5.2 To cooperate with other relevant national organizations and other Anti-Doping Organizations.
- 20.5.3 To encourage reciprocal testing between National Anti-Doping Organizations.
- 20.5.4 To promote anti-doping research.
- 20.6 Roles and Responsibilities of Major Event Organizations
- 20.6.1 To adopt and implement anti-doping policies and rules for their Events which conform with the Code.
- 20.6.2 To take appropriate action to discourage noncompliance with the Code as provided in Article 23.5.
- 20.6.3 To authorize and facilitate the Independent Observer Program.
- 20.7 Roles and Responsibilities of WADA
- 20.7.1 To adopt and implement policies and procedures which conform with the Code.
- 20.7.2 To monitor the processing of Adverse Analytical Findings.
- 20.7.3 To approve International Standards applicable to the implementation of the Code.
- 20.7.4 To accredit laboratories to conduct Sample analysis or to approve others to conduct Sample analysis.
- 20.7.5 To develop and approve Models of Best Practice.
- 20.7.6 To promote, conduct, commission, fund and coordinate anti-doping research.
- 20.7.7 To conduct an effective Independent Observer Program.
- 20.7.8 To conduct Doping Controls as authorized by other Anti-Doping Organizations.
- Article 21: Roles and Responsibilities Of Participants**
- 21.1 Roles and Responsibilities of Athletes
- 21.1.1 To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code.
- 21.1.2 To be available for Sample collection.
- 21.1.3 To take responsibility, in the context of anti-doping, for what they ingest and use.
- 21.1.4 To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code.
- 21.2 Roles and Responsibilities of Athlete Support Personnel
- 21.2.1 To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the Code and which are applicable to them or the Athletes whom they support.
- 21.2.2 To cooperate with the Athlete Testing program.
- 21.2.3 To use their influence on Athlete values and behaviour to foster anti-doping attitudes.
- Article 22: Involvement of Governments**
- Each government's commitment to the Code will be evidenced by its signing a Declaration on or before the first day of the Athens Olympic Games to be followed by a process leading to a convention or other obligation to be implemented as appropriate to the constitutional and administrative contexts of each government on or before the first day of the Turin Winter Olympic Games.
- It is the expectation of the Signatories that the Declaration and the convention or other obligation will reflect the following major points:
- 22.1 Affirmative measures will be undertaken by each government in support of anti-doping in at least the following areas:
- Support for national anti-doping programs;
  - The availability of Prohibited Substances and Prohibited Methods;
  - Facilitate access for WADA to conduct Out-of-Competition Doping Controls;
  - The problem of nutritional supplements which contain undisclosed Prohibited Substances; and
  - Withholding some or all financial support from sport organizations and Participants that are not in compliance with the Code or applicable anti-doping rules adopted pursuant to the Code.
- 22.2 All other governmental involvement with anti-doping will be brought into harmony with the Code.
- 22.3 Ongoing compliance with the commitments reflected in the convention or other obligation will be monitored as determined in consultation between WADA and the applicable government(s).
- Part Four - Acceptance, Compliance, Modification & Interpretation**
- Article 23: Acceptance, Compliance And Modification**
- 23.1 Acceptance of the Code
- 23.2.2 In implementing the Code, the Signatories are encouraged to use the Models of Best Practice recommended by WADA.
- 23.1.1 The following entities shall be Signatories accepting the Code: WADA, The International Olympic Committee, International Federations, The International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, and National Anti-Doping Organizations. These entities shall accept the Code by signing a declaration of acceptance upon approval by each of their respective governing bodies.
- 23.1.2 Other sport organizations that may not be under the control of a Signatory may, upon WADA's invitation, also accept the Code.

- 23.1.3 A list of all acceptances will be made public by WADA. 23.2 Implementation of the Code
- 23.2.1 The Signatories shall implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility.
- 23.2.2 In implementing the Code, the Signatories are encouraged to use the Models of Best Practice recommended by WADA.
- 23.3 Acceptance and Implementation Deadlines
- 23.3.1 Signatories shall accept and implement the Code on or before the first day of the Athens Olympic Games.
- 23.3.2 The Code may be accepted after the abovereferenced deadlines; however, Signatories shall not be considered in compliance with the Code until they have accepted the Code (and that acceptance has not been withdrawn).
- 23.4 Monitoring Compliance with the Code
- 23.4.1 Compliance with the Code shall be monitored by WADA or as otherwise agreed by WADA.
- 23.4.2 To facilitate monitoring, each Signatory shall report to WADA on its compliance with the Code every second year and shall explain reasons for noncompliance.
- 23.4.3 WADA shall consider explanations for noncompliance and, in extraordinary situations, may recommend to the International Olympic Committee, International Paralympic Committee, International Federations, and Major Event Organizations that they provisionally excuse the non-compliance.
- 23.4.4 WADA shall, after dialogue with the subject organization, make reports on compliance to the International Olympic Committee, the International Paralympic Committee, International Federations, and Major Event Organizations. These reports shall also be made available to the public.
- 23.5 Consequences of Noncompliance with the Code
- 23.5.1 Noncompliance with the Code by either the government or National Olympic Committee of a country may result in consequences with respect to Olympic Games, Paralympic Games, World Championships or the Events of Major Event Organizations as determined by the ruling body for each Event. The imposition of such consequences may be appealed by the National Olympic Committee or government to CAS pursuant to Article 13.4.
- 23.6 Modification of the Code
- 23.6.1 WADA shall be responsible for overseeing the evolution and improvement of the Code. Athletes and all Signatories and governments shall be invited to participate in such process.
- 23.6.2 WADA shall initiate proposed amendments to the Code and shall ensure a consultative process to both receive and respond to recommendations and to facilitate review and feedback from Athletes, Signatories and governments on recommended amendments.
- 23.6.3 Amendments to the Code shall, after appropriate consultation, be approved by a two-thirds majority of the WADA Foundation Board including a majority of both the public sector and Olympic Movement members casting votes. Amendments shall, unless provided otherwise, go into effect three months after such approval.
- 23.6.4 Signatories shall implement any applicable amendment to the Code within one year of approval by the WADA Foundation Board.
- 23.7 Withdrawal of Acceptance of the Code
- 23.7.1 Signatories may withdraw acceptance of the Code after providing WADA six-month's written notice of their intent to withdraw.

#### Article 24: Interpretation of the Code

- 24.1 The official text of the Code shall be maintained by WADA and shall be published in English and French. In the event of any conflict between the English and French versions, the English version shall prevail.
- 24.2 The comments annotating various provisions of the Code are included to assist in the understanding and interpretation of the Code.
- 24.3 The Code shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments.
- 24.4 The headings used for the various Parts and Articles of the Code are for convenience only and shall not be deemed part of the substance of the Code or to affect in any way the language of the provisions to which they refer.
- 24.5 The Code shall not apply retrospectively to matters pending before the date the Code is accepted by a Signatory and implemented in its rules.
- 24.6 Appendix I Definitions shall be considered an integral part of the Code.

## Appendix

### Definitions

#### Adverse Analytical Finding:

A report from a laboratory or other approved Testing entity that identifies in a Specimen the presence of a Prohibited Substance or its Metabolites or Markers (including elevated quantities of endogenous substances) or evidence of the Use of a Prohibited Method.

#### Anti-Doping Organization:

A Signatory that is responsible for adopting rules for initiating, implementing or enforcing any part of the Doping Control process. This includes, for example, the International Olympic Committee, the International Paralympic Committee, other Major Event Organizations that conduct Testing at their Events, WADA, International Federations, and National Anti-Doping Organizations.

#### Athlete:

For purposes of Doping Control, any Person who participates in sport at the international level (as defined by each International Federation) or national level (as defined by each National Anti-Doping Organization) and any additional Person who participates in sport at a lower level if designated by the Person's National Anti-Doping Organization. For purposes of anti-doping information and education, any Person who participates in sport under the authority of any Signatory, government, or other sports organization accepting the Code.

#### Athlete Support Personnel:

Any coach, trainer, manager, agent, team staff, official, medical or para-medical personnel working with or treating Athletes participating in or preparing for sports competition.

#### Attempt:

Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the attempt prior to it being discovered by a third party not involved in the Attempt.

#### Code:

The World Anti-Doping Code.

#### Competition:

A single race, match, game or singular athletic contest. For example, the finals of the Olympic 100-meter dash. For stage races and other athletic contests where prizes are awarded on a daily or other interim basis the distinction between a Competition and an Event will be as provided in the rules of the applicable International Federation.

#### Consequences of Anti-Doping Rules Violations:

An Athlete's or other Person's violation of an anti-doping rule may result in one or more of the following:

(a) Disqualification means the Athlete's results in a particular

Competition or Event are invalidated, with all resulting consequences including forfeiture of any medals, points and prizes;

(b) Ineligibility means the Athlete or other Person is barred for a specified period of time from participating in any Competition or other activity or funding as provided in Article 10.9; and

(c) Provisional Suspension means the Athlete or other Person is barred temporarily from participating in any Competition prior to the final decision at a hearing conducted under Article 8 (Right to a Fair Hearing).

**Disqualification:**

See Consequences of Anti-Doping Rules Violations above.

**Doping Control:**

The process including test distribution planning, Sample collection and handling, laboratory analysis, results management, hearings and appeals.

**Event:**

A series of individual Competitions conducted together under one ruling body (e.g., the Olympic Games, FINA World Championships, or Pan American Games).

**In-Competition:**

For purposes of differentiating between In-Competition and Out-of-Competition Testing, unless provided otherwise in the rules of an International Federation or other relevant Anti-Doping Organization, an In-Competition test is a test where an Athlete is selected for testing in connection with a specific Competition.

**Independent Observer Program:**

A team of observers, under the supervision of WADA, who observe the Doping Control process at certain Events and report on observations. If WADA is testing In-Competition at an Event, the observers shall be supervised by an independent organization.

**Ineligibility:**

See Consequences of Anti-Doping Rules Violations above.

**International Event:**

An Event where the International Olympic Committee, the International Paralympic Committee, an International Federation, a Major Event Organization, or another international sport organization is the ruling body for the Event or appoints the technical officials for the Event.

**International-Level Athlete:**

Athletes designated by one or more International Federations as being within the Registered Testing Pool for an International Federation.

**International Standard:**

A standard adopted by WADA in support of the Code. Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly.

**Major Event Organizations:**

This term refers to the continental associations of National Olympic Committees and other international multi-sport organizations that function as the ruling body for any continental, regional or other International Event.

**Marker:**

A compound, group of compounds or biological parameters that indicates the Use of a Prohibited Substance or Prohibited Method.

**Metabolite:**

Any substance produced by a biotransformation process.

**Minor:**

A natural Person who has not reached the age of majority as established by the applicable laws of his or her country of residence.

**National Anti-Doping Organization:**

The entity(ies) designated by each country as possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of Samples, the management of test results, and the conduct of hearings, all at the national level. If this designation has not been made by the competent public authority(ies), the entity shall be the country's National Olympic Committee or its designee.

**National Event:**

A sport Event involving international or national level Athletes that is not an International Event.

**National Olympic Committee:**

The organization recognized by the International Olympic Committee. The term National Olympic Committee shall also include the National Sport Confederation in those countries where the National Sport Confederation assumes typical National Olympic Committee responsibilities in the anti-doping area.

**No Advance Notice:**

A Doping Control which takes place with no advance warning to the Athlete and where the Athlete is continuously chaperoned from the moment of notification through Sample provision.

**No Fault or Negligence:**

The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.

**No Significant Fault or Negligence:**

The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation.

**Out-of-Competition:**

Any Doping Control which is not In-Competition.

Participant: Any Athlete or Athlete Support Personnel. Person: A natural Person or an organization or other entity.

**Possession:**

The actual, physical possession, or the constructive possession (which shall be found only if the Person has exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists); provided, however, that if the Person does not have exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists, constructive possession shall only be found if the Person knew about the presence of the Prohibited Substance/Method and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on possession if, prior to receiving notification of any kind that the Person has committed an anti-doping rule violation, the Person has taken concrete action demonstrating that the Person no longer intends to have Possession and has renounced the Person's previous Possession.

**Prohibited List:**

The List identifying the Prohibited Substances and Prohibited Methods.

**Prohibited Method:**

Any method so described on the Prohibited List.

**Prohibited Substance:**

Any substance so described on the Prohibited List.

**Provisional Hearing:**

For purposes of Article 7.5, an expedited abbreviated hearing occurring prior to a hearing under Article 8 (Right to a Fair Hearing) that provides the Athlete with notice and an opportunity to be heard in either written or oral form.

**Provisional Suspension:**

See Consequences above.

**Publicly Disclose or Publicly Report:**

To disseminate or distribute information to the general public or persons beyond those persons entitled to earlier notification in accordance with Article 14.

**Registered Testing Pool:**

The pool of top level Athletes established separately by each International Federation and National Anti-Doping Organization who are subject to both In-Competition and Out-of-Competition Testing as part of that International Federation's or Organization's test distribution plan.

**Sample Specimen:**

Any biological material collected for the purposes of Doping Control.

**Signatories:**

Those entities signing the Code and agreeing to comply with the Code, including the International Olympic Committee, International Federations, International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations, and WADA.

**Tampering:**

Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly to alter results or prevent normal procedures from occurring.

**Target Testing:**

Selection of Athletes for Testing where specific Athletes or groups of Athletes are selected on a non-random basis for Testing at a specified time.

**Team Sport:**

A sport in which the substitution of players is permitted during a Competition.

**Testing:**

The parts of the Doping Control process involving test distribution planning, Sample collection, Sample handling, and Sample transport to the laboratory.

**Trafficking:**

To sell, give, administer, transport, send, deliver or distribute a Prohibited Substance or Prohibited Method to an Athlete either directly or through one or more third parties, but excluding the sale or distribution (by medical personnel or by Persons other than an Athlete's Support Personnel) of a Prohibited Substance for genuine and legal therapeutic purposes.

**Use:**

The application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method.

**WADA:**

The World Anti-Doping Agency.

## **Seventh Annual Asser-Clingendael International Sports Lecture The Hague, The Netherlands, 6 September 2007**

*This year's twin topics were:*

### **The Council of Europe and Sport/The European Union and Sport: “A New Perspective to Pan-European Sport Cooperation and the European Commission's White Paper on Sport”**

The Council of Europe was the first international organization established in Europe after the Second World War. With 46 Member States, the Council of Europe, seated in Strasbourg currently represents the image of a “wider Europe”. The main objective of the Council of Europe is to strengthen democracy, human rights and the rule of law. The Council of Europe was the first international intergovernmental organization to take initiatives to establish legal instruments and to offer an institutional framework for the development of sport at the European level. The first stage of the Council of Europe's work in this field was marked by the adoption of the Committee of Ministers' Resolution on Doping of Athletes in 1967. The extensive work of the Council of Europe on sport is evident through the main texts on sport, such as the European Sports Charter, the Code of Sports Ethics, the European Convention on Spectator Violence, and the Anti-Doping Convention. Presently, the Council of Europe is in the process of finding ways to give a new perspective to Pan-European sport cooperation within its framework by the creation of “a partial agreement on sport”.

The European Union has no direct competence for sport. However, European policies in a number of areas have a considerable and growing impact on sport. Certain aspects of sport are subject to the full application of EU law, particularly with respect to Internal Market and competition provisions. Moreover, several types of activities relating to sport can be supported through EU programmes, including in the fields of education, vocational training, youth, culture and regional policy. The important role of sport in European society and its specific nature, has been recognized by the Heads of State and Government of the Member States. For instance, at the European Council, held in Nice in 2000, a Declaration was issued, which calls on EU bodies to give special consideration to the social, educational and cultural functions inherent to sport. It points out that certain special characteristics of sport, such as internal cohesion and solidarity, fair competition, and the protection of the moral and material interests of sportsmen and women, particularly the younger generation, should be taken into account in current policies pursued by the Community institutions. (*continued on page 140*)

Sport organizations and Member States have repeatedly called on the Commission to ensure that the principles and values developed on the basis of the Nice Declaration are implemented properly and in a coherent manner. In order to give an appropriate answer to these concerns, the Commission took a political initiative in the area of sport, which will take the form of a White Paper. The White Paper will take stock of the current situation and outline the way forward to address the challenges that European sport faces. It will aim at outlining the role of sport in European society, its economic dimension, its special organizational features, and its interaction with EU policies. Special attention will be paid to the identification of areas where EU action can provide added value with regard to action already taken by sport organisations and Member State authorities. The White Paper on Sport is planned to be published on 4 July next.

The Lecture was held on Thursday 6 September 2007 at the Clingendael Institute in The Hague and will be co-chaired by Dr Robert Siekmann, Director of the ASSER international Sports Law Centre and Prof. Ian Blackshaw, Member of CAS and Honorary Fellow of the Centre.

**The guest lecturers were:**

- Mr Ralph-René Weingärtner, Director for Youth and Sport, Council of Europe, Strasbourg:  
*"The Council of Europe and Sport: A New Perspective to Pan-European Sport Cooperation"*

- Mr Michal Krejza, Head of Sport Unit, European Commission, Brussels:  
*"The European Commission's White Paper on Sport: the Challenges that Sport Faces"*.

At the Lecture two recent sports law book publications, which were produced by the ASSER International Sports Law Centre in cooperation with T.M.C. Asser Press were presented to the speakers respectively: *The Council of Europe and Sport: Basic Documents* and *European Sports Law: Collected Papers* by Stephen Weatherill.

## **Conference "Recent Developments in Sport in the European Union", Lisbon, Portugal, 26 September 2007**

The European Commission has recently issued a White Paper on Sport. During the Portuguese Presidency of the European Union the content of this White Paper is being discussed and the first contours of the future approach towards sport in the European Union will become visible.

The ASSER International Sports Law Centre, The Hague, The Netherlands, took the opportunity to organize a conference on *Recent Developments in sport in the European Union* in the capital of the current Presidency of the EU.

The conference aimed to clarify the contents of the European Commission's White Paper and its possible impact on the sports sector in the EU and in Portugal. A special focus of the conference lies on the activities of players' agents in football. On this occasion the first copy of the book "Players' Agents Worldwide: Legal Aspects" published by the TMC Asser Press with the collaboration of the Portuguese lawyers Pedro Cardigos and Ricardo Henriques, was presented to Comandante Vicente Moura, President of the Portuguese Olympic Committee (COP).

**Programme:**

*Opening by the chairman*

**Dr. Pedro Cardigos**

Partner of the law firm ABBC - Sociedade de Advogados, RL

*The impact of the European Commission's White Paper on Sport*

**Dr. Richard Parrish**

Director, Centre for Sports law Research, Edge Hill University (UK)

*The White Paper on Sport: the perspective of the Portuguese Olympic Committee (COP)*

**Comandante José Vicente Moura**  
**President of the Portuguese Olympic Committee (COP)**

*Players' Agents in the EU and the draft FIFA regulations on Players' Agents*

**Roberto Branco Martins LLM**  
**Asser International Sports Law Centre (NL)**

*The legal regulation of Players' Agents in Portugal*

**Dr. Ricardo Henriques**  
**Associate of the law firm ABBC - Sociedade de Advogados, RL**

*Panel Discussion*

**Moderator Dr. Pedro Cardigos**

**with the participation of:**

- **Dr. João Leal**  
Legal Director of the Portuguese Football Federation (FPF)
- **Dra. Zsuzsanna Jambor**  
European Commission DG COMP
- **Dr. Emanuel Calçada**  
Director of the Portuguese National Football Agents Association (ANAF)
- **Dr. Alexandre Mestre,**  
collaborator of Mr. José Luis Arnaut regarding the *Independent European Sport Review* and associate at the law firm PLMJ Advogados
- **Dr. João Nogueira da Rocha**  
Legal Director of the Portuguese Football Players Union (SJPF)
- **Dr. João Orlando de Vieira de Carvalho**  
The Portuguese Football League (LPFP)

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# The 3rd Annual Convention of the Asian Sports Law Society and the Annual Convention of the Sports Law Seminar of the China Law Society

The board meeting of the Asian Sports Law Society was held in Seoul, Korea, from 1 to 3 December 2006. The topics under discussion included the modification of the Asian Sports Law Society Statute and the host city of the 2007 international academic forum. With the 2008 Olympic Games due to be held in Beijing, the directors present unanimously voted for Beijing as the host city, with the China Sports Law Seminar as the sponsor and the legal issues concerning 2008 Olympic Games as the major theme.

Since its foundation in 2005, the Asian Sports Law Society has held two successful international sports law forums, focusing on "The Tasks and Challenges Confronting Asian Sports Law" and "Challenges Confronting Sports Law as an Embodiment of National Obligation" respectively, which evoked worldwide response. Considering the contribution of the Research Centre for Sports Law (CUPL) to the establishment of the Asian Sports Law Society and academic research into sports law in China, the China Sports Law Seminar asked the China University of Political Science and Law to organise the 2007 sports law international forum.

## *Objective:*

To provide an excellent platform for international exchange and cooperation in sports science, a convenient channel for a comprehensive understanding of the current sports law situations both in Asia and worldwide, as well as all related issues and their countermeasures. Furthermore, to provide legal support for the 2008 Olympic Games, thereby contributing to the development of sports science.

## *Theme: Legal issues concerning the Olympic Games*

The forum will discuss the following topics:

- Topic 1: Legal status of the participants in Olympic Games
- Topic 2: Legal relationship between sports clubs and players
- Topic 3: Sports disputes tackling mechanism
- Topic 4: Protection of Olympic intellectual property
- Topic 5: Legal issues concerning the commercial development and utilisation of the Olympic facilities
- Topic 6: Sports morality and anti-doping measures

## *Goal:*

To organise a unique, top level, highly influential international academic forum and to make a significant contribution to sports science and Olympic law research.

Sponsored by: the Asian Sports Law Society and Sports Law Seminar of the China Law Society

Organised by: China University of Political Science and Law and Hongfan Guangzhu Law Firm

*Date: 10 to 11 November 2007*

9 November: check-in

10-11 November: convention

12 November: departure

## *Place:*

New Red Building on Changping Campus, CUPL

## *Scale:*

about 120 participants

### *Guests of Honour:*

Officials from the Law Committee of the National People's Congress, the Supreme Court, Supreme People's Procuratorate, Legislative Affairs Office of the State Council, State Sports General Administration, Beijing Municipal Government, Organisational Committee of the 29th Olympic Games, Ministry of Education and Ministry of Justice; leaders from China University of Political Science and Law and China Law Society and Beijing Municipal Law Society; President of the Korea Sports and Entertainment Law Society, President of the Japan Sports Law Society, managing director of the Asian Sports Law Society.

### *Participants:*

Directors from the China Sports Law Seminar of the China Law Society, national and international sports and legal experts and scholars from Hong Kong, Macao SARs, Taiwan, Korea, Japan, India, Vietnam, Australia, Europe, US, as well as news media.

### *Schedule:*

1. 9 November: Check-in (24-hour service available),  
18.00: Welcome banquet
2. 10 November:  
7.00-8.00: Breakfast  
8.30 Opening ceremony; welcome speeches delivered by:  
President of China University of Political Science and Law  
Leader of the China Law Society,  
Leader of the State Sports General Administration  
Leader of the Beijing Organisational Committee of Olympic Games  
President of the Korea Sports and Entertainment Law Society  
President of the Japan Sports Law Society  
Experts in international sports law  
Group photo  
9.45-10.00: Tea break  
10.00-12.00: Speeches at the Main Meeting:  
Keynote speech by Professor Jiao Hongchang,  
Academic speech by Professor Jiang Ping,  
Comment on the forum by Mr Wei JiZhong  
12.00-13.00: Lunch  
13.00-14.00: Siesta
3. 14.00-16.00: Topics for Group Discussion:  
Legal Status of the Participants in the Olympic Games (branch meeting room 1)  
Legal relationship between sports clubs and players (branch meeting room 2),  
Sports Disputes Tackling Mechanism (branch meeting room 3)  
16.00-16.15: Tea break  
16.15-18.00 Comments by experts and question-and-answer session  
18.00-19.00: Dinner
4. 11 November:  
7.00-8.00: Breakfast  
8.30-10.30: Topics for group discussion:  
Sports morality and anti-doping measures (branch meeting room 1)  
Protection of Olympic intellectual property (branch meeting room 2)  
Legal issues concerning the commercialised development and utilisation of the Olympic facilities (branch meeting room 3)  
10.0-10.45: Tea break  
10.45-12.10: Comments by experts and question-and-answer session  
12.10-13.00: Lunch  
13.00-14.00: Siesta



5. 14.00-15.30: Closing ceremony  
Summary speeches delivered by representatives from branch meetings  
Summary speech delivered by the current chairman of the Asian Sports Law Society  
Closing speech delivered by leaders of China University of Political Science and Law
- 17.30-19.00: Banquet

*Thesis submission:*

Please write your thesis on the convention's theme and send it by e-mail to the convention committee.

*Thesis requirement:*

- 1 Not published in a national academic convention or publicity publication
- 2 Write the thesis in English or Chinese in accordance with the required format, including footnotes for comments, page number
- 3 Usual number of words: 5000.

Organisational Committee of the Convention: composed of Research Centre for Sports Law, CUPL and relevant departments and branches, including secretariat, liaison office, cooperation and development office, academic office, financial office, and supervision board.

China Sports Law Seminar of China Law Society  
Research Centre for Sports Law of CUPL  
01-08-2007  
(dd-mm-yy)

*Contact information for the Organisational Committee of the Convention:*

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