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Anti-Doping and Privacy

MOTOE Case

Home Grown Players Rule

**Anti-Doping in White
Paper on Sport**

Sanctions in WADA Code

Sports Blogging

TV Rights and IP

Ambush Marketing

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EDITORIAL

ARTICLES

- | | | | |
|--|-----------|--|------------|
| The Athlete's Right to Respect for his Private Life and his Home | 3 | Image Rights in South Africa | 71 |
| <i>Janwillem Soek</i> | | <i>Steve Cornelius</i> | |
| Policing the Boundaries between Regulation and Commercial Exploitation: Lessons from the MOTOE Case | 13 | Ambush Marketing: Criminal Offence or Free Enterprise? | 75 |
| <i>Samuli Miettinen</i> | | <i>Luisa Leone</i> | |
| European Court vs Sports Organisations: Who Will Win the Antitrust Competition? | 19 | Price-Fixing between Horizontal Competitors in the English Super League | 77 |
| <i>Andreas Manville</i> | | <i>Leanne O'Leary</i> | |
| Models for the Promotion of Home Grown Players for the Protection of National Representative Teams | 26 | Fighting Sport Corruption: Polish Experience of a Global Dilemma | 86 |
| <i>Ruben Conzelmann</i> | | <i>Hubert Radke</i> | |
| Anti-Doping in and beyond the European Commission's White Paper on Sport | 30 | Football Supporters' Rights: A Lost Cause? | 89 |
| <i>Jacob Kornbeck</i> | | <i>Anastassia Tsoukala</i> | |
| Sanctions for Anti-Doping Rule Violations in the Revised Version of the World Anti-Doping Code | 36 | Safeguarding Confidentiality in Mediation | 94 |
| <i>Alessandro L. Celli, Lucien W. Valloni and Dmitry A. Pentsov</i> | | <i>Ian Blackshaw</i> | |
| One World One Dream? Sports Blogging at the Beijing Olympic Games | 42 | A Comparison of the European and North American Models of Sports Organisation | 100 |
| <i>Evi Werkers, Katrien Lefever and Peggy Valcke</i> | | <i>James A.R. Nafziger</i> | |
| The Legal Nature of Premium Sports Events: 'IP or not IP - That is the Question' | 52 | International Comparative Sports Law. The US and EU Systems of Sport Governance: Commercialized v. Socio-Cultural Model – Competition and Labor Law | 108 |
| <i>Oles Andriychuk</i> | | <i>Anastasios Kaburakis</i> | |
| | | Fundamental Doctrines of International Sports Law | 130 |
| | | <i>Ola O. Olatawura</i> | |

PAPERS

- | | | | |
|--|------------|--|------------|
| Some Day the Mountains Might Get 'em but the Law Never Will | 144 | • Protecting IP Rights under English Common Law and European Continental Law: 'Passing Off' and 'Unfair Competition' Compared | 150 |
| <i>David McArdle</i> | | <i>Ian Blackshaw</i> | |
| • Global IP & Patents Meeting, London 2008 | | | |
| The Importance of IP Rights in Sport | | | |
| • London Legal Training 2008 Annual IP Conference, London 30 October 2008 | 146 | | |

OPINION

- **Lewis Hamilton Loses Formula One Time Penalty Appeal: Was Justice Done?** 154
- **The Olympics Should be Scaled Down** 154
- **Dwain Chambers Loses High Court Challenge to Overturn his Lifetime Olympics Ban** 155

Ian Blackshaw

BOOK REVIEWS

- The Sporting Exception in European Union Law**
by **Richard Parrish and Samuli Miettinen** 156

Peter W. Heermann

- The International Olympic Committee and the Olympic System** by **Jean-Loup Chappelet and Brenda Kubler-Mabbott** 157

Ian Blackshaw

CONFERENCES

- Comparing Agent Regulation in the United States and Europe** 159

Rick Karcher



In this “miscellanea” issue of ISLJ the reader will find several articles on anti-doping and the law. In the leading article, Janwillem Soek, who is the author of “The Strict Liability Principle and the Human Rights of Athletes in Doping Cases” (T.M.C. Asser Press, The Hague 2006) deals with the fundamental human rights topic of the sportsperson’s right to respect for his private life and his home. Then Jacob Kornbeck of the Sport Unit, Directorate-General for Education and Culture, European Commission, Brussels, discusses anti-doping in and beyond the European Commission’s White Paper on Sport. Finally, Alessandro Celli, Lucien Vallon and Dmitry Pentsov, of the Froriep Renggli Law Firm, Zurich, Switzerland present their views with regard to sanctions for anti-doping rule violations in the new version of the WADA Code.

Amongst other interesting contributions on diverse topical issues, Samuli Miettinen, who recently moved from Edge Hill to the University of Salford (United Kingdom), assesses the European Court of Justice’s verdict in the MOTOE case, while Ruben Conzelmann presents a summary of his PhD on models for the promotion of home-grown players for the protection of national representative teams. A study on sports blogging at the Beijing Olympic Games is delivered by Evi Werkers, Katrien Lefever and Peggy Valcke who are legal researchers at the Interdisciplinary Centre for Law and ICT of the Catholic University of Leuven, Belgium. A comparison of the European and North American models of sport governance is on the agenda in contributions by Jim Nafziger and Anastasios Kaburakis.

Two book publications were finalized and will be published by T.M.C. Asser Press in the forthcoming period, that is “The EU, Sport, Law and Policy: Regulation, Re-regulation and Representation” (Simon Gardiner, Richard Parrish and Robert Siekmann, Eds), and “TV Rights and Sport: Legal Aspects” (Ian Blackshaw, Steve Cornelius and Robert Siekmann, Eds).

The Forewords to these books are delivered by Dr Michal Krejza, Head of Sport Unit, European Commission, and Dr Alexander Scheuer, managing director of the Institute of European Media Law (EMR), Saarbrücken/Brussels, respectively.

Currently, The ASSER International Sports Law Centre is undertaking a study on “Health and Safety in the Sport Sector” which was commissioned by EURO-MEI UNI and EASE, employees’ and employers’ organizations in sport at large in Europe, within the framework of the project “Moving towards European social dialogue in the sport sector: Content and Contact (CC-Project)”. The study

will be finalized in May 2009. At the end of September last, the Centre, with the cooperation of Edge Hill University, the Catholic University of Leuven and SPORT+MARKT AG, Cologne, Germany, submitted to the European Commission a research proposal regarding a study on sports agents in the European Union, which was previously announced in the White Paper on Sport.

On 19/20 September last, the German Association for Sports Law (Konstanzer Arbeitskreis für Deutsches und Internationales Arbeitsrecht) organized its autumn meeting, this time dealing with the Problems of Hooliganism, in Spiez am Thunersee, Switzerland, in hotel Belvédère where the German national football team was accommodated during the Football World Cup of 1954 (“das Wunder von Bern”). On that occasion, Martin Schimke of Bird & Bird, Düsseldorf, Germany, and a member of the Court of Arbitration for Sport dealt with the CAS award regarding Feyenoord Rotterdam, while Robert Siekmann was invited to lecture on the international legal framework for combating transnational football hooliganism in Europe.

Finally, we extend a heartfelt welcome to Hayden Opie of the University of Melbourne and Deborah Healy of The University of New South Wales, Australia as new members of the Advisory Board.

The Editors

The Athlete's Right to Respect for his Private Life and his Home

by Janwillem Soek*

Introduction

Competition cyclist Andrej Kashechkin was caught on a charge of blood doping during an unannounced check on 1 August 2007 while holidaying in Turkey. On 31 August he was fired by his team Astana, after a countercheck also proved positive. The cyclist also faced a two-year suspension and an additional two-year Pro Tour suspension. He then laid a charge with the court in Liège (Belgium) against the International Cycling Union UCI. He maintained that carrying out a doping check during a personal holiday is a violation of human rights. Judicial testing against fundamental human rights rules, of the regulations which give sporting and anti-doping organisations the right to carry out doping checks outside the competition context, is vitally important. Should the court have found that the checks are a violation of a sportsperson's right to privacy, then one of the most important elements in the existing doping control system would have fallen away. Unfortunately the procedure met a premature end, because the Liège court declared itself to be unqualified to consider the issue for 'territorial reasons': the cyclist no longer lived in Belgium and the UCI's base is in Switzerland. It is anticipated that Kashechkin will launch a case against the UCI in Switzerland in the near future. Indeed, on the eve of the case in Belgium Kashechkin's lawyers indicated their willingness to proceed through to the European Court of Human Rights.

The possibility of disturbing a sportsperson in his private life and home to take a doping sample, gives rise to a number of interesting questions. What follows will attempt to provide answers to the questions. The first issue which arises is the legal basis of such checks performed outside a competition context, and the status of the legal basis. If the basis resides in 'purely sportive rules', does the court then have the possibility to test the rules? Can it be taken as a point of departure that no single objective of the sporting sector can justify that the more fundamental social interests and rights of the sportsperson are violated? In other words: are the interests of the sporting world only related to the autonomous private rights, or are these interests subordinate to rules of the human rights treaties? If the answer to this is that the sporting world must step aside for fundamental human rights, the follow-up question must be whether the right the sporting world accords itself to carry out doping checks at the home of a sportsperson or during his or her holiday, is in conflict with basic rights. Finally there is the question as to whether in choosing to exercise a sport, the sportsperson has voluntarily renounced the protection human rights offers.

The WADA and the World Anti-Doping Code

The first World Conference on Doping in Sport was held in February 1999 in Lausanne on the initiative of the International Olympic Committee (IOC). The objective of the conference was to reach a common approach to the use of doping in sport. It was attended by representatives of governments, intergovernmental organisations and international sporting organisations. Setting up the World Anti-Doping Agency (WADA) was a direct result of this conference. The reason for calling this body into being was the assumption that the battle against doping could then be continued more effectively if the Olympic Movement (including the athletes) and the governments worked together. The collaboration established in the 'Lausanne Declaration' could be regarded as the first 'joint venture' between sporting organisations and governments. The WADA statutes established that it would be governed on equal terms by authorities and sporting organisations.¹ The IOC committed itself to funding the WADA until the end of 2001. From January 2002 sport and governments together would fund the WADA.²

The WADA Draft Mission Statement declared: "The mission of the Agency shall be to promote and coordinate at international level the fight against doping in sport in all its forms; to this end, the Agency will cooperate with intergovernmental organisations, governments, public authorities and other public and private bodies fighting against doping in sport, *inter alia*, the International Olympic Committee (IOC), International Sports Federations (IF), National Olympic Committees (NOC) and the athletes".

WADA was also assigned "[...] to promote harmonised rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof taking into account the rights of athletes".³ After the establishment of the WADA, the International Intergovernmental Consultative Group on Anti-Doping in Sport (IICGADS) was created to coordinate the efforts of the public authorities in the WADA. The role which national and regional authorities were supposed to play in the WADA was subsequently clarified during various meetings of the IICGADS.

After being established, one of the most important tasks of WADA was to come up with universally applicable anti-doping regulations, whose drafting was entrusted to a Code Project Team. There were several stages within an eighteen-month period; the consultation process involved all categories of stakeholders in addition to independent experts for certain key areas; the comments and suggestions received had been addressed and incorporated into each new version of the document. An outline of the framework of the World Anti-Doping Code (the Code) was started immediately after the meetings of the Executive Committee and the Foundation Board between September and November 2001. This process involved athletes, the International Intergovernmental Consultative Group on Anti-Doping in Sport (IICGADS), the Council of Europe, various governments, various national anti-doping organizations (NADOs), several IFs, the GAISF, the CAS and all the members of the various WADA working committees. The foundations for the Code were laid between December 2001 and April 2002 and were the product of consultations. Approximately 130 individuals and organizations submitted comments. During this stage, about 30 experts in the field of doping were involved as content producers. Meetings were held with athletes, IFs, the European Commission, the Council of Europe, governments, NOCs and NADOs. The WADA participated in the Harmonization Conference in the Netherlands and in the IICGADS meeting in Kuala Lumpur in 2002. After the first version of the Code had been completed, it was circulated between May and September 2002. Meetings followed involving athletes, the IOC Athletes' Commission, the European

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also composed equally of representatives from the Olympic Movement and governments.

1 See art. 6, sub 2 and art. 11 Statutes of the WADA (Constitutive Instrument of Foundation of the World Anti-Doping Agency). The 38-member Foundation Board is WADA's supreme decision-making body. It is composed equally of representatives from the Olympic Movement and governments. The WADA Foundation Board delegates the actual management and running of the Agency, including the performance of activities and the administration of assets, to the Executive Committee, WADA's ultimate policy-making body. The 12-member Executive Committee is

2 See art. 5 Statutes of the WADA (Constitutive Instrument of Foundation of the World Anti-Doping Agency). As the WADA writes on its website, it is "a unique hybrid organization that is governed and funded equally by the Sports Movement and Governments". The WADA is a private organisation in terms of Swiss law. The WADA cannot however be regarded as a non-governmental organisation (NGO). The WADA does not have a legal capacity under international law; the WADA does not enjoy any international statutory privileges and immunities.

3 Draft Mission Statement, 4.6.

Olympic Committees Athletes' Commission, the IOC, the majority of IFs, the GAISF, the ASOIF, the ARISE, the AIOWF, several governments, the Council of Europe, the IICGADS, the European Union Presidency, a number of NOCs and various NADOs. The expertise of several key drafting experts could be drawn on. Over 120 comments were the result of this exploration. The second draft of the Code was published on 10 October 2002. Again, meetings were held with practically all the parties mentioned above who had been involved previously. This round of consultations yielded another 90 comments. The third draft dates from 20 February 2003 and was circulated in the final quarter of that month.

The Copenhagen Declaration on Anti-Doping in Sport

The second World Conference on Doping in Sport took place in Copenhagen from 3 to 5 May 2003. The purpose of this conference '[...] was to review, discuss and agree upon the Code content and its use as the basis for the fight against doping in sport. The approach had been to highlight the importance of the athletes, and its basis was the integrity of sport.'⁴ Taking part in the Conference were representatives of the IOC and of 80 governments, 60 NOCs, 70 IFs, 30 NADOs and 20 athletes, all in all around 1000 persons. The first day was set aside for the discussion of the content of the third draft of the Code. The WADA Foundation Board would adopt the Code on the third day of the Conference. A Conference Resolution would also be drawn up on that day, based on the interventions and their content. With the so-called "Copenhagen Declaration on Anti-Doping in Sport" (Copenhagen Declaration) "the World Conference accept[ed] the World Anti-Doping Code [...] as the basis for the fight against doping in sport throughout the world".⁵ The governments present at the Conference accepted the principles laid down in the Code as a basis for the "fight against doping in sport". They declared among other things that they would 'support a timely process leading to a convention or other obligation concerning, among other things, the Code, to be implemented through instruments appropriate to the constitutional and administrative contexts of each government on or before the XX Olympic Winter Games in Turin in 2006'.⁶ The governments agreed to a joint meeting in Copenhagen in order to discuss intergovernmental aspects and to arrive at a Government Declaration which was to supplement the Conference Resolution.

'There should be no place at the Olympic Games for IFs or NOCs that refused to implement the Code. Likewise, no organisation of the Olympic Games should be awarded to a country whose government had neglected or refused to implement the Code,' IOC chairman Rogge warned in his opening address, and he further urged all IFs and NOCs 'to apply the same philosophy'.⁷

The UNESCO Anti-Doping Convention

Given that the WADA is a private organisation, with which authorities cannot link directly, an instrument needed to be found for formalising the governmental obligations. It was chosen to draw up a Treaty within the UNESCO framework. The first intrinsic discussions began in the autumn of 2003.⁸

During the 33rd UNESCO General Meeting on 19 October 2005, the International Convention against Doping in Sport was established and adopted unanimously. The convention determined among others that the Code should be implemented "[...] through instruments appropriate to the constitutional and administrative contexts of each government [...]"⁹ Once the 30 countries required had ratified it in terms of art. 37 of the Convention, it came into effect on 1 February 2007.¹⁰

The convention does not impose any mandatory harmonisation of legislation. The obligations of a government can also be met through a policy of self-regulation. The convention partners are free in their choice of the instruments to be deployed to comply with the Convention obligations, varying from legislation to administrative procedures. The free choice is established explicitly in article 5.¹¹ In adopting the Convention a Party to the Convention assumes a variety of obligations. However a large number of these obligations are preceded by the clause "where appropriate",¹² and cannot thus be regarded as fixed obligations, but rather as obligations of effort. If the clause is included in a provision, this offers a Party to the Convention the scope to assess whether the provision is relevant to its own specific situation. All this goes together with the distribution of responsibility between organised sport and governments which applies in many countries, namely because it is the sports who bear the primary responsibility of combating the use of doping. In such a situation most of the obligations of the Parties to the Convention are also realised via the organised sport, and the governments only play a stimulatory role.

Generally the Parties to the Convention are free in their national anti-doping policies to take more far-reaching measures, such as established in article 4, first paragraph.¹³ This is important for the Parties to the Convention who have a different responsibility distribution than that mentioned earlier, and who attempt to combat doping via (punitive) legislation for example.

Under art. 6 of the convention: "[T]his 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." In its generality the Agreement to Combat Doping from the Council of Europe of 16 November 1989 has a higher standard than the UNESCO Convention.¹⁴ The current anti-doping policies of the 40 or so countries which have ratified the Council of Europe's anti-doping convention¹⁵, also comply with the obligations arising from the UNESCO Convention. An important difference between the UNESCO Convention and the convention from the Council of Europe is recognition of the mission of the WADA and of the principle of equal funding of the WADA by sport and governments. In contrast to that of the Council of Europe, the UNESCO Convention also has a global reach.

One of the few firm obligations imposed upon a party to the convention can be found in art. 8. Measures must be taken to regulate the availability of banned substances and methods in such a way, that their use by athletes in sport is restricted. Article 11 prescribes that a party to the convention must dictate requirements to the sporting

4 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 13.

5 World Conference on Doping in Sport Resolution, adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003, sub 1.

6 World Conference on Doping in Sport Resolution, adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003, sub 2.

7 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 1.

8 The elaboration of the new instrument was proposed during the Round Table of Sports Ministers that gathered 360 participants from 103 countries at UNESCO in

January 2003. The idea was endorsed at the 32nd session of the General Conference in 2003. The Convention draft was then developed with input from representatives of 95 countries and the financial contribution of 9 Member States: Australia, Canada, Denmark, Finland, Iceland, Japan, Norway, New Zealand and Sweden, according to a UNESCO press release of 20 October 2005.

9 In the Netherlands the Minister of Foreign Affairs presented the UNESCO Convention to parliament for tacit approval by letter of 20 September 2006. (See Dutch Parliament, meeting year 2006-2007, 30 835 (R 1816), A and no. 1). Under art. 5, sub 1 of the Statute Law of

7 July 1994, complying with a regulation concerning the approval and notification of decisions of international legal organisations is accorded tacit approval, if the wish is not notified within 30 days of the presentation of a convention to the parliament by or on behalf of one of the Chambers or by at least a fifth of the constitutional number of members of one of the Chambers, to make the convention subject to explicit approval. From the fact that the convention came into effect in the Netherlands on 1 February 2007, it can be inferred that the members of parliament had no need of a parliamentary consideration of the convention.

10 "No convention in history has been adopted so quickly and ratified so quick-

ly", according to the former chairman of the WADA Richard Pound. www.wada-ama.org/en/dynamic.ch2?pageCategory.id=254.

11 "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."

12 See: Art. 8, 10, 11, 12, 16, 23 and 26.

13 "Nothing in this Convention prevents the States Parties from adopting additional measures complementary to the Code."

organisations in terms of carrying out their own adequate anti-doping policy. Should a sporting organisation not comply with this, the sanction of subsidy reduction must be applied. Individual athletes who have committed a doping offence must also be restricted in terms of financial entitlements they may claim on the basis of benefits arrangements applying to leading sportspersons.

The Relationship between the UNESCO Convention and the Code

In signing the Copenhagen Declaration the government representatives primarily indicated acceptance of the Code, and they uttered the intention to achieve formal acceptance and implementation of the Code. They agreed “[...] to articulate a political and moral understanding among Participants to: [...] Support the World Anti-Doping Code [...]”.¹⁶ Given that governments, as statutory organs, cannot bind themselves to a text which has been conceived by a private body, the Declaration must be followed by a convention, intended to establish the desired legally binding foundation. During the deliberations which led to the UNESCO Convention, the Dutch delegation argued strongly that the convention would not lead to a mandatory harmonisation of legislation. Ultimately the Code was attached to the Convention as Appendix I for information, and did not form an integral part of the Convention.¹⁷ On the basis of art. 3, sub (a) the parties to the convention are only obligated to fulfilment of the object of the Convention, to the introduction of suitable measures at a national and international level which are consistent with the principles of the Code. The convention expects this of the parties to the convention under art. 4, sub 1 “[I]n order to coordinate the implementation, at the national and international level, of the fight against doping in sport.” Although the Parties to the Convention do not accept the wording of the Code¹⁸, they commit to taking measures which are consistent with the principles of the Code. These principles can however only be derived from the wording of the Code. If it is not the wording of the Code, but the principles inherent in the Code which are determinant, this could lead to problems of interpretation. Each party to the convention could take measures on the basis of its interpretation of the Code’s principles. Interpretation of the principles could differ from country to country. This is at odds with the preamble of the convention’s intended “harmonisation of anti-doping standards and practices in sport [...] at [...] global level”. The convention does not obligate the parties to the convention to the introduction or harmonisation of national legislation, and they are free in their choice of the instruments to be deployed to comply with the convention’s obligations. They are only bound by the principles of the Code. How then should one in fact read art. 23.5.1. of the Code in this light? There it is established that “[N]oncompliance 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 [...] The imposition of such consequences may be appealed by the National Olympic Committee or government to CAS [...]”.¹⁹ For the parties to the convention this could probably involve the provision “noncompliance with the principles of the Code”. Although the parties to the convention have not adopted the wording of the Code as such, they also raised no objection to the wording during the second World Doping Conference. They have committed to ensuring that the sporting

organisations incorporate the wording in their doping regulations in their territories. They themselves are obliged to reflect the wording as far as possible in their own anti-doping policies.²⁰

When it applies, art. 12(a) of the Convention stipulates, the parties to the convention must promote and facilitate the execution of doping checks by the sporting and anti-doping organisations within their jurisdiction, and in a way which is consistent with the Code, including checks which occur unannounced, outside the competition context. With this the parties to the convention have accepted that non-governmental organisations (and also foreign non-governmental organisations) may carry out doping checks outside competition contexts. They have accepted that the organisations must grant access to the homes and private lives of their subjects.

Out-of-Competition Doping Controls

At the beginning of the sixties anabolic steroids first appeared on the market. The introduction of these substances and the fact that they were relatively easy to obtain changed the nature of the doping problem in one fell swoop. The use of anabolic steroids, among which the male growth hormone testosterone, offers athletes the opportunity to stimulate the growth of muscle tissue without them having to undergo rigid training. The administration of these substances mainly occurred in the out-of-competition season and during periods of training. Initially, showing the use of anabolic steroids in the analysis of the urine samples of the athletes tested was a huge problem. After some time, however, an effective method of analysis was developed. This method was applied for the first time in the analysis of the samples taken during the European athletics championships in Rome in 1974. A new problem revealed itself. As the steroids were used during periods of training and their presence in the athletes’ bodies during competitions (i.e. a month later) had virtually disappeared, the analyses rendered nearly no positive results. The doping controls within the competition context were, as far as anabolic steroids were concerned, inadequate. An effective anti-doping programme to deter athletes from using these substances would therefore need to target the controls during these times. At the end of the eighties, rules were included in the doping regulations of a number of international federations making (unannounced) ‘out-of-competition’ doping controls possible. These federations applied some pressure to their members, the national sports federations, to lay down such rules in their doping regulations and to establish and carry out a national out-of-competition doping control programme. In order to be able to adequately carry out such a programme, the federations needed to know at what location, wherever in the world, an athlete underwent his training regime. Some doping regulations stipulated that an athlete not stating his whereabouts did, in fact, commit a doping offence. Apart from the fact that the national federations had to apply out-of-competition controls to the athletes registered with them, the international federations reserved the right to conduct such tests throughout the world with the co-operation of their members. The national federations were obliged to supply the addresses of the athletes registered with them to the international federations. Parallel to the efforts of the international federations displayed at the end of the eighties with respect to worldwide, unannounced out-of-competition controls, run the activities in this area of the Council of Europe.²¹ Article 4 (3) (c)

14 See art. 6 of the UNESCO Convention.

In its final version this article states that the present International Convention Against Doping, following entry into force, shall not prevail over other existing instruments sharing the same goals. This particularly applies to the 1989 Anti-Doping Convention of the Council of Europe to which several States also participating in this Convention’s negotiation process are already signatories.

15 CETS No. 135.

16 Copenhagen Declaration art. 2 jo. art. 2.2.

17 See art. 4, sub 2 of the UNESCO Convention.

18 It is notable in this context that under the final sentence of art. 4, sub 1 nothing in the Convention prohibits parties to the convention from taking measures supplementary to the Code. Here the wording of the Code is used as a sound basis.

19 See also art. 13.4 of the Code. That confusion could also strike members of the government of a party to the treaty is apparent from a speech which the Dutch Secretary of State for Sport delivered on 12 February 2007 to representatives of the

member states of the Council of Europe, which was considering a review of the anti-doping code of the WADA: “At the end of the conference, I hope we all qualify as winners for again taking the fight against doping to a higher level. Because that’s what we all want: to be able to enjoy sport and the terrific achievements of top-class sportspeople who compete fairly and sportingly. In other words, without doping! It’s precisely this what we and billions of other people around the world want when we established WADA in the 1990s. A short time later we adopted the Anti-Doping Code.” (italics J.S.).

20 See also Copenhagen Declaration art. 4.1. “Each Participant [...] recognises the role of the Code as the foundation in the worldwide fight against doping in sport.” The WADA notes on its website that: “[B]ecause many governments cannot be legally bound by a non-governmental document such as [...] the Code, they accordingly, pursuant to the Code, drafted an International Convention under the auspices of UNESCO [...] to allow formal acceptance of WADA and the Code”. (italics JS).

and (d) of the 1989 Anti-Doping Convention of the Council of Europe, concerning measures to curb the availability of prohibited doping substances and methods, read:

'[...] the Parties shall:

1. encourage and, where appropriate, facilitate the carrying out by their sports organisations of doping controls required by the competent international sports organisations whether during or outside competitions; and
2. 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.'

In December 1991 the IOC Medical Commission established a working group having out-of-competition doping control as its field of study. One of the first findings of this working group was that, although some international federations (the IAAF, the FISA and the IWF) had proceeded to carry out this type of controls, these isolated attempts were inadequate. 'Effective coordination and harmonization between the various authorities responsible for these activities are indispensable; this should be undertaken by an ad hoc committee under the moral authority and guidance of the IOC'. In order to achieve some level of harmonisation in the then current rules that the various international federations had established with respect to out-of-competition testing, this issue was included in the agenda for the IOC Medical Commission's meeting in Lausanne on 13 January 1994. The representatives of the International Olympic Committee (IOC), the Association of Summer Olympic International Federations (ASOIF), the Association of International Olympic Winter Federations (AIWF), the international federations, the Association of National Olympic Committees (ANOC), the continental associations of NOCs and the athletes adopted principles which had to lead to the unification of 'their anti-doping rules and procedures for controls they perform both during and out of competition (unannounced tests)'.²² In June 1999 the executive organ of the IOC during a meeting in Seoul decided that doping controls would be carried out during training at the Olympic Games in 2000. The IOC had been pressured to a certain degree by the information given out by the Australian anti-doping office, which announced that it intended to conduct such tests.

Pursuant to the terms of the Lausanne Declaration, WADA was established on 10 November 1999 and would be fully operational in time for the 2000 Olympics in Sydney.²³ In the WADA Draft Mission Statement under 4.4. "Unannounced out-of-competition controls" it said: "The mission of the Agency shall be to encourage, support, coordinate, and when necessary undertake, in full agreement with the public and private bodies concerned, the organization of unannounced out-of-competition testing".

The World Anti-Doping Code came into force in 2003. Sporting organisations were required to incorporate specific parts of the Code in their anti-doping regulations within a specific period. These parts also

included those involving doping checks outside competition contexts. In terms of such doping checks outside competition contexts, the Code contained detailed and uniform rules for sporting and anti-doping organisations. In the official Commentary to art. 2.4. it is stated that: "[U]nannounced Out-of-Competition Testing is at the core of effective Doping Control". Art. 5.1.1. of the Code stipulates that every international sports federation must draw up a "Registered Testing Pool" for all athletes from the professional circuit and for the sportspersons who are included in a preselection for the Olympic Games, world and continental championships. Every national anti-doping organisation must establish such a 'pool' for such athletes in its country. The international federations and national anti-doping organisations must plan and carry out checks outside the competition context on the athletes in their 'pool'. Art. 14.3 of the Code stipulates that sportspersons included in the 'pools' - athletes who are thus eligible to be checked outside the competition context - must notify the anti-doping bodies precisely where they are and will be in the future: the so-called "athlete whereabouts information". "Without accurate athlete location information such testing is inefficient and sometimes impossible", according to the Commentary to art. 2.4. The WADA also lets readers of its website know that "because out-of-competition tests can be conducted anytime, anywhere, and without notice to athletes, they are the most effective means of deterrence and detection of doping and are an important step in strengthening athlete and public confidence in doping-free sport."

The international federations and national anti-doping organisations bear responsibility for collecting data about the athletes' whereabouts. This information must be forwarded to the WADA. The WADA makes the information accessible to the other anti-doping organisations which are empowered to check the athletes. Under art. 2.4. of the Code an athlete is guilty of a doping violation, if he does not provide the required whereabouts information.²⁴ The commentary to this provision also adds: "[A] violation of this article may be based on either intentional or negligent conduct by the athlete". The code of 2003 says nothing about the number of missed checks required to constitute a doping violation. According to the new version - accepted in November 2007 - an athlete runs the risk of a sanction if he has missed three or more checks over a period of 18 months.

Art. 15.2. of the Code stipulates that doping checks outside the competition context can be initiated and conducted by (a) the WADA; (b) the IOC or the IPC - with regard to the Olympic Games or the Paralympic Games respectively; (c) the international federation of the athlete; (d) the national anti-doping organisation of the athlete; or (e) the national anti-doping organisation of the country where the athlete is located. Where there is a combined effort, checks outside the competition context must be coordinated by the WADA in order to achieve the maximum possible effectiveness.²⁵

Doping inspectors from both national and international sporting and anti-doping organisations may come knocking at the door of any sportsperson who is included in the 'Registered Testing Pool' at any time to carry out a doping check.²⁶ Before investigating whether the

21 Out-of-competition testing was on the agenda of the European Sports Conference, held in Börlange (Sweden) on 30 October 1988. This was also the case at the second 'Permanent World Conference on Anti-doping in Sport' of 1989.

22 In the so-called Lausanne Declaration 'Preventing and fighting against doping in sport' it was agreed that the first stage in the fight against doping would be for the 'voluntary' bodies to reach an agreement to enable them to negotiate with the governmental bodies, with a view to eliminating the existing contradictions between national legislation and the rules of the sports movement'.

23 In cooperation with WADA the International Federations would - for the time being - maintain their competence and responsibility to apply doping rules

in accordance with their own procedures. Paragraph 1 of Art. 4 of the Constitutive Instrument of Foundation formulated one of the objectives of the WADA as follows: 'to promote and coordinate at international level the fight against doping in sport in all its forms including through in and out-of-competition controls; to this end, the Foundation will cooperate with intergovernmental organizations, governments, public authorities and other public and private bodies fighting against doping in sport, inter alia the International Olympic Committee (IOC), International Sports Federations (IF), National Olympic Committees (NOC) and the athletes; it will seek and obtain from all the above the moral and political commitment to follow its recommendations'.

24 The wording of art. 2.4. of the Code is identical to that of art. 2(3)(d) of the UNESCO Convention.

25 Cf. inter alia, Anti-Doping Rules of the UCI, rule 8. Given that at the international level, doping checks by the international sporting organisations outside competition contexts requires complex organisation and is additionally fairly costly, a private body such as International Doping Tests & Management (IDTM) has entered the market to assume the tasks of the sporting organisations. On its website IDTM recommends itself as a "state-of-the-art service provider of doping control management. [...] We deliver a global doping control service to keep your sport free of doping."

26 On 25 September 2007 the Gazette of

Antwerp carried a report that the management committee of the International Cycling Union (UCI) had decided on 19 September 2007, that the elite teams in cycling should contribute towards the unplanned doping tests carried out on their cyclists outside the competitions. This measure was an initiative of the association of ProTour teams (IPCT), but the UCI would supervise its execution. The results of the checks would be sent to the WADA. The UCI had calculated that in this way the number of unexpected checks would rise by 75%. The number of cyclists who would be subjected to this measure would also be expanded. In total this 'target group' as the UCI called them, would increase to some 800 cyclists.

powers are legitimate that the Code has accorded to national and international sporting and anti-doping organisations, it should be considered whether the anti-doping rules of the sporting organisations - in general - have been indemnified against testing by the courts.

The Nature of the Anti-Doping Rules

It is remarked in the Introduction to the Code that “[A]nti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played”.²⁷ With this explanation the compilers of the Code indicated that doping rules - because they are part of the rules of the game (“non-economic” rules) - are immune to testing by the courts. In the *Meca Medina* case the Court of Justice of the European Community blew a hole in this supposedly impenetrable armour. Swimmers *Meca-Medina* and *Majcen*, found guilty of doping and therefore punished, argued before the Court that the anti-doping regulations of the international sporting organisation concerned constituted a competition restriction in the sense of art. 81 EC. In a consideration important to the matter at hand, the Court reached the decision that “It is apparent 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 or the body which has laid it down”.²⁸ An activity could not *a priori* be immune from the effects of the EU treaty for the simple reason that it should be regarded as a sporting activity. The anti-doping rules which are also regarded by organised sport as “sport rules governing the conditions under which sport is played” should also be tested, the Court believed, against the competition provisions in the EC Treaty.²⁹ With the *Meca-Medina* case the Court of Justice provided an opening for testing anti-doping rules against the provisions of the EC Treaty. By analogy, I do not believe there is any plausible reason to argue why a “purely sporting rule” should not also be tested against provisions in the human rights treaties.³⁰

With the Code a system has been created controlled by the WADA, which enables anti-doping organisations to check athletes either announced or unannounced wherever they may be in the world, to test for the use of doping substances. This system has been accepted by the sporting organisations and parties to the UNESCO Convention. The courts will not be able to remain aloof, if a sportsperson complains that his human rights have been violated by the execution of a “purely sporting rule”, which accords a doping inspector the powers to gain (unannounced) access to the residence of a sportsperson and thereby to penetrate his private life. Will the judge be receptive to the argument from the sportsperson, that his right to privacy has been violated by the home visit of a doping inspector? In other words, are such home visits legitimate? To this end, the safe-

guards the rights offer the sportsperson must be considered, and secondly whether those rights also have validity in the relationship between the sportsperson and the sporting organisation and/or anti-doping organisation.

The Right to Privacy

Now that the countries which have accepted the UNESCO Convention have therefore also accepted the powers of the anti-doping organisations to carry out doping checks outside the competition context, on the surface it must be a notable conclusion to link the checks to the right to privacy. Notable, because one should always be able to trust that the representatives of countries which have ratified the Human Rights Convention, have not drawn up any convention which would be in conflict with the provisions of the Human Rights Convention.

It should again be pointed out that the countries which have ratified the UNESCO Convention, have not committed themselves to implementation of the Code. It is certainly the case, as we saw in the foregoing, that in ratifying the convention, at the very least they have linked themselves to the Code politically and in policy terms: they have undertaken to operate within the spirit of the Code. They have accepted that “For the purposes of this Convention: [...] ‘Anti-doping rule violation’ in sport means ... (*inter alia*) violation of applicable requirements regarding athlete availability for out-of-competition testing, including failure to provide required whereabouts information [...]”.³¹ It cannot be denied that the parties to the convention have endorsed the anti-doping practices of the sport and anti-doping organisations on the basis of the Code, and in particular with those concerning doping checks outside competition contexts. But have the parties to the convention thereby agreed to a practice which is in conflict with human rights? To determine this, art. 12 of the Universal Declaration of Human Rights³² or art. 17 of the International Covenant On Civil And Political Rights³³ can be taken as a yardstick, as well as in the European context, art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)³⁴.

Article 8 - Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁵

27 To cover itself further against outside interference, it was also stated in the Introduction to the Code that: “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.” It should be remarked as an aside that the anti-doping rules - in contrast to assertions in the Code - differ in character from rules of play (the “purely sporting rules”). Sport itself is entirely conscious of this given the disproportionate difference in seriousness of the sanctions which normally follow a contravention of the anti-doping rules on one hand, and serious contravention of the rules of the game on the other. At the same time a special course of proceedings has been created for dealing with doping contraventions.

28 Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991 paragraph 27.

29 In this case it appeared from the test carried out by the Court that the restrictions imposed - the anti-doping regulations and the sanctions imposed as a result of them - went no further than was judged to be necessary and proportionate, to guarantee legitimate objectives such as the integrity of the competition and the health of the sportspersons.

30 The *Guardian* reported on 26 October 2005, that “[T]he Professional Footballers’ Association chief executive said this week that the imposition of an effective out-of-competition testing regime would infringe his members’ human rights and said that he would consider strike action were it to be enforced.”

31 Art. 2(3)(d) UNESCO Convention.

32 “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.”

33 “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”

34 See also art. 7 of the Charter of Basic Rights of the European Union: “7: ‘Everyone has the right to respect for his or her private and family life, home and communications’. The Dutch Constitution determines on the matter of honouring the right to privacy: Art. 10, sub 1: ‘Every person has, subject to or by virtue of restrictions to be stipulated by the law, the right to respect of his personal privacy.’ Art. 11: ‘Every person has, subject to or by virtue of restrictions to be stipulated by the law, the right to the inviolability of his body’ and art. 12, sub 1: ‘Entry into a home without the resi-

dent’s permission is only permitted in the instances stipulated by or in accordance with the law, by persons who are designated by or in accordance with the law.”

35 In the *Hatton* Case the European Court of Human Rights gave the following definition of home: “A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person’s home, but also include those that are not concrete or physical, [...]. A serious breach may result in the breach of a person’s right to respect for his home if it prevents him from enjoying the amenities of his home.” P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.): *Theory and Practice of the European Convention on Human Rights* (Antwerp and Oxford 2006), p. 719.

The European Court of Human Rights has ruled a number of times that private life is a broad term not susceptible to exhaustive definition³⁶ It has nevertheless been outlined that it protects the moral and physical integrity of the individual³⁷, including the right to live privately, away from unwanted attention. It also secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his personality³⁸.

In the doctrine and the decision, two doctrines were developed on the issue of human rights which have a bearing on the matter under consideration: these concern the “positive obligations” and the “direct horizontal effects of human rights.” Both doctrines will be considered briefly to the extent that they have a bearing on the position of the sportsperson in doping checks outside a competition context.

Indirect Horizontal Effect of Art. 8 ECHR through “Positive Obligations”

If the doping organisation was a statutory body and the doping inspector despatched by the organisation was a ‘public authority’, then the sportsperson could refer to art. 8, sub 2 ECHR, if the inspector gained access to his home without the required written authorisation.³⁹ The only occasion that such a written authorisation is not required is if the home needs to be entered immediately to prevent or combat serious and immediate danger to the safety of individuals or goods.⁴⁰ In the Netherlands the doping inspector is not a government body.⁴¹ Obtaining access to a sportsperson’s home or place of work without prior authorisation does not occur “in accordance with the law and is necessary in a democratic society”. Here the sportsman is not regarded as a “suspect”. Should the sportsperson look upon all this with favour merely because of the fact that it is occurring within the context of private law? Is a sportsperson accorded fewer rights than someone suspected of a punishable act?⁴² Where the individual suspected of a felony could refer to the state’s “negative obligations” established in art. 8, sub 2 ECHR, it should also be possible that a citizen could employ the “defensive rights” in his favour against another citizen in the case of a breach of his privacy.⁴³ This should then occur with supportive assistance from the state. “While the [a negative obligation] presupposes the duty of states to *refrain* from action, the [a positive obligation], by contrast, imposes on the states the duty to *act* in order to ensure possibilities for the effective exercise of the Convention rights”, according to Cherednychenko.⁴⁴ The *Marckx v. Belgium* case is one of the first decisions of the Court of Human Rights pointing to the responsibility of a state in the case of violations of the rights of private persons guaranteed by the ECHR.⁴⁵ This case

involved a violation of the “right to respect for family life” of art. 8. The obligation of the state not to violate the right to a private and family life can imply a positive obligation, for example through the introduction of legislation which is in accordance with that right. The doctrine of the “positive obligations” does not imply that individuals can make a direct appeal to a basic law in their private law relationships with each other. These relationships are however beginning “to lose their immunity for the effect of basic laws,” according to Cherednychenko.⁴⁶ According to Van Dijk and Van Hoof “It is established case-law that the Convention does not merely oblige the authorities of the Contracting States to respect the rights and freedoms embodied in it, but in addition requires them to secure the enjoyment of these rights and freedoms by preventing and remedying any breach thereof, and that, therefore, the obligation to secure the effective exercise of Convention rights may involve positive obligations on the part of the State, even involving the adoption of measures in the sphere of the relations between individuals.”⁴⁷ A government has the responsibility to ensure that individuals can enjoy their fundamental rights in practice. Measures can be expected from a government, should the rights of one individual be harmed by another individual.⁴⁸ The Code has created a situation in which a private law organisation (the WADA or a national anti-doping organisation) is enabled to violate the rights of an individual (a sportsperson). Checking the doping use of a sportsperson who is enjoying his or her leisure time in a home environment, on holiday with his family or in his office, cannot be seen any other way than a violation of his right to “respect for his private and family life and his home”. In signing the Copenhagen Declaration and ratifying the UNESCO Convention, the countries which are party to the ECHR and which had on its basis a “positive obligation” to guarantee the fundamental rights of a sportsperson, have grouped behind the WADA mission and have accepted the principles of the Code. They have accepted that a private organisation may enter the home of a sportsperson (“domiciliary visit”)⁴⁹, without the sportsperson being able to call on the “defensive rights” which are established in art. 8, sub 2 ECHR. Even should a party to the ECHR have incorporated into its legislation that such “domiciliary visits” may occur, the sportsperson can nevertheless dispute its legitimacy. In the *Young, James and Webster v. The United Kingdom*⁵⁰ case the European Court of Human Rights considered that “[U]nder Article 1 of the Convention, each Contracting State shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [...] [this] Convention”; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation

36 See, as a recent authority, *Peck v. the United Kingdom*, appl. no. 44647/98, par. 57.

37 See *X and Y v. the Netherlands*, 26 March 1985, Series A no. 91, paras. 22-27.

38 See *Brüggegan and Scheuten v. Germany*, appl. no. 6959/75, par. 55.

39 In the Netherlands the following are empowered to issue authorisation for entering in accordance with Art. 3, sub 1 of the Algemene Wet op het Binnentreden (Awbi, or General Entry Law): a. the Advocate General of the Court; b. the Public Prosecutor; c. the Assistant Public Prosecutor.

40 Art. 2, sub 3 of the Algemene Wet op het Binnentreden (Awbi or General Entry Law).

41 Under the regime of the Human Rights Act in *Popular Housing and Regeneration Community Association Ltd v Donoghue*, [2001] EWCA Civ 595, the British Court of Appeal provided a summary of factors which a body needed to meet to be regarded as a ‘public authority’. The factors are: 10. Statutory authority; 20. control over the function by another body which is a public authority; 30. acts which might be of a private nature being

enmeshed in the activities of a public body; 40. closeness of the relationship with a public body; and 50. transfer of responsibilities between public and private sectors”. Except in countries where the doping checks are based on a law, in countries which do not have such legislation doping organisations cannot be regarded as ‘public authority’. In other countries, too, the WADA cannot be viewed as such an authority.

42 In an interview with the *Stuttgarter Zeitung* of 14 November 2007, mountain-biker Lado Fumic was one of the few athletes to unburden his heart: “[...] and now you ask me about my objections to dope tests. I’m not opposed to the battle against doping, on the contrary. But I have a major problem with being treated like a super-criminal just because I’m an athlete. I have a major problem with the fact that human rights are not supposed to apply to me, I’m simply opposed to the permanent and continually growing violation of my personal rights.”

43 Art. 1 ECHR obliges the member states “to secure to everyone within their jurisdiction the rights and freedoms defined in [...] this Convention”.

44 Olha Cherednychenko: “Towards the Control of Private Acts by the European Court of Human Rights?” (*Cherednychenko I*), in 13 MJ 2 (2006), p. 199.

45 See *Marckx v. Belgium*, 13 June 1979, appl. No. 6833/74, par. 31.

46 Olha Cherednychenko: “Fundamental rights, Contract and the Protection of the Weaker Party” (*Cherednychenko II*), PhD Tilburg 2007, p. 513.

47 P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.): “Theory and Practice of the European Convention on Human Rights” (Antwerp and Oxford 2006), p. 836.

48 “[...] the state may be held to be under an obligation to amend the legislation which makes it possible for one individual to infringe the rights of another individual [...]”, according to *Cherednychenko I*, p. 200.

49 According to the Dutch legislation, entering a residence is only permitted following the issuing of a search warrant. Without such a warrant the issue becomes one of unlawful entry, and any evidence thus obtained was “obtained illegally”.

50 13 August 1981, 7601/76;7806/77, par. 49.

British legislation had enabled the British Railways Board to fire employees who refused to join a trade union chosen by the Board. The ECHR found this to be in conflict with art. 11 ECHR.

51 A state must ensure that the convention obligations are also respected in the horizontal relationship between non-state actors mutually. “Should the convention state not succeed in doing this as required, and should the activities of private actors lead to violations of the rights included in the ECHR, then it shall hold the private actors responsible for such violations: in accordance with the international law principles concerning state responsibility, it shall bear the responsibility of “guilty oversight” according to J. Wouters and L. De Smet: “The ECHR, international human rights standards and (multinational) organisations”, Katholieke Universiteit Leuven, Faculty of the Science of Jurisprudence, Institute for International Law, Working Paper No. 37 - January 2003, revised June 2003, p. 12.

in the enactment of domestic legislation, the responsibility of the State for that violation is engaged.”⁵¹

“The obligation to modify legislation only arises if a violation of the Convention derives directly or unavoidably from national legislation.”⁵² The doctrine of the “positive obligation” “opens up possibilities for the protection of individuals from each other by holding the state responsible in the international arena for a failure to legislate or grant horizontal effect to fundamental rights in order to guarantee fundamental rights standards in relationships between private parties.”⁵³ Should there not be any legislation concerning doping checks outside a competition context, which violate the right guaranteed in art. 8 ECHR on respecting private lives and the home, but which do indeed create such a situation *de facto* by the acceptance of an international public law instrument, then the government is obliged to take measures to remove the possibilities which lead to such a violation. In the matter under discussion this can then lead to countries which have accepted the ECHR, calling for a review of the UNESCO Convention. In that convention a clause should be incorporated forbidding doping checks outside the competition context if such checks violate the right of the individual to “respect for his private and family life and his home”.

It will be a difficult task for an individual sportsperson to move his government as legislative power via the courts or parliament, to enact measures which will lead to doping inspectors being bound to consider his right to privacy. Testing the activities of the WADA and the NADOs remains indirect within the system of “positive obligations.” Legal proceedings could only be launched against states, and only the states may be held responsible. In this system the WADA and the NADOs remain out of range. Governments will not easily be inclined to enact measures now that they have knowingly accepted the UNESCO Convention. They will not concede easily - given the loss of face this would entail - that they have created a situation to the detriment of individual sportspersons.⁵⁴ At the same time governments will fall back on the fact that the Anti-Doping treaty of 1989 which they accepted, was drawn up by the same body which drew up the ECHR. In art. 4(e) of that treaty the governments were even encouraged by the Council of Europe to facilitate doping checks by international sporting organisations outside the competition context.

During the time that the provisions of the Code regarding the checks outside the competition context are not amended, there is - possibly - another route which may serve the sportsperson in enforcing his right to privacy. On the basis of a possible horizontal effect of art. 8 ECHR, he could accuse the doping inspector of interfering in his private life and deny him access to his home.

Direct Horizontal Effect of Art. 8 ECHR

Originally the fundamental rights in the constitution and in human rights treaties, as an aspect of public law, were only applicable in the vertical relationship between the state and its citizens. The intended rights only fulfilled the function of defending citizens against the

state, and their influence on the relationship between citizens mutually was minimal.⁵⁵ Seen in this light, a sportsperson challenging the violation of his “right to respect for his private life and his home” can only resort to art. 8, if his country incorporates legislation involving doping and the anti-doping organisation is a state body. Among others this is the case in Belgium, France, Italy and Spain. In these countries, which do not have anti-doping legislation, the relationship between the non-statutory anti-doping organisation and the sportsperson has a private law nature. Here it must be added immediately that in the countries which have a statutory national anti-doping organisation, the relationship between the WADA and the sportsperson is untouched and has a private disposition. Should grounds for interference by a doping inspector in art. 8 ECHR be lacking, then in principle there is a violation.⁵⁶

A change has however occurred in recent decades in the view that the human rights established in the ECHR only have a vertical effect. “Gradually, horizontal relationships between private parties have begun losing their immunity from the effect of fundamental rights”, according to Cherednychenko.⁵⁷ The assertion that the ECHR does not entail rights and obligations for citizens, would “be contrary to the entire idea of respect for the fundamental rights and freedoms upon which the ECHR is founded. If one accepts that the fundamental rights and freedoms are essentially inherent in the dignity of people, they must then be protected against any breach of this, irrespective of which actors lie at the basis of this.”⁵⁸ In a number of verdicts the European Court has taken the opportunity to consider that the ECHR has an effect in a private law relationship on the basis of art. 1 ECHR, which ensures the rights and freedoms of the treaty for everyone who resorts to the jurisdiction of the parties to the convention. It can also be said of art. 8 ECHR by the nature and the way in which it is formulated, that it should have a “third party effect.”⁵⁹

Over time an increasing number of citizens have called fellow citizens to account legally for violation of their fundamental rights. In the Netherlands the Supreme Court has accepted that, through the route of a private law category (unlawful deed), a horizontal effect is due to art. 8 ECHR with regard to the right of respecting the personal privacy.⁶⁰ It is notable that, although in principle the restrictive clause in the second sub of art. 8 addresses the vertical effect of the right to privacy, the Supreme Court decided furthermore that “[...] in connection with article 8 sub 2 ECHR [...] justification grounds can arise from written or unwritten law.” This restriction “only plays a role within the context of the private law doctrine of a treatment which would (otherwise) be unlawful,” according to Besselink.⁶¹ The privacy aspects can be taken into consideration by the Dutch courts. “The basic laws flow through to private law indirectly; they are translated into a private law interest.”⁶² This means that a basic law will be considered as a private law interest within open private law norms.⁶³ According to Hendrickx⁶⁴ direct third-party effects means “that one can resort to a basic right in such a way, that is to say as a basic law, in the relationship between private individuals, and not via private

52 Rick Lawson: “Positive obligations under the ECHR: rise and fall of the ‘fair balance’-test - Part I”, in: NJCM Bulletin 20-5 (1995), p. 561.

53 In the case *X and Y v. The Netherlands* (appl.no. 8978/80, sub 23) of 26 March 1985, the ECHR determined that a positive obligation rests on the convention states to guarantee the respect for private lives. This obligation “may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.” Cf. *Cherednychenko 1*, p. 200. Also in the *Appleby and others v. The United Kingdom* case of 24 September 2003, the European Court recognised that the existence of the “positive obligation” accorded a horizontal effect of the rights in the ECHR to private parties.

54 The Dutch state believes it has no restriction whatsoever in the wording of the Code. It is apparently of the opinion that in signing the Copenhagen Declaration, it was not restricted by the wording of the Code. The Declaration would only be by and for governments. In it, it is stated among other things that governments recognise the mission of the WADA (and not the WADA itself!) and subscribe to the principles of the Code (and not the Code itself!) and that the Public Authorities will work on a new international statutory instrument (see: the UNESCO Convention). A distinction between the Declaration (for governments) and the Code (for sporting organisations and anti-doping organisations) is essential.

55 Cf. *Cherednychenko 1*, p. 195.

56 See case *Halford v. The United Kingdom*, 25 June 1997, 20605/92, par. 51: “It cannot [...] be said that the interference was ‘in accordance with the law’ for the purposes of Article 8 para. 2 of the Convention, since the domestic law did not provide adequate protection to Ms Halford against interferences by the police with her right to respect for her private life and correspondence”.

57 *Cherednychenko 1*, p. 196.

58 According to J. Wouters and L. De Smet: *op.cit.*, p. 11.

59 See: E.A. Alkema: “The third-party applicability or ‘Drittwirkung’ of the European Convention on Human Rights”, in F. Matscher and H. Petzold, eds., *Protecting human rights: the European dimension* (Cologne 1988), pp. 42-45; D.J. Harris, M. O’Boyle and C.

Warbrick, *Law of the European Convention on Human Rights* (London 1995), pp. 19-22.

60 HR 9 January 1987, NJ 1987, 928 (par. 4.4).

61 L.E.M. Besselink: “Pitfalls and predicaments: the horizontal effects of citizen and political rights” in: C. Flinterman and W. van Genugten (eds.), *Non-state actors and human rights; established values, new routes* (The Hague 2003), p. 7.

62 Cf. HR 22 January 1988, NJ 1998, 891 (Maimonides-lyceum).

63 Cf. L.E.M. Verhey: “Horizontal effects of basic laws, in particular the right to privacy” (Zwolle 1992), p. 426.

64 F. Hendrickx: “Privacy and labour laws”, in: *Juridisch Wetenschappelijk Studententijdschrift*, faculty of the science of jurisprudence, KU Leuven.

law concepts. The basic law must achieve its justice as a basic law. This is not the case if one suggests that it is sufficient for one to retrieve the value which lies behind the basic law, in the private law concepts." Although their approaches to the basic laws can differ⁶⁵, courts in other Western European countries have also acknowledged the horizontal effect of art. 8 ECHR.⁶⁶

It is up to the national court to decide whether the complaint of a sportsperson on the basis of the privacy right of art. 8 ECHR can be honoured. In Dutch law this can be founded in the form of an action from an unlawful deed. Normally an action from an unlawful deed gives rise to a claim for damages.⁶⁷ A different legal consequence is also possible.⁶⁸ An important reason for linking to an unlawful deed action is that in the second sub of art. 6:162 Civil Code, the categorisation introduced for determining the unlawfulness of the argumentation can perform excellent service.⁶⁹ The category concerning the "violation of a right" encompasses acting whereby a violation is committed on the subjective right of someone else. The most important subjective rights which play a role in the unlawful deed are the rights of property and character rights. In terms of unlawful argumentation this is generally a violation of the character rights. In interpreting the concept of character rights, the basic laws and the treaties' legal human rights play a crucial role. Character rights are taken to mean rights inalienable to the person or associated with the character, such as the right to private life. Within the context of the unlawful argumentation, the right to protection of one's private life is certainly an issue. At the end of this article I will return to the theme of illegally obtained evidence.

Appeals against judgments by national courts can be lodged with the ECHR. This court can review the decisions, "in particular those which involve an interpretation of national private law or instruments [...] as to their compatibility with fundamental rights standards"⁷⁰ In the *Hoffmann v. Austria*⁷¹ case the ECHR ruled that "[T]he Supreme Court's decision [...] constitutes an interference with the applicant's right to respect for her family life and the case thus falls within the ambit of Article 8. The fact relied on by the Government in support of the opposite view, namely that the Supreme Court's decision was taken in the context of a dispute between private individuals, makes no difference in this respect." In the *Pla and Puncernau v. Andorra*⁷² case the ECHR formulated the rule that "[T]he Court is not in the territory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it [...] a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention [...]". By saying in so many words that it "cannot remain passive" when a court's interpretation of a "private contract" (and thus more) is in conflict with the ECHR, the ECHR declares itself to be prepared to expand its dominion over the entire terrain of private law. All this means that a complaint from a sportsperson arising within association law, that his right to privacy guaranteed in art. 8 ECHR has been violated by an anti-doping organisation, can therefore also be heard before the ECHR.

It could therefore be that - in the first instance - the national court in a private law dispute based on its national legislation - which complies with the requirements of the ECHR - reaches an interpretation which is in conflict with the fundamental rights in the ECHR, or - in the second instance - that the national court issues a judgment which reflects a correct interpretation of its national legislation, but that this legislation is in conflict with the fundamental rights in the ECHR. In the first-mentioned instance, the question arises "as to the compatibility of a discriminatory treatment by a private individual with the Convention".⁷³ The latter instance concerns a violation of the ECHR by the state and lies within the field of the "positive obligation" doctrine, and then the state is given to understand that its legislation must be amended.

The sportsperson who believes that his right to respect for his private life and his home has been violated by a doping check outside the

competition context, can lodge a case based on an action of unlawful deed based directly on art. 8 ECHR, against the anti-doping organisation which has directed the doping inspector to him. It is possible that the court will issue a verdict in his favour. If on the contrary the court - in the highest instance - should reach a verdict unfavourable to him, or if the judgement is unacceptable to the doping organisation, then the decision can be lodged with the ECHR for review in terms of art. 34 ECHR⁷⁴.

Which extra arguments can the sportsperson introduce into the case to convince the court that the right established in art. 8 ECHR is applicable to his relationship with the doping organisation? He could maintain that as the 'weaker party' in terms of the powerful doping organisation, he deserves protection and that the interests of a doping check outside the competition context are disproportionate in comparison to his right to respect for his private life and his home. Finally the sportsperson will need to defend himself against the argument of the sporting world that he, in making a voluntary choice to exercise a sport, has ceded his right to privacy on a voluntary basis.

The Sportsperson as the Weaker Party

There is a considerable lack of a balance of power between the sportsperson and the doping authorities (including the international sporting organisations). The sportsperson must often simply acquiesce in what is imposed upon him by his opposing party. Increasingly onerous sanctions are being requested. The sportsperson must undergo doping checks while he is enjoying his leisure time. Three months in advance the sportsperson must indicate where he will be during this period (the 'whereabouts'). According to an IOC draft regulation, to facilitate unannounced 24-hour doping checks athletes must indicate where they will be in two-hour time blocks; absence during a check counts as a positive test. The sportsperson simply has to submit to all this. Sportspersons may not say a word about the policy, they must just remain silent. Sportspersons face powerful anti-doping and sporting organisations, which are supported by a number of statutory bodies. The sportsperson finds himself in the wrong scale of the balance. The privacy expectations of the professional sportsperson are being steadily devalued. These are the expectations one has about the interference by third parties in the private life within the social context in which one is found or operates. If one can be visited unannounced by anti-doping officers anywhere in the world, in any situation, at any time, the expectation of enjoying any privacy cannot be great.⁷⁵ This marginalised privacy expectation does not occur in any

65 One legal system regards private rights as subsidiary to fundamental rights, while in another the relationship between fundamental and private rights is regarded as complementary. Cf. Olha Cherednychenko: "Fundamental rights and private law: a relationship of subordination or complementarity?", in: Utrecht Law Review, Vol. 3, Issue 2 (December) 2007.

66 See: Wouters and De Smet, *op.cit.* p. 14. Cf. also: Belgium, Court of Cassation, 27-02-2001 (www.cass.be); Luxembourg: Tribunal d'arrondissement Luxembourg, 6-4-2000, Rev.Trim.Dr.h.2001, pp. 851 et.seq.; France: Cour de Cassation, 12-1-1999, A.J.T. 1999-2000, pp. 756 et.seq.; In Germany: Bundesverfassungsgericht, 19-10-1993, BVerfGE 89, 214.

67 Art. 6:162, sub 1 Civil Code stipulates that "Anyone who commits an unlawful deed against another, which can be attributed to him, is obliged to compensate the damage which the other suffers as a result thereof."

68 Apart from a declaration for law according to art. 3:302 BW, an injunction or interdiction according to art. 3:296 BW or a rectification ex art. 6:167 BW are among the possibilities.

69 "An unlawful deed is taken to include a violation of a right and doing or omitting in conflict with a legal obligation or with that which is considered proper according to unwritten law in society, all subject to the presence of justification grounds."

70 *Cherednychenko I*, p. 203.

71 EHRM 23 June 1993, Appl. no. 12875/87, sub 29.

72 EHRM 13 July 2004, Appl. no. 69498/01, sub 59.

73 *Cherednychenko I*, p. 207.

74 "The Court may receive applications from any person, [...] claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

75 "The sportspersons themselves are not heard in the doping debate. They are only the gladiators. The rules of the game are determined by others in accordance with an ethical code which does not apply in the 'normal' professional world and which would certainly not be attainable there," according to those drawing up the manifesto which was

other professional group outside professional sport, and the question is whether a sportsperson must consent to such a far-reaching curtailment of his right to respect for his private life, his family life and his home for the simple reason that otherwise the battle against doping cannot be won. Even if permission to interfere with the private life is given voluntarily, even then such permission may not lead to the right to privacy itself being fully destroyed. The 'privacy expectation' concept should certainly imply that a different assessment will be made of the right to privacy of a sportsperson depending on whether or not he is occupied with his sport, i.e. occupied with a training session, or that he is situated in his home and is devoting himself there to his family life, or is enjoying a holiday.

If a sportsperson wishes to participate in competitions, he must agree contractually that he will subject himself to any doping check in accordance with the stipulations laid down in the sporting regulations. From their position of power the sporting organisations can impose their will. The sportsperson must subject himself as the weaker party.⁷⁶ It must be recognised that in such a considerable absence of a balance of power between parties, actual contract freedom is in fact lacking for the weaker party. In classic contract law the weaker party is obliged to fulfil his contract: *pacta sunt servanda*. In her dissertation Olha Cherednychenko shows that "Within the system of contract law a tendency can even be perceived towards a more socially-oriented contract law, which is expressed in an increasing concern for the interests of the weaker party. In contrast to the traditional contract law, current contract law insists far more carefully on the weighty predicate that the agreement must have been signed voluntarily."⁷⁷ In his relationship with a powerful opponent the weaker party may appeal to the fundamental rights of the ECHR. This will also apply to the sportsperson, who is compelled to observe the sporting regulations of his national and international sporting organisation by virtue of his membership of an association.

Appeal to Proportionality

The right to privacy is not an absolute right. Under certain circumstances a restriction of the right is permitted. How far may this restriction extend? Can a sportsperson insist that the interference in his private life by doping checks outside the competition context is unlawful, because it is not in proportion to the objective which the checks strive to attain, and that it is thus disproportionate?⁷⁸ Those who impose the restriction are not simply permitted to cite the first reason which comes to hand. The right to privacy cannot simply be balanced against the right to the discharge of an authority's powers without any nuancing. To determine whether a curtailment should be regarded as proportionate, a double test can be used, according to Hendrickx.⁷⁹ "In the first instance it contains a relevance test: in other words that each privacy-restricting measure must be relevant or suitable to safeguard the justified interest. An interference in the basic laws may thus not be pointless. Secondly there is a proportionality test. Every measure, condition, restriction or sanction must be proportionate to the objective to be attained. The necessity requirement⁸⁰ implies that the restriction may not go further than is needed." Although one could assert on plausible grounds that doping checks outside the competition context are suitable to safeguard a justified interest, one could wonder in all conscience whether such checks without prior warning in the home of a sportsperson, where he is enjoying his right to a pri-

vate life, do not in fact go further than necessary. Is such a check a necessary "step in strengthening athlete and public confidence in doping-free sport"? Unannounced doping checks during training sessions are of themselves a "most effective means of deterrence and detection of doping". If one weighs the right of the sportsperson to respect for his private life, against actions of the sporting organisation which must generate confidence among the public that the sport is doping-free, then the sportsperson's right to privacy must take precedence.

Voluntary Submission - Renouncing the Right to Privacy?

Should a sportsperson lodge a case against an anti-doping organisation, then in the first place the organisation will argue that the sportsperson submitted himself voluntarily to the anti-doping regime of his national sporting organisation. But how voluntary is that voluntariness? "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"⁸¹, according to the Introduction to the Code. In its Commentary it is noted that: "[B]y their participation in sport, athletes are bound by the competitive rules of their sport. In the same manner, athletes [...] should be bound by anti-doping rules based on Article 2 of the Code by virtue of their agreements for membership, accreditation, or participation in sports organizations or sports events subject to the Code. Each Signatory, however, shall take the necessary steps to ensure that all Athletes [...] within its authority are bound by the relevant Anti-Doping Organization's anti-doping rules."

Someone may participate in sport from his own free will, but his will is not free when it comes to doping checks. If an athlete reaches the top in his sport through his talent and hard work, he is included in the "Registered Testing Pool", and outside the competition context he can be tested for the use of doping at any time, anywhere in the world. There is absolutely no question of making a free choice to submit to this type of doping check. The voluntariness which the sport refers to is a legal (dogmatic) presumption, which does not accord with the reality, even though the Introduction to the Code mentions in passing that: "[A]thletes accept these rules [i.e. the anti-doping rules] as a condition of participation." The important question arises here as to whether an individual can cede his basic rights to privacy in an association law relationship. Without the permission of a sportsperson, in principle interference is not possible in his private life, but the submission to doping checks outside the competition context is a "condition of participation". If a sportsperson does not agree to such checks, then he may not participate in competitions. And participation in competitions is an essential component of the sport, certainly for sportspersons who do not exercise their sport in a recreational manner. Refusing to submit to the doping rules of the Code means that the sportsperson will only be able to exercise his sport in a recreational manner. If a sportsperson wishes to take part in competitions, he must submit to the doping regime of his international sporting federation's established rules in the Code. Once again, there is no question of voluntary agreement.

An invitation to cede the right to privacy voluntarily can be regarded as unethical under certain circumstances. In professional cycling, for example, it does indeed occur. An elite cyclist who is under contract may only exercise his profession, i.e. participate in competitions,

published on 14 March 2005 in the Belgian newspaper "Het Nieuwsblad".

⁷⁶ In June 2007 the UCI demanded that cyclists sign an anti-doping declaration (Riders' commitment to a new cycling). In signing the declaration the signatory declared that he was not involved in the Puerto affair or any other doping issue, and that he would comply with the UCI's anti-doping regulations. The cyclist also accepted by signing, that he would owe the UCI a year's salary if he was suspended for two years or longer for contraven-

ing the anti-doping regulations. Finally the cyclist declared by signing that he was prepared to cooperate with DNA investigations relating to the Puerto affair. Signing was not obligatory. However because the UCI revealed publicly who had signed the declaration, hesitant cyclists were suspected indirectly. It was a misunderstanding, that without signing this document the riders could not appear in the Tour de France. In a press release the cyclists of the Rabobank team declared their acknowledgement of

doping in cycling, and they supported the UCI in the battle against this problem. The cyclists also believed that the UCI showed no interest in the free choice of the individual cyclist. The members of the RABO team eventually signed the declaration, albeit under duress.

⁷⁷ Cherednychenko II, p. 513.

⁷⁸ Cf. the case of the European Court: *The Sunday Times v. The United Kingdom*, 26 April 1979, Appl. no. 6538/74, par. 62.

⁷⁹ Hendrickx, *op.cit.* under B.3.

⁸⁰ "Under the Court's settled case-law, the

notion of 'necessity' implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued." Zaak *Smirnov v. Russia*, 7 June 2007, Appl. no. 71362/01, Par. 43.

⁸¹ Most of the provisions in the Code - including those involving doping checks outside a competition context - must be incorporated into the International Sporting Organisations' anti-doping rules wording.

if he possesses a licence from the UCI or his national association. Of itself this can already be regarded as a violation of the cyclist's economic and social rights, namely the right to employment. This right is guaranteed by a variety of international legal instruments.⁸² The licence is only issued if the sportsperson declares his submission to any anti-doping check in accordance with the provisions included in the sporting regulations, thus also to doping checks outside the competition context. Acquiring a licence is not founded on voluntariness, indeed to the contrary: without a licence the cyclist cannot exercise his profession and given that an employer cannot be expected to have a cyclist in service who cannot exercise his profession, the days of the cyclist as a professional cyclist will be numbered. The cyclist will regard himself as facing a dilemma when it comes to the licence application. Ceding the right to privacy means food on the table; maintaining one's principles by choosing the right to privacy means ceding the right to employment.

"To justify committing non-state entities to basic laws, a distinction is indeed drawn between 'voluntary' and 'compelled': if an entity is a compelled association of which one is not voluntarily a member and from which one may not withdraw voluntarily, then committing to basic laws is more readily indicated than when there is a voluntarily association."⁸³ Committing to the basic laws is certainly indicated in the (compelled) association between anti-doping organisations and sportspersons because - as we have seen - the voluntary submission of sportspersons to the underlying doping checks is a fiction; in addition, withdrawing from the association is unrealistic for professional sportspersons.⁸⁴ "Professional athletes regularly have to submit to the sanctioning power of the association, to be able to pursue their profession in the first place. The voluntary element that is otherwise characteristic of civil law therefore hardly applies in the field of sports jurisdiction", according to Reinbart.⁸⁵ "Because athletes depend for their existence on the monopoly organisation in commercialised sports, they cannot escape this dependence; in practice, autonomously protecting their own interests is not possible for them; they depend [...] on others for protection", according to Fritzweiler.⁸⁶ Given a lack of private law voluntariness and the need for protection, the sportsperson is offered the fundamental right to privacy guaranteed in art. 8 ECHR.

The foregoing considered doping checks outside the competition context, which violate the private life of a sportsperson, without devoting any attention to the consequences of such a check. If the doping check is qualified as unlawful, should then a doping contravention which arises from such a check, indeed be prosecuted? Does it not then fall to a judge to declare the submitted sample introduced as evidence, as evidence obtained unlawfully? To put it another way: where such checks turn out to be positive showing the sportsperson to have used doping, does that person get off free?

Unlawfully Obtained Evidence

Analysis of the blood taken during the doping check on Andrej Kashechkin indicated that the cyclist was guilty of blood-doping, which is forbidden in the UCI's doping regulations and the Code. Proof of a doping contravention was submitted and a sanction was imposed for this transgression. Thus proof of a doping contravention had been obtained through carrying out an unlawful deed. The disciplinary judge, who abided by the rules of the doping regulations, had not reached such a conclusion, and neither did he have to. The relevant rules in the doping regulations are after all derived from the Code and supported by a large number of governments. There was no reason whatsoever for the disciplinary judge to suppose that a doping check carried out during a sportsperson's holiday was in conflict with fundamental rules. A 'normal' judge would have reached the conclusion that the doping check was unlawful and that the evidence which the check had yielded was inadmissible. In Dutch law a disciplinary decision is regarded as a settlement agreement. According to art. 7:904, sub 1 the restriction in such an agreement is nullified if such restriction "in connection with the content or means of establishment is unacceptable in the given circumstances by the criterion of reasonableness and fairness." If the agreement (in this case therefore the

underlying disciplinary sentence) is nullified, "the court may issue a decision, unless it follows from the agreement or the nature of the decision that it must be replaced in another manner," according to the second paragraph of the abovementioned article. The judge who is confronted with evidence unlawfully obtained by the disciplinary powers is faced with a dilemma. On one hand the disciplinary judge could arrive closer to the truth using the material, but on the other, the judge would wish to avoid unlawful conduct rather than honouring it. Unlawfully obtained evidence does not always have to be beyond consideration. In art. 6:162, sub 2 of the Dutch Civil Code, three categories are named which determine whether an act must be regarded as an unlawful deed, "all this subject to the presence of justification grounds." The need for justification grounds arises particularly in the "violation of a right" unlawful category named in art. 6:162, sub 2. "Whether the evidence stands up can only be assessed on the basis of the other available evidentiary material. Thus "necessity of proof" can be a justification for introducing unlawfully obtained evidence into the case", according to Embregts.⁸⁷ The problem in a doping case is however, that other than the unlawfully obtained evidence, no other evidence of a doping contravention exists. In principle there is thus no "necessity of proof" but rather an absence of all evidence. No matter how earnestly it goes against the sense of justice, the judge will have to nullify the disciplinary sentence.

Summary

A concrete result of the first World Conference on Doping in Sport, attended by representatives of governments, intergovernmental organisations and international sporting organisations, was the establishment of the World Anti-Doping Agency (WADA). Among the WADA's first tasks was to draw up a global anti-doping code in which the technical and operational aspects of combating doping would be established. A number of sporting organisations, governments, doping specialists and key drafting experts were consulted in the process which led to the definitive wording of the World Anti-Doping Code. During the second World Conference on Doping in Sport, again attended by representatives of governments and international sporting organisations, the wording was approved. The sporting organisations committed themselves to the wording of the Code and the governments accepted the principles which were embodied in the Code. Because the governments could not commit to regulations drawn up by a private body, it was decided to draft an international treaty which would offer governments a legal framework for international harmonisation of the battle against doping in sport.

During UNESCO's 33rd General Session a large number of member states adopted the International Convention against Doping Use in Sport. The new convention urged member states to "implement educational and training programmes on anti-doping within their capacities," in this way making public opinion more aware of the damaging consequences of doping for sport's health and ethical values. More information should be distributed about the responsibilities athletes bear, and about the testing procedures. The signatories also undertook to "promote the active participation of athletes and sporting personnel in all facets of the doping battle." In terms of checks and sanctions, the UNESCO Convention stipulated that all athletes should be tested regularly against the same rules - with uniform sanctions for contraventions. The member states must take the

82 The Universal Declaration of Human Rights, art. 23, the International Convention on Economic, Social and Cultural Rights, art. 6 and the revised European Social Charter.

83 L.E.M. Besselink, *op.cit.*, p. 8.

84 A professional practitioner who believes the rules for his professional group to be crushing, can emigrate to a country where the sector uses milder rules; a professional sportsperson is bound by rules which are identical for his branch of sport everywhere in the world.

85 Michael Reinbart,

"Sportverbandsgerichtsbarkeit und Doppelbestrafungsverbot", in *SpuRt* 2001, p. 48.

86 Jochen Fritzweiler in, Fritzweiler/Pfister/Summerer: *Praxishandbuch Sportrecht*, Munich 1998, p. 12.

87 Meriam C. D. Embregts: "Definitive answer on evidence exclusion: an investigation into the admissibility of unlawfully obtained evidence in criminal justice, civil justice and administrative law", PhD Utrecht (Deventer 2003), p. 59.

necessary measures in accordance with the principles laid down in the Code. The convention requires that its member states cooperate internationally and coordinate their policies better with the principles the WADA honours, such as no prior warning of checks which can be carried out outside the competition context. Cross-border doping checking teams are also part of the arsenal of doping combating instruments the Convention wants to see set up. The Code and the convention permit private anti-doping organisations to check unannounced whether sportspersons have been resorting to doping, even when these sportspersons are enjoying their leisure time at home. The states which are party to the European Convention on Human Rights have also agreed to this type of checking, and this while in art. 8 the European convention guarantees the right of everyone to respect for his private life and home. The provisions in the code on whose basis the sportsperson must admit a doping inspector to his home or his regular place of work, and the authorisation for such checks which the governments have allowed in accepting the UNESCO Convention, form a violation of the right to privacy of a sportsperson. Where in accordance with the second paragraph of art. 8 ECHR a national governmental body is only permitted to authorise access to the home of a citizen under stringent conditions, how then might a national - and even more oddly a non-national - private organisation be permitted without prior authorisation, to be allowed such access?

The Court of Human Rights has accepted the so-called “positive obligation” doctrine and the direct horizontal effect of human rights in the ECHR. A government has the obligation to ensure that individuals can enjoy their fundamental rights in practice. Violation of these rights can be challenged in the courts. By saying in so many words that it “cannot remain passive” when the interpretation by a national court of a private construction produced by citizens is in conflict with the ECHR, the European Court has declared itself prepared to extend its judicial competence across the entire terrain of private law. Once the national judicial procedure has been completed, the European Court can be approached, on the basis of the “positive obligation” doctrine, to compel a state to take measures which will

combat anti-doping organisations’ violations of the privacy rights of sportspersons. Human rights can work horizontally. One then proceeds from the assumption that human and fundamental rights are not only defensive rights against the state, but that they also serve as a general order of values which can also apply between citizens mutually, guaranteed by the constitution or human rights conventions. This direct horizontal effect of human rights offers the sportsperson the possibility, on the basis of art. 8 ECHR, to lodge a case with the courts against the anti-doping organisation for a violation of his right to privacy. In such a case the anti-doping organisation will assert that the sportsperson has agreed to the doping checks outside the competition context voluntarily. The sportsperson may then respond on good grounds that there is no voluntariness. The sportsperson may maintain to the court that he particularly needs the protection of art. 8 ECHR as the weaker party, against the anti-doping organisation which believes itself to be powerful through the support of the government and the sporting world. The sportsperson can also maintain that the objectives of the underlying doping checks, which reach far further than competitions and training, are disproportionate in terms of his right to respect of his private life. In their ardour for striving towards a “clean sport” the anti-doping organisations must resort to other measures than those which form a violation of the respect for a sportsperson’s private life guaranteed in art. 8 ECHR. This objective does not sanctify *all* measures.⁸⁸ The sporting world must realise that they operate within the same culture which has produced the fundamental human rights. The rules in sport cannot be immune to these rights. The governments of the states which have adopted the UNESCO Convention, may not leave the sporting world under the illusion that such immunity is legally valid.

The International Sports Law Journal

⁸⁸ The sporting philosopher Johan Steenbergren regarded sportsmen and women themselves as the only ones who could resolve the doping problem. “Not ‘cunning lawyers’ or ‘naive scientists’ or

the government. Sportspersons should no longer allow themselves to be manipulated.” NRC Handelsblad, weekly newspaper, 18 June 2001.

Policing the Boundaries between Regulation and Commercial Exploitation: Lessons from the *MOTOE* Case*

by Samuli Miettinen**

1. Introduction

The regulation of sport has never been an explicit competence in the EC Treaty.¹ Sports governance has nevertheless found its way into the domain of Community law through the application of the Treaty provisions on free movement and competition law to economic activity. In examining the proportionality of restrictions to free movement rights or rules that pursue non-competition or pro-competitive aims whilst incidentally restricting competition, the European Court of Justice is signalling that sports governing bodies, too, must follow at least a rudimentary code of practice in order to comply with Community law.

The Court’s application of EC law to sport has primarily developed in the sphere of free movement. Despite a substantial number of Commission competition decisions relevant to sport, the Court’s sports-related case law in the field of competition law remains sparse. Whilst sport is now routinely treated as ordinary economic activity,² the first such judgment of substance, the 2006 *Meca-Medina* judgment,³ is open to a number of conflicting interpretations as to the role of public policy justifications in competition law.⁴ A key issue relevant to sport is whether private bodies may restrict competition in the public interest. Conversely, it is unclear whether a public mandate, either in relation to sport or other economic activity, can entitle an organisation to protect essentially private interests.⁵ Questions arise as

to what types of regulatory functions private bodies can perform, how they must perform those functions, and where the dividing line stands between public interest justifications and others that serve primarily private interests. These are relatively common in scenarios where a regulatory body also discharges some commercial function. Such body could potentially use its regulatory powers to facilitate its

* Case C-49/07 *MOTOE* Judgment of the Grand Chamber of 1. July, 2008, not yet reported.

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1 See Van den Bogaert, S., and Vermeersch, A, ‘Sport and the EC Treaty: a Tale of Uneasy Bedfellows?’ (2006) 31(6) *European Law Review* pp. 821-840.

2 In paragraph 22 of *MOTOE*, the court notably did not pay great attention to its past case law on the relationship between sport and Community law. It simply noted: ‘...any activity consisting in offering goods or services on a given market is an economic activity [references omitted]. Provided that the condition is satisfied, the fact that an activity has a connection with sport does not hinder the application of the rules of the Treaty.’

3 Case C-519/94 P *Meca-Medina* [2006] ECR I-6991. See also *Piau v Commission* Case T-193/02 [2005] ECR II-209, C-171/05 P [2006] ECR I-37.

commercial success at the expense of some competitors, a situation that was examined from several angles in the Court's recent *MOTOE* judgment.⁶

The *MOTOE* judgment provides some reasons why sports services will not often constitute services of general interest that are shielded from the full force of the Treaty's internal market rules. It also develops some doctrinal aspects of Article 86(1) liability for special powers that lead to abuses of dominant positions. In this examination, the Court stretches the economic notion of collective dominance and reinstates the controversial *Corbeau* approach whereby regulatory abuse needs not actually occur for Article 86(1) to have been infringed. As a consequence of its analysis, the Court requires Member States to directly oversee those regulators which it endows with special public law powers. The opinion of Advocate General Kokott offers some criteria that such oversight must satisfy. However, the judgment of the Court itself provides only a few guidelines in this respect. Whilst it casts doubt on the delegation of unfettered powers to undertakings in the context of Article 86(1), the Court does not substantially develop the independent notion of Article 82 abuse in the context of leveraging power that does not derive from a state mandate, relying instead on the risk of abuse for the purposes of Article 86(1).

2. Synopsis of key facts

Article 49(1) of the Greek Road Traffic Code provided that "competitions involving motorcycles or mopeds... are allowed to take place only after authorisation has been granted."⁷ Such authorisation was granted by the Minister for Public Order or authorities empowered by him "following the consent of the legal person which officially represents in Greece the Fédération Internationale de Motorcyclisme" (FIM). In Greece, domestic legislation therefore gave the FIM-nominated national motor racing organisation, Elliniki Leskhi Aftokinitou kai Periiigiseon (ELPA), a veto over whether races could be authorised within the national territory. All races required authorisation by the State, and part of this authorisation process required the express consent of ELPA. Although ELPA had created a nominally separate national motorcycle-racing committee, Ethniki Epitropi Agonon Motosykletas (ETHEAM), the independence of ETHEAM was neither seriously argued nor presumed by the Court.

A body wishing to acquire authorisation for a competition must, in advance, submit rules for that event to ELPA "...so as to allow scrutiny of the list of participants, the route or track for the race, the safety measures adopted and, more generally, all the conditions for the safe running event."⁸ Dates of competitions were to be announced in advance, must not affect dates already scheduled, and 'must be in the interests of the racers and the organisers.'⁹ Organisers were required to obtain third party liability insurance.¹⁰ These might all be characterised as requirements potentially in the public interest.

However, in order to acquire consent, organisers of races were also required to abide by the conditions of the national motorcycle competition code and ETHEAM's circulars.¹¹ It is less clear that all of these were requirements in the public interest. According to the national rules, championships, cups or prizes could be named after sponsors only after ELPA and ETHEAM gave consent.¹² Athletes could not be required to consent to advertising, except where a sponsorship agreement concluded by ETHEAM and ELPA was applicable.¹³ The organisational rules and authorisation processes therefore

contained steps that potentially gave FIM's national representative a commercial advantage. If it was engaged in economic activity and occupied a dominant position, imposing such requirements could possibly constitute abuse. The questions of the referring court asked firstly, whether Articles 82 and 86 applied to regulatory bodies with authority delegated from public law where they engaged in economic activity, and secondly if so, whether the national rule which delegated such responsibility without subjecting it to restrictions, obligations or review, was compatible with Articles 82 and 86 EC.¹⁴

3. The legal framework

Article 82 of the EC Treaty states:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.'

Article 82 has direct effect.¹⁵ As the Court has recognized since *Continental Can*, this covers situations where the abuse can harm competitors by reinforcing the abusive undertaking's market position.¹⁶ In respect of leveraging a dominant position, the Court's summary in *Ambulanz Glöckner* is instructive:

'...an abuse within the meaning of Article [82] of the Treaty is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which could be carried out by an other undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from that undertaking... Where the extension of the dominant position of an undertaking to which the State has granted special or exclusive rights results from a State measure, such a measure constitutes an infringement of Article [86] in conjunction with Article [82] of the Treaty...'¹⁷

Behaviour which is objectively justified and proportionate is not abusive. Unlike Article 81, there is currently less constitutional controversy about whether policy objectives other than efficiency should be permitted.¹⁸ The notion of 'abuse' seems capable of containing both public, and private justifications.¹⁹

Article 86(1) states:

'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.'

This establishes the general rule that public undertakings and special rights are subject to the Treaty. Special powers are not prohibited *per se*, but can not in themselves be relied upon to justify breaches of the other listed Treaty articles. The list of Treaty articles with which Article 86(1) operates is not exhaustive,²⁰ so in principle any undertakings that are public or granted special rights are bound by the full force of Treaty provisions even when they are formally addressed to Member States.

4 See f.ex. Szyzszak, E., 'Competition and Sport' (2007) 32(1) *European Law Review* pp. 95-110 pp. 105-106, with references.

5 Schweitzer, H., *Competition Law and Public Policy: Reconsidering and Uneasy Relationship* (2007) EUI law department working paper no. 30.

6 Case C-49/07 *MOTOE* Judgment of the Grand Chamber of 1. July, 2008. Hereinafter *MOTOE*.

7 Paragraph 3 ECJ judgment.

8 Paragraph 7 ECJ judgment.

9 Paragraph 9 ECJ judgment.

10 Paragraph 14 ECJ judgment, citing Article 110.1 of the national sporting rules for motorcycling (Ethnikos Athlitikos Kanonismos Motosikletas).

11 Paragraph 9 ECJ judgment.

12 Paragraph 14, citing Article 10.7 of the national sporting rules for motorcycling.

13 *Id.*, citing Article 60.6 of the national rules.

14 Paragraph 18 ECJ judgment.

15 Case 155/73 *Sacchi* [1974] ECR 409 para-

graph 18.

16 Case 6/72 *Continental Can* paragraphs 20 and 25.

17 Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089 paragraph 40, referring Case C-18/88 *GB-INNO-BM* [1991] ECR I-5941, paragraph 18, *GB-INNO-BM*, paragraph 21, and Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraph 61.

18 See further DG Comp discussion paper on the Application of Art. 82 of the

Treaty to Exclusionary Abuses (December 2005) pp. 24-28.

19 See further Nazzini, R., 'The wood began to move: an essay on consumer welfare, evidence, and burden of proof in Article 82 cases' (2006) 31(4) *European Law Review* pp. 518-539 at pp. 530-536.

20 See for example Case C-410/04 *ANAV* [2006] ECR p. I-3303 paragraph 23, with respect to Articles 43 and 49, and *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*. ECR [1991] p.

Article 86(2) states:

‘Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this 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. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.’

Services of general economic interest and revenue-producing monopolies are, in principle, subject to the Treaty rules, including those on competition.²¹ An exception can be made, but only to the extent that the ordinary Treaty rules obstruct the performance of the tasks with which the undertaking is entrusted.²² Article 86(2) has direct effect, despite some academic doubts about the appropriateness of delegating to national courts determination of what is contrary to the interests of the Community.²³ Services of general economic interest have been the topic of much recent academic discussion. In *MOTOE*, the Court considers only arguments to this effect, and is not confronted with the considerably less settled framework for revenue producing monopolies that do not provide services of general economic interest.

4. *MOTOE* and *FIA/F1* compared

The *MOTOE* case involved the combination of regulatory powers and organisation of competitions with economic activity in the regulated market. In this respect, the facts are not unlike those related to some similar issues considered in the *F1/FIA* investigation,²⁴ where the *FIA* was alleged to have abused its regulatory role to secure commercial advantages. However, a key difference is the role which the state plays in legitimising and establishing the special powers of the dominant undertaking. In *MOTOE*, the respondent *ELPA* was granted a regulatory power of consent by the state, and could effectively prevent rival competitions with that state power, rather than economic power. This power was alleged to have been abused when it offered no reasons for refusing to consent to a competition that was a rival to its own competitions. These issues resurface in *MOTOE*, where the Court examines whether a *FIM*-nominated national sports governing body abuses its dominant position when it both exploits and controls entry to a market. Although the role of the state in devolving unregulated special powers is condemned, it is difficult to draw wider conclusions on precisely what constitutes abusive leveraging. This is because the Court in *MOTOE* sidesteps the issue by accepting that the mere risk of abuse is sufficient for an infringement of Article 86(1) read in conjunction with Article 82. Advocate General Kokott went further, considering that ‘the maintenance of effective competition and the ensuring of transparency require a clear separation between the entity that participates in the authorisation by a public body of motorcycling events and... the undertakings that organise and market such events...’²⁵

5. Non-profit undertakings are undertakings

Article 82 prohibits undertakings from abusing a dominant position. In essence, *ELPA* attempted to argue in the alternative that it was not an undertaking because it exercised public law powers, and that because its activity was non-profit it was therefore non-economic. The Court carefully separated the various functions of the organisation, as a consequence of which it focussed on the economic nature of those activities which *ELPA* also regulated. *ELPA* and its rival, *MOTOE*, were both formally classified as non-profit organisations. However, this was not sufficient to preclude their activities from being economic in nature. Both undertook economic activity as *ELPA* and *MOTOE* were both involved in organising and marketing competing cycling events.²⁶

Undertakings are, according to the classic definition in Community competition law, ‘any entity engaged in economic activity, irrespective of its legal form and the way in which it is financed’.²⁷ The focus is not on the form of the body or organisation, but on the particular activity which it is pursuing. Although the exercise of public law powers is not in itself subject to competition law,²⁸ it is conceivable that some activities of an organisation endowed with public law powers are economic, even when the exercise of those powers is not.²⁹ In this, admittedly diminished sense, the separation of economic and non-economic activities remains a core function in applying EC competition law to sports governance, despite the demise of the ‘purely sporting’ justifications.³⁰

The Court has in the past accepted that a limited number of statutory social service providers are not ‘undertakings’.³¹ Whilst it did not reconsider this issue in its judgment, Advocate General Kokott notes in her opinion that *ELPA* is ‘in no way similar’.³² Even though *ELPA* was non-profit, and assuming that it pursued some social objective, it was not under sufficient state control to be a public organ founded on solidarity rather than a market actor. According to AG Kokott, this would have required ‘State regulation giving rise to certain solidarity obligations, the institution in question being left with no significant influence on the extent of the services which it was required to provide or the amount of the contributions that it received.’³³ By analogy, the level of direct state control that would be required in order to satisfy this requirement is such that independent sports governing bodies wishing to retain their independence are unlikely to plead this particular exception.

6. Competition can exist between purely non-profit organisations

Non-profit aims do not excuse what would otherwise be economic activity from the application of the competition rules. Such non-profit economic activities may exist ‘in competition with [those] of other operators which do seek to make a profit’.³⁴ However, both *MOTOE* and *ELPA* were, under Greek law, non-profit organisations. This, according to the Court, was not a bar to finding that they were in competition, because ‘[t]he success or economic survival of such associations depends ultimately on their being able to impose, on the relevant market, their services to the detriment of those offered by the

I-5889 paragraph 14, with respect to Article 28. This seems obvious given that Article 12 does not apply to economic activity governed by more specific non-discrimination provisions in the Treaty.

²¹ For a thorough review, see Sauter, W., ‘Services of general economic interest and universal service in EU law’ (2008) 33(2) *European Law Review* 167-193.

²² See further Commission Communication ‘Services of general interest, including social services of general interest: a new European commitment’ COM(2007) 725 final pp. 3-6.

²³ Case 66/86 *Ahmed Saeed Flugreisen* [1989] ECR 803 paragraph 56 establishing direct effect. See on these doubts Craig, P and deBurca, G., *EU Law: Text, Cases and Materials* (OUP, Oxford, 2007) p. 1082.

²⁴ The Commission closed its *FIA/F1* investigation in 2001 following amendments by *FIA* to its structure that sought to separate the commercial and regulatory functions of the international governing body and to assure standards of good governance. See Commission White Paper on Sport, Staff Working Document SEC(2007)935 pp. 73-74. Notice published pursuant to Article 19(3) of Regulation no. 17 concerning cases COMP/35.163; Notification of *FIA* Regulations, COMP/36.638; Notification by *FIA*/FOA of Agreements relating to the *FIA* Formula One World Championship, COMP/36.776; *GTR/FIA* and others (2001/C169/03, 13. June 2001; Commission press release IP/01/1523 30. October 2001. Parrish, R.,

Sports Law and Policy in the European Union (Manchester University Press, Manchester, 2003) pp. 135-137.

²⁵ *MOTOE*, point 102 opinion of Advocate General Kokott.

²⁶ *MOTOE*, paragraph 23 ECJ judgment.

²⁷ Paragraph 21 ECJ judgment, citing Case C-41/90 *Höfnier and Elser* [1991] ECR I-1979 paragraph 21.

²⁸ Paragraph 24 ECJ judgment citing Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43 paragraphs 30 and 31.

²⁹ Paragraph 25 ECJ judgment citing Case C-82/01 *Aéroports de Paris v Commission* [2002] ECR I-9297 paragraph 74.

³⁰ Weatherill, S., ‘Anti-doping Revisited: the Demise of the Rule of “Purely Sporting Interest”? (2006) 27(12)

European Competition Law Review pp. 645-657.

³¹ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637; *Cisal* [2002] ECR I-691 and Case C-355/01 *AOK Bundesverband* [2004] ECR I-2493. *MOTOE*, opinion of AG Kokott point 47, fn36.

³² *MOTOE*, opinion of AG Kokott point 47.

³³ *Id.*, citing *Poucet and Pistre* paragraphs 18 and 19; *Cisal* paragraph 45 and *AOK Bundesverband* (paragraphs 47 and 49).

³⁴ Paragraph 27 ECJ judgment, citing Case C-222 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289 paragraphs 122 and 123.

other operators'.³⁵ Thus, whilst the Court hypothesised about a third party for-profit competitor, it was satisfied that non-profit organisations could also be engaged in economic competition amongst themselves.

7. State-mandated regulators are collectively dominant irrespective of market share

Since ELPA was engaged in economic activity,³⁶ the Court did not hesitate to consider ELPA an undertaking for the purposes of behaviour other than exercising public law powers. For constitutional reasons related to the division of labour between the national and the European court during the preliminary reference procedure it was less prepared to determine whether, on the facts, it held a dominant position.³⁷ Nevertheless, 'in the spirit of cooperation', it outlined some of its classic case law on market definition, dominance, and the effect on trade between Member States and provided some guidance on their application to the facts.³⁸

Of note in this systematic but otherwise routine reiteration of well-established principles is the Court's observation that 'an undertaking can be put in [a dominant] position when it is granted special or exclusive rights enabling it to determine whether and, as the case may be, in what conditions, other undertakings may have access to the relevant market and engage in their activities on that market'.³⁹ Contrary to what the Court's conventional market power analysis suggested in *Wouters*,⁴⁰ in *MOTOE* it implies that a regulatory role that governs market access may itself create a dominant position in respect of the economic activity that is regulated.⁴¹ It could also be argued that where the body itself does not undertake economic activity, the activity of members of such a body is now arguably subject to scrutiny as potential 'abuse' of a collectively dominant position even where but for that power, in terms of an analysis based on market share and fragmentation, they might not have been collectively dominant. Collective regulatory power, for the purposes of Article 82, could amount to collective dominance regardless of the economic presence of the collective regulator. The mere risk of abuse, as will be demonstrated below, will be enough to condemn a Member State under Articles 86(1) and 82. Such a risk is not as yet enough to constitute abuse solely for the purposes of Article 82. Much will hang on the balance of what can be considered 'abusive' behaviour. It is also not beyond dispute that, by analogy, private regulatory power leads to a dominant position regardless of market share.

8. Unfettered special powers infringe Article 86(1) - Corbeau revisited.

It has been the subject of some debate whether, in order for a Member State to breach Article 86(1), an undertaking must in fact breach Treaty obligations.⁴² The crux of one such argument is that if an undertaking has discretion not to abuse its special position, then the Member State will not be held responsible for abuses which the undertaking commits. In line with its *Höfner and Elser* judgment, the Court in *MOTOE* considers that 'the mere creation or reinforcement of a dominant position through the grant of special or exclusive rights within the meaning of Article 86(1) EC is not in itself incompatible with Article 82 EC'.⁴³ Equally conventionally, it observes that the

Member State will be in breach if the undertaking 'merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or commit such abuses'.⁴⁴ However, the Court then appears to go further than this, and suggests that even where an abuse is not inevitable and an undertaking is not 'led' to an abuse in the form of an imperative to do so, creating a 'risk of an abuse of a dominant position' is sufficient to breach Article 86(1).⁴⁵

ELPA was undoubtedly an undertaking. As such, the question arose as to whether its grant of special rights was contrary to Article 86(1) and 82. Article 86(1) requires consideration of whether special rights are granted and whether the special rights lead to an infringement of the Treaty such as a breach of Article 82. If so, it must be determined whether those special rights are nevertheless justifiable with reference to Article 86(2).

On the facts, ELPA was clearly granted special rights that other undertakings were not.⁴⁶ A Member State will be in breach of Articles 86(1) and 82 if an undertaking which is granted special rights 'is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses'.⁴⁷ It is well established that this is the case where a regulator is active on an ancillary market. The *MOTOE* judgment raises the question of whether abuse must be shown at all, or whether the risk of abuse itself requires regulation and supervision of an undertaking that is placed, by virtue of special powers, in a dominant position.

In support for this proposition, the Court refers to three authorities, none of which seem to extend quite as far as the *MOTOE* statement. In paragraph 37 of the *ERT* judgment,⁴⁸ the court considered special rights contrary to Article 86(1) 'where those rights are liable to create a situation in which that undertaking is led to infringe Article [82] of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes'. This does not suggest the mere 'risk of an abuse' is sufficient, but rather, as Meyring has observed,⁴⁹ that the special rights must induce abuse. In *Merci convenzionali porto di Genova SpA*,⁵⁰ the Court considered Article 86(1) was breached '... if the undertaking in question, merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position... or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses'. Here, the Court adds to the inducement-test the possibility that some powers can not but be abused, and therefore their grant is prohibited. In *Merci*, the special rights were considered to induce, rather than compel the undertaking to abuse,⁵¹ so the case does not shed any light on how strictly an undertaking must be directed to abuse. In *Centro Europa*,⁵² the Court considered Articles 82 and 86(1) to be infringed when an undertaking 'is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses', but did not consider this in more detail for want of facts.⁵³

Within these the Court has also referred to three others, which demonstrated that the liable to abuse test is of a more mature pedigree. In *Pavlov*,⁵⁴ the Court considered Article 86(1) to be breached, as in *Höfner*, if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position, but also if the rights were liable to lead to a situation in which the undertaking abused its dominant position. In *Ambulanz Glöckner*,

35 Paragraph 28 ECJ judgment.

36 Paragraph 18 ECJ judgment. The court, despite nominally accepting in paragraph 30 that the finding of facts was not within its remit in an Article 234 reference, considers in paragraph 33 this to be 'clear from the reference'.

37 Paragraph 30 ECJ judgment.

38 Paragraphs 30-42 ECJ judgment, citing among others Case 27/76 *United Brands* [1978], Case C-62 *AKZO v Commission* [1991] ECR I-3359, Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, and Case C-260/89 *ERT* [1991] ECR I-2925.

39 *MOTOE*, Paragraph 38 ECJ judgment.

40 On this point, see Case C-309/99 *Wouters* [2002] ECR I-1577 paragraph 114.

41 See also the Commission's Piau decision, considered in para 52 of the CFI judgment in *Piau*: The commission thought material '... that FIFA is not active on the market for provision of advice [to players] in which players' agents operate and concludes that 'Article 82 EC does not apply in the present case as described by the complainant'.

42 Meyring, B., 'Silvano Raso: when is a statutory monopoly contrary to the E.C. Treaty?' (1998) 23(4) *European Law Review*, pp. 364-370.

43 Paragraph 48 ECJ. Compare *Höfner* paragraph 29: 'the simple fact of creating a dominant position... is not as such incompatible with the Treaty'.

44 Paragraph 49 ECJ.

45 Paragraph 50 ECJ.

46 Paragraph 43 ECJ.

47 Paragraph 49 ECJ, citing *Höfner and Elser*, cited above, paragraph 29; *ERT*, cited above, paragraph 37; Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraphs 16 and 17; and Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077, paragraph 18.

48 Case C-260/89 *ERT* [1991] ECR I-2925.

49 Meyring, fn42 above at p. 369.

50 Case C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889 paragraph 17.

51 *Merci convenzionali*, paragraph 19.

52 Case C-380/05 *Centro Europa 7*, judgment of the 4th chamber of 31 January 2008, not yet reported, paragraph 60.

53 *Centro Europa 7*, paragraph 62.

54 C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 127. As of the time of writing, the judgment is only available in Finnish and Danish. This translation is the author's, based on the Finnish version.

a breach occurred 'only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses'.⁵⁵ In *Servizi Ausiliari Dottori Commercialisti*, the two tests were whether 'the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses'.⁵⁶ Thus, on the more general level it remains uncertain how far an undertaking must be under an imperative to abuse its powers even though in *MOTOE*, the Court considers that the unfettered power of consent 'could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates'.⁵⁷

The Court offers two, potentially overlapping criteria for whether Article 86(1) is breached. A conventional analysis leads to concluding that regulatory powers coupled with market activity in ancillary markets are always incompatible with the Treaty, because they place the regulatory in a position where it is 'liable' to abuse that position. The Court also offered an alternative in *MOTOE*, which could be read as making it possible for Member States not to infringe Article 86(1) even in such circumstances, so long as the power was subject to 'restrictions, obligations or review'. However, in such circumstances, the Court appears to have considered that a 'risk' of abuse is sufficient, and that therefore the undertaking need not be compelled to abuse, or even be liable to be led to abuse, its dominant position. The conclusion seems awkward in relation to the letter of Article 86(1), which requires the enactment or maintenance of a rule that is, rather than is likely to become, contrary to another provision of the Treaty. It is also uncomfortable because it equates, for the purposes of Article 82, a risk of abuse with abuse that has already occurred. In this respect, the Court seems to be again gravitating to the approach in *Corbeau*, where no specific abuse need have been identified,⁵⁸ rather than the principle found for example in *La Crespelle* that Member States are not in breach by designating special rights so long as the undertaking can avoid abusing its dominant position.⁵⁹

In support of this approach, the Court refers to *Job Centre*, suggesting that 'it is not necessary that any abuse should actually occur'.⁶⁰ It is true that actual abuse is not necessary for the trade between member states to potentially be affected. However, neither *Job Centre* nor *Michelin*, to which the Court refers in *Job Centre*, lend support for the proposition that abusive behaviour needs not have taken place for Article 82 to be infringed. In effect, the *MOTOE* judgment therefore subjects regulatory power that could be abused, rather than that which is in fact abused, to 'restrictions, obligations and review' on the basis of Articles 82 and 86(1). The referring court considered that the power was not, and in *MOTOE*, the ECJ concluded that such a risk was therefore present.⁶¹ Even if an undertaking that is in a dominant position due to a special power does not abuse that power, the State would be in breach of Article 86(1) in conjunction with 82 when it does not regulate the power.

Leveraging economic power is abusive in itself: '...where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself... an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking'.⁶² In *MOTOE*, the Court draws some parallels to regulatory power, noting that where a body is active in other ancillary markets, its regulatory function is itself the reason why it is led to abuse its dominant position by imposing unfair conditions on its competitors.⁶³

9. Equality or reviewability - will the real Article 86(1) test please stand up?

MOTOE offers two competing rationales for why the state mandate for regulation is contrary to Articles 86(1) and 82 read together. The first is the unequal position - or distortion of competition - which such a position offers. The second is the unfettered discretion which

an economically active regulator enjoys in exercising its regulatory role. There was no doubt that the *de facto* conferral of 'the power to designate the persons authorised to organise those events and to set the conditions...' placed ELPA in an unequal position compared to its competitors, since it was not subject to external consent in the regulatory process.⁶⁴ However, the Court does not appear to be overly concerned with the equality approach. If it were, the grant of special powers would always be wrong in itself, a position which the Court has avoided taking both in *MOTOE* and earlier judgments. Instead, although it recognised that the inequality which flowed from regulatory power was problematic, it suggested that, if tempered with 'restrictions, obligations, and review,' the grant of that power might not in itself be contrary to Articles 86(1) and 82. As a consequence of *MOTOE*, it could be argued that since all undertakings that are endowed with regulatory powers are placed in a dominant position, regardless of whether they abuse that position, they must be subject to 'restrictions, obligations and review'.

10. No service of general economic interest 'entrusted'

An undertaking is 'led to abuse' a dominant position where it has a regulatory function that leads to a dominant position, but where it also acts on other markets. If its exercise of special powers is not moderated, no abuse needs to be shown for the grant of those powers to be contrary to Articles 86(1) and 82. Article 86(2) permits the grant of exclusive rights to undertakings that are 'entrusted' with the operation of services of general economic interest so long as those rights are necessary for the performance of the 'entrusted' tasks. However, both the Court and the Advocate general considered the economic tasks, namely the organisation and marketing of sporting events, separately from the exercise of the power of consent.⁶⁵ This classification of the powers led to the conclusion that whilst some powers were 'entrusted' to ELPA in respect of the power to give consent, they did not relate to economic activity and thus neither their exercise nor their grant could be justified by reference to Article 86(2). Conversely, in respect of the economic activities, no powers were 'entrusted'. Even if the organisation and marketing of sports events could be regarded as a service of general economic interest, as both the opinion and the judgment were at pains to avoid examining in detail,⁶⁶ the lack of an express conferral of powers from the Member State to ELPA precluded the organisation and commercial exploitation of events from constituting a service of general economic interest.

11. Defining 'restrictions, obligations and review' and regulatory 'abuse'

For a case which on its face involves some evaluation of what constitutes Article 82 'abuse', the Court was surprisingly muted on the issue of when the exercise of regulatory powers might constitute abuse, preferring to consider the mere risk of abuse sufficient. *MOTOE* therefore does not offer much direct guidance as to what amounts to abuse, much less in circumstances where regulatory power is essentially private in nature. Nevertheless, the reviewability of such powers is likely to lead to situations where the questions asked of the Court can no

55 Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089 paragraph 39.

56 Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 23.

57 *MOTOE*, Paragraph 52 ECJ.

58 Case C-320/91 *Corbeau* [1993] ECR I-2533; Hancher, L, 'Casenote on *Corbeau*' (1994) 31 Common Market Law Review 105-122; Gardner, A, *The Velvet Revolution: Article 90 and the Triumph of the Free Market Europe's Regulated Sectors*, (1995) 16(2) European Competition Law Review 1995, 78-86 at p.79.

59 Case C-323/93 *la Crespelle* [1994] ECR I-5077 paragraphs 18-21.

60 *Job Centre* Case 55-96 [1997] ECR I-

7119, paragraph 36, which itself relies on Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 104.

61 *Id.* In *MOTOE*, contrary to the domestic court's reference, the Greek government unsuccessfully disputed this point and claimed that the power was subject to constraints - see points 104-105 of AG Kokott's opinion.

62 Case 311/84 CBEM [1985] ECR 3261 paragraph 27; Case C-18/88 *GB Inno BM* [1991] ECR I-5941 paragraph 25.

63 *MOTOE* paragraphs 49-50.

64 *MOTOE*, paragraph 51 ECJ.

65 Paragraphs 45-46 ECJ judgment; points 109 and 110, opinion of AG Kokott.

66 Paragraph 45 ECJ, point 109 AG.

longer be answered with guidelines on reviewability and administrative formalities. The substance of these questions will in due course be more concerned with substantive issues as to abuse, economic efficiency, and public interest justifications.

The Court suggests that the grant of special powers that risk abuse is prohibited under EC law, but that special powers that are tempered by 'restrictions, obligations, and review' do not, *ceteris paribus*, risk abuse.⁶⁷ Whilst the judgment of the Court does not offer a detailed list of such fetters on discretion, Advocate General Kokott observed that authorization may be refused only in accordance with objective, non-discriminatory criteria and that applicants must have effective legal remedies, including interim measures.⁶⁸ Whatever form these governance requirements eventually take, the reliance on 'restrictions, obligations and review' raises some substantial but as yet unanswered questions as to the standard of those conditions, and the form in which 'review' must be available. Domestic judicial review may be deemed capable of satisfying provide these,⁶⁹ but it is unclear whether either dispute resolution mechanisms internal to sports or competition regulation satisfy this requirement.

Aggrieved parties in cases of abusive behaviour may complain to competition regulators at the national or Community level. One open question is whether competition authorities are in a position to provide adequate 'restrictions, obligations and review' so as to preclude discretion from being unfettered, particularly if their remedies are limited. The ECJ did not expressly consider the possibility whether Community-level competition regulation could constitute the required counterbalance. It would be surprising if this were an accidental omission, but the reasons as to why this level of control was ignored may also shed light on whether complaint-based ex-post domestic competition regulation could ever constitute the required 'restrictions, obligations, and review' of special powers that are otherwise liable to lead to an infringement of Articles 86(1) and 82. It may be that *ad hoc* control is not sufficient to constitute review for the purposes of Article 86(1). Detailed ex-ante control, were it to be carried out on every exercise of powers, would defeat the purpose of devolving special powers since the ex-ante regulator would in any event exercise overall control of the use of special powers. Such an approach would also discourage liberalisation in countries with a history of state intervention in sport. An effective appeals process seems appropriate

if special powers are devolved. However, many sports governing bodies internalise dispute resolution mechanisms, and in practice make difficult, if not ultimately impossible, the genuinely impartial review of grievances. Given this, the Court could in *MOTOE* have been more forceful in requiring a clear separation between regulatory and commercial functions. Even if it is not mandated by the Court, such a solution is not without merit. Although economic sporting activity is subject to EC rules just as any other economic activity,⁷⁰ a clear separation between regulatory and commercial activities could preclude a regulator from being deemed an undertaking for the purposes of competition law, and would thus limit the extent to which governance is exposed to EC competition law without resorting to a blanket exception, or even special treatment, for sport in Community law.

Even if special powers are regulated, and thus their grant is not *per se* prohibited by Article 86(1), when one entity engages in both regulatory and commercial functions, it may risk abusing a dominant position contrary to Article 82. Perhaps a direct reply to the question of what constitutes regulatory abuse, rather than whether the grant of powers is prohibited, requires an equally direct question as to whether the combination of regulatory and economic functions is abusive purely on the basis of Article 82. Thanks to the reinvigoration of the *Corbeau* approach, no actual abuse needed to be shown for Article 86(1) to be infringed. It was therefore not necessary for the Court in *MOTOE* to measure the behaviour of the governing body against a substantive notion of abuse. If the equality and transparency advocated by Advocate General Kokott are to be taken as a serious benchmark, the position of ELPA and other economically active sports governing bodies seems more appropriately one of consultation, rather than direct control over authorisation. To ensure this, the Court could have required that the ultimate decision on consent should rest in the power of a public body, rather than, as in the hypothetical scenario if ELPA's power was to be subject to review, with one of the economic competitors. In the Court's words, to rely on anything less than a clear separation risks abuse.

67 Paragraph 52 ECJ.

68 Point 103 opinion of AG Kokott.

69 Point 104 opinion of AG Kokott.

70 Paragraph 22 ECJ.

Autumn Meeting of German Association for Sports Law ("Konstanzer Arbeitskreis")

On 19 and 20 September 2009, the German Association for Sports Law organized its autumn meeting in Spiez am Thunersee, Switzerland, in the "Strandhotel Belvedere" which is famous in Germany because of the fact that the German national football team who won the World Cup in 1954 ("Wunder von Bern"), was accommodated in this hotel. A curiosity is that on the doors of the rooms on the hotel's third and highest floor the names of the players and coaches are indicated. Presentations were delivered by Mr Helmut Spahn, security manager of the German Football Association, who spoke on the present security model of the FA in the light of the experience gained from the World Cup 2006 that took place in Germany; Dr Martin Schimke, Bird & Bird Law Firm, Düsseldorf, on the CAS Award in the Feyenoord Rotterdam v. UEFA case; Prof. Dr Wolf-Dietrich Walker, Law Faculty, University of Giessen, on the liability for spectator violence in civil law; and Dr Robert Siekmann, Director, ASSER International Sports Law Centre, The Hague, The Netherlands, on legal problems of measures against transnational football hooliganism in Europe.

European Court vs Sports Organisations - Who Will Win the Antitrust Competition?

by **Andreas Manville***

Sport is a fast growing and lucrative business. Individual athletes, teams, clubs and sport associations are competing more and harder, not only in sporting competitions but also in economic competition. As the competition for economic figures and the fight for more and more money are becoming tighter it is not surprising that these participants are facing severe competition in the world of money. Thus, their behaviour is increasingly falling within the scope of antitrust provisions. Therefore, it was only a question of time before the European Court of Justice (ECJ) would take a decision in the sports sector based on Articles 81 and 82 of the Treaty after it had over decades sufficiently examined the legal relations between the participants under Articles 39 and 49 of the Treaty (guaranteeing the free movement of workers and the freedom of provision of service). In its judgment "Meca-Medina" of 18 July 2006¹ the ECJ took the opportunity² and decided whether and how the antitrust provisions apply to sporting rules. The present Article wants to shed some light on the question of the application of the EU antitrust law (Articles 81 and 82 EC Treaty) in sport considering the Meca-Medina judgement in its application. Some criticisms of the judgment will be reviewed and some sport rules with regard to possible problems will be examined, in particular UEFA's "home-grown player rule".

1. Antitrust law and sport - the economic scale

In 2006/07 Europe's top leagues had a revenue of almost 14 billion € while only the "big five" (England, Spain, Italy, Germany and France) alone generated more than 7 billion € and with a revenue of more than 3.5 billion € by the top 20 clubs, Madrid leading with 351 m €.

The costs of wages of the "big five" exceeded 4 billion € making the English premier league the most expensive with 1.4 billion €!!!

Moreover, a comparison over the last decade of "on-pitch and off-pitch" performance proves a clear positive relation between the clubs sportive and economic success³.

These quite impressive figures show once more that money plays a very important (and probably the most important) role and is the key to sportive success and it demonstrates how economically driven professional football is.

2. Application in general and cases

Whereas the question whether Articles 81, 82 EC Treaty apply to sport is generally answered with a clear yes (yet some do not like it) problems are arising when defining to what extent.

Since its judgement in the case Walrave⁴ it is established case law by the European Court of Justice that sport is subject to the EC Treaty provisions insofar as it constitutes an economic activity⁵.

Whilst the ECJ based its decisions in most cases on the four freedoms (notably on Articles 39 EC and 49 EC) the European Commission and some Advocate General have based their decisions (also) on Articles 81 EC and 82 EC⁶.

But in the recent judgment in the Meca-Medina case⁷ the ECJ made it clear that Articles 81 EC and 82 EC do apply - in addition to Articles 39 EC and 49 EC - and that sporting rules have to comply with tests developed by the ECJ in competition matters⁸.

3. Specificity of sport

However, sports operators are not congruent with "normal" economic operators.

In general, a club pursues 2 objectives, sporting success and also an economic one. To achieve these goals a frame for the competition must be established, a sufficient number of other competitive competitors must be available and rules as regards the modus operandi of the competition must be agreed upon.

Football is a product of a contest between 2 teams and this interde-

pendence between competing participants of a sports event is specific and distinguishes it from other economic sectors. And the higher the uncertainty as to the result and the better and more thrilling matches are the higher the interest of the spectators in the competition. Thus, this interdependence and the need for thrilling competitions can only be achieved if there is a certain degree of equality and competitive balance among the competition participants. That means that the clubs have a vital interest in (also) having strong competitors.

In general, the framework for a competition and the "rules of the game" are established and determined by sport organisations which are usually characterised by a monopolistic pyramid structure ensuring a uniform and complete organisation of the conditions for the competition. In football the organisation is structured in the way described, there is a single national association responsible for the organisation on national level and being combined under the European association (UEFA) which forms part of the single worldwide federation, the FIFA. This kind of organisation and structure being responsible for creating the "market" and the competition sets it also apart from other economic operators (principle of a uniform and coordinated organisation).

Last but not least sport forms part of a society and fulfils very important functions among which are health, social, cultural, recreational and educational functions. In order to fulfil these functions the monetary aspect must not be lost out of sight. Thus, financial resources need to be redistributed from the professional level to amateur sport. This principle of solidarity is also carried out by the above mentioned associations.

4. Who are the economic operators in sporting activities

Depending on the kind of match (national league, international league, e.g. Champions League, national team matches) different economic operators are involved. In the first place there are the clubs playing the match and then the association responsible for carrying out the competition. And even the player can be an economic operator, for example when the player presents a brand sponsoring individually the player while being interviewed before or after a match.

As there are always two or more levels of economic operators involved antitrust law can intervene at different levels and constellations which can also lead to more and different situations falling within the scope of the antitrust law.

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1 Case C-519/04 P, Meca-Medina [2006] ECR I-6991

2 It was to be expected as this tendency has become apparent, c.f. conclusions of Advocate General Lenz in case Bosman (Case C-415/93 Bosman [1995] ECR I-4921) and lately the Commission (see for example Press releases on investigations IP/01/1523 (FIA) or IP/02/585 and IP/02/284 (both concerning FIFA)-two of many in the last years) and the Court of First Instance in case Piau (T-193/02),

confirming the Commission's decision (also) based on Articles 81 EC and 82 EC.

3 Study of Deloitte "Football Money League" of February 2008, BBC News Channel of 28 May 2008 "Record Premier League wage bill".

4 Case 36/74, Walrave [1974] ECR 1405

5 Confirmed in cases Donà (see below fn 12), Bosman (see below fn 13), Lehtonen (see below fn 14), Deliège and Pacqué (see below fn 15).

6 Advocate General Lenz in the Bosman (see below fn 13) case (see paras. 253-286 of the conclusions), for the Commission see supra footnote (fn) 2.

7 See supra fn 1

8 Notably the so-called Wouters test, see below point 6 and fn 26.

5. The development of the jurisprudence of the European Court of Justice

i) 1974 the ECJ decided in case *Walrave*⁹ that sport is subject to the EC Treaty provisions and it is since then established case-law.

In that judgement the ECJ first examined the question whether Community law can be applicable in the field of sport and decided that "Having regard to the objectives of the Community, the practice of sport is subject to Community law only insofar as it constitutes an economic activity within the meaning of Article 2 of the Treaty"¹⁰.

The ECJ then turned to the problem of whether Community law could also be applied to the rules of private sporting associations. It held affirmatively and stressed that the "objectives of the Community contained in Article 3(c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law."¹¹

ii) And 1976 in case *Donà*, the ECJ, referring to *Walrave*, confirmed that Community law applies to the rules of sporting associations¹².

iii) Next "étape", 1996, was the *Bosman*-case, most probably THE judgment of the ECJ in the sport sector. In its judgment the ECJ confirmed its jurisprudence and made it very clear that professional sports fall within the scope of the EC Treaty. At the same time it confirmed the possibility of exceptions for which there is only a very limited scope on non-economic grounds given ("...freedom of Articles 48 and 52 do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. [...] such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty."¹³).

iv) 2000 the ECJ decided on not less than three cases, case *Lehtonen*¹⁴ and joined cases *Deliège*¹⁵ and *Pacquéé*¹⁶.

In the joined cases the ECJ was again referred to with regard to international competitions and it held that sporting activities and, in particular, a high-ranking athlete's participation in an international competition are capable of falling within the scope of the EC Treaty (in that case Articles 49 and 50 of the Treaty) even if some of the activities are not paid for by those for whom they are performed¹⁷. Further the ECJ held that restriction can be made without violating the provision in stating that "sports rules requiring professional or semi-professional athletes or persons aspiring to take part in a professional or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition, which does not involve national teams competing against each other, does not in itself, as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services prohibited by Article 59 [now Article 49] of the Treaty".

However, the ECJ emphasized in its judgment *Lehtonen* that any restriction on the scope of the Treaty must remain limited to its proper objective, and may not be relied on to exclude therefrom the whole of a sporting activity¹⁸.

v) The next judgment, the second landmark after *Bosman*, was the *Meca-Medina* judgment.

In this case the anti-doping rules of the IOC (International Olympic Committee) were at stake. For the first time it tested the rules attacked under Articles 81 EC and 82 EC (Advocate General Lenz had already done so in his conclusion in the *Bosman* case and proposed to test "sporting rules" also under Articles 81 EC and 82 EC - the ECJ did not take the opportunity at that time to take a decision regarding a possible application).

First, it rejected the concept of "purely sporting rules" falling outside the scope of the treaty and thus would not have to go through a verification under Articles 81 EC and 82 EC.

Second, it gave a clear method for examining the compatibility of the rules in question with Articles 81 EC and 82 EC as not every sporting rule restricting the competition infringes the said Articles.

6. The consequence of the Meca-Medina judgment and its critics

"... it is apparent 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 or the body which has laid it down. 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 [...] and] must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition. Thus, [...] it will be necessary to determine whether the rules which govern that activity satisfy the requirements of Articles 39 EC and 49 EC, that is to say do not constitute restrictions prohibited by those Articles. Likewise, where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, given the specific requirements of Articles 81 EC and 82 EC, whether the rules [...] restrict[s] competition [...]. Therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity, that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those Articles."¹⁹

With this statement the ECJ diametrically opposed the decision of the Court of First Instance, stating that "Since [the rule] ... is based on purely sporting considerations and therefore has nothing to do with any economic consideration, the rules [...] laid down by sports organisations do not come within the scope of the Treaty provisions on the economic freedoms and, in particular, of Articles 49 EC, 81 EC and 82 EC."²⁰

With this decision the ECJ says that in principle every sporting rule can fall within the scope of the Treaty and will be examined for its compliance with Articles 39 EC and 49 EC and also with Articles 81 EC and 82 EC whether the rule in question constitutes an economic activity or not.

At a first glance this statement seems inconsistent with the established case law of the ECJ holding that the practice of sport is subject to Community law only insofar as it constitutes an economic activity within the meaning of the Treaty.

This is one of the main criticism: the implication that the ECJ would extend its power of jurisdiction to matters which clearly fall outside the scope of the treaty, thus being in breach, and would fail in its duties (instead of leaving the matter to the sport associations where it could be dealt with best) and would set up an incoherent jurisprudence which would lead to legal uncertainty as regards to the Court's practice and judgments²¹.

That criticism is incorrect and fails to meet what the ECJ said.

The core statement is that whenever the sporting activity in question constitutes an economic activity and thus falls within the scope of the EC Treaty (as always held), the conditions for engaging in the sporting activity, the rules for exercising that sport, are subject to all the obligations which result from the various provisions of the Treaty. That means that in principle sporting rules are subject to scrutiny under the provisions and obligations, notably Articles 81 EC and 82 EC, of the Treaty insofar as the rules in question determine the con-

9 Concerning international team competitions, see *supra* fn 4.

10 See *supra* fn 4, paras. 4 to 9

11 See *supra* fn 4, paras. 17 to 19

12 Case 13/76, *Donà*, [1976] ECR 1333,

paras. 17 and 18

13 Case C-415/93 *Bosman* [1995] ECR I-4921, para. 76

14 Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681

15 Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, concerning the selection rules applied by the Belgian judoka federation to authorise the participation of professional and semi-pro-

fessional athletes in an international judoka competition.

16 Case C-191/97, see *supra* fn 15.

17 See *supra* fn 15, paras. 55-56.

18 See *supra* fn 14, para. 34

19 See *supra* fn 1, paras. 23-31

20 Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291

21 See representatively the critics from the UEFA, "Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?" by Gianni Infantino, published on the UEFA website (www.UEFA.com).

ditions for athletes or teams to engage in professional sport which undoubtedly constitutes an economic activity.

In fact and contrary to the criticism, the ECJ has developed the application of the antitrust provisions in a very stringent and coherent manner. It would be quite inconsequential in deciding that (semi-professional and professional) sporting activities constitute an economic activity and therefore fall within the scope of the Treaty but the rules establishing the access and the conditions to engage in this (economic) sporting activity falls outside the scope. It would be incomprehensible that rules laid down by undertakings²² in a sector where billions upon billions of Euros are generated each year should be exempt from the scope of the Treaty and the scrutiny of the ECJ.

It goes without saying, that the ECJ also takes the will of the “legislator” into consideration, as expressed in the declarations to the Amsterdam Treaty and to the Nice Treaty. Heads of State and Governments of the EU emphasised the social significance of sport and recognised its special character and the importance and primary responsibility of sporting organisations in conducting sport affairs was pointed out. However, at the same time it clarifies that the sporting organisations have to exercise their tasks and duties with due regard (also) to Community legislation²³. Well, one may say: “Of course, what else”. But some of the Court’s slashers might see in those lines in the declarations a “white card” for exemption of EU law for sporting rules and would like to have a provision stating that EU law does not apply to sporting rules as also supported by some Member States²⁴.

As regards the criticism regarding legal uncertainty the following must be said:

In the judgement the ECJ has established a clear method for the examination of the compatibility of sporting rules with the antitrust rules.

In deciding that “purely sporting rules” not fall within the application of the antitrust rules do not exist, the ECJ defined the scope of the Articles 81 EC and 82 EC extensively regarding sporting rules. In doing so it does not mean and does not even imply that in the Court’s opinion sporting rules generally infringe the said Articles.

No, not all!

In developing a clear method in the same judgment for the examination of the compatibility of sporting rules with the antitrust rules it enhanced legal certainty and made clear that not every rule potentially restricting the competition infringes Article 81 EC or 82 EC.

In order to scrutinise the compliance of sporting rules with the EU antitrust rules

- account must first of all be taken of the overall context in which the sporting rule was taken or produces its effects and, more specifically, of its objectives;
- it must be considered whether the consequential restrictive effects are inherent in the pursuit of those objectives;
- and whether they are proportionate to them²⁵, i.e. in regard to the objectives pursued.

These principles were developed and applied in the Wouters case²⁶ (therefore called “Wouters test”) by the ECJ.

Thus, the Court’s method on testing sporting rules for compliance with the antitrust rules can be summarised by the following test structure:

- i) Determination whether the sporting rule in question falls within the scope of the EC antitrust rules:
 - a) Was the rule adopted by an “undertaking” or an “association of undertakings”²⁷?
 - b) Does the rule restrict competition within the meaning of Article 81(1) EC²⁸?
 - c) Is trade between Member States affected?
- ii) If the antitrust rules are applicable does the sporting rule in question breach Article 81(1) EC taking into account²⁹
 - a) the overall context in which the sporting rule was taken or produces its effects and, more specifically, of its objectives;
 - b) whether the consequential restrictive effects are inherent in the pursuit of those objectives; and
 - c) whether the rule is proportionate³⁰ in light of the objective pursued and is applied in a transparent, objective and non-discriminatory manner.
- iii) In case of breaching Article 81(1) EC, does the rule in question fulfil the exemption conditions of Article 81(3) EC and thus, could it be declared compatible with the antitrust rules³¹?

Any restriction found under Article 81(1) EC may be declared inapplicable in case of agreements which (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress, (ii) while allowing consumers a fair share of the resulting benefits, and (iii) which do not impose restrictions which are not indispensable to the attainment of these objectives and (iv) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.³². These four requirements must be fulfilled cumulatively. This clear and structured methodology elaborated by the ECJ in the present case enhanced and improved the legal certainty for the assessment of the compliance of sporting rules with Articles 81 EC and 82 EC and thus gives the economic operators in the sporting sector a method to examine if their plans will pass the test before the ECJ. Therefore, the criticism saying that the ECJ increased the legal uncertainty is absolutely unjustified.

However, bearing in mind the great spectrum and variety of possible sporting rules and the different characteristics of each sport a generalisation and categorisation of sporting rules complying with or being non-compatible with the antitrust rules is not permitted. Thus, the ECJ emphasised that each rule must be examined on a case-by-case basis.

Insofar, a certain legal uncertainty is left. But this is (always) the case when assessing rules as complex as in the sporting sector involving many aspects at the same time, sportive and economic ones. In particular the requirement of the Wouters principles and its proportionality test forbid any generalisation.

But on the other hand in applying the antitrust rules in this way it leaves the necessary flexibility to duly considering the specificity of sport and to recognising the variety and distinctive characteristics of each sport.

22 See below fn 27.

23 See the Amsterdam Treaty (1997)[Declaration n°29 attached to the Amsterdam treaty] and of the Nice Treaty (2000)[Declaration on the specific characteristics of sport and its social function in Europe].

24 As French President Nicolas Sarkozy said presenting his EU presidency priorities to the European Parliament on 10 July, “I’d like there to be a European sporting exception similar to the cultural exception”; see also below point 8.

25 See supra fn 1, para. 42.

26 C-309/99, Wouters [2002] ECR I-1577

27 Sports associations are “undertakings”

when carrying out “economic activity” itself (e.g., sale of tickets or sale of their own rights on an event). Besides sports associations, also clubs or athletes can be considered an “undertaking” when exercising an economic activity; however they do usually not adopt sporting rules which are at stake like the ones in the case discussed here. An “association of undertakings” is given when members of a sports association carry out an economic activity. In both cases, it must be determined whether the sport in which the clubs or athletes (thus the members of a sports association) are active can be considered an economic activity. If there is no “eco-

conomic activity” carried out the rule cannot fall within the scope of Articles 81 EC and 82 EC.

28 or constitute an abuse of a dominant position under Article 82 EC (it seems that the method developed by the ECJ on Article 81 EC could be transferred and thus applied under Article 82 EC). Potential adverse effects on competition are sufficient, see supra fn 1, para. 47.

29 This is the so-called “Wouters test”.

30 Proportionality test

i) whether the rule was suitable to achieve the objective pursued,
ii) whether it was necessary to achieve the objective pursued and

iii) whether the rule imposed a burden on the individual that was excessive in relation to the objective sought to be achieved.

31 As the ECJ considered the antidoping rules not to be in breach of Article 81(1) EC it did not examine whether Article 81(3) EC could apply. In case Article 82 EC applies, it must be examined whether an objective justification could apply.

32 Such a justification may be considered where a rule fails to comply with the Wouters test but where the beneficial effects of that rule outweigh its restrictive.

7. Two examples of application of these principles to sporting rules currently under discussion, notably the “home-grown player” rule of the UEFA:

As already said above, the extensive scope of the antitrust rules given by the Meca-Medina judgment leads to the fact that, in principle, every sporting rule is eligible to fall within the scope of the antitrust rules. Nevertheless, falling within the scope does not automatically constitute a breach of the antitrust rules.

7.1. Selection criteria for the participation in (international) sport competitions³³

The ECJ confirmed in the said case that the selection rules in question did not infringe the freedom to provide service; but the ECJ did not examine the compatibility of those rules with the antitrust rules. Whereas the Commission seems to believe that selection rules concerning the participation of athletes in sporting competition³⁴ are likely to meet the Meca-Medina test for Article 81(1) EC it is noteworthy to mention a recent decision of the CAS of the COIB³⁵ in the case of the Belgium tennis players Olivier Rochus et Steve Darcis. The Belgium (National) Olympic Committee applied more severe selection criteria than the International Tennis Federation (ITF) for the admittance to the Olympic Games in Peking in 2008. While the two tennis players fulfilled the criteria of the ITF and thus participation in the Olympic Games would be allowed, the COIB refused to allow participation because they did not fulfil the more severe criteria of the COIB. The decision³⁶ of the arbitral Committee declared the Belgium selection criteria to be applicable and instructed the Olympic Committee to allow the two tennis players to participate. This case and the arbitral decision shows very well the possible application of the principles developed in the Meca-Medina case and that those selection criteria even in the light of the Deliège judgment are more likely to fail the test as they seem to be disproportionate in the light of the objective pursued³⁷ and therefore failing to meet the Wouters test³⁸ and also failing a justification under Article 81(3) EC. Moreover, it seems appropriate to express some doubts on whether the rules in question concerning participation in the Olympic Games are applied in a non-discriminatory manner³⁹. Thus, a general statement that sporting rules laying down selection criteria for the participation in international sport competitions are likely to meet the Meca-Medina test cannot be made. This example demonstrates vividly the necessity of the required case-by-case approach and the flexibility of the test as to considering the specificity of the sport and the sporting rule in question.⁴⁰

7.2. UEFA’s “home-grown player rule”

The rule sets out that clubs participating in the Champions League and the UEFA Cup (both organised by the UEFA) must have a mini-

imum number of so-called “home-grown players” in their squads, as from the 2008/09 season it must be 8 out of 25 players in the list A. No club may have more than 25 players on List A during the season. As a minimum, places 18 to 25 on List A (8 places) are reserved exclusively for “locally trained players” and no club may have more than four “association-trained players” listed in places 18 to 25 on List A. List A must specify the 8 players who qualify as being “locally trained”, as well as whether they are “club-trained” or “association-trained”⁴¹.

“Home-grown players” are defined by UEFA as players who, regardless of their nationality or age, have been trained by their club⁴² or by another club in the national association⁴³ for at least three seasons or 36 months between the age of 15 and 21. The UEFA rule does not contain any nationality conditions. It also applies in the same way to all players and all clubs participating in competitions organised by UEFA⁴⁴. The ruling does not apply to domestic competitions, although UEFA is encouraging its members to adopt the rule in their own competitions too.⁴⁵

The UEFA’s concept is the counterpart to FIFA’s “6 + 5-players rule” requiring 6 players in every club team’s starting line-up to be qualified for the country in which they play. This rule, as it stands, is directly discriminatory and therefore, incompatible with EU law⁴⁶.

On 28 May 2008 the Commission said in its press release⁴⁷ that the said rule is compatible with the principles of the free movement of persons. Some doubts regarding this statement seem appropriate and the following possible problems should be emphasised:

7.2.1. Possible infringement of Article 39 EC:

a) Even the European Commission acknowledges in its statement⁴⁸ that a club will most likely recruit young players living in the region (or the Member State) of that club in order to meet the requirement of the rule described which means conversely that young players from other Member States will not have access in the same way which could constitute an indirect discrimination on the basis of nationality under Article 39 EC and thus a violation of the said Article⁴⁹.

An aggravating factor is that in practice, there are restrictions to access mainly concerning the age of players, but in some Member States, young players are only allowed to join training centres in the region where they live⁵⁰.

b) If a “home-grown player” would like to change club but the club would not be able to fill up that gap with another “home-grown player” thereby having only a reduced squad available, the pressure for the club could lead to a restriction of the player’s right under Article 39 EC (and also 49 EC) and thus constitute a direct violation of the said Article⁵¹. This point of view will weigh even more bearing in mind the tendencies to restrict the rights of young players and to let them fall outside the scope of the Treaty⁵².

³³ See supra fn 15.

³⁴ Point 2.2.1.1 of Commission Staff Working Document - The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport (SEC(2007)935).

³⁵ La Commission d’arbitrage du sport belge (CAS) du Comité Olympique et Interfédéral belge (COIB).

³⁶ Decision taken on 31 July 2008, see for example “Le Vif” of 31st July 2008.

³⁷ See supra point 6 and fn 25.

³⁸ Supposed that the trade between Member States is affected which is quite likely (even though it concerns the Belgium Committee on Belgium players in Belgium).

³⁹ Of course, among Belgium sportsmen/women the rules are applied in a non-discriminatory manner. But if it is determined that the rule has a restrictive effect on competition and affects trade between Member States it would

not be non-discriminatory as insofar the participation rules would discriminate Belgium sportsmen.

⁴⁰ In this case a violation of Articles 49 EC and 50 EC is very probable and would lead to the same result.

⁴¹ See point 17.08 of Article 17 of the “Regulations of the UEFA Champions League” (same applies for the UEFA Cup).

⁴² Point 17.10 of the said Article 17 stipulates “A “club-trained player” is a player who, between the age of 15 (or the start of the season during which he turns 15) and 21 (or the end of the season during which he turns 21), and irrespective of his nationality and age, has been registered with his current club for a period, continuous or not, of three entire seasons (i.e. a period starting with the first official match of the relevant national championship and ending with the last official match of that relevant national championship) or of 36 months.”

⁴³ Point 17.11 of the said Article 17 stipulates “An “association-trained player” is a player who, between the age of 15 (or the start of the season during which the player turns 15) and 21 (or the end of the season during which the player turns 21), and irrespective of his nationality and age, has been registered with a club or with other clubs affiliated to the same national association as that of his current club for a period, continuous or not, of three entire seasons or of 36 months.”

⁴⁴ See Commission’s press release IP/08/807.

⁴⁵ At least 8 national associates are already applying the home-grown players rule to their national championships (see point III(D)i) on page 40 of the “Study on training of young sportsmen/women in Europe, Extension-Part II” (Study Part II), an independent study commissioned by the Commission. There is also the “Study on training of young sports-

men/women in Europe, Extension-Part I” (Study Part I); both available on the European Commission’s website (http://ec.europa.eu/sport/news/news270_en.htm).

⁴⁶ See supra fn 44.

⁴⁷ See supra fn 44.

⁴⁸ See supra fn 44.

⁴⁹ This view is supported by the Study Part I supra fn 45 in noticing on page 13 in point 8) “From a general point of view, we observed that there are few non national players in European training centres.”

⁵⁰ See supra fn 45, the Study Part II, point B9 on page 9; the restriction (Belgium requires even the Belgian nationality; France has similar restrictions and Germany has reserved some places of youngster teams to Germans).

- c) Conversely, the clubs have the possibility to freely decide on how and with whom to fill vacant positions with regard to only two-thirds of the positions in the team. Consequently, fewer -unrestricted-positions will be available and a player eager to change to a new team might be rejected because the club cannot employ more than 17 “non-home grown” players. Thus, a restriction of Article 39 EC could be the result. In addition, if it turns out to be true, that the rule creates an indirect discrimination (as pointed out in point (a) above) consequently it means that as 8 available positions in a squad are restricted to “home-grown players” the rule lays down provisions that forces the clubs to exercise a staff policy maintaining an indirect discrimination and, thus not only the rule of UEFA is in breach of Article 39 EC because of indirect discrimination but also the clubs are in breach with their staff policy in restricting access into their squads.

7.2.2. Possible infringement of Articles 81 EC and 82 EC:

It is quite obvious that the rule falls within the scope of the antitrust rules as this rule imposed by the UEFA has an adverse effect⁵³ on the competition of the clubs as well as of the players in an international football competition (Champions League, UEFA Cup)⁵⁴. But there are some doubts whether the rule will pass the Wouters test, and thus is in compliance with Article 81 EC.

- a) It is questionable whether the consequential restrictive effects of the rule are inherent in the pursuit of its objectives. The objectives are - overall - the promotion of the training of young European players, the support and protection of quality training for young footballers in the EU and consolidating the balance of competitions⁵⁵. While the Commission sees these objectives as legitimate ones of general interest as being inherent to sporting activity it seems doubtful whether they are inherent to sporting activities and whether they are the real motivation behind that rule. A more careful investigation and a clearer motivation could be necessary. Furthermore, it seems doubtful whether the requirement of having 8 “home-grown” players on the A list does ensure the objectives pursued. There is no compelling connection between those 8 players and the said objectives as the listing of a player might at best be understood as an indication of meeting the said objectives. If there was also the requirement of a number of players of those 8 who must play the indication would be much stronger. Anyway, the listing of players in the A list does not say anything about the quality of the training neither does it ensure a “balance of competition”. Thus, there are already some doubts whether the rule could pass the first two criteria of the Wouter’s test⁵⁶.
- b) As already noticed above⁵⁷ there are restrictions of access to training centres. They are connected to the age, place of residence and the player’s family, travel distance between residence and training centre and/or nationality⁵⁸. In practise, the access is so different from Member State to Member State that these imbalanced and non-uniformed criteria for access could hinder the competition for both, the clubs (in finding youngsters) as well as for the youngsters. The UEFA sets up a rule which is applied uniformly for all clubs⁵⁹ but with a very different “procedural framework” to achieve the requirements stipulated in UEFA’s rule. That could mean that some clubs can easier fulfil the requirements, and thus it could constitute a distortion of the competition⁶⁰.

- c) The rule drives the clubs to start as early as possible with the search for and the education of young talent, and thus to tie the young players to the club as early as possible. With such a - predictable - behaviour two aspects are critical:
- The fight for talented players could be relocated from predominantly young adults to young teenagers with negative effects on the personal developments of those youngsters⁶¹. Whether the rule is proportionate from this point of view is doubtful⁶².
 - Furthermore, clubs lacking young talented players because they were not (sufficiently) successful in their region must extend their search and recruitment area as they have to plan and ensure compliance with the said rule in the future. If a 15 or 16 year old teenager is taken away from his family living fairly far from the training centre this could counter partially the efforts in the fight against the exploitation of young people. What will happen to those “promising” talents having high hopes and expectations after 2 or 3 years at an age of 18 or 19 if they do not fulfil the club’s expectations? Do the clubs take appropriate measures to avoid disadvantages for the future professional and personal life of “failed” talent? The protection of the youngsters, in particular those of age 15-17 years, for a possible later non-professional football life has to be considered and the clubs have to bear the consequences and take their responsibilities especially for those whose football dreams will not come true. The stronger the impact of this decisive event into the “regular” life of those “failed” talents when being recruited the better the precautionary measures of the clubs have to be “to bring them back into life”. These thoughts bring more negative effects into the scale when considering the negative and positive effects in the proportionate test.

Thus, a disproportionate state could be created being detrimental to the interest and the protection of that group (of young players) targeted by that rule.⁶³

- d) The secondary effect of that rule is the manifestation of two classes of players, the one who is trained in a recognised training centre for at least three years at an age of 15 - 21, and the other one who was not trained for the three required years and thus not qualifying under the “home-grown player” rule. On the club’s side this rule means that the squad is divided into 2 “departments” with a restrictive access to about 1/3 of it (the 8 places in the squad reserved for “home-grown players”). Further, the start of a career, the choice of a training centre or club, and the duration during which the player will be trained and if he will be a “fully qualified home-grown player” eventually, is - in general - not in the hand of the player; the club will determine all these parameters regulating the player’s “way for qualification”. Besides, there are -probably many - “unqualified” players who were already too old when the rule entered into force, thus those are not able to have access to the “restricted department” of a squad.

It means that the rule sets up two types of players: The player qualified as a “home-grown player” and the player non-qualified as a “home-grown player”. Further, the rule produces effect on three levels:

51 This could put serious obstacles in the player’s future professional life and development, for example if a “home-grown player” is only “number 25” in the squad which means in practice that he will not - or at least not regularly - play; thus the player’s development will be at stake and if he would like to change to a club where he would play in the regular team and could advance in his development and in his career the club could deny him that possibility putting its own interests in the first place.

52 See supra fn 24 and below Sarkozy in point 8.

53 Which adverse effects will be shown in the following.

54 See above the requirements for the scope to be applicable.

55 See supra fn 44.

56 Points (6)(ii)(a) and (b)

57 Point (I)(a)

58 See supra fn 45, the Study Part II, points A) and B) of point I, on pages 6 to 10.

59 Playing in a UEFA competition or -as a matter of fact- also those clubs who are “planning” to achieve the participation in a UEFA competition in the future.

60 Would it be not consistent to lay down uniform conditions applying to all in the

same way in order to achieve the requirements?

61 See supra fn 45, the Study Part I, point I(A)5), on pages 11 and 12, saying “However, the situation is more delicate in some EU countries for young players who wish to follow their studies at high school or even at the university while training”.

62 Measures counter fighting such effects or developments could be stipulated in the rule.

63 See supra fn 45, the Study Part I, points I(A)2), 3), 5), 6) and 7); the protection of minors varies largely from one Member

State to another, setting up different legal frameworks, with different contracts for minors, different requirements to be fulfilled by the personal working with the youngsters etc.; thus the framework for youngsters and their protection is very differently regulated with more or less protection and care for their “non-sport life”.

i) Start of a career/selection procedure: the club will search/do a screening for promising talents eligible to fall within the scope of the rule (which means that the talent must be younger than 18 years to be able to be trained for three years and fulfilling the “qualification” requirements before being 21 years old.

At this level⁶⁴ the rule has a possible adverse effect on competition as the rule gives an advantage to those living close to training centres or living in regions/countries with a high training facility infra-structure whereas young players envisaging a career but living in a region/country with a low density of training centres will find themselves in a detrimental position.

Thus, as the rule does not ensure the installation of training facilities with a more or less equal access⁶⁵ for young players it has a possible adverse effect on the competition between young players for access to become a “home-grown player” as there are no comparable and equal conditions in place.

ii) “Qualified home-grown players” who would like to change the club:

In their “home country” these players definitely have an advantage in the competition with players from other “home countries” as well as with “non-qualified” players⁶⁶ because they have access to both “departments”, which means they are privileged and have access to a possible 25 places whereas the others are restricted and compete for the 17 remaining places. This applies in particular to the teams of the top 5 leagues as they concentrate the main economic resources, and thus have attracted and are still attracting the best players in their clubs. As a consequence, the competition between the players becomes now harder and harder, especially for club-trained players in the clubs of Top 5 countries. But the rule gives them at least four guaranteed places which could mean a market closure and a prevention of competition. In privileging “qualified home-grown players” an adverse effect on the competition could be created.

iii) The unqualified home-grown players” who would like to change the club:

As they have no “home country”⁶⁷ they compete always and only for the 17 places for “non-qualified” players and they can never access 25 places. That means, in the competition for squad seats they are disadvantaged, thus the rule creates a group of disadvantaged players. This disadvantage is not a result of the player’s skills, abilities and talent but determined externally. The problem is that all this development is not in the hands of the player but is determined by third parties, e.g. the club, the coach, the manager etc. A player could be for example a “late discovery” or a “late bloomer” not eligible anymore to complete the three-year period to qualify prior to reaching 21 years of age, or a player starts at 17 and just after the start of his training he is seriously injured and is disabled for 2 years and then it is too late to complete the three-year period in time. His professional life and future⁶⁸ are determined by a third and depend only to a minor part on what should be the decisive criteria: his talent and performance. Even if he manages to enter into the “training program” it is not only his performance which is decisive for obtain-

ing the “qualification” but he depends largely on external imponderables beyond his control and influence. That means that the obtaining of the “qualification” depends to a good part on luck and coincidence⁶⁹ and this risk inherent is left to the player. This will put him later as he is “unqualified” in a detrimental competition position and, thus possibly creates an adverse effect in the competition for the “seats in the squad”.

e) Last, this rule could favour clubs financially more potent as they can afford better (highly skilled personal and well equipped) training centres. They could have an advantage in the recruitment procedure as those clubs are usually also the more admired ones who young players would like to play. And, they would have still enough money to buy expensive top players to create a “high quality” team independent of the quality of their “home-grown players”, if needed. Therefore, some doubts can be expressed whether this rule leads really to a more balanced competition or if it could tend to have a converse and the competitive advantage of financially potent clubs would even increase⁷⁰.

f) Conclusions on the “home-grown player” rule:

All these considerations show that the possible adverse effects on competition for either entering the training centres or obtaining a place in the squad taking into account (i) the overall context⁷¹ in which the sporting rule was taken or produces its effects and taking into account its objectives⁷², (ii) considering whether the consequential restrictive effects are inherent⁷³ in the pursuit of those objectives, could lead to the opinion that (iii) the rule is disproportionate in the light of the objective pursued⁷⁴. Is it true that the rule will meet eventually the objectives pursued and aren’t there other, less restrictive measures possible to achieve these objectives? Thereupon, further investigations must be conducted as well as to the question whether the rule leads to an indirect discrimination on the basis of the nationality⁷⁵, a possible infringement by the UEFA but also by the clubs.

Further, it must be clearly said, the rule is addressed to the clubs but the “target” of the rule is undoubtedly the group of young players aged between 15 - end 17⁷⁶. A further problem is that the “framework”⁷⁷ applying to those youngsters varies largely from Member State to Member State. This must be born in mind when considering whether the rule is suitable, necessary and whether the negative effects for the young players are too excessive in relation to the objectives pursued. The same applies when considering the positive and negative effects and weighing them up under Article 81(3) EC.

And another point must be clarified: the argument⁷⁸ that the rule only applies to a few clubs (those qualified for UEFA competitions) and each year those clubs are more or less the same, and therefore the rule has only a “restricted” application not applying to the entire neither to the major activities of European football clubs and players cannot be taken into account. First, any club who would like to participate sooner or later in a UEFA competition must start with the training of young talents well ahead before reaching a UEFA competition as the rule just wants to prevent that a club only buys its players (and a squad with only 17 players, no “home-

64 As described above (see supra point (7)(B)(I)) a possible indirect discrimination under Article 39 EC must be considered.

65 For example, a rule could stipulate that there must be at least 1 centre per 5 million inhabitants and at least 1 centre per Member’s (the club) country to avoid a blank region or even country; this would entail the UEFA to support financially those regions financially less potent to set up a centre (and actually the UEFA is giving already since years financial support).

66 See also below iii).

67 Because not fulfilling the requirements of the rule.

68 Certainly the future of his private life, too.

69 When will he be discovered? When will a club invite him and appoint him? Will he be able to follow the training for three years, no injuries or other interruptions?

70 See supra fn 45, the Study Part I, point II(C)2) supporting this view; the richer the club the more the investment in club trained players and in addition they have enough money left to recruit the top players (the clubs of the top 5 leagues).

71 See supra fn 44.

72 See above the introduction to point (B).

73 There can be also doubts expressed whether the consequential restrictive

effects are actually inherent (see above the consideration in point (II)(a)).

74 There seems to be a tendency that the negative effects are put on the shoulders of the players and it seems doubtful whether the positive effect of that rule in the pursuit of its objectives could outweigh.

75 See supra point (I)(a).

76 Latest possible “training start” to complete the 3 years in time is at an age of end 17 years to have 3 years completed before becoming 21 years.

77 Even the books of specifications for the training structures (laying down quality criteria for the training) differ greatly from Member State to another (some

even do not lay down quality criteria).

Actually, one objective is to ensure the quality of the training-but how could that be achieved if it is not clear which quality criteria shall apply and even no minimum standards are laid down(see supra fn 45, the Study Part I, point I(A)2)); this objective seems questionable (see also point (7)(B)(II)(a) above).

78 This argument can be found in the Study, Part II, point III(D)1), on page 40, concluding that “Therefore, the concrete application of the home-grown players is very limited with regards to European clubs and European professional football players.”

grown players” is too small to compete on the international stage). Therefore, numerous teams will apply this rule whether they will play in a UEFA competition or not because many clubs would like to play in such competition as the participation is “gold” worth for the clubs. Second and actually, that argument could even prove that the rule will fail in achieving its objectives because if there (almost) always clubs of the top 5 leagues⁷⁹ playing in and winning the UEFA competitions it means that investing alone in young players will not lead to success but money is needed to form a strong team with top players. The impact and relevance of the rule discussed is rather small for success and the creation of better quality in training seems questionable. As the economic power remains with the “big five”-clubs the rule could maintain the “imbalance in sporting competitions” and could be therefore neither a possible mean to ensure the balance between the clubs nor a mean to create a balance one day.

Thus, taking all these considerations into account the rule’s compliance with the antitrust law is doubtful.

Whether this rule could fall within Article 81(3) EC and be declared compatible seems questionable. Article 81(3) EC is an exception and thus is applied restrictively⁸⁰. For example, what would be a fair share for the consumers? Do the beneficial effects of that rule outweigh its restrictive effects? Nevertheless, even if not obvious, it is definitely worth to discuss a possible candidature for Article 81(3) EC following the outcome of the investigations still to be conducted.

8. Conclusions and outlook

From the above (points (7)(A) and (B)) it can be concluded that there are strong indications that the „home-grown player” rule;

a) creates at least an indirect discrimination on the basis of nationality and thus an infringement of Article 39 EC. UEFA sets up a rule which seems “at the surface” non-discriminatory but leaves the “implementation” to its members knowing very well how the rule will be implemented, i.e. the conditions and the framework in which the rule will be applied in order to fulfil the requirements set up by UEFA. With regard to the conditions and the framework it can be concluded that restriction are applied mostly in relation to residence in the training region, to the age of the youngsters and even to the nationality of the youngsters (which actually constitutes a direct discrimination).

The discrimination could even be pursued and be still persisting in the professional teams because of the requirements set out by the said rule (as 8 places are restricted), thus a free movement could be partially restricted. The UEFA cannot escape the responsibility and excuse itself by pointing to the members and pretending its rule is perfect but it is the members’ fault that there is an indirect discrimination. The UEFA knows very well the framework in which its members will apply the „home-grown player” rule and what effect it will create;

b) could hinder the competition of players and clubs because;

i) there is no “common/equal” framework for all “sporting operators” (players, clubs, associations) with the result that the clubs during the recruitment process have to comply with different, partially not comparable, prerequisites, so that some clubs have easier recruitment possibilities, and conversely, the youngsters across the Member States do not have similar training access and neither an equivalent training environment. In some countries even an appropriate standard for the protection of minors and their future is missing.

As there are no comparable or equivalent conditions for all players and clubs across the EU a distortion of the competition between clubs and as well as between players could be experienced;

ii) an equivalent framework is missing for all and because there is no necessary connection between the rule and the objective pursued it is questionable whether the consequential restrictive effects of the rule are inherent in the pursuit of its objectives;

iii) some players are left “outside” the market (the “unqualified” ones) which creates as a consequence a market protection for the

“qualified” players and privileges the latter constituting a possible adverse effect in the competition among players in particular because the players do not have equivalent access conditions, thus no equivalent conditions to “qualify”;

iv) it seems rather doubtful if the „home-grown player” rule is able to achieve the objectives pursued.

Thus, the „home-grown player” rule is about to fail the test of compliance with the antitrust rules as it fails to fulfil the Wouters test either because the consequential restrictive effects of the rule are not inherent in the pursuit of its objectives or -more probable- because the rule is disproportionate in the light of the objectives pursued.

Not only is the case-law developing - in addition sports operators are trying to come up with new ideas and adaptation to their existing rules, more or less successfully. Since there are some “difficulties” with the European Court of Justice the efforts have been increased to gain a “special” position of sport in the Treaty or, asking for even more, to have sport exempted from the application of the Treaty provisions.

The latest “success” is the statement of the French President Nicolas Sarkozy while presenting his country’s EU presidency priorities to the European Parliament on 10 July 2008. There he demands “I’d like there to be a European sporting exception similar to the cultural exception. I am for the freedom of circulation of people and goods.” But he refused to accept the fact that from the age of 14, young players can be sold to other football clubs, thus meaning their first clubs cannot reap the benefit of the efforts they put into training the young talents⁸¹.

It seems as if the sportsworld does not really find a way (or maybe is not willing) to comply with the Treaty. Therefore, they are trying to be exempt from the application of the Treaty.

In a way this is pathetic as on the one hand sports operators are putting so much effort into economic development and improvement to “grow up” and to “play in the Champions League of the big business teams”.

But on the other hand they do not want to take the responsibilities and to fulfil the legal prerequisites applying to big business. And as shown above⁸², especially in football, there is real economic power. It is irresponsible and pathetic if politics grants a “white card of exemption” to the detriment of others, e.g. players. Nicolas Sarkozy gave the perfect example, but it must be asked who deserves more protection - the 14 year old youngster or the clubs? It seems that he wants to protect the interests of the clubs - and the youngster’s interests? With all due respect one can only hope he reconsiders that position. This cannot be the right approach.

Nevertheless, after all the critics it must be recognised that the clubs and associations have taken measures to improve the situation of players, in particular of young players. However, further improvements can be envisaged, notably in a changing environment and with new rules set up, like the one discussed.

Probably the time has come to recognise that the big sports operators do not juggle with peanuts anymore and to draw a line between professional and amateur sport. It seems the professional sport evolved in economic terms but otherwise the development of sport operators could not keep pace. They have to recognise that the sport environment has also evolved and they are not living anymore in the 60s or 70s of last century where the player earned some thousand Euros and revenue was insignificant compared to economic operators. Today the clubs are even too big to be considered a SME⁸³, they enjoy revenue 6-8 times higher than the threshold definition. This is a com-

79 See the statistics on the Champions League’s finalists and winners.

80 See supra at the end of point 6 for the requirements to be fulfilled.

81 See article published on EurActive.com on 14 July 2008.

82 See point 1.

83 Since 01/01/2005 inside the EU, a SME is defined as an enterprises which employ fewer than 250 persons and

which have either an annual turnover not exceeding 50 million euro, or an annual balance sheet total not exceeding 43 million. Even if a club employs less than 250 persons with a annual revenue of several 100 million Euros it clearly exceeds the thresholds. See Commission Recommendation 2003/361/EC and its annexes.

pletely different situation and their economic potency must be taken into account when considering possible exemptions.

In the end, the important question is how to balance the different interests of the parties involved in sports (athletes, clubs, associations, spectators, commercial partners, etc.) in a fair and well-balanced manner taking into account the different potency. That's normal business life! And besides -sport enjoys many exceptional positions.

Coming back to the initial question: Who will win?

Well, the European Court leads by 2:0 - but the match is not over yet. Let's see how the sport operators strike back and which ideas they will develop for their counter attack. However, if they will score with the "home-grown player rule" seems doubtful.

The International Sports Law Journal

Models for the Promotion of Home Grown Players for the Protection of National Representative Teams

by Ruben Conzelmann*

1. Introduction

Even many years after the *Bosman* ruling in 1995, the discussion about nationality clauses and minimum quotas in professional sports is still of great relevance. FIFA intends to establish a '6+5' rule that requires clubs to field at least six domestic players in the starting team. The parties concerned are quite aware of the fact that a renewed limitation of professional EU-players stands in direct opposition to the *Bosman* ruling from the Court of Justice. On the other hand, UEFA promotes the concept of a 'home-grown player' rule, which requires clubs to include in their squads at least four home-grown players out of 25.¹ These plans of the FIFA and UEFA are daring ventures indeed and indicate the existence of a great practical need for reinforced activities in the support of domestic (younger) players. In an attempt to justify their plans, FIFA and UEFA argue that the clauses are needed for the training and development of young upcoming players, the strengthening of national representative teams, so that the fans can identify with their club team and to maintain a sportive balance within a league.

Yet, with all of these aspects that were already brought forth by the associations during the *Bosman* trial as an attempt to justify the former '3+2' nationality clause² (obviously without success), the question remains: Why should the Court of Justice change its ruling in concern of discriminatory clauses in the field of professional sports? In fact, there are some indicators for a more sports "friendly" ruling from the Court in the future, even when it comes to discriminatory clauses.

- 1) The *actual effects* of the *Bosman* ruling were far *more drastic* than what the Court of Justice and the Attorney General *Lenz* had predicted. There is hope that the Court will take into more profound consideration, the actual (mis)developments and needs of the sporting system in its future ruling.
- 2) Newly introduced minimum quotas or similar models could be shaped in such a way, so that their *discriminatory effect* would be *weaker* than the effect of the former '3+2' nationality clause that was rejected by the Court in 1995.
- 3) The *legal framework has changed* in some aspects since the *Bosman*

ruling. For example, various European institutions have expressed their *political support* for a promotion of young players, even when this leads to an indirect discrimination of professional EU-players.

For these reasons, the '6+5' rule or the 'home grown player' rule can not be identified as incompatible with EU law by merely pointing out their discriminatory effects and the up-to-now sports ruling of the Court of Justice. Instead, what is needed is a more detailed look at the current legal framework as well as the actual developments in football since *Bosman*.

2. Actual developments in sports since Bosman

Since the removal of the '3+2' nationality clause after the season 1995/96, there has been a significant raise in the quota of foreign players in some European football leagues. The recruitment policy of many clubs is nowadays characterized by calculating the efficiency and economy of a player. On the other hand, the training and development of young players costs time and can be a risky investment. Therefore, some clubs rather make use of the possibility to recruit and field more experienced players from the EU Member States. In the *Bosman* trial, Attorney General *Lenz* had predicted that it would be „*unlikely, that the migration of foreign players would increase to such an extent, that the chances of the domestic players would be seriously diminished.*”³

But the increase of the foreigner quota has actually led to a steady decline of the quota of young domestic players in club competitions. Overall, the playing experience of young domestic players in today's competitions is at a very low level. Yet, playing experience on a high level has been identified by experts as an essential element of a successful player development.⁴ Moreover, there are some good, young upcoming players who are not spotted because they do not get enough chances to present themselves in games.

The deficit in playing experience for young domestic players within their own national league is not compensated by an increase in playing experience in the leagues of foreign Member States. Therefore showing that the Court's prediction as stated in the *Bosman* case not being correct, as it concluded:

„*Even if ... the opening of the labour market ... leads to a decrease in the chances of the domestic people to find work in their own national member state, it still opens new work perspectives for them in other member states.*”⁵

In reality, it is shown that very few young players have actually entered a foreign European league and have success in becoming established there. Because of a lack of playing experience there are currently major deficits in the training and development of young players. This leads to negative consequences in the performance of the national representative teams in the traditionally "big" football leagues, whereas

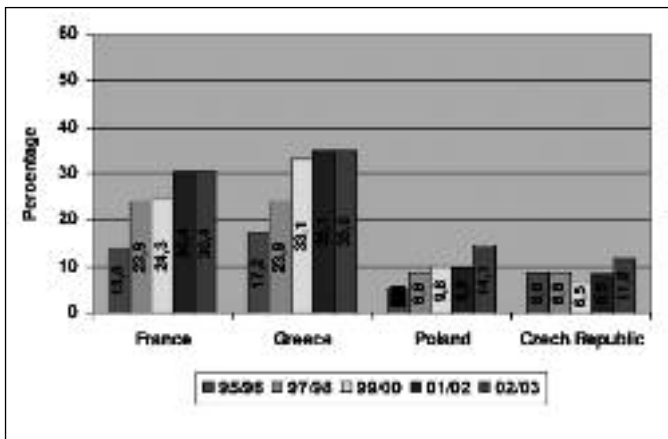
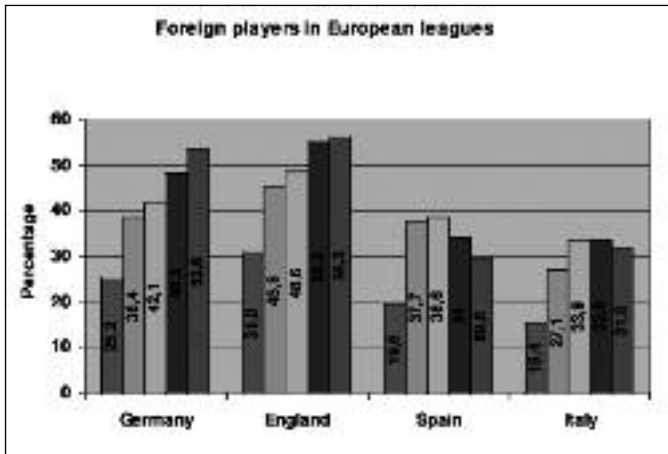
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2 Under this ruling of the UEFA that was object of the *Bosman* trial, the clubs were allowed to field a maximum number of three foreign players plus two foreign players, which had been registered in the respective national association for at least five years.

3 A.G. *Lenz*, in: Case C-415/93, *Bosman* [1995] E.C.R. I-4921, at [146].

4 Managers and coaches in football, basketball, hockey and handball identify the following as primary deficits of young players: tactical skills, consistency and mental strength. All of these are skills that are best gained on the playing field.

1 Home-grown' players are defined by UEFA as players who, regardless of their nationality or age, have been trained by their club or by another club in the national association for at least three years between the age of 15 and 21.



Source: Conzelmann, Modelle für eine Förderung der inländischen Nachwuchssportler zur Stärkung der Nationalmannschaften, 2008.

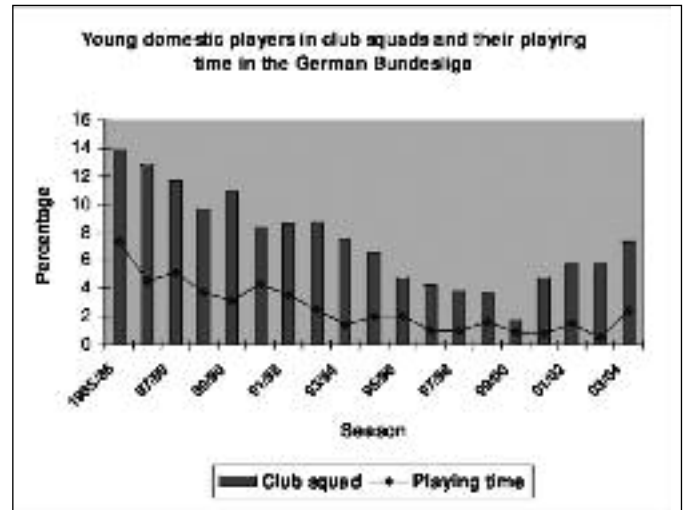
the national representative teams in the economic periphery profit from the liberalization of the player market.

Another argument for minimum quotas is the aspect of *regional identification* between fans and their clubs. An empirical study of Schütz from the Cologne University of Sports has *not* confirmed the nationality of a player as the essential factor of identification for the fans.⁶ Instead, it is the “success” of a team, the “individual quality” of a player and his “personality” that has proven to be actual factors of positive identification for the fans in relation to their club, and not the nationality of the players alone.

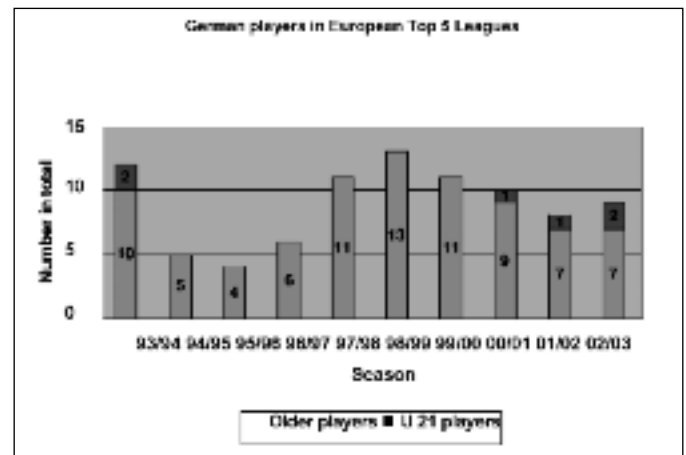
There has not been a detailed study on the connection between nationality clauses and the *sportive balance* within a league up to this date. However, within the German Fußball-Bundesliga, there seems to not have been any significant imbalance between the clubs within the last few years.

3. Ideas for solutions

The wording of a model as ‘*minimum quota*’ for domestic players seems to be more favourable than the wording as a classical ‘*nationality clause*’ (such as the former ‘3+2’ rule), because it highlights the goal of minimum quotas which is the promotion of domestic players. The discrimination of foreign players is only a non-intended side effect. The ‘6+5’ rule leads to an increase in the playing time of domestic players in general, and therefore, also provides more playing time for the domestic young players. Nevertheless, if a plan targets at a specific improvement for the situation of young players, the model should be worded accordingly to a minimum quota for *domestic young players*. Such a model could be justified more easily because the Court of Justice (as well as the European Counsel, Commission and Parliament) have explicitly acknowledged the training and development of young players as legitimate goals in sports.⁷



Source: Schellhaas/Tettinger/Conzelmann/Kummer, Optionen einer Nachwuchsförderung für Nationalmannschaften in Mannschaftssportarten.



Source: Schellhaas/Tettinger/Conzelmann/Kummer, Optionen einer Nachwuchsförderung für Nationalmannschaften in Mannschaftssportarten.

An alternative model, which has a weaker discriminatory effect than minimum quotas, is a young player ‘*promoting tax*’, which means that the clubs may field as many foreign players as they wish. Yet, in the case that they do not field the minimum number of domestic young players (this number is to be determined by the association in advance of a season), the clubs have to pay a ‘tax’ for the respective single game into a special fund. The money in this fund could be invested into programs to promote domestic young players.

In the choice of either promotion model (with its specific formulations), the sporting associations still have a *scope of independent evaluation*.

Consequently, they may pursue their goals and establish a model that *significantly* increases the playing time of domestic young players.⁸

5 Case C-415/93, *Bosman* [1995] E.C.R. I-4921, at [134].

6 Schütz, Identifikationsstruktur und Identifikationsmanagement von Fußballfans nach dem Bosman-Urteil des Europäischen Gerichtshofes im Kontext der Einflussnahme der Politik der Europäischen Union auf den Sport [2006].

7 Case C-415/93, *Bosman* [1995] E.C.R. I-4921, at [106]; *European Counsel*, Nice Declaration, Enclosure IV, at [11]; *European Commission*, White Paper on Sport, p. 6 f.; *European Parliament*, Resolution on the Future of Professional Football in Europe, at [11].

8 Case C-275/92, *Schindler* [1994] E.C.R. I-1039, at [61]; *European Counsel*, Nice Declaration, Enclosure IV, at [7].

4. The legal framework for minimum quotas

4.1. Freedom of movement versus freedom of association

So far, the focus of the legal discussion about nationality clauses was the 'freedom of movement', being guaranteed in Art. 39 EC as a fundamental freedom. In the *Bosman* ruling, the Court has decided that the freedom of movement can be used by individual professional sportsmen to their personal advantage against the rules of sporting associations, because association rules can be qualified as collective rules in the labour field of professional sport.⁹ A quota like the '6+5' rule does not hinder the clubs to *sign up* an unlimited number of foreign players. It only dictates the number of foreigners that may be *fielded* in a game. Still, the Court has decided, that such clauses impair the freedom of movement because the participation in games is a main goal of a professional player.¹⁰ Also, a club, which reasonably calculates its squad, is not going to sign up many more foreign players than are allowed on the field at one time.

The sporting associations, on the other hand, can refer to the basic right of 'freedom of association' (common constitutional record, Art. 12 (1) Charter of Fundamental Rights, Art. 11 (2) European Convention on Human Rights) to justify the minimum quota rules. The freedom of association or 'autonomy of sporting associations' principally includes the right to lay down discriminatory rules. This basic right provision in favour of the associations has only been briefly mentioned in the sports ruling of the Court. For example, in the *Bosman* case the Court stated only briefly, that the '3+2' nationality clause would not be a necessary rule to ensure this freedom to the sporting associations.¹¹

However, the basic rights that are guaranteed in the European legal system are not "2nd class" to the fundamental freedoms, but have to be followed by the European institutions because of Art. 6(2) EU. The basic rights are capable of restricting even fundamental rights of the EC Treaty such as the freedom of movement.¹² The equal rank of the Charter of fundamental rights in comparison to the fundamental freedoms of the EC Treaty (and therefore the quality of the Charter rights as legally binding) is now explicitly laid down in Art. 6(1) EU (Lisbon).

4.2. Association agreements

The European Community has concluded a large number of association agreements with third countries, which demand an equal treatment of the professional sportsmen of the respective third countries within the European Union area. In the *Kolpak* ruling from the year 2003, the Court decided that a nationality clause of the German Handball Association is invalid in respect to the Slovak Handball players because of Art. 38 (1) of the association agreement between the European Community and Slovakia.¹³ Likewise, in the *Simutenkov* case from the year 2005, the Spanish football regulations stood under the spotlight that included restrictions for non-EU-players.¹⁴ The Court came to the conclusion that Art. 23 (1) of the association agreement between the European Community and Russia opposed an association rule (under the condition that they are legitimately

employed with a Member State football club) that limits the number of Russian professional players in games.

In the public discussion, this jurisdiction of the Court has led to some gloomy predictions for the future of European sports. At the first glance, one may agree with these predictions, especially when one considers the Cotonou agreement between the Community and 77 states of the African, Caribbean and Pacific that came into effect on April 1st 2003 and involves about 683 Mio. people. Art. 13 (3) of the Cotonou agreement contains a comparable discrimination ban to the *Kolpak* and *Simutenkov* cases. However, there is an essential difference between the freedom of movement in Art. 39 EC and the respective legal provisions of the association agreements. The obligation to equal treatment in Art. 39 EC goes as far as to prohibit discriminations in the access to a market *and* in the working conditions, whereas the respective rights in association agreements only prohibit discriminations in the working conditions.¹⁵ Putting up a legal framework for the access of third state citizens to a Member State labour market (granting of a residence and working permit) remains in the competence of the individual Member State. In Germany, the legislator has considered the demands for the promotion of young players in the sporting industry, and has granted to the sporting associations in § 7 Nr. 4 Employment regulation some participation rights in the decision of granting residence and labour permits for professional non-EU-players.¹⁶

4.3. National identity and cultural diversity

The objective legal aspects of national identity and cultural diversity in Europe (Art. 6 (3) EU, Art. 151 (1) and (4) EG, Art. 22 Charter of Fundamental Rights) also speak for the legitimacy of minimum quotas. In sports, which is part of culture, these targets of the European primary law are meaningful in the context of national representative teams. The Court of Justice has taken into account the national representative teams as being a characteristic part of cultural diversity of the EU Member States. Regulations and practices, which stand in direct relationship to specific demands of national representative teams (such as nationality clauses) are not a violation of the freedom of movement. However, it seems not to be sufficient to only allow nationality clauses in the context of national representative teams, because the maintenance of an internationally competitive national representative team requires specific *pre-measures* in the league games for the development of young domestic players.

4.4. Competition law

As a consequence of the commercialization in sports, the sporting associations and their clubs are being qualified as 'corporations' and, therefore, fall under the scope of the Treaty's provisions of competition law (Arts. 81 and 82 EC).¹⁷

However, *particular features of sports* have to be duly considered in this, because the economic enterprises of sporting associations differ greatly from economic enterprises of 'ordinary' corporations. Usually, corporations try to minimize or diminish competing corporations in order to optimize their market position. By contrast, professional clubs in sports rely on each other's existence, because sporting events can only be successfully commercially exploited, if a certain sportive balance between the clubs remains.

According to an appendix to the White Paper on Sport from July 2007, the European Commission believes minimum quotas in league competitions likely to infringe the provisions of Arts. 81 and 82 EC, even though there was a general possibility to justify these regulations.¹⁸ Also, the former '3+2' nationality clause was held to be infringing EC law by Attorney General *Lenz* and others.¹⁹ In the case *Meca-Medina and Majcen* of the year 2006, the Court has established a methodical approach to decide whether or not an association rule infringes European competition law.²⁰ Notably, the Court even reviews those association rules under competition law, which are motivated exclusively by sports, not business (e.g. measures in doping prevention). The Court has not conceded a 'sports exemption clause' with regard to the Treaty's provisions on competition law for exclusively sports-motivated regulations, as it had done in the context of

9 Case Rs. C-415/93, *Bosman* [1995] E.C.R. I-4921, at [82].

10 Case Rs. C-415/93, *Bosman* [1995] E.C.R. I-4921, at [120].

11 Case Rs. C-415/93, *Bosman* [1995] E.C.R. I-4921, at [79].

12 Case C-112/00, *Schmidberger* [2003] E.C.R. I-5694, at [81]; Case C-36/02, *Laserdrome* [2004] E.C.R. I-9641, at [35].

13 Case C-438/00, *Kolpak* [2003] E.C.R. I-4135.

14 Case C-265/03, *Simutenkov* [2005] E.C.R. I-2579.

15 The association agreement with Turkey alone guarantees for the Turkish residents equal treatment rights in access to Member State labour markets within tight limits.

16 According to § 7 Nr. 4 Employment Regulation the responsible foreign

authority can grant a residence and working permit without the approval of the Federal Labour Office, if the National Olympic Committee and the responsible sporting association confirm the "sportive qualification" of the non-EU-applicant. Until now, the practice of the associations has been to confirm the "sportive qualification", if the non-EU-applicant was signed up by a first division club.

17 Case C 519/04 P, *Meca-Medina and Majcen* [2006] E.C.R. I-6991.

18 *European Commission*, Accompanying document to the White Paper on Sport from 11 July 2007, SEK(2007) 935, p. 44 f.

19 *A.G. Lenz*, in: Case C-415/93, *Bosman* [1995] I-4921, at [262]; *Streinz*, SpuRt 1998, p. 92; *Weiß*, SpuRt 1998, p. 98 f.

20 Case Rs. C-519/04 P, *Meca-Medina and Majcen* [2006] E.C.R. I-6991.

fundamental freedoms. To determine the compatibility of association rules with Arts. 81 and 82 EC, the overall context and the purpose of the respective rule have to be taken into account. Moreover, the possible restrictions that the association rule imposes on competition have to be inherent to the rule's purpose. They also have to be proportionate. Considering the Court's rather strict standard of the *Meca-Medina and Majcen* ruling, it seems likely that the Court would qualify minimum quotas as coordination relevant to competition in the Common Market.

However, in the Court's jurisdiction, such coordination between corporations does not infringe competition law, if there is only a small impact on the trade within the Common Market and if it is therefore considered as non perceptible (so called 'de-minimis' ruling). The perceptibility of minimum quotas would have to be determined with careful attention to the particular features of sports. In the end, moderate minimum quotas should rather be qualified as *non perceptible*, because they impact the clubs' options of commercial exploitation of the games (e.g. TV-rights, ticket sale, merchandising) only slightly. According to the Court's ruling, the 'de-minimis' exemption does not apply to line-ups where a big corporation is the exclusive producer of a product.²¹ At first glance, this seems to be true for the sporting associations. In accordance with the 'one-place' principle they hold a monopoly for their sport, because for each sport only one association can be a member of its respective parent association. Nevertheless, the 'de-minimis' ruling still seems to be applicable respect to association rules, because a somewhat more differentiating standard is needed. In sports, the association's monopoly does not (contrary to the 'ordinary' corporations' monopolies) aim at achieving a dominating market position by weakening competitors. Rather, the monopoly is motivated purely by sports, because it aims at unity and standardization of sports rules.

4.5. The Lisbon Treaty

In the Lisbon Treaty, which is currently in the ratification process, the term 'sports' has for the first time found its way into the European primary law, namely in the catalogue of competences of the European institutions (Arts. 6 e and 165 EU). According to Art. 6 e EU (Lisbon), the competence of the Union in the field of sport is limited to a support, coordination and supplementation of the measures of the Member States. According to Art. 165(1) EU (Lisbon), the Union contributes to the promotion of the European dimension of sports and, while doing this, respects the specific characteristics, the voluntary structure and the social dimension of the sports sector. However, a harmonization of regulations of Member States in relation to sports is not allowed.²² The legal bindingness of the Charter Rights (such as the freedom of associations) and their equal importance to the fundamental freedoms (such as the freedom of movement) is now being guaranteed in Art. 6(1) EU (Lisbon). Moreover, the principle of subsidiary is being put into more concrete terms by an appendix to the Treaty. In future, legislative drafts of the Union have to be especially well justified in regard to the principle of subsidiary. During the legislative process in the Union, the national parliaments can reprimand a violation of the principle of subsidiary and appeal to the Court of Justice for help.

4.6. Recent working documents of European institutions

In March 2007, the European Parliament decided on a political declaration about the future of professional football in Europe. In that,

the Parliament recognized that the increasing involvement of sports in the European legal framework has worsened the problem of legal uncertainties for the sporting associations. The *Bosman* ruling has had a positive effect for the mobility of football players in Europe, says the Parliament, and yet has at the same time reduced the chances for young talents to demonstrate their skills in the highest competition level. Accordingly, the Parliament "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".²³

In June 2007, the Commission has published a White Paper to outline the application of European law on sports. The White Paper contains interesting information about minimum quotas. In contrast to the Helsinki-Report from the year 1999, the Commission no longer condemns discriminatory clauses for regular league games, according to the following statement:

"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."²⁴

The Commission relates to the demand of the Parliament, which has offered political support for a minimum quota of home-grown players in clubs in its Resolution from March 2007. In a press release from May 28th 2008, the Commission has disclosed its legal conception, holding directly discriminatory rules such as the '6+5' rule as incompatible with European law, whereas indirectly discriminatory rules such as the 'home-grown player' rule (which relates only to the place of training and not to the nationality) would be compatible with the legal framework.²⁵ However, it is not convincing why the hidden protection in the 'home grown player' rule (that formally relates to the place of training, and yet actually mostly affects foreign players) should be privileged in comparison to the '6+5' rule, which directly relates to the nationality of a player. In the Nice-declaration from the year 2000, the European Counsel has demanded from the sporting associations to lay down a *transparent* set of rules.

It has to be emphasized that statements from the Commission merely have the non-binding effect of a political statement. They do not provide any legal certainty. For example, the former '3+2' foreigner clause was a result of consultations between the Commission and UEFA. Yet the Court dismissed it in its *Bosman* ruling.²⁶ Therefore, promises or guidelines of the Commission with respect to contentious legal issues have to be treated with caution.

4.7. Justification of minimum quotas

In the end, there is a consensus that it is generally possible to justify minimum quotas in sports. In the *Bosman* trial, the Court has pondered on the persuasiveness of the arguments that were put forth by the sporting associations in favour of nationality clauses. As a result, it has denied the proportionality of the '3+2' nationality clause.²⁷ However, the explanation of this justification proofs to be more difficult. After all, minimum quotas such as the '6+5' rule are in essence *direct discriminations*, which can only be justified within narrow bounds according to the Court's jurisprudence. 'Public order' (Art. 39 (3) EC) as one justification requires the existence of an actual and sufficient danger to a foundational societal interest. Because of the restrictive interpretation of the justification of 'public order' not every reasonable interest of the sporting associations is a foundational societal interest. Rather, such an interest would require an endangerment for the *continuity or existence* of a sports system (e.g. high-performance sports system, which is characterized by a continuous replacement of older players by younger players) in general. Even in the light of the present deficits in the training of young players, it proofs to be diffi-

21 Case Rs. 30/78, *Distillers Company* [1980], E.C.R. 2229, at [28].

22 *Grodde*, SpuRt 2005, p. 225.

23 *European Parliament*, Resolution on the Future of Professional Football in Europe, 29 March 2007, at [34].

24 *European Commission*, White Paper on Sport, p. 6.

25 Press release of the *European Commission* from 28 May 2008, IP/08/807.

26 Case C-415/93, *Bosman* [1995] E.C.R. I-4921, at [136].

27 Case C-415/93, *Bosman* [1995] E.C.R. I-4921, at [122 f.]; about the general possibility to justify discriminatory rules in sports, see *Randelshofer/ U. Forsthoff*, in: Grabitz/Hilf (ed.), before Arts. 39-55, at [140].

cult to substantiate such a foundational endangerment for the sports system.²⁸

A justification of minimum quotas can also be construed under the unwritten justification of 'pressing reasons of public interest', which has evolved in the Court's jurisdiction.²⁹ In the field of sports, the maintenance of a sportive balance within a league and the training of younger players have been recognized as pressing interests by the Court.³⁰ Yet, the Court has pointed out that merely *non discriminatory* and *indirectly discriminatory* rules could be justified by the 'pressing reasons of public interest', whereas *directly discriminatory* rules could only be justified by written clauses that are included in the EC Treaty's provisions.³¹ Nevertheless, in the Court's ruling, a development toward an encompassing extension of this unwritten justification to all kinds of (even directly) discriminatory rules can be observed.³² Some voices in the legal literature welcome an extension of the unwritten justification clause as well.³³

5. Conclusion

Even in the light of the *Bosman* ruling, European law does not seem to be so cemented as to completely prohibit minimum quotas in sports. In recent documents, the European Commission and the European Parliament have expressed their understanding for the need of the sporting associations to take measures to promote young players and national representative teams.

Specifically, the Commission and the Parliament view UEFA's

'home-grown player' rule as compatible with European law. On the other hand, minimum quotas such as FIFA's '6+5' rule are more difficult to justify, because they explicitly relate to the nationality of the players and are therefore directly discriminatory. Nevertheless, the Lisbon Treaty strengthens the legal position of the sporting associations by way of putting the basic right of the freedom of associations on the same level as the freedom of movement. When the basic rights and the fundamental freedoms of the EC are in conflict (as they are in the case of minimum clauses) the Court of Justice is being called not to overemphasize one position at the expense of the other position, but to balance these positions in a convincing way.

28 Heidersdorf, *Ausländerklauseln im Profisport*, 1998, p. 51; Klose, *Die Rolle des Sports bei der Europäischen Einigung. Zum Problem von Ausländersperreklausein*, 1989, p. 149.
29 For the first time in Case 1201/78, *Cassis de Dijon* [1979] E.C.R. p. 649.
30 Case C-415/93, *Bosman* [1995] E.C.R. I-4921, at [104 and 106].
31 Case C-388/01, *Commission ./. Italy* [2003] E.C.R. I-721, at [19 f.].
32 Case C-2/90, *Wallonian Garbage* [1992], E.C.R. I-4431; Case C-379/98, *PreussenElektra* [2001] E.C.R. I-2099.

33 A.G. Jacobs, in: Case C-379/98, *PreussenElektra* [2001] E.C.R. I-2099, at [233]; Koenig/Kübling, *NVwZ* 2001, p. 770; Kingreen, *Grundfreiheiten*, in: von Bogdandy (ed.), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge* [2003], p. 674; Groß, *Rechtfertigungsmöglichkeiten von Sportverbänden bei Beschränkungen der Grundfreiheiten*, in: Vieweg (ed.), *Perspektiven des Sportrechts* [2005], p. 55 f.

Anti-Doping in and beyond the European Commission's White Paper on Sport*

by Jacob Kornbeck**

1. Introduction

The European Commission's White Paper on Sport¹ is the first strategic document on sport at EU level. It provides orientation in an area which until now was not covered by any article in the EC Treaty.² The section on doping included in the White Paper (section 2.2) is important as the potential and actual role of the EU (in particular the Commission) in relation to doping has previously been debated by proponents as well as opponents of more integration via the "Community method" (the First Pillar based on Community Law, as opposed to the Second and Third Pillars of the EU). The White Paper thus provides clarification on some issues which are currently very topical. It is, however, a political document and not a legal act, and should be interpreted as such.

2. Discussion of anti-doping and the EU in legal literature

There may be a margin for additional regulatory activity at EU level via a range of existing legal acts that are already in force.³ The EU's role has, moreover, been amplified by recent case law, as one specific case, for the first time, was concerned with anti-doping rules: *Meca-Medina and Majcen v Commission*. This case led to judgements by the Court of First Instance (CFI) and the Court of Justice (ECJ)⁴ and inspired a small, but well-informed body of commentaries by legal scholars.⁵ The case is also occasionally commented by Soek⁶ who finds it to raise some issues of principle, including in relation to the transportation of samples and the unbroken chain of custody.

The *Meca-Medina* case is significant, not only because it was the first piece of case law regarding anti-doping rules, but also because it deals with the implications of decisions taken by the organs of sports

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1 COM (2007) 391. 11.07.2007: White Paper on Sport.

2 Colucci, M. (2007): *L'Union européenne et le sport : au-delà du Livre blanc*. In: *Revue du droit de l'Union européenne* 2007, n. 3, octobre, p. 633-652; Husting, A. (2007): *Le livre blanc de la Commission sur le sport: Un document "timoré et indécis" ou le point de départ d'une politique européenne du sport?* In: *Revue du Marché commun et de l'Union européenne*, no. 511, pp. 513-517; Krejza, M. (2007): *The European Commission's White Paper on Sport*. In: *The International Sports Law Journal*, vol. 2007, no. 3-4, pp. 73-76.
3 Vermeersch, A. (2006): *The European Union and the Fight against Doping in Sport: on the field or on the sidelines?* In: *Entertainment and Sports Law Journal*, vol. 4, no. 1.

4 Court of First Instance (T-313/02), judgement of 30.09.2004; European Court of Justice (C-519/04), judgement of 18.07.2006.
5 Ballesteros Moffa, L.A. (2007): *La intervención administrativa en materia de dopaje deportivo a la luz de la Ley Orgánica 7/2006, de 21 de noviembre, de protección de la salud y de lucha contra el dopaje en el deporte*. In: *Revista de Administración Pública* 2007, mayo-agosto, n. 173, p. 355-405; Choquet, A. (2006): *La lutte contre le dopage au regard du droit communautaire de la concurrence : à propos de l'arrêt "Meca-Medina et Majcen"* du Tribunal de première instance des Communautés européennes (30 septembre 2004). In:

Revue du Marché commun et de l'Union européenne 2006, n. 494, janvier, p. 29-34; Cortés Martín, J.M. (2007): *Deporte profesional y Derecho europeo de la competencia en la jurisprudencia el TJCE*. In: *Revista de Derecho Comunitario Europeo* 2007, v. 11, n. 28, septiembre/diciembre, p. 857-882; Icard, P. (2007): *La spécificité du sport menacée?* In : *Revue Dalloz*, vol. 2007, no. 9, pp. 635-639; Summerer, 2007; Weatherill, 2005, 2006; Zylberstein, 2007
6 Soek, J. (2006): *The strict liability principle and the human rights of athletes in doping cases*. The Hague: T.M.C. Asser Press, pp. 110, 112, 124, 171.

organisations. Various legal conceptions regarding the autonomy of sport emerged in the analyses made. Italian readers should note that an equivalent to article 117 of the Italian Constitution (*autonomia dell'ordinamento sportivo*, in conjunction with the concept of *legislazione concorrente*)⁷ is not found in EU law and does not seem to exist in the national law of any other Member State. While the German legal order places great emphasis on the autonomy of private associations, doctrine and case law do not attribute the same implications to the decisions taken by the governing bodies of sport, as this is the case under the terms of article 117 of the Italian Constitution. Since professional athletes are totally dependent on organisations with a monopoly structure, they are not free to promote their own interests and thus (in accordance with the case law of the German Constitutional Court) need protection from public authorities.⁸ As sport organisations do not meet the usual requirements of German courts in terms of democratic organisation⁹, it seems problematic that the same structures that develop and enforce the rules cannot also interpret them.

And yet, in *Meca-Medina*, a seemingly banal case regarding two swimmers who had tested positive for nandrolone (and claimed that they might inadvertently have produced the substance via metabolism, due to the consumption of uncastrated boar meat via a Brazilian dish called *sarapatel*), some scholars would see a potential threat to the autonomy of sporting organisations¹⁰, while others identified a clash between “sporting rules” and “economic” rules.¹¹ One author noted that the Court did not decide about the relevance of anti-doping rules to EU competition law as such, but did consider the principles of freedom of movement as sufficiently relevant for the case.¹² Yet according to one legal opinion a sharp distinction between “sporting rules” and “economic” rules may not always be realistic¹³, and the judgement rendered by the Court of First Instance in 2004 was criticised by a leading scholar in the field¹⁴ who subsequently greeted the Court’s decision to withdraw from this line of thought.¹⁵

Clarification is needed in this field where the only tangible EU law is made up of two judgements, and where the Commission has not until now seen it as appropriate to propose more targeted intervention. Taking stock of the situation is also rendered difficult by the limited number of publications from legal scholars, the vast majority being commentaries to the *Meca-Medina* case.¹⁶ Significantly, the major English-language textbooks published by major UK academic publishers still lack entries (let alone chapters or sections) on “sport” and/or “doping”.¹⁷ The same applies to a more practical policy guide intended for decision makers and journalists (Leonard, 2005), and this surprising situation is mirrored even within Council of Europe law, where the Council of Europe’s own standard textbook does not even mention sport, despite this being a policy field underpinned by an international law convention.^{18, 19} Surprisingly, even the textbook published by the arguably most active commentator of the relevant case law²⁰ has no such entry.

So while the White Paper certainly leaves many questions unaccounted for, it is remarkable simply for addressing the issues in question. While the EU has provided crucial funding to anti-doping research²¹, it has not until now played a regulatory role - with the punctual exception of the *Meca Medina* case - which makes the White Paper so much more relevant to anti-doping issues. But before this relevance can be assessed, the general characteristics of the White Paper will need to be identified.

3. The White Paper on Sport: nature, structure and rationale

A White Paper is a Commission Communication is not a piece of legislation, though it may (or may not) include proposals for legislative initiatives. There is no legal difference between a White Paper and a simple Communication, but certainly a political one. When the Commission decides to give the label White Paper to a Communication, it automatically ensures it a very high visibility, as only a handful of White Papers are published each year (some years as few as one). The White Paper on Sport consists of:

- A Political Document (*White Paper on Sport*) (20 pp.) which is available in all official languages. This is the main text, addressing all decision makers in various sectors and at various levels around Europe. (*Quotes made from, and references made to it in this paper all refer to the Political Document.*) The length is limited as the Commission operates a strict limit (usually 15 pp.) on this type of texts and the genre is one which automatically receives a very high level of visibility. It is followed by:
- An annex listing the Action Points (numbered deliverables from the Political Document) (*Pierre de Coubertin Action Plan*) (6 pp.). These deliverables are not legally binding but the Commission has committed itself politically to putting them into practice. In this White Paper they do not represent proposals for legislative measures, but in many cases they promise more efficient use of existing structures, capacities and resources.
- A long, technical report for a specialist public (Staff Working Document: *The EU and Sport: Background and Content*) (129 pp.).
- An Impact Assessment (as required for all initiatives of this type) (40 pp.), followed by a Summary of Impact Assessment (3 pp.).²² The preparation and publication of Impact Assessments is obligatory for texts of this type, although their exact legal status and practical implications are open to various interpretations, as highlighted in a recent doctoral thesis.²³

Part 2 of the White Paper is entitled “The Societal Role of Sport” (Part 1 is an Introduction) and includes sections on public health (counteracting overweight and obesity via physical activity); the fight against doping (to be discussed below in more detail); education and training (with proposals for a more targeted use of Community funding as well as linking up certain mechanisms of soft cooperation with

7 Coccia, M. (2004); De Silvestri, A.; Forlenza, O.; Fumagalli, L.; Musumarra, L. & Selli, L.: *Diritto dello sport*. Grassina (Firenze): Le Monnier università, pp. 20-22.

8 Pfister, B. (2007): Einführung. In: Fritzweiler, J.; Pfister, B. & Summerer, T.; Reinhardt, B. & von Coelln, C.: *Praxishandbuch Sportrecht*. 2. Aufl. München: Beck, p. 15.

9 Ibid., p. 26

10 Icard, P. (2007): La spécificité du sport menacée? In: *Revue Dalloz*, vol. 2007, no. 9, pp. 635-639.

11 Zylberstein, J. (2007): Collision entre idéaux sportifs et contingences économiques dans l’arrêt *Meca-Medina*. In: *Cahiers de droit européen* 2007, vol. 43, no. 1/2, pp. 213-237.

12 Choquet, A. (2006): La lutte contre le dopage au regard du droit communautaire de la concurrence : à propos de l’arrêt “*Meca-Medina et Majcen*” du

Tribunal de première instance des Communautés européennes (30 septembre 2004). In: *Revue du Marché commun et de l’Union européenne* 2006, n. 494, janvier, p. 29-34.

13 Olfers, M. (2008): From Case-By-Case to a General Playbook. In: *International Sports Law Journal*, vol. 2008, no. 1-2, pp. 93-94.

14 Weatherill, S. (2005): Anti-doping rules and EC law. In: *European Competition Law Review* 2005, vol. 26, no. 7, pp. 416-421.

15 Weatherill, S. (2007): *Cases and Materials on EU Law*. Oxford: Oxford University Press.

16 See references above

17 Berry, E. & Hargreaves, S. (2007): *European Union Law*. 2nd ed. Oxford: Oxford University Press; Chalmers, D.; Hadjiemmanuil, C.; Monti, G. & Tomkins, A. (2006): *European Union Law: texts and materials*. Cambridge:

Cambridge University Press; Craig, P. & de Búrca, G. (2008): *EU Law: text, cases, and materials*. 4th ed. Oxford: Oxford University Press; Fairhurst, J. (2006): *Law of the European Union*. 5th ed. Harlow: Pearson Longman; Weatherill, S.

(2007): *Cases and Materials on EU Law*. Oxford: Oxford University Press.

18 Council of Europe: *Anti-Doping Convention*. Strasbourg, 16.XI.1989. (European Treaty Series - No. 135).

19 Benoît-Rohmer, F. & Klebes, H. (2005): *Council of Europe Law: towards a pan-European legal area*. Strasbourg: Council of Europe Publishing.

20 Weatherill, S. (2007): *Cases and Materials on EU Law*. Oxford: Oxford University Press.

21 See: European Commission. Directorate-General for Research (2002): *Antidoping: la lotta all’uso dei farmaci che alterano le prestazioni sportive*. UE, Commissione europea. Lussemburgo: EUR-OP; Italian

version: European Commission. Directorate-General for Research (2002): *Anti-doping: the fight against performance-enhancing drugs in sport*. EU, European Commission. Luxembourg: EUR-OP.

22 All documents are available in E-format on-line, the Political Document having been translated into all official EU languages while other documents are available solely in English, with French and German versions planned in some cases. A hardcopy version of the Political Document (all languages), as well as one hardcopy publication including all documents (English only), are available in very limited quantities.

23 Meuwese, A.C.M. (2008): *Impact Assessment in EU Law Making*. Alphen aan den Rijn, et al.: Wolters Kluwer Law & Business.

education and training for sport occupations and sport professions); volunteering and active citizenship (with ideas for support to these activities, including a vow, together with Member States, to look at the challenges they are facing); social inclusion, integration and equal opportunities (strongly focused on the mobilisation of funding from existing EU programmes, but also aiming at furthering political cooperation around these issues via existing cooperation mechanisms); the fight against racism and violence (including networking with civil society as well as concrete proposals for cooperation with Member States enforcement and prosecution authorities); the external dimension (making sport more visible and more present in the EU's external policies); and finally sustainable development (ensuring that the construction and running of sports facilities, as well as sporting practices, are environmentally friendly).

Part 3 on "The Economic Dimension of sport" deals with two major types of problems (the need to make sport policy making more evidence-based at European level, via the development of more targeted statistical tools, as well as a promise to support the continued existence of VAT exemptions and reduced rates for the benefit of non-profit sport organisations). Part 4 on "The Organisation of Sport" looks at a variety of organisational and legal issues, some of which are also potentially relevant to the fight against doping (measures against corruption and money laundering in sport).

Significantly, however, the White Paper action points on doping (numbered deliverables on which the Commission has committed itself to deliver results) are included in Part 2 (Societal Role), thereby underlining the non-economic and non-organisational aspects of this fight which make it important for the EU to make its contribution. It is by defining sport as a socio-cultural good worthy of protection (in terms of ensuring access to sporting activities to the greatest possible number of residents of the Union, but not in terms of protecting specific structures which have grown out of the associative practices of the 19th and 20th centuries) that the fight against doping takes on a very specific and singular meaning of its own. Anti-doping work is laden with economic aspects as it represents heavy investments from public authorities and sport organisations, and because sanctions have grave consequences for professional athletes (loss of income, and often a premature end to a professional career). It is also true that legal and organisational aspects play an important role in the complex realities of doping and anti-doping practices. Yet it is due to the (negative) societal role of doping (as a threat to sport itself, as well as to the surrounding societies) that doping deserves special attention.

4. Proposals regarding the fight against doping

Section 2.2 of the White Paper ("Joining forces in the fight against doping")²⁴ is founded on the understanding that doping is more than just a problem for sport. It is as much a societal problem as it poses a serious threat to individual and public health, as it has a seriously corrupting effect on individuals and groups and furthers the formation of organised illegal networks, thereby posing a public order problem. At the same time, given the multitude of actors involved in anti-doping both nationally and internationally, and taken into account the well-developed rules and structures in many Member States as well as the very dissimilar division of labour between public authorities and sports organisations, it was important for the Commission only to propose measures which would represent a clear added value at European level. This is the background to point 4 of the Action Plan:

"(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."²⁵

Via existing programmes in the field of police cooperation it is possible to support networks for the purpose of sharing information and good practice, and/or for the purpose of further training. While there

is a recognised need to involve law enforcement agencies more, it is only legitimate if they do not feel equipped to deal with such novel tasks. Partnerships with such actors as WADA-accredited laboratories, national anti-doping organisations (NADO's), WADA and Interpol could be useful in a highly operational way.

At this stage, the White Paper includes an point which is significant although it is not part of the Action Plan:

"The Commission recommends that in illicit doping substances be treated in the same manner as trade in illicit drugs throughout the EU."²⁶

The Commission considers that the fight against doping should not only target athletes but also those who provide them with doping substances. The continued trade in doping substances represents a serious public order challenge and the existence of illegal networks is a reason for concern.

There is no obligation for Member States to follow what is merely a political statement, yet this short sentence about the criminalisation of trade in doping substances seems to have sparked a much-needed debate in some Member States. While it is true that attachment to the subsidiarity principle is strong in some Member States where eurosceptic actors are well organised, it is remarkable how well this recommendation was received. One of the three major national newspapers brought two big articles, one dealing with the White Paper in general, and the other solely with the recommendation about the criminalisation of trade in doping substances. The journalist presented the Commission's proposal to the president and the CEO of the national cycling union of Denmark (*Dansk Cykle Union*) (DCU) who greeted it whole-heartedly.²⁷

The Rasmussen case in the 2007 Tour de France had certainly played a role in the active cycling nation of Denmark, but it is still remarkable that such a far-reaching proposal addressed at other actors than the EU itself should be welcomed in this way. That DCU embraced the White Paper's proposals, shows that many leading people in organised sport do look to public authorities, including the EU, to take action and ensure the existence of a level-playing field.

The White Paper goes on in the same vein, calling on "all actors with a responsibility for public health to take the health-hazard aspects of doping into account".²⁸ Obviously, this exhortation includes public authorities, sports organisations and potentially all other members of civil society with a manifest capacity to make a contribution and bring about a positive change. The Commission 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"²⁹, but it is equally obvious that Member States' governments (especially the ministries of education and public health), local authorities (via their education, youth, sport or health departments) and socio-cultural organisations (especially those whose activities address children and young people) have the potential to make substantial contributions. Potentially, the Commission's message includes any kind of actor with a capacity and a willingness to contribute. This type of network-based policy-making, where a state actor acts via communication and networking rather than via coercion based on the adoption and implementation of binding legal arrangements, is becoming increasingly important. In the fight against overweight and obesity, not only Member States but also the EU is resorting to many initiatives of soft cooperation.

In the field of sport, until now not covered by a specific provision in the Treaty, the mixture of "hard law" and "soft law" has always been a predominant feature of the EU's initiatives, with a strong accent on "soft law".³⁰ With a phrase borrowed from Snyder³¹, "soft law" can be defined as rules which "have no legally binding force but which nev-

24 Political Document, pp. 4-5; Staff Working Document, pp. 10-11.

25 White Paper on Sport, pp. 4-5.

26 White Paper on Sport, p. 5.

27 Aagaard, M. (2007): EU vil sidestille

dopingbagmænd med narkohandlere. In: Politiken, 12 July 2007, p. 12.

28 White Paper on Sport, p. 5.

29 Idem.

ertheless may have practical effects”³². A more restrictive use of the term foresees it to cover solely a specific set of text genres.³³ In any case, practical, real-term implications thus outweigh legal-dogmatic limitations and the perspective needed to assess them comes closer to a political science approach than to a conventional legal analysis, which makes it necessary, for the purpose of such assessments to draw on the “governance” literature of political scientists, especially in this emerging EU activity field of sport and physical activity.³⁴ Yet while some legal scholars³⁵ tend to list categories of “soft law” *instruments* (thus still following a conventional legal approach), for a fuller understanding of the issues at stake, the opportunities offered and the difficulties to be confronted, it may be necessary to expand the focus to also include “soft cooperation” *networks* and “soft decision” *mechanisms*, thus focussing as much on the *de-facto* aspects, as on the *de-jure* aspects of issues.

This practice has been matched by a slow development away from a situation where sport was an entirely “horizontal” field of activity (layered into a multitude of other policy sectors, but without any defined territory of its own and with only very limited own resources), towards gradually becoming a “vertical” policy field (with own powers, structures and resources)³⁶ - albeit still seconded by strong “horizontal” arrangements (as can be seen from the White Paper, the preparation of which was coordinated with 15 different Directorates-General of the Commission). The EU being a structure with “hard law” prerogatives in certain fields, such as the internal market, but without equivalent powers in other fields, such as sport or youth, its ability to take action is very different from one area to another. The EU may decide to legislate, when it holds powers to do so (as in the case of food labelling), or it may need to resort to voluntary self-regulation between stakeholders (as it does via the EU Platform for Action on Diet, Physical Activity and Health)³⁷, or to soft political cooperation with Member States (as in the case of the recurrent informal meetings of Member States’ Sport Ministers). The non-binding doping-related recommendations put forward in the White Paper should be understood in this spirit.

The White Paper goes on underlining the need for “a more coordinated approach in the fight against doping,” suggesting that “defining common positions in relation to the Council of Europe, WADA and UNESCO” would be beneficial, and that an “exchange of information and good practice between Governments, national anti-doping organisations and laboratories” should be aimed at.³⁸ Finally, the Commission has profited from the White Paper to remind Member States of the need for “proper implementation of the UNESCO Convention against Doping in Sport”.³⁹ This exhortation goes beyond a mere invitation to sign and ratify the Convention which was adopted in 2005 and which obliges State Parties to recognise the World Anti-Doping Agency (WADA) and its World Anti-Doping Code. The only concrete obligations laid down in the Convention are to “adopt appropriate measures at the national and international levels which are consistent with the principles of the Code”, to “encourage all forms of international cooperation aimed at protecting athletes and ethics in sport and at sharing the results of research” and “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 3)⁴⁰. All Member States of the EU have also ratified the Council of Europe’s Anti-Doping Convention, which provides the basis for a monitoring system,⁴¹ although the mutual recognition of doping tests has only been added later with an Additional Protocol (signed 2002, which will enter into force in 2008).⁴²

The difference between mere ratification and “proper implementation” lies in the concrete measures taken to put the Convention’s objectives into practice. Given the vague nature of the most central provisions of the Convention (no obligation for State Parties to implement it via specified legal instruments, no obligation to set up specific structures), the need for implementation to be whole-hearted, substantial, effective and visible is thus even higher than it would be, had the Convention been of a more conventional type (with more measurable and verifiable obligations).

Section 2.2 is rounded off by the second and last point inserted into the Action Plan:

“(5) The Commission will play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States.”⁴³

To this end, the creation of an EU Working Group on Anti-Doping was decided by Member States’ Sport Directors, meeting in Brdo (Slovenia) on 5 February 2008.⁴⁴ The Working Group will be complementary to the Council of Europe whose anti-doping system is well-established (1989 Convention with follow-up system and Monitoring Group).

Of related interest is a section of Part 4 of the White Paper (The Organisation of Sport) dealing with “Corruption, money laundering and other forms of financial crime”. Concerns about illegal financial practices in the field of sport are shared by Member States and the EU alike and the problems are well-known to the public as critical journalists are increasingly reporting about them.⁴⁵ The White Paper proposes public-private partnerships which may help to identify vulnerabilities to corruption in sport and to develop preventive and repressive strategies to counter corruption implementation of EU anti-money laundering legislation with regard to the sport sector.⁴⁶

Future developments would be closely linked to the entry into force of the Lisbon Treaty if this Treaty is ratified by all Member States of the EU. Article 149 TEC, as amended by the Lisbon Treaty, foresees a role for the EU in relation to

“developing 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 the youngest sportsmen and sportswomen”⁴⁷

Both the promotion of fairness and openness in sporting competitions and the protection of the physical and moral integrity of sportsmen and sportswomen are phrases circumscribing major aspects of anti-doping work.

30 Kornbeck, J. (2006a): Governance als Soft Law: Innovation oder Notwendigkeit im sportpolitischen Handeln der EU? In: Tokarski, W.; Petry, K. & Jesse, B. (eds): Sportpolitik. Theorie- und Praxisfelder von Governance im Sport. Cologne: Sportverlag Strauß (Veröffentlichungen der Deutschen Sporthochschule Köln, vol. 15), pp. 31-52.
31 Snyder, E. (1993): The Effectiveness of European Community Law: institutions, processes, tools and techniques. In: Modern Law Review, vol. 56, no. 1, pp. 19-54; Craig, P. & de Búrca, G. (2008): EU Law: text, cases, and materials. 4th ed. Oxford: Oxford University Press.
32 Chalmers, D. & Tomkins, A. (2007):

European Union Public Law. Cambridge: Cambridge University Press, p. 137.
33 Craig, P. & de Búrca, G. (2008): EU Law: text, cases, and materials. 4th ed. Oxford: Oxford University Press, p. 87.
34 Kornbeck, J. (2006a): Governance als Soft Law: Innovation oder Notwendigkeit im sportpolitischen Handeln der EU? In: Tokarski, W.; Petry, K. & Jesse, B. (eds): Sportpolitik. Theorie- und Praxisfelder von Governance im Sport. Cologne: Sportverlag Strauß (Veröffentlichungen der Deutschen Sporthochschule Köln, vol. 15), pp. 31-52.
35 Snyder, E. (1993): The Effectiveness of European Community Law: institutions, processes, tools and techniques. In:

Modern Law Review, vol. 56, no. 1, pp. 19-54; Craig, P. & de Búrca, G. (2008): EU Law: text, cases, and materials. 4th ed. Oxford: Oxford University Press.
36 Kornbeck, J. (2006b): Sport und EG/EU - Ein horizontales oder vertikales Thema? Eine Zwischenbilanz der ersten dreißig Jahre (1974-2004). In: Sport und Gesellschaft, vol. 3, no. 1, pp. 81-103.
37 See the website of the EU Platform for Action on Diet, Physical Activity and Health.
38 White Paper on Sport, p. 5.
39 Idem.
40 UNESCO (2005): International Convention against Doping in Sport. Paris, 19 October 2005.

41 Council of Europe (1989): Anti-Doping Convention. Strasbourg, 16.XI.1989. (European Treaty Series - No. 135).
42 Council of Europe (2002): Additional Protocol to the Anti-Doping Convention. Warsaw, 12.IX.2002.
43 White Paper on Sport, p. 5.
44 See press release: Republic of Slovenia [EU Presidency] (2008): EU Directors General Discuss White Paper on Sport.
45 Weinreich, J. (ed): Korruption im Sport. Leipzig: Forum Verlag, pp. 214-227.
46 Section 4.6, action points 44-46, p. 16
47 Lisbon Treaty as published, Official Journal of the EU, C 306, 17.12.2007, p. 82, pt. 124.



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If ratified by all, this provision would provide the EU with a competence to take action on sport matters, albeit without any harmonisation of national legislation. Some Member States are keen to have this confirmed⁴⁸, although the Lisbon Treaty is in fact crystal clear precisely on this point. Support from the European Parliament, the Committee of the Regions and the Economic and Social Committee is strong. On 8 May 2008, Parliament adopted its report on the White Paper⁴⁹ and voted a Resolution which includes the following section:

“MEPs request Member States to agree on a common legislative approach towards doping and to define common positions in relation to WADA, UNESCO and the Council of Europe. In particular, MEPs call on Member States to treat the trade in illegal doping substances in the same manner as the trade in illicit drugs and to combat doping by avoiding excessively busy schedules that put pressure on athletes. They recommend checks, increased research and testing, long-term monitoring by independent doctors and measures focusing on prevention and training of athletes. MEPs call for an action plan on the fight against doping, in the run-up to the London 2012 Olympics. Member States are asked to ensure more comprehensive information and education for young sports competitors regarding performance-enhancing drugs, prescriptions which may contain them and their effect on health.”⁵⁰

It will thus be seen that the philosophy chosen by the Commission has largely been adopted by Parliament also.

5. Beyond the White Paper

To round off this discussion, we shall look at some likely developments for the coming months and years.

1. The Commission will follow up on its promises made in the White Paper with various means, reflecting the diversity of the proposals made. The European Parliament can be expected to show a continued strong interest in anti-doping matters. Member States' collaboration within the newly founded EU Working Group on Anti-Doping is likely to provide more clarity as to how much EU involvement is really wanted. This is likely to provide a climate where more decisions (albeit legally non-binding) could be taken at EU level which would affect anti-doping work. Closer cooperation with the Council of Europe could also lead to various concrete results.
2. CFI and ECJ case law might in the future become more instrumental in defining some aspects of anti-doping work. Case law can be expected to continue keeping a close orientation with the likely economic impact of anti-doping rules.
3. Finally, the most palpable impact of the White Paper in relation to anti-doping might be of a more informal nature, namely by fostering debate leading to changes at national level towards a more penal approach. Even in countries with no anti-doping law, such as Germany, inspiring legal debates on the criminalisation of doping trade⁵¹, and sometimes even of doping itself (punishing athletes, as in Italy)⁵² can be found. The theory and practice of anti-doping work around Europe has been presented in an edited book, which

includes some chapters on legal aspects.⁵³ The strict liability of athletes has been analysed in a human rights perspective.⁵⁴ Certainly, academic literature can be expected to develop in this field where practice leaves innumerable questions unanswered. How many policy initiatives will follow, remains to be seen, yet a number of Member States have moved towards criminalisation. Laws were changed recently in some countries and in Germany the Medicaments Act (*Arzneimittelgesetz*) now includes a provision entitled “Ban on Medicaments for the Purpose of Doping in Sport” (§ 6a *Verbot von Arzneimitteln zu Dopingzwecken im Sport*). The law includes penal provisions providing for prison sentences up to three years for those who trade substances or administer them to others. Possession of “a not negligible quantity” (“*wer [...] in nicht geringer Menge [...] besitzt*”) (§ 95) is criminal, considering that quantities over a certain threshold cannot be consumed without exposing oneself to the risk of an overdose.⁵⁵ And on 3 July 2008, France followed with a law aimed at penalising those who trade doping substances.⁵⁶

6. Conclusion

Affirming that doping is a “recent” problem⁵⁷ is problematic as doping practices have been known in some form or another since Antiquity. But it is true that a coordinated response, including from public authorities, has taken time to emerge. Ever since France introduced its first doping law in 1965, the focus has shifted away from purely sportive aspects towards health aspects.⁵⁸ In recent years there has also been a slowly growing realisation of the public order problems linked to doping and even in Germany, where no law exists and no law is planned, a stronger role for state organs has become more acceptable.⁵⁹

The White Paper on Sport has allowed the EU to make an entry on the anti-doping scene. This move has been generally well received by stakeholders. Although the White Paper does not propose legislative action at EU level, it may have an informal impact on legislation nationally, and it certainly confirms the impression that a stronger role for governments is increasingly becoming acceptable. In the field of sport, this is more epochal than it might seem at first glance.

Returning again to Germany (a country where the autonomy of sport organisations has been almost sacrosanct, despite the absence of a provision like article 117 of the Italian Constitution), the governing bodies of sport have gradually developed a huge body of rules which fill entire compendia, available in loose leaf or bound editions. The legal zeal deployed may surpass that of state actors and the resulting mass of rules is only comprehensible to specialists.⁶⁰ But there may be signs of a sea-change as even ardent defenders of “autonomy” start advocating regulation, at least with regard to doping.⁶¹ Doping may in the end have been the one single problem that prompted the governing bodies of sport, as well as the general public, to change their minds about the distribution of tasks between government and sport. Although the EU does not have the ambition to step in and become a regulator of sport, the White Paper may later prove to have been part of a wider trend, and its doping section may have proven the point with particular clarity.

48 House of Commons Culture, Media and Sport Committee (2008): European Commission White Paper on Sport. Seventh Report of Session 2007-08. HC 347. Published on 14 May 2008 by authority of the House of Commons. London: The Stationery Office Limited.

49 European Parliament (2008): Session document A6-0149/2008 - 14.4.2008 - Report on the White Paper on Sport (2007/2261(INI)). Committee on Culture and Education. Rapporteur: Manolis Mavrommatis.

50 European Parliament (2008): INI/2007/2261 - 08/05/2008 - EP: non-legislative resolution.

51 Daumann, F. (2003): Staatlicher Handlungsbedarf bei Doping im

Hochleistungssport. In: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 2003, Bd. 54, p. 243-268;

Prokop, C. (2000): Die Grenzen der Dopingverbote. Baden-Baden: Nomos.

52 Bannenberg, B. & Rössner, D. (2006): Straftat gegen den Wettbewerb. Plädoyer für den Einsatz des Strafrechts bei Dopingverstößen. In: Weinreich, (2006), pp. 214-227.

53 Spitzer, G. (2006): Doping and doping control in Europe: performance enhancing drugs, elite sports and leisure time sport in Denmark, Great Britain, East and West Germany, Poland, France, Italy. Aachen: Meyer & Meyer Sport (Edition Sport & Freizeit, vol. 15).

54 Soek, J. (2006): The strict liability princi-

ple and the human rights of athletes in doping cases. The Hague: T.M.C. Asser Press.

55 Arzneimittelgesetz [Germany] [1976] (2008): Gesetz über den Verkehr mit Arzneimitteln. (Arzneimittelgesetz - AMG).

56 Loi n° 2008-650 du 3 juillet 2008 relative à la lutte contre le trafic de produits dopants. In: Journal Officiel de la République française, JORE, n° 0155 du 4 juillet 2008, page 10715.

57 Lowenstein, W. & Siri, F. (2001): Le dopage : une drogue comme une autre ? In: Numéro hors-série de: Le Dalloz, vol. 2001, n. 20 du 24 mai 2001.

58 Idem.

59 Daumann, F. (2003): Staatlicher

Handlungsbedarf bei Doping im Hochleistungssport. In: Jahrbuch für die Ordnung von Wirtschaft und

Gesellschaft 2003, Bd. 54, p. 243-268;

Prokop, C. (2000): Die Grenzen der Dopingverbote. Baden-Baden: Nomos; Lowenstein, W. & Siri, F. (2001): Le dopage : une drogue comme une autre ? In: Numéro hors-série de: Le Dalloz, vol. 2001, n. 20 du 24 mai 2001; Reinhardt, B. (2007): Sport und Strafrecht. In: Fritzweiler, et al. (2007), pp. 640-716.

60 Pfister, B. (2007): Einführung. In: Fritzweiler, et al. (2007), pp. 1-27.

61 Reinhardt, B. (2007): Sport und Strafrecht. In: Fritzweiler, et al. (2007), pp. 640-716.

Sanctions for Anti-Doping Rule Violations in the Revised Version of the World Anti-Doping Code*

by Alessandro L. Celli, Lucien W. Valloni, Dmitry A. Pentsov**

I. Introduction

The fight against the use of doping in sport which was started by international sport federations in the late 20-s of the last century sometimes resembles a boxing match where its participants are constantly exchanging powerful punches.¹ Indeed, over the last several decades, the introduction of doping tests and the lists of prohibited substances have been constantly countered by the development of new substances, notably anabolic steroids, and more sophisticated methods of doping which, in turn, has led to the development of new testing methods, and, more recently, the creation of the World Anti-Doping Agency (WADA), and the adoption of the World Anti-Doping Code (the "WADC").²

Viewed from this perspective, recently the use of doping in sport received another punch. On November 17, 2007, the World Anti-Doping Foundation Board has approved a revised World Anti-Doping Code, which will enter into force on January 1, 2009 (the "WADC-2009").³ The revised version of the Code contains a number of major innovations, notably as concerns sanctions for anti-doping rule violations. These innovations reflect two general themes which emerged during the Code's review - firmness and fairness - both targeted at strengthening the fight against doping in sport.⁴ Correspondingly, the purpose of this Article is to analyze the most important innovations concerning sanctions focusing on their practical consequences for athletes and teams.⁵

The practical consequences of the innovations concerning sanctions for anti-doping rule violations are illustrated on the example of actual cases decided by the Court of Arbitration for Sport (CAS) on the basis of provisions the World Anti-Doping Code prior to its revision.⁶ After a brief description of the facts of a case, legal issues presented and decision reached by the CAS, the hypothesis is made as to how the same court would have ruled on the same set of facts after January 1, 2009, on the basis of provisions of WADC-2009. Making an interesting combination of a statutory interpretation and a case law analysis, such approach goes to the heart of the legal profession - to predict as accurately as possible how the court would rule on a specific set of facts in a particular case,⁷ and transforms a theoretical analysis of innovations concerning sanctions for anti-doping rule violations into a fascinating reading. Furthermore, such "re-hearing" of previously decided CAS cases could make this Article appealing not only to sports law scholars and legal practitioners, but also to wide variety of athletes and sporting bodies officials, who might be interested in knowing whether and, if so, how these new provisions could specifically affect their own rights and interests in the future. Prior to making this analysis, however, it would be desirable to briefly recall the meaning of "doping" in the WADC-2009 as well as the founda-

tions of the liability for anti-doping rule violations.

II. The definition of "Doping" and the principle of strict liability for anti-doping rule violations

The term "doping" is defined in WADC-2009 as the occurrence of one or more anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code.⁸ These violations which closely resemble the violations listed in Articles 2.1-2.8 of WADC are:

- The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.⁹
- Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.¹⁰
- 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.¹¹
- Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation.¹²
- Tampering or Attempted Tampering with any part of Doping Control.¹³
- Possession of Prohibited Substances and Methods: (i) Possession by an Athlete In-Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Athlete Out-of-Competition of any Prohibited Method or any Prohibited Substance which is prohibited in Out-of-Competition testing, 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.¹⁴ (ii) Possession by an Athlete Support Personnel In-Competition of any Prohibited Method or any Prohibited Substance, or Possession by an Athlete Support Personnel Out-of-Competition of any Prohibited Method or any Prohibited Substance which is prohibited in Out-of-Competition Testing, 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.¹⁵
- Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method.¹⁶
- Administration or Attempted administration to any Athlete In-

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1 The first international sport federation to ban the use of doping was the International Amateur Athletic Federation (IAAF) in 1928. See, World Anti-Doping Agency: A Brief History of Anti-Doping, available at: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory=id=312> (last visited May 10, 2008).

2 The English version of the WADC is available at: http://www.wada-ama.org/rtecontent/document/code_v3.pdf; the Russian version is available at: [http://www.wada-](http://www.wada-ama.org/rtecontent/document/code_ru.pdf)

www.wada-ama.org/rtecontent/document/code_ru.pdf (last visited May 10, 2008).

3 The English version of the WADC-2009 is available at: http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf (last visited May 10, 2008).

4 World Anti-Doping Agency: Q&A: World Anti-Doping Code Review: Consultation Process & Major Envisaged Changes, available at: http://www.wada-ama.org/rtecontent/document/QA_Code_Consultation_En.pdf (last visited May 10, 2008).

5 It should be noted that the provisions of WADC, in principle, do not have direct application (see, e.g., TAS 2006/A/1038, *Joseph N'Sima v. FIBA & AMA*, award dated December 4, 2006, section 83, avail-

able at: <http://www.wada-ama.org/rtecontent/document/CAS-NSima.pdf> (last visited May 10, 2008). Correspondingly, Article 23.2 of WADC-2009 lists the Articles of the Code (and corresponding Comments) which must be implemented by the signatories to the Code, including International Federations and National Anti-Doping Organizations, without substantive change, namely, Article 1 (Definition of Doping), Article 2 (Anti-Doping Rule Violations), Article 3 (Proof of Doping), Article 4.2.2 (Specified Substances), Article 4.3.3 (WADA's Determination of the Prohibited List), Article 7.6 (Retirement from Sport), Article 9 (Automatic Disqualification of Individual Results), Article 10 (Sanctions

Competition of any Prohibited Method or Prohibited Substance, or administration or Attempted administration to any Athlete Out-of-Competition of any Prohibited Method or any Prohibited Substance that is prohibited in Out-of-Competition Testing, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation.¹⁷

The liability for the presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen is based upon the strict liability principle. Under this principle, an anti-doping rule violation occurs whenever a prohibited substance is found in an athlete's bodily specimen. This violation occurs regardless of whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault. If the Positive Sample came from an In-Competition test, then the results of that Competition are automatically invalidated.¹⁸ However, the Athlete then has the possibility to avoid or reduce the period of ineligibility which could be also imposed upon him or her if this Athlete can demonstrate the absence of fault or significant fault¹⁹ or in certain circumstances the absence of intent to enhance his or her sport performance.²⁰

Perhaps, the clearest explanation of the rationale for the strict liability principle has been presented by the CAS in 1995 in the case of *USA Shooting & Quigley v. International Shooting Union (UIT)*.²¹ As was pointed out by the Court, it was true that a strict liability test was likely in some cases to be unfair in an individual case, where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she was not responsible - particularly in the circumstances of sudden illness in a foreign country. But it was also in some sense "unfair" for an athlete to get food poisoning on the eve of an important competition. Yet in neither case would the rules of the competition be altered to undo the unfairness. Just as the competition would not be postponed to await the athlete's recovery, so the prohibition of banned substances would not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.²² Furthermore, in the CAS's view, it appeared 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, according to the CAS, it was likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it was certain that a requirement of intent would

invite costly litigation that may well cripple federations - particularly those run on modest budgets - in their fight against doping.²³

III. Innovations concerning sanctions on individuals

1. New definition of "specified substances" and its impact on the existing system of sanctions

The sanctions for the use of prohibited substances provided for in the current version of WADC may be subdivided into: (i) basic periods of ineligibility²⁴ and (ii) reduced periods of ineligibility for the use of those prohibited substances which are qualified as "specified substances".²⁵ The specified substances are those substances identified in the Prohibited List which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.²⁶ Where an athlete can establish that the use of such a specified substance was not intended to enhance sport performance, this violation may result in a reduced sanction.²⁷ On the other hand, when an athlete fails to do so, or when the prohibited substance used by an athlete is not "specified substance", such athlete would be subject to the basic sanctions.

While WADC-2009 also provides for the same two categories of sanctions, namely basic periods of ineligibility²⁸ and reduced periods of ineligibility for the use of "specified substances",²⁹ as compared to its predecessor, the scope of the definition of "specified substances" in WADC-2009, has been significantly broadened. The new version of the Code defines "specified substances" as all prohibited substances, except substances in the classes of anabolic agents and hormones and those stimulants so identified on the prohibited list.³⁰ As a result, under WADC-2009, the reduced sanctions could be applied in a substantially larger number of cases than that under WADC. On the other hand, unlike WADC, to become eligible for a reduced sanction under WADC-2009, the athletes would have to prove not only the lack of intent to enhance the athlete's sport performance or mask the use of a performance-enhancing substance, but also to establish how this substance entered his or her body or came into his or her possession.³¹ This combination of the expansion of the definition of specified substances with the hardening of the burden of proof placed upon athletes, may be seen as a reflection of the trend for a greater flexibility as concerns sanctions in cases where the athlete can clearly demonstrate that he or she did not intend to enhance sport performance, which emerged during the Code's review.³²

The practical implications of the new definition of "specified substances" for the athletes could be illustrated on the example of the case of *WADA v. Darko Stanic & Swiss Olympic*, decided by CAS in 2007³³ and the case of *WADA v. National Shooting Association*

on Individuals), Article 11 (Consequences to Teams), Article 13 (Appeals) with the exception of 13.2.2 and 13.5, Article 15.4 (Mutual Recognition), Article 17 (Statute of Limitations), Article 24 (Interpretation of the Code), and Appendix 1 - Definitions. No additional provision may be added to a Signatory's rules which changes the effect of the Articles enumerated in this Article.

6 The Court of Arbitration for Sport in Lausanne, Switzerland, created in 1984, is a permanent independent arbitration body specialized in resolving disputes directly or indirectly related to sport. Its organization as well as its arbitration proceedings is governed by the 1994 Code of Sport-related Arbitration, divided into two parts: the Statutes of bodies working for the settlement of sport-related disputes and the Procedural Rules. In 1999, mediation rules have been added to the Code. See, <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0/> (last visited May 10, 2008).

7 As Judge Oliver Wendell Holmes, a pre-

eminent American lawyer, once said, the prophecies of what the courts will do in fact, and nothing more pretentious, are what he meant by the law. See, Oliver W. Holmes, *The Path of the Law* //Harvard Law Review, 1897, Vol. 10, pp. 457, 461.

8 Article 1 of WADC-2009. Appendix 1 to WADC defines "prohibited substance" as any substance so described on the Prohibited List.

9 Article 2.1 of WADC-2009.

10 Article 2.2 of WADC-2009.

11 Article 2.3 of WADC-2009.

12 Article 2.4 of WADC-2009.

13 Article 2.5 of WADC-2009.

14 Article 2.6.1 of WADC-2009.

15 Article 2.6.2 of WADC-2009.

16 Article 2.7 of WADC-2009.

17 Article 2.8 of WADC-2009.

18 Article 9 of WADC-2009 (Automatic Disqualification of Individual Results).

19 Article 10.5 of WADC-2009 (Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances).

20 Article 10.4 (Elimination or Reduction of the Period of Ineligibility for Specified Substances under Certain Circumstances).

See, also, WADC-2009, Commentary to Article 2.1.1.

21 CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995. //CAS: Digest of CAS Awards, vol. 1, 1986-1998, (Mathieu Reeb, ed., 1998), p. 187-204.

22 CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995, p. 193 (section 14).

23 CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995, p. 193 (section 15). It should be also noted that despite the acceptance of the strict liability principle by the CAS, certain authors have criticised this principle, arguing that it is contrary to Article 6(2) of the European Convention on Human Rights (Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law). See, Janwillem Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases* (2006), pp. 399-401. Others point out that since the suspension from competition will cite an effect on an athlete's income, the exclusion should at least be accompanied by an appreciation of the

subjective element of each case. This is all the more true since the Federations are monopolies in their fields of sport. See, Frank Oshütz, *Doping Cases before the CAS and the World Anti-Doping Code. //The Court of Arbitration for Sport 1984-2004* (Ian S. Blackshaw, Robert C.R. Siekmann, Janwillem Soek, eds., 2006), p. 253.

24 Article 10.2 of WADC. Ineligibility means that 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 of WADC (see, Appendix 1 to WADC: Definitions).

25 Article 10.3 of WADC.

26 Article 10.3 of WADC.

27 Article 10.3 of WADC.

28 Article 10.2 of WADC-2009.

29 Article 10.4 of WADC-2009.

30 Article 4.2.2 of WADC-2009.

31 Article 10.4 of WADC-2009.

32 Comment to Article 4.4.2 of WADC-2009.

33 CAS 2006/A/1130, *WADA v. Darko Stanic & Swiss Olympic*, award of January 4, 2007, available at: <http://www.wada->

of Malaysia (NSAM) & Cheah & Ng & Masitah, decided by CAS in 2008.³⁴

In *WADA v. Darko Stanic & Swiss Olympic*, Darko Stanic, a professional handball player, played for a Swiss club named "Grasshoppers Handball AG" ("Grasshoppers"). On April 28, 2006, after a game between St. Otmar St. Gallen and Grasshoppers, he was tested positive for Benzoyllecgonine and Methylecgonine, which are metabolites of cocaine; cocaine being specified within WADA's list of substances prohibited In-Competition. During the disciplinary hearings, held by the Disciplinary Chamber of Swiss Olympic, Mr. Stanic stated that he had come to the conclusion that the cocaine must have entered his system as a consequence of him unknowingly smoking a cigarette containing cocaine at a discotheque in Zurich, where he went with his friend four days before the positive test.

On July 6, 2006, the disciplinary Chamber issued its decision whereby Darko Stanic was suspended for a period of six months. In reaching this decision, the Chamber considered that the athlete had committed "no significant fault or negligence" as defined by Article 17.4.2 of Swiss Olympic Doping Statute and that given the overall circumstances, including Darko Stanic's personal situation, the minimum sanction of one year's suspension should be reduced to six months.

On appeal, lodged by WADA, CAS set aside the decision of the Disciplinary Chamber and declared the athlete ineligible for competition for two years. CAS recalled that the proof by the athlete of how the prohibited substance entered his/her system is a necessary precondition in establishing lack of fault or no significant fault.³⁵ Applying this precondition in the present case, CAS came to the conclusion that on the basis of the circumstances described and evidence presented by Darko Stanic, and bearing in mind public knowledge relating to cocaine and crack, it was improbable that the athlete unknowingly smoked a cigarette containing cocaine or crack given to him in the discotheque by a stranger.³⁶ Correspondingly, CAS considered that on the balance of probabilities the athlete has clearly not provided evidence making it more probable than not that cocaine or crack entered his system as a result of him smoking a cigarette than he asked a stranger for in a discotheque.³⁷

Supposing that a similar case would have been considered under WADC-2009, the result most probably would have been the same. Although it may be expected that under the revised Code cocaine would be considered as a "specified substance", the athlete still did not manage to establish how this substance entered his body. Since one of the conditions for the application of the reduced period of ineligibility for the use of specified substances is not satisfied, the athlete would be subject to a basic period of ineligibility.

In *WADA v. National Shooting Association of Malaysia (NSAM) & Cheah & Ng & Masitah*, Ms. Cheah, Ms. Ng and Ms. Masitah, international level shooters and members of the national team of the NSAM for between 7 and 10 years, were tested positive for a specified substance, Propranolol and its metabolites, during a local shooting competition held in Malaysia in March of 2007. During the hearings held by a doping enquiry panel established from members of the NSAM, from the National Sport Council and the Medical Committee of the Olympic Committee of Malaysia, the shooters alleged that the prohibited substance was contained in the unwrapped chocolates which were given to them by their coach, but that they were not aware of the presence of the prohibited substance in the chocolates. The panel found that the shooters did not intentionally take the prohibited substance to enhance their performance and, in the end, the NSAM imposed upon the three shooters a six-month period of ineligibility.³⁸

On appeal, lodged by WADA in relation to a 6-month suspension, CAS set aside the decision the NSAM and imposed upon the three shooters a two-year suspension. CAS found that in the present case there were no circumstantial evidence - other than there mere allegation of the shooters - that they did not intend to enhance their performance. The shooters did not provide to the doping enquiry panel a piece of the contaminated chocolate. Nor did the coach admit before the doping enquiry panel to have manipulated the chocolate.

Furthermore, there was no evidence that in the given circumstances an unintentional violation of the anti-doping rules by the shooters was more likely than the intentional misuse of the substance. As a result, the CAS came to the conclusion that the shooters and the NSAM did not discharge their burden of proof that the anti-doping rule violation was committed by the shooters without their intent to enhance their performance.³⁹

Supposing that a similar case would have been considered under WADC-2009, the result most probably would have been the same. Although Propranolol is a specified substance, the shooters did not to prove the lack of intent to enhance their sport performance. Neither, did they establish how this substance entered their body. Since both of the conditions for the application of the reduced period of ineligibility for the use of specified substances are not satisfied, correspondingly, the shooters would be subject to a basic period of ineligibility.

2. Broadening the possibilities of elimination or reduction of period of ineligibility based on no fault or negligence or no significant fault or negligence

Similarly to its predecessor, WADC-2009 also provides for the possibility of reduction or elimination of the period of ineligibility based on exceptional circumstances, namely in those cases where the athlete can establish that he or she had no fault or negligence,⁴⁰ or no significant fault or negligence.⁴¹ Unlike its predecessor, however, WADC-2009 does not limit the application of these provisions to certain specified anti-doping rule violations, such as presence of prohibited substance, the use of prohibited substance or prohibited method,⁴² or presence of prohibited substance, the use of a prohibited substance or prohibited method, its administration or failing to submit to sample collection.⁴³ As a result, under WADC-2009, the elimination or reduction of the period of ineligibility based on the absence of fault or negligence or significant fault or negligence would be theoretically possible in case of any anti-doping rule violation.

On the other hand, in a number of anti-doping rule violations (such as trafficking or attempted trafficking in prohibited substance or prohibited method), the knowledge of the violation is an element of the violation itself. In such cases, proving the absence of significant fault or negligence and, correspondingly, meeting the criteria for the reduction could be extremely difficult. That is why, it may be anticipated that the practical effect of innovations concerning "no fault or negligence" or "no significant fault or negligence" rules would be insignificant.

3. Strengthening of incentives to come forward

Recalling that the cooperation of athletes, athlete support personnel and other persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations in light is important to clean

ama.org/rtecontent/document/CAS_Stani
c.pdf (last visited May 10, 2008).

34 CAS 2007/A/1395, *WADA v. National Shooting Association of Malaysia (NSAM) & Cheah & Ng & Masitah*, award of March 31, 2008, available at: [http://www.wada-](http://www.wada-ama.org/rtecontent/document/CAS_2007-A-1395.pdf)

ama.org/rtecontent/document/CAS_2007-A-1395.pdf (last visited May 10, 2008).

35 CAS 2006/A/1130, *WADA v. Darko Stanic & Swiss Olympic*, section 41.

36 CAS 2006/A/1130, *WADA v. Darko Stanic & Swiss Olympic*, section 51.

37 CAS 2006/A/1130, *WADA v. Darko Stanic & Swiss Olympic*, section 53.

38 CAS 2007/A/1395, *WADA v. National Shooting Association of Malaysia (NSAM) & Cheah & Ng & Masitah*, section 6.

39 CAS 2007/A/1395, *WADA v. National Shooting Association of Malaysia (NSAM) & Cheah & Ng & Masitah*, section 78.

40 Article 10.5.1 of WADC, Article 10.5.1 of WADC-2009. No fault of negligence means 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 (see, Appendix 1 to WADC-2009: Definitions).

41 Article 10.5.2 of WADC, Article 10.5.2 of WADC-2009. No significant fault or negligence means 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 (see, Appendix 1 to WADC-2009: Definitions).

42 Article 10.5.1 of WADC.

43 Article 10.5.2 of WADC.

sport,⁴⁴ WADC-2009 has significantly strengthened the incentives for athletes and other persons to come forward in four major respects. First, WADC-2009 has expanded the list of exceptional circumstances which could be used as a basis for elimination or reduction of ineligibility period by adding there the admission of an anti-doping rule violation in the absence of other evidence. Under this new provision, where an athlete or other person voluntarily admits the commission of an anti-doping rule violation before having received notice of a sample collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than the presence of a prohibited substance or its metabolites or markers in the athlete's sample, before receiving first notice of the admitted violation pursuant to Article 7 of the Code) and that admission is the only reliable evidence of the violation at the time of admission, then the period of ineligibility may be reduced, but not below one half of the period of ineligibility otherwise applicable.⁴⁵

Second, WADC-2009 has enhanced the potential extent of the suspension of an ineligibility period from one half to three quarters of the otherwise applicable ineligibility period in cases where athlete or other person has provided substantial assistance to an anti-doping organization, criminal authority or professional disciplinary body which results in a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another person.⁴⁶ Furthermore, while WADC currently limits the application of these provisions only to anti-doping rule violations involving possession by athlete's support personnel, trafficking and administration of a prohibited substance or prohibited method to an athlete,⁴⁷ WADC-2009 extends their application to all anti-doping rule violations.⁴⁸

Third, WADC-2009 introduces a rule to address the situation where an athlete or other person establishes entitlement to reduction in sanction under more than one provision of Article 10 of WADC-2009 (no significant fault or negligence, substantial assistance or admission in the absence of other evidence).⁴⁹ Under this new rule, after the period of ineligibility is determined in accordance with Articles 10.2, 10.3, 10.4 and 10.6 of the Code, it would be possible to further reduce or suspend this period, but not below one-quarter of the otherwise applicable period of ineligibility.⁵⁰

Fourth, similarly to WADC, under WADC-2009, the ineligibility period, as a general rule, shall also start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date the ineligibility is accepted or otherwise imposed.⁵¹ Unlike WADC, however, WADC-2009 includes into the list of justifications for starting the period of ineligibility earlier than the date of the hearing decision not only delays not attributable to the athlete (as it already was under WADC),⁵² but also timely admission by the athlete of the anti-doping rule violation,⁵³ and provisional suspension.⁵⁴

As concerns the timely admission, under the new rule of WADC-2009, where the athlete promptly (which, in all events, means before the athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the anti-doping organization, the period of ineligibility may start as early as the date of sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this rule is applied, the athlete or other person shall serve at least one-half of the period of ineligibility going forward from the date the athlete or other person accepted the imposition of a sanction or the date of a hearing decision imposing a sanction.⁵⁵ Nevertheless, this rule shall not apply where the period of ineligibility already has been reduced under Article 10.5.4 (Admission of an anti-doping rule violation in the absence of other evidence).⁵⁶

As concerns the provisional suspension, if such suspension is imposed and respected by the athlete, then the athlete shall receive a credit for such period of provisional suspension against any period of ineligibility which may ultimately be imposed.⁵⁷ If an athlete voluntarily accepts a provisional suspension in writing from an anti-doping organization with results management authority and thereafter refrains from competing, the athlete shall receive a credit for such period of voluntary provisional suspension against any period of inel-

igibility which may ultimately be imposed.⁵⁸ An athlete's voluntary acceptance of a provisional suspension is not an admission by the athlete and shall not be used in any way as to draw an adverse inference against the athlete.⁵⁹

These four innovations would offer the athletes and other persons who committed anti-doping rule violations a possibility of a significant reduction of ineligibility period, provided that they cooperate with anti-doping organizations, criminal authorities or professional disciplinary bodies either with respect to their own violation of anti-doping rule or with respect to the violation committed by another person. The innovations concerning the early commencement of ineligibility period, in particular, would also create a motivation for the athletes for an early admission of anti-doping rule violation or acceptance of provisional suspension instead of engaging in a prolonged legal battle to challenge the fact of the anti-doping rule violation.

The practical consequences of these innovations could be illustrated on the example of the case of *World Anti-Doping Agency (WADA) v. United States Anti-Doping Agency (USADA), United States Bobsled & Skeleton Federation (USBF) & Zachery Lund*, decided by *ad hoc* Division of CAS (XX Olympic Winter Games in Turin) in 2006.⁶⁰ Mr. Lund competed as a member of the United States Skeleton Team in the World Cup races held at Calgary, Canada, in November 2005. Following a doping control test conducted on November 10, 2005 after the skeleton race, Mr. Lund tested positive for Finasteride, an alphareductase inhibitor, which has been included on the WADA Prohibited List since January 1, 2005 as a masking agent. Mr. Lund has previously disclosed on the Doping Control Form that he had taken Proscar, a medication which contains Finasteride. He did not have, and had not applied for, a Therapeutic Use Exemption (TUE) for the use of Finasteride.⁶¹ Furthermore, while he had checked the Prohibited List on the FIBT and USADA websites every year for five years from 1999 to 2004, he failed to check it in 2005 (when the changes concerning Finasteride have been introduced).⁶² Finally, Mr. Lund has openly been using medication containing Finasteride since 1999 to treat male pattern baldness.⁶³

On January 16, 2006, the USBSF selected Mr. Lund to compete in the XX Olympic Winter Games in Turin. On January 22, 2006, Mr. Lund acknowledged that he had committed a doping violation and accepted the sanction of a Public Warning and disqualification of all competition results in the World Cup in Calgary, including forfeiture of any medals, points and prizes.⁶⁴ On February 2, 2006, WADA appealed this sanction to the CAS *ad hoc* Division.⁶⁵

Having considered the appeal, the *ad hoc* Division of the CAS came to the conclusion that Mr. Lund, on his own admission, an

44 Comment to Article 10.5.3 of WADC-2009.

45 Article 10.5.4 of WADC-2009.

46 Article 10.5.3 of WADC-2009.

47 Article 10.5.3 of WADC.

48 Article 10.5.3 of WADC-2009.

49 Article 10.5.5 of WADC-2009.

50 Article 10.5.5 of WADC-2009.

51 Article 10.8 of WADC; Article 10.9 of WADC-2009.

52 Article 10.8 of WADC; Article 10.9.1 of WADC-2009.

53 Article 10.9.2 of WADC-2009.

54 Articles 10.9.3-10.9.5 of WADC-2009.

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 of WADC-2009 (Right to a fair hearing) (see, Appendix 1 to WADC-2009: Definitions).

55 Article 10.9.2 of WADC-2009.

56 Comment to Article 10.9.2 of WADC-2009.

57 Article 10.9.3 of WADC-2009.

58 Article 10.9.4 of WADC-2009.

59 Comment to Article 10.9.4 of WADC-2009.

60 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, award dated February 10, 2006, available at:

http://www.wada-ama.org/rtecontent/document/CASELA_W_Lund.pdf (last visited May 10, 2008).

61 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 1.3.

62 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 4.1.

63 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 1.9.

64 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 1.6.

65 The CAS *ad hoc* Division had jurisdiction over the case because the dispute has arisen "during the period of ten days preceding the Opening Ceremony of the Olympic Games and "in connection with" the Olympic Games, since Mr. Lund has been selected to compete in the United States team. See, Article 1 of the Arbitration Rules for the Olympic Games (the CAS *ad hoc* Rules), available at: [http://www.tas-cas.org/dzwwfiles/document/422/5048/0/reglementJO%20\(eng\).pdf](http://www.tas-cas.org/dzwwfiles/document/422/5048/0/reglementJO%20(eng).pdf) (last visited May 10, 2008).

admission which was contained on the Doping Control Form, committed an anti-doping violation and cannot escape a period of ineligibility. The Division has arrived at this decision "with a heavy heart" as it meant that Mr. Lund would miss the XX Olympic Winter Games. For a number of years he did what any responsible athlete should do and regularly checked the Prohibited List. But in 2005, he made a mistake and failed to do so. However, even then he continued to include on the Doping Control Form the information that he was taking medication which was known to the anti-doping organizations to contain a Prohibited Substance, and yet this was not picked up by any anti-doping organisation until his positive test in late 2005.⁶⁶ The Division found this failure both surprising and was left with the uneasy feeling that Mr. Lund was badly served by the anti-doping organizations.⁶⁷ Finally, the Panel found that Mr. Lund has satisfied it that in all of the circumstances he bears No Significant Fault or Negligence, and, therefore, reduced the period of ineligibility from two years to one year.⁶⁸

Supposing that a similar case would have been considered under WADC-2009, the result could have been different. First, since under WADC-2009, Finasteride would have been considered as a specified substance, Mr. Lund established both the lack of intent to enhance his sport performance and how this substance entered his body, and this was his first anti-doping rule violation, he would have been eligible for a reprimand and no period of ineligibility.⁶⁹ Assuming, for illustration, that the hearing panel would otherwise impose on Mr. Lund a period of ineligibility of one year (as it did in the actual case), this period could be further reduced pursuant to Article 10.5.5 of WADC-2009 on the basis of combination of No Significant Fault or Negligence (Article 10.5.2) and admission of an anti-doping rule violation in the absence of other evidence (Article 10.5.4) (since Mr. Lund admitted taking a prohibited substance on the Doping Control Form prior to the positive test). As a result, the period of ineligibility could be further reduced up to three months (one fourth of the otherwise applicable period of ineligibility). Finally, since Mr. Lund promptly admitted the anti-doping rule violation, the period of ineligibility may start on the date of the sample collection.⁷⁰

4. Greater flexibility of sanctions in case of multiple violations

As compared to its predecessor, WADC-2009 has introduced four major innovations concerning sanctions in case of multiple violations. First, unlike its predecessor, WADC-2009 prescribes detailed provisions to address the situation when the athlete or another person has consequently committed violations of different anti doping rules.⁷¹ This is achieved by including into WADC-2009 a comprehensive Table which prescribes sanctions in case of a second violation for the different combinations of the following violations and sanctions:

- reduced sanction for specified substance under Article 10.4 of the Code;
- filing failure and/or missed tests;
- reduced sanction for no significant fault or negligence;
- standard sanction under Article 10.2 or 10.3.1 of the Code;
- aggravated sanction under Article 10.6 of the Code;
- trafficking and administration.⁷²

Second, as compared to WADC, the range of sanctions for the second violation of anti-doping rules in WADC-2009 has been significantly increased.⁷³ While under WADC, the basic period of ineligibility for the second 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) is lifetime ineligibility,⁷⁴ the basic period of ineligibility for the same violations under WADC-2009 could be from eight years ineligibility to lifetime ineligibility. By the same token, while under WADC the reduced period of ineligibility for second similar violations involving specified substances is two years,⁷⁵ under WADC-2009 the reduced period of ineligibility in such case ranges from one to four years.⁷⁶

Third, WADC-2009 introduced a specific rule for the case when after the resolution of the first anti-doping rule violation, an anti-dop-

ing organization discovers facts involving an anti-doping rule violation by the athlete or other person which occurred prior to the notification regarding the first violation.⁷⁷ Pursuant to the new rule, in such cases the anti-doping organization shall impose an additional sanction based on the sanction that could have been imposed if the two violations would have been adjudicated at the same time. Results in all competitions dating back to the earlier anti-doping rule violation will be disqualified as provided in Article 10.8. To avoid the possibility of a finding of aggravated circumstances (Article 10.6 of WADC-2009) on account of the earlier-in-time but later discovered violation, the athlete or other person must voluntarily admit the earlier anti-doping rule violation on a timely basis after notice of the violation for which he or she is first charged. The same rule shall also apply when the anti-doping organization discovers facts involving another prior violation after the resolution of a second anti-doping rule violation.⁷⁸ Finally, another major innovation introduced by WADC-2009 is a new rule, according to which for purposes of Article 10.7, each anti-doping rule violation must take place within the same eight-year period in order to be considered multiple violations.⁷⁹

The combined effect of these four innovations could be a greater flexibility of sanctions for multiple violations, as compared to WADC, which could lead to a lesser sanction but could also sometimes lead to a bigger sanction. The practical consequences of this flexibility could be illustrated on the example of the case of *Australian Sports Anti-Doping Authority v. Marinov*, decided by CAS in 2007.⁸⁰ Mr. Sevdalin Marinov was born in Bulgaria in 1968 and migrated to Australia in 1991. He has been involved in the sport of weightlifting since 1979, starting as an athlete and winning a number of awards, including the Gold Medal for Bulgaria for weightlifting in the fly weight 52KG division at the 1988 Olympic Games in Seoul. He was the World Record Holder in the 52KG division. In 1994 he was suspended from the sport for 2 years for using a prohibited substance, and retired from competition in 1996. Nevertheless, the evidence of the case was silent as to the circumstances of the offence or the identity of the substance used.

In November 2003, when the events of the case took place, Mr. Marinov was a head coach of an Australian Weightlifting team under the control of the Australian Weightlifting Federation (AWF). On November 14, 2006, three packets each containing substances prohibited under the 2002 AWF Anti-Doping Policy were found by police in a wardrobe in a bedroom in a house belonging to a certain Mr. Murphy, which was used by Mr. Marinov following the earlier separation from his wife. The search followed the interception of Murphy's car by the police on November 13, 2006, when a number of illegal drugs have been found in it. Other illegal substances were found throughout Murphy's house, and he was later charged and pleaded guilty to a number of drug related offences including trafficking and possessing an anabolic steroid.

The Australian Sports Anti-Doping Authority (ASADA) started proceedings against Mr. Marinov for potentially committing an Anti-Doping Rule Violation, being possession of prohibited substances, namely anabolic and androgenic steroidal agents, and trafficking of prohibited substances, namely anabolic and androgenic steroidal agents.⁸¹ Mr. Marinov denied any knowledge of the substances saying that he had not seen them before and he had no knowledge of how they got into the wardrobe. Consequently, on February 15, 2007, the ASADA lodged an application with CAS Oceania Registry to deter-

66 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 4.15.

67 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 4.16.

68 CAS OG 06/001, *WADA v. USADA, USBF & Zachery Lund*, section 4.17.

69 Article 10.4 of WADC-2009.

70 Article 10.9.2 of WADC-2009.

71 Article 10.7 of WADC-2009.

72 Article 10.7.1 of WADC-2009.

73 Article 10.7 of WADC-2009.

74 Article 10.2 of WADC.

75 Article 10.3 of WADC.

76 Article 10.7.1 of WADC-2009.

77 Article 10.7.4, part 2, of WADC-2009.

78 Article 10.7.4, part 2, of WADC-2009.

79 Article 10.7.5 of WADC-2009.

80 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, award of June 9, 2007, the text of the decision was previously available on WADA website.

81 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 13.

mine whether Mr. Marinov committed the anti-doping rule violation and, if so, what sanctions to apply.⁸²

Having considered the evidence, the CAS found that Mr. Marinov had custody or control of the three packets on November 14 and since August 2003. He occupied the bedroom exclusively from August 2003 and accordingly had custody or control (possession) of the room and its contents in which the prohibited substances were found. If the packets belonged to Murphy, Mr. Marinov had the power and ability to direct Murphy to get rid of them or to remove them from the bedroom occupied by him. In the CAS's view, Mr. Marinov was able in any event to remove the packets himself and put them beyond his custody and control.⁸³ The CAS, therefore, determined that Mr. Marinov committed a doping offence of trafficking by possessing and holding prohibited substances contrary to 2002 AWF Anti-Doping Policy.⁸⁴ Accordingly, as it was Mr. Marinov's second offence, the CAS was required to impose the mandatory sanction of being ineligible for life from being selected to represent Australia in international competition, from competing in any events and competitions or under the auspices of the AWF, from receiving direct or indirect funding assistance from the AWF and from holding any position within the AWF.⁸⁵

Supposing that a similar case would have been considered under WADC-2009, the result could have been different. Since the first anti-doping rule violation have been committed by Mr. Marinov in 1994, i.e., outside the eight-year period required under Article 10.7.5 of WADC-2009, his latest violation (trafficking) committed in 2006 could not be considered as a multiple violation. Consequently, under WADC-2009, Mr. Marinov could have been potentially subject to a lesser sanction, namely, four years ineligibility for trafficking⁸⁶ or even two years, in case his acts would have been qualified not as trafficking, but as possession of prohibited substances.⁸⁷

5. Introduction of aggravating circumstances which may increase the period of ineligibility

Reflecting the trend of strengthening the firmness in fight against doping which emerged during the Code's review, WADC-2009 has introduced a specific provision allowing for the increase of sanctions in cases involving aggravated circumstances. Under this new provision, if the anti-doping organization establishes in an individual case involving an anti-doping rule violation other than Article 2.7 (trafficking) and 2.8 (administration) that aggravating circumstances are present which justify the imposition of a period of ineligibility greater than the standard sanction, then the period of ineligibility otherwise applicable shall be increased up to a maximum of four years unless the athlete or other person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule.⁸⁸ In line with strengthening incentives to come forward, WADC-2009 further provides that the athlete or other person can avoid the application of this new Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by anti-doping organization.⁸⁹

While Article 10.6 itself does not provide a list of the aggravating circumstances, the examples of such circumstances are given in the Comment to Article 10.6:

* the athlete or other person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or

involving a conspiracy or a common enterprise to commit anti-doping rule violations;

- * the athlete or other person used or possessed multiple prohibited substances or prohibited methods or used or possessed a prohibited substance or prohibited method on multiple occasions;
- * a normal individual would be likely to enjoy the performance-enhancing effects or the anti-doping rule violation(s) beyond the otherwise applicable period of ineligibility;
- * the athlete or person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.⁹⁰

The Comment to Article 10.6 further points out that these examples are not exclusive and other aggravating factors may also justify the imposition of a longer period of ineligibility.⁹¹ As a result, in comparison with WADC, under WADC-2009 the athletes could potentially face longer periods of ineligibility in cases which, in the view of an anti-doping organization and, eventually, the CAS, while considering an appeal, involve aggravating circumstances.

Although certain authors have already expressed the view that "aggravating circumstances" are defined in WADC-2009 with sufficient precision in order to comply with the principle "no crime nor punishment without law" (*nullum crimen, nulla poena sine lege*),⁹² it may still be anticipated that the athletes would try to challenge these longer periods of ineligibility imposed under Article 10.6 of WADA-2009 on the basis of violation of this principle as well as on the basis of lack of predictability that the circumstances in a particular case would qualify as "aggravating circumstances". While making this challenge, the athletes could rely upon the decision of the CAS in the case of *USA Shooting & Quigley v. UIT*.⁹³ In this case, the CAS refused to apply a strict liability standard, because it was not clearly articulated in the Anti-Doping Regulations of the UIT.⁹⁴ The CAS pointed out that 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. 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.⁹⁵

This reasoning of the CAS may be fully applied to the possible challenge of the validity of increased sanction imposed on the basis of aggravating circumstances not specified in the WADC-2009. Indeed, when an anti-doping organization justifies increased sanction by such circumstances, the athlete does not have any possibility of knowing in advance that a given circumstance in his/her particular case would be considered as an aggravating circumstance. Therefore, if such sanction is applied, it would clearly lack predictability, which, in light of the decision in *USA Shooting & Quigley v. UIT* could lead the CAS to reverse the increased sanction.

IV. Innovations concerning consequences of anti-doping rule violations to teams

As compared to its predecessor, WADC-2009 has introduced four innovations concerning consequences of anti-doping rule violations by individual athletes for their teams.⁹⁶ First, as compared to WADC, WADC-2009 has increased the threshold for disciplinary action

82 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 18.

83 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 77.

84 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 79.

85 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, section 80.

86 Article 10.3.2 of WADC-2009.

87 Article 10.2 of WADC-2009.

88 Article 10.6, part 1, of WADC-2009.

89 Article 10.6, part 2, of WADC-2009.

90 Comment to Article 10.6 of WADC-2009.

91 Comment to Article 10.6 of WADC-2009.

92 See, Gabrielle Kaufmann-Kohler, Antonio Rigozzi, Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes available at: www.wadama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf (last visited May 10, 2008).

93 CAS 94/129, *USA Shooting & Quigley v. UIT*, award of May 23, 1995, //CAS: Digest of CAS Awards, vol. I, 1986-1998, (Mathieu Reeb, ed., 1998), p. 187-204.

94 Article 2 of the UIT Anti-Doping Regulations, was entitled "Definitions" and it began with the following words: "Doping means the use of one or more substances mentioned in the official UIT Anti-Doping List with the aim of attaining an increase in performance...". Consequently, Article 2 of the Regulations required a finding of culpable intent of the

athlete. See, CAS 94/129, *USA Shooting & Quigley v. UIT*, p. 194 (sections 18 and 22).

95 CAS 94/129, *USA Shooting & Quigley v. UIT*, p. 197-198 (section 34).

96 Team sport is defined in WADC-2009 as a sport in which the substitution of players is permitted during a competition. Competition is a single race, match, game or a singular athletic contest. (see, Appendix 1 to WADC-2009: Definitions).

against the teams. While under WADC, a team may be subject to disqualification or other disciplinary action if more than one of its members is found to have committed an anti-doping rule violation,⁹⁷ under WADC-2009, the ruling body of the event shall impose an appropriate sanction on the team (e.g., loss of points, disqualification from a competition or event, or other sanction) if more than *two* of its members are found to have committed such violation.⁹⁸

Second, while WADC provides for the possibility to punish the team in case of anti-doping rule violations by its members (“the team may be subject”), WADC-2009 imposes the obligation upon the ruling body of the event to punish such team (“shall impose an appropriate sanction”).⁹⁹ Third, while the possibility of imposing sanctions upon teams in addition to sanctions upon individual members already existed under WADC, WADC-2009 for the first time provides a specific rule confirming such possibility.¹⁰⁰ Finally, WADC-2009 introduces a new provision allowing the ruling body for an event to establish rules for the event which impose consequences stricter than those in Article 11.2 for the purposes of the event, for example rules, which would require disqualification of a team from the Games of the Olympiad based on a lesser number of anti-doping rule violations during the period of the Games of the Olympiad.¹⁰¹ From the point of view of their practical consequences, the combined effect of these innovations could lead to a harshening of the consequences for the teams in case of anti-doping rule violations by their members, although the increase of the threshold for imposition of sanctions upon teams could sometimes lead to their release of liability as compared to WADC.

V. Lessons for the future

The rapid pace of modern life in general and the athlete’s life in particular makes the question “what if” extremely difficult to answer. What if by the time of a certain anti-doping rule violation by a cer-

tain athlete or trainer the WADC-2009 had already entered into effect? Could this have resulted in a lesser period of ineligibility for an athlete (such as Mr. Zachery Lund)¹⁰² so that he could have participated in the next Winter Olympic Games and could have broken a new record? Could this have resulted in a lesser period of ineligibility for an experienced trainer (such as Mr. Sevdalin Marinov)¹⁰³ so that he could have trained many athletes, one of whom could have broken another record? We would never know. Nevertheless, the thing which could be said with certainty is that the WADC-2009 created stronger incentives for the athletes and their trainers to practice a drug-free sport and consequently, laid a solid foundation for the greater realization of human abilities in this area in the spirit of a fair competition. Finally, it may be recalled that one of the important goals of different sport stakeholders (for example, Federation Internationale de Football Association (FIFA)) was always to move the WADC towards more flexibility in order to enable a more individual case by case management by the competent bodies deciding the cases. This goal was partially achieved in WADC-2009 and a step into the right direction has been made.¹⁰⁴

97 Article 11 of WADC.

98 Article 11.2 of WADC-2009. The event is a series of individual competitions conducted together under one ruling body (e.g., the Olympic Games, FINA World Championships, or Pan American Games). (see, Appendix 1 to WADC: Definitions; Appendix 1 to WADC-2009: Definitions).

99 Article 11.2 of WADC-2009.

100 Article 11.2 of WADC-2009.

101 Article 11.3 of WADC-2009; Comment to Article 11.3 of WADC-2009.

102 CAS OG 06/001, *WADA v. USADA*,

USBF & Zachery Lund, award dated February 10, 2006, available at: http://www.wada-ama.org/rtecontent/document/CASELA_W_Lund.pdf (last visited May 10, 2008).

103 CAS A1/2007, *Australian Sports Anti-Doping Authority v. Sevdalin Marinov*, award of June 9, 2007.

104 See, Feedback on Code 2007: Draft Version 2.0, Comments on Article 10 by FIFA. // <http://www.wada-ama.org/rtecontent/document/c3Article10.pdf> (last visited May 10, 2008).

One World One Dream? Sports Blogging at the Beijing Olympic Games

by Evi Werkers, Katrien Lefever and Peggy Valcke*

The 2008 Olympics are finished, world records have been broken, medals have been distributed and athletes have returned home. The Beijing Games were a much discussed event even before they took place. Not only was press freedom severely restricted by the Chinese government, hindering journalists from doing a decent job, but the International Olympic Committee (IOC) also decided to put a check on new media covering the Olympic Games. Although the IOC recognizes the freedom of the media, the organization seemed to deviate with ease from this fundamental principle in its own Internet Guidelines issued for the 2008 Olympics. This raises the question whether the restrictions included in these Guidelines can be justified, or whether the IOC yielded to the pressure of the Olympic host.

In the first two Parts of this article we take a closer look at the recent developments in the sports media landscape due to sociological and technological changes. In Part 3 the risks and opportunities of broadcasting the Beijing Olympics via the Internet and the internet and blogging guidelines adopted by the IOC in order to protect the exclusive rights of stakeholders, are examined. In Part 4 we take up the challenge to analyse the aforementioned guidelines in the context of the European Convention on Human Rights to finally draw conclusions in Part 5.

1. The Olympic Games: anywhere, anytime

In the past, sports fans could only follow the Olympic Games on a traditional television set. Due to technological developments, howev-

er, the media landscape has changed tremendously. The emergence of new communication technologies, such as the Internet and interactive digital television, the convergence of these technologies, and the multiplication of the number of viewing devices, has greatly affected how sports fans follow sports events. Fans can now be informed about the Games “24/7”, consult highlights on sports websites, receive news alerts or pictures on their mobile phones, and watch extensive analysis on their television sets at home. In other words, sports news has become available and accessible at a place and time that suits the viewer. Whereas the Olympic Charter¹ states that the IOC will take all necessary steps in order to ensure the fullest coverage by the different media (traditional media as well as new media) and the widest possible audience in the world for the Olympic Games,² the IOC prohibited for a long time broadcasting images of the Olympic Games on the Internet and mobile phone. Although the IOC has acknowledged

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Technology (IBBT), which was founded by the Flemish Government in 2004.

¹ The Olympic Charter, last updated July 7, 2007, is the codification of the fundamental principles, rules and by-laws for the organization of the Olympic Games and for governing the Olympic movement.

² Art. 49 Olympic Charter.

that television and new media are complementary instead of competing media, enriching the experience of the Olympic Games together,³ the 2008 Games were the first for which a tender procedure was launched to sell Internet and mobile phone platform rights. When the Olympics took place in Athens in 2004, live Internet coverage was only available in a handful of territories. Beijing 2008, however, marked the first time that new media coverage (featuring live broadband Internet coverage and mobile phone clips) was available across the world.⁴ Thanks to this initiative, the Olympic Games were apparently made accessible to more people than ever before... But was that really the case?

Beijing is a modern international city, but is the capital of a country where human rights violations still take place - we only have to recall the developments in Tibet, which almost caused a universal boycott of the Olympic Games - and where the concept of free media and freedom of speech is a controversial subject. Contrary to what journalists might have been accustomed to in their home countries or with previous Olympic Games reporting, the 2008 host is less likely to grant them full enjoyment of media freedom. The Chinese government has the most developed surveillance systems in the world, which, collectively, are also known as "The Great Firewall of China".⁵ Thousands of "cybercops" are employed to monitor online content and activities and to censor online speech. Even the most powerful companies such as Google, Yahoo and Microsoft are put under severe political pressure to disclose information disclosing the identity of certain users. As a result, China's internet users are confronted with sophisticated filtering systems, registration of personal domestic websites and personal responsibility for all content. It goes without saying that this regime puts a serious burden on journalistic reporting. Premier Wen Jiabao, however, promised in his opening address to sport accord on 24 April 2007 that the freedom of foreign journalists in their news coverage would be ensured. As a consequence, temporary regulations on media freedom were adopted by the Chinese government;⁶ designed to enable foreign journalists⁷ to talk to any consenting interviewee, and to move freely within China. In practice, however, the new regulation remained idle and violations of media freedom (intimidation, harassment, imprisonment, Internet filtering etc.) were, and still are, a matter of course. Reporting on issues that went beyond the scope of the Olympic Games was strongly discouraged on various political as well as organizational levels. As a result, sports journalists were forced to report within the "glass bell" of the 2008 Olympic Games. The question is, however, whether such far reaching restrictions can be reconciled with the ethics of journalists and with their essential role as social "watchdogs", reporting on all matters of general interest. But not only traditional journalists are targeted. As stated by the IOC in the Olympic Charter, Article 51 forbids athletes from engaging in "*any kind of demonstration or political, religious or racial propaganda ... in any Olympic sites, venues or other areas*". Consequently, National Olympic Committees (NOC) have drafted guidelines for their national athletes to follow this obligation, with some going further than others (*infra*).

2. Sports journalism: for everyone, by everyone?

Over the past few years, journalism has been subject to several sociological as well as technological developments. The multitude of media platforms, the growing amount of content generated by the public, the speed and twenty-four hour availability of the Internet, the increasing convergence of media and of news coverage, etc. have not passed by without effect. It goes without saying that this evolution has had a serious impact on sports journalism as well. In the past, sports journalism in the different media has always caused a certain tension: print journalists had to cope with the fact that their reporting of a sports event was most probably already covered in a broadly television-mediated event. Yet, in some way or another, these two media have always been able to complement each other instead of replacing each other. The old battle seems, however to have reached another level, now that they are both facing the competition of online journalism, which has become the primordial source for breaking news and sports events. Hence traditional print, radio and television pro-

ducers as well as journalists have been induced to step into the less familiar world of online journalism and production. As a consequence, both print and audiovisual sports media seem to have been put on the same footing, since they can both make use of the latest digital technologies and a greater degree of flexibility to update stories. In this sense, we can also observe a growing convergence of the media. The impact of digitization on mainstream media should therefore not be underestimated.

The sports fanatic is no longer an easy customer who can be satisfied by the mere reporting and strategic analysis of the sports event itself. Such consumers now want camera shots from different angles, additional information on previous sporting achievements of athletes, comments by other members of the audience on a separate forum, a personal blog run by the athlete him or herself, etc. In other words, sports consumers no longer passively submit themselves to linear audiovisual broadcasts or fixed texts, but desire on-demand services enabling them to decide where, when and by what means (podcast, webcast, weblog, etc.) they are to experience the sports events and / or intervene in a more active way (by, for example, posting a comment or a link on the forum on the subject). The array of material available to sports fans in the digital era continues to grow every day.

The digitization of sports reporting requires not only the implementation of new technological equipment, but also multi-skilled and multi-tasking journalists. The Internet has considerably lowered the threshold, and has made it possible for everyone to publish their own content worldwide, without having to count upon intermediaries providing the technological and financial support to do so, or to be subject to prior editorial control. Freedom of expression is flourishing more than ever before and content⁸ is no longer the exclusive property of traditional media players who decide what should be displayed to fit in the context of their brand, what will attract their target audience, or what will increase their profit. You do not need a professional card or license to get access to, and be active on, the Internet. Bloggers reporting and expressing their personal opinion on sports events - sometimes illustrating their texts with pictures or videos taken at the scene - are a very interesting additional source of information for traditional journalists as well as an audience that seeks the most rapidly updated news sources. Though doubt can be cast on the quality and accuracy of the sport blogs, some claim that bloggers will take over the task of journalists. We doubt that bloggers will soon replace well-trained traditional journalists currently working for print publishers and broadcasters, but it can hardly be denied that their role in the knowledge information society is growing considerably. But should a blogger still be treated differently to the "traditionally professionally trained journalist" when both provide similar information? Is it possible to justify such a distinction in the 21st Century, when everyone is a potential journalistic watchdog? Why should information posted on a blog by an expert, who is not employed by a publisher or producer but acts on his or her own accord, be treated differently? In most countries, professional journalists' associations lay down the

3 Sport and Television: no longer just the two? "What impact on Olympic Broadcasting?", 17th International Symposium, 17 October 2006, Sportel.

4 This was either provided by the rights holding broadcaster within the territory, and/or by direct broadcast via the IOC's digital broadcast platform: IOC Media Marketing Guide, Beijing 2008, http://multimedia.olympic.org/pdf/en_report_1329.pdf.

5 Several guidelines provide specific suggestions on how to evade this online censorship, e.g., *The Human Rights Watch Reporters' Guide to covering the Beijing Olympics; Everyone's guide to bypassing internet censorship for citizens worldwide*; and *Digital security and privacy for human right defenders*.

6 Service Guide for Media Coverage of the Beijing Olympic Games and the

preparatory period (in effect from 1 January 2007 until 17 October 2008).

7 However, the same rules do not extend to local sources, as the report of Human Rights Watch points out.

8 In its Communication on creative content online, the European Commission defined "content" as follows: "*content and services such as audiovisual media online (film, television, music and radio), games online, online publishing, educational content as well as user generated content*". Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, Brussels, 3 January 2008, COM (2007)836 final.

conditions that have to be fulfilled to become an accredited journalist. Bloggers generally cannot apply for this title because they do not have enough regular publications and / or income to become a “professional”. On the other hand, many bloggers do not want to associate themselves with professional organizations; on the contrary, they see themselves as the critical voice or watchdog watching over the “fourth estate power”.

As the demarcation between a professional journalist and a non-professional blogger is blurring, we believe a functional approach to define a journalistic activity is in order, and suggest the following criterion: “a person who directly contributes, edits, produces or disseminates information of public interest aimed at the public via a medium”.⁹ This functional approach to the journalistic process has the advantage of being a flexible tool which allows a judge to examine whether a person can indeed invoke specific journalistic privileges, irrespective of job titles, labels, a person’s employment or publication medium. Using this functional criterion, blogging is no longer necessarily excluded from journalistic privileges such as access to sports events, the press room, the right to protection of journalistic sources.¹⁰ Even the Chinese government - which does not exactly have a good reputation amongst bloggers¹¹ - seems to have opened a window for bloggers, defining the notion “foreign journalists”, to whom the temporary regulation apply, quite broadly as follows: “Foreign journalists and foreign reporters in China, for short-term news coverage, including journalists of Internet media organizations, freelancers, foreign staff of Beijing Olympic Broadcasting, holders of valid Olympic Identity and Accreditation Cards. These aforesaid journalists include employees of foreign rights holding broadcasters, accredited written and photographic press organizations for the Beijing Olympic Games (emphasis added by authors)”.¹²

3. The Olympic Games via the Internet: risks and opportunities

3.1. What is at stake?

a. Exclusive broadcasting rights

Since sports generate very high audience figures, exclusive broadcasting rights for sports events are the prime target for broadcasters.¹³ Hence, actors in the audiovisual media landscape compete against each other for exclusive broadcasting rights to televise sports events exclusively on their channels. It is important for broadcasters to acquire exclusive broadcasting rights to build up audience, to improve the image of the channel and to differentiate themselves from other broadcasters by broadcasting events not available on other channels.¹⁴ The popularity of these broadcasting rights is reflected in the high prices which are now being paid to transmit them: for example, in the four-year period from 2005 to 2008 (which includes the Turin 2006 and Beijing 2008 Games), Olympic broadcasting revenues reached about \$2.5 billion. This makes the selling of broadcasting rights to sports events the primary source of income for the sports / entertainment industry.¹⁵

In the past, content creation was the broadcasters’ monopoly. The production of content was very expensive and only broadcasters had the tools and the infrastructure to produce and broadcast programmes. However, due to the abovementioned technological developments, other actors have now also entered the content creation market, which implied that broadcasters have lost their monopoly. The notion of audience has shifted from passive consumers of information to active information producers who take advantage of the new interactive opportunities to create their own content and to put it on the Internet (*supra*). This evolution has created, on the one hand, new opportunities for citizens to exercise their right to freedom of expression and information by recording and distributing information and video fragments of important events, but, on the other hand, it has also created, at the same time, the opportunity for citizens to violate the exclusive rights of broadcasters who offer the events. And the latter is exactly the IOC’s main fear. Olympic broadcasters paid a lot of money for the exclusive rights to the 2008 Games, and the IOC wanted to guarantee that only these broadcasters could televise the images of breaking news and scoops from the Olympic venues.

Without exclusivity, any competing channel could have broadcasted the same event at the same time on another channel. Accordingly, the television audience and subsequent ratings would have split between the two channels, devaluating the product.¹⁶

b. Exclusive intellectual property rights

Complementary to the protection provided by exclusive media rights, the marketing of sports is protected by intellectual property rights (patent, trademark, design, copyright, related rights and database right). We only have to think of the large sponsors providing the athletes’ outfits, the numerous brands / trademarks on sports articles used, sports teams’ (domain) names, sports broadcasts via cable / satellite, streaming, webcasting, the sports analysis and archives of electronic sports newspapers and magazines, etcetera.¹⁷ Sponsors, broadcasters, the IOC, NOCs, suppliers / developers of goods or services involved in the Beijing Olympic Games were faced with almost limitless possibilities to exploit sports. It goes without saying that it is in the interest of such organizations that their rights remain exclusive, and are adequately protected against unlawful uses by third parties. This raises the question to what extent journalists employed by media organizations, independent bloggers and athletes encounter limits or restrictions set by these exclusive rights, whenever they are reporting on the Olympic Games.

• Sports events: copyrightable or not?

Sports events as such are not protected by copyright (attributed to authors) or related rights (attributed to performers, producers and broadcasters). A sports event is nothing but a mere fact, pure information falling outside the scope of copyright as it does not fulfill the two basic conditions needed to acquire copyright protection, namely “originality” and a “concrete character”. It is exactly the first characteristic that a sports event, like for example a soccer game, lacks. Consequently, neither the athlete nor his sports team can create a monopoly on his sporting achievements through the use of exclusive rights to protect his or economic (leave alone moral) interests.

Still, it is not always easy to draw the line between what is copyrightable and what is not. It would be reasonable to state that the main difference lies in the fact that - contrary to, for example, a theatre play - sportspeople do not follow an underlying script, but are rather subject to unanticipated occurrences.¹⁸ Yet one might wonder why, for example an “artistic performance” such as a dance performance, a concert or a theatre play is protected by copyright and related rights (attributed to performers dancers, singers, actors, musicians), whereas a performance by an athlete in for example, artistic gymnastics, synchronized swimming or figure skating, does not. In our opinion, this distinction is rather questionable.

9 Constitutional Court Belgium nr. 2006/91 of 7 June 2006.

10 A. Flanagan “Blogging: a journal need not make a journalist”. *Fordham Intell. Prop. Media & Ent. L.J.* Vol. 16 (2006), p. 425-426; E. Werkers, E. Lievens & P. Valcke “Bronnengeheim voor bloggers?” [Confidentiality of sources for bloggers?]. *NjW* No. 147 (2006), p. 630-636; E. Werkers, E. Lievens & P. Valcke, “Exploring the legal boundaries of online journalism”, in P. Masip & J. Rom (eds), *Communication crossroads: limits and transgressions*, IV International Conference Communication and Reality, Barcelona, Facultat de Comunicació Blanquerna Universitat Ramon Llull, 2007, Volume I, p. 457-469.

11 “China jails internet journalist”, <http://www.voanews.com/uspolicy/2007-08-27-voa2.cfm>; “Citizen journalism battles the Chinese censors”, www.breitbart.com/article.php?id=070625034359.p7naesre&show_article=1.

12 Service Guide for Media Coverage of the Beijing Olympic Games and the preparatory period, 23.

13 DG-X European Commission, *The European Model of Sport - Consultation document of DG X*, November 1998, 15.

14 DG-X European Commission, *The European Model of Sport - Consultation document of DG X*, November 1998, 15.

15 Commission of the European Communities, *White Paper on Sport*, 11 July 2007, COM(2007) 391 final, 17.

16 R. Saltzman, “Television news access to exclusively owned sporting events: a comparative study”, *Sports Law J.* 2000/7, 2.

17 W.T. Champion, *Sports law in a nutshell*, St. Paul (Minn.): Thomson West, 2005, 319-326.

18 A. Mak and B.J. Van den Akker, “Restrictions on the freedom of information in sport”, *The International Sports Law Journal* 2003/1, 24-26.

• *A separate sui generis copyright protection for sports events*

As athletes and sports clubs cannot apply for copyright protection or related rights with regard to a sports event or achievement as such, certain sporting federations have been pushing for a separate *sui generis* copyright protection within the European Union (EU) that would protect the sport event as a whole as well as information and spin-offs arising from the event. Journalists' groups and media organizations immediately reacted by arguing that this would be a very serious threat to the freedom of the press to report on sport.¹⁹ In our opinion, this would indeed completely breach the core principles of copyright which goal is not to lock up facts like sports events. For the time being, however, the copyright extension idea has been rejected.²⁰

However, sports events are usually brought in a format leading to legal protection. There are several possibilities. Once the sports event has been broadcast, for example, the broadcast itself is protected by copyright as an audiovisual work, and by related rights attributed to the producer who invested in the (first) fixation of the broadcast. As a consequence, the reproduction, communication to the public and further distribution of that broadcast, news coverage or film requires the authorization (license) of the right holder. In practice, this will always be a broadcaster.

Another possibility is that sports events are entered into a database, which is protected by a *sui generis* database²¹ right, if there is proof of substantial investment in either the acquisition, verification or presentation of the contents.²² The *sui generis* right grants producers two monopolies that are similar in scope to the right of reproduction and communication to the public. The first monopoly is the right of extraction, meaning the right to transfer all or a substantial part of the contents of a database to another medium by any means or in any form.²³ The second monopoly is the right of re-utilization, which means the right to make available to the public all, or a substantial part, of the contents of a database by the distribution of copies, renting, on-line delivery, or any other form of transmission.²⁴ The term "substantial" refers here to either the quantity of information or to its quality, and is a measure of the potential damage to the original producer's investment. Additionally, repeated and systematic extraction and re-utilization of insubstantial parts are prohibited when they conflict with the normal exploitation of the database, or unreasonably prejudice the producer's legitimate interests. Nonetheless, a lawful user of a database is not required to obtain the authorization of the author to perform acts necessary to make normal use of the database.²⁵

Finally, the organizer of the event can also invoke its mere property right (also recognized as a fundamental right) to restrict access to the premises of the sports event. Likewise, as is stated in Article 7 of the Olympic Charter: "*The Olympic Games are the exclusive property of the IOC which owns all rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanism whatsoever, whether now existing or developed in the future. The IOC shall determine the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games.*"

• *Legal exceptions for journalists*

To a certain extent, this monopoly needs to be nuanced: most countries have adopted legal exceptions for which no license has to be obtained from the right holder. The most relevant case in the context of this article is the right granted to the press to quote fragments (or, sometimes, even the entire reproduction, such as in the case of visual works of art) of copyrighted works in the course of their reports on current events. Given the territorial nature of copyright - which means that one must evaluate whether a work has been used in accordance with the legislation of the country where the user wants to make use of the work - and our focus on the Beijing Games, we thus need to take a closer look at the *Chinese Copyright Act*. This Act states that: "*a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the*

author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: reuse or citation, for any unavoidable reason, of a published work in newspapers, periodicals, at radio stations, television stations or any other media for the purpose of reporting current events."²⁶

As the exception does not put forward any specific conditions as to whom exactly should be qualified as "the press" we believe it is not asserted that the exception excludes bloggers. Moreover the Chinese Copyright Act even specifically refers to "any other media". In other words, both traditional journalists working in mainstream media and athletes, blogging in a journalistic manner about the Olympic Games without an accreditation, should be perfectly able to invoke this legal exception within the conditions set forward by the legislation.

There are less concerns, however, with regard to the intellectual property rights which we mentioned above. Although we cannot possibly ignore the considerable amounts of money involved with all the commercial goods and services accompanying sports events, the usage of protected trademarks, and otherwise protected goods and services that are mentioned in some way or another in a journalistic report, is normally less likely to enter into conflict with the interests of intellectual property right holders. Furthermore, the European Audiovisual Media Services Directive explicitly prohibits the sponsoring of and the use of product placement in news programs.²⁷ Most scholars agree that everyone should be able to comment on sports events without being limited by - for example - the mere coincidental appearance of trademarks.²⁸ However, it is not inconceivable that - given some turbulent political events associated with the Olympics - the logo of the Olympic Games could be, for example, parodied (which in itself is not illegal).

• *Enforcement of intellectual property rights in a digital context*

As the saying goes, "*all that glitters is not gold*". The Internet not only provides interesting original online creative content generated by new players, but it is also swarming with illegal and harmful content that infringes the rights of others. One of the problems that has been given much media attention recently is the fact that sports events (in all formats, such as text, audiovisual, radio, webcast, etc.) - covered by exclusive media licensing agreements and copyright - are now copied on a large scale on the Internet without the authorization of the right holders involved (publishers, producers, broadcasters and journalists) (*infra*). One incident recently mentioned by the Internet media that illustrates this concern is the IOC's request to the Swedish authorities for the removal of copyrighted Olympics content illegally stored on the peer-to-peer network PirateBay.²⁹ Another incident, spurring the IOC to undertake action for misuse of the Olympic logo, concerned

19 As stated by F.P. Balsemao, chair of the European Publishers Council ahead of the vote. "*This is unjustified protectionism and injurious to press freedom*", see "MEPs reject intellectual property rights for sporting events", <http://euobserver.com/9/26119>

20 Amendment 191 Draft Report M. Mavromatis, Draft Report White Paper on Sport, 15.02.2008, PE400.553v01-00; Press Release 08/05/2008, "Doping, TV rights and betting: EP adopts report by M. Mavromatis MEP on the White Paper on Sport".

21 "A collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means": Art. 1 par. 2 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *Official Journal L* 077, March 27th, 1996, p. 20-28 (EU Database Directive).

22 Art. 7 par. 1 EU Database Directive.

23 Art. 7 par. 2 (a) EU Database Directive.

24 Art. 7 par. 2 (b) EU Database Directive.

25 Art. 6 par. 1 EU Database Directive.

26 Art. 22.3. *Copyright Act* of the People's Republic of China, adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and revised in accordance with the Decision on the Amendment of the Copyright Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress.

27 Art. 3 f) 4. and 3 g) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *OJ.L.* 332/27, 18.12.2007

28 A. Mak & B.J. Van den Akker, "Restrictions on the freedom of information in sport", *The International Sports Law Journal* 2003/1, 24-26.

29 <http://www.p2pnet.net/story/16769>.

a video on the sharing network YouTube depicting demonstrators conducting a candlelight vigil and projecting a protest video onto the Chinese consulate building. The projection featured recent footage of Tibetan monks being arrested, the Olympic logo's five interlocking rings turned into handcuffs. YouTube immediately removed the video after having received the IOC's complaint.³⁰

Given the amounts of money involved in obtaining "exclusive" licenses to cover major sports events, it goes without saying that infringements of obtained intellectual property rights cause considerable harm to all the contracting parties involved. Obviously, new measures are being sought to protect and enforce the aforementioned rights in a digital context. This has resulted in the adoption of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights,³¹ which requires all Member States to apply effective, dissuasive, proportionate, fair and equitable measures, procedures and remedies against those engaged in counterfeiting and piracy, and creates a level playing field for right holders in the EU (as a consequence, all Member States will have a similar set of measures, procedures and remedies available for right holders to defend their intellectual property rights when they are infringed).

3.2. The IOC Guidelines

In addition to the aforementioned layers of legal protection, the IOC has adopted separate Internet guidelines that focus on specific groups: 1) Internet Guidelines for athletes, coaches, trainers, officials;³² 2) Internet Guidelines for Broadcast Rights-holders;³³ 3) Internet Guidelines for the Written Press and other Non-Rights Holders;³⁴ 4) Internet Guidelines for the National Olympic Committees³⁵ These guidelines are complemented by the *IOC Blogging Guidelines*, which apply to all accredited persons.

a. General Internet Guidelines for all accredited persons

Although the IOC recognizes that the Internet is an important medium for broadcasters to enhance the quality, presentation, immediacy and comprehension of Olympic broadcasts, broadcasting right holders were not given free reign to do what they wanted with the Beijing 2008 images, as the IOC asked them to respect a few principles. More precisely, right holders were encouraged to use the Internet for cross-promotion by including complementary stories and news features

that encourage viewers to "tune in" to the Olympic broadcast coverage: e.g., the Olympic results, the broadcast schedule and photographic pictures (although not reproduced in a sequential manner so as to simulate moving images). But, no sound or moving images of any Olympic events, including any sporting action, and the opening, closing and medal ceremonies or other activities that occurred within accredited zones were able to be disseminated over the Internet by the exclusive right holders, unless authorized by the IOC.³⁶

The Internet is also an essential medium for the written press and non-right holders. Since they have integrated this medium into their business models, it is logical that they want to feed their websites with Olympic-themed content to target the online audience and to better serve fans during the Games. The written press and non-right holders were permitted to use their own websites to disseminate written and photographic (not in a sequential manner) coverage such as what would appear in a newspaper.³⁷ However, they were not permitted to disseminate moving images or play-by-play audio coverage of the Games over the Internet, except as permitted by the *IOC News Access Rules*.³⁸ In addition, news organizations are allowed to webcast, no earlier than 30 minutes after the conclusion of a press conference, press conferences that took place in the Media Press Centre.³⁹

The Internet guidelines for athletes stated that athletes are prohibited to create a website especially for the Olympic Games. When, however, an athlete already had a website, he or she was allowed to maintain that website, on which the athlete could report his or her own personal views and comments, not report on any issues other than those linked to him or her.⁴⁰

Finally, the NOCs were given the permission to use the Internet to promote the Olympic Movement, but they had to focus on their own national team, and not use video or audio material.⁴¹

b. IOC Blogging guidelines

As stated before, the IOC recognizes that the Internet is an important medium for the communication and promotion of sport and the Olympic Movement. Moreover, the IOC realizes that journalists and athletes use this medium to connect with their viewers, readers and fans to share their experience of a big tournament. Athletes are no longer only the topic of the professional journalists' reports; they also became journalists themselves reporting about their own experiences in Beijing.

According to the Olympic Charter, only persons accredited as media may act as journalists or reporters. Under no circumstances, throughout the duration of an Olympic Games, may any athlete, coach, official, press attaché or any other accredited participant act as a journalist.⁴² This rule does not restrict athletes from being interviewed by an accredited journalist, but the athletes cannot act as journalists themselves.⁴³ This resulted in a blogging prohibition for athletes during the Olympic Games preceding the 2008 Games. When athletes blog, this could be considered as a journalistic activity, which would result in exclusion from the Olympic Games.

Nevertheless, the IOC could not ignore that this blogging culture is a fact, and that it is better to embrace this technological and socio-logical development. This resulted in the following IOC statement: "*Athlete blogs bring a more modern perspective to the global appreciation of the Games, particularly for a younger audience, and enhance the universality of the games. But the IOC does not want the village turned into a reality TV show during the Olympics*". Therefore, since the IOC clearly considers blogging as a legitimate form of personal expression and not as a form of journalism (and thus not infringing § 3 of the Bye-law to Rule 49), athletes were allowed to blog during the 2008 Beijing Olympics. To ensure that the integrity of broadcaster and sponsor rights were maintained, however, the IOC signified that it would monitor Olympic online content,⁴⁴ and also issued blogging guidelines⁴⁵ permitting athletes to blog when they respected strict conditions. These blogging guidelines did not only apply to athletes, but also to all accredited persons at the Beijing 2008 Games such as journalists and coaches, who maintained personal blogs, accessible by the general public, that contained any content related to their personal experiences at, and participation in, the Games from 8 days prior

30 <http://blogscoped.com/archive/2008-08-13-n13.html>.

31 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O.J. L. 157, 30.04.2004. Rectification of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O.J. L. 195, 02.06.2004, 16.

32 IOC Internet Guidelines for athletes, coaches, trainers, officials and any other accredited participants Games of the XXIX Olympiad, Beijing 2008.

33 IOC Internet Guidelines for Broadcast Rights-holders Games of the XXIX Olympiad, Beijing 2008.

34 IOC Internet Guidelines for the Written Press and other Non-Rights Holding Media Games of the XXIX Olympiad, Beijing 2008.

35 IOC Internet Guidelines for National Olympic Committees Games of the XXIX Olympiad, Beijing 2008.

36 Principle 1-2 IOC Internet Guidelines for Broadcast Rights-holders Games of the XXIX Olympiad, Beijing 2008.

37 Principle 1 IOC Internet Guidelines for the Written Press and other Non-Rights Holding Media Games of the XXIX Olympiad, Beijing 2008.

38 Television News Access Rules applicable

to Non-Rights Holding Broadcast Organizations at the Beijing 2008 Olympic Games.

39 Principle 2 IOC Internet Guidelines for the Written Press and other Non-Rights Holding Media Games of the XXIX Olympiad, Beijing 2008.

40 Principle 2 IOC Internet Guidelines for athletes, coaches, trainers, officials and any other accredited participants Games of the XXIX Olympiad, Beijing 2008.

41 Principle 1 IOC Internet Guidelines for National Olympic Committees Games of the XXIX Olympiad, Beijing 2008.

42 Buy-law to rule 49 Olympic Charter.

43 IOC Internet Guidelines for athletes, coaches, trainers, officials and any other accredited participants Games of the XXIX Olympiad, Beijing 2008.

44 Principle 4 IOC Internet Guidelines for athletes, coaches, trainers, officials and any other accredited participants;

Principle 6 IOC Internet Guidelines for Broadcast Rights-holders; Principle 5 IOC Internet Guidelines for National Olympic Committees; Principle 7 IOC Internet Guidelines for the Written Press and other non rights holding Media.

45 IOC Blogging Guidelines for Persons Accredited at the Games of the XXIX Olympiad, Beijing 2008. (hereinafter *Blogging Guidelines*).

to the Opening Ceremony of the Games until 3 days after the Closing Ceremony of the Games.

These Guidelines define a blog as a type of website where entries are made (such as in a journal or diary), usually displayed in a reverse chronological order.⁴⁶ The IOC stated very clearly that blogs from athletes had to be confined solely to their own personal Olympic-related experience. These blogs should have taken the form of a diary or journal and, in any event, were not allowed to contain any interviews with, or stories about, other athletes. Furthermore, their blogs should have at all times conformed to the Olympic spirit and the fundamental principles of Olympism as contained in the Olympic Charter, dignified and in good taste.⁴⁷ Blogging athletes must also have indicated that the views expressed in their blogs were their own. If a blogger's commentary were to have been deemed as defamatory, obscene or proprietary, the blogger was to be held personally liable.⁴⁸ Furthermore, the athletes' blog could not contain any sound or moving images (including sequences of still photographs that simulated moving images) of any Olympic events, including any sporting action, and the opening, closing of the Beijing Games, the medal ceremonies or other activities that took place within any zone for which an Olympic identity and accreditation card was required for entry.⁴⁹ Also, still pictures taken within accredited zones at the Games could not be incorporated in a blog. Notwithstanding the foregoing restrictions, however, accredited persons were able to feature still pictures taken of themselves within accredited zones, provided that such pictures did not contain any sporting action of the Games, or its opening, closing or medal ceremonies.⁵⁰ Finally, athletes could not enter into any exclusive agreement with any company with respect to the posting of any Olympic Content,⁵¹ and no advertising and/or sponsorship could be visible on the screen at the same time as any Olympic Content.⁵²

c. Political statements on blogs

In 2001, when the Games were awarded to China, everybody expressed the hope this would be an opportunity to foster democracy and improve human rights. According to Amnesty International and other observers, however, China has not fulfilled the promise made when bidding for the Olympics (*supra*). Before the start of the Games, athletes were asked what they thought about the Chinese situation. Since Article 51 (3) of the Olympic Charter states that no kind of demonstration or political, religious or racial propaganda is permitted at any Olympic site, venue or other area, it was unclear whether or not the athletes could state their opinion about this topic. Therefore, the Article was further clarified in the guidelines on the interpretation of rule 51 (3) of the Olympic Charter. Further, the IOC President, Jacques Rogge, explained that a person's ability to express his or her opinion is a basic human right and, as such, does not need to have a specific clause in the Olympic Charter because its place is implicit. But he stressed that there is also the right not to express an opinion. Athletes who want to focus on their preparations should not be made to feel obliged to express themselves.⁵³ All the NOCs agreed to these Guidelines,⁵⁴ except the British and New Zealand Committees, which instead prohibited their athletes to speak freely about political issues concerning China.

d. Copyright and intellectual property rights related issues

Several restrictions have explicitly been mentioned in the Guidelines. *Firstly*, broadcast right holders could only feature Olympic content on

their website in their news capacity and to complement their acquired broadcast rights. *Secondly*, the same content could not be syndicated by broadcast right holders to third parties without a license from the IOC (for example, to be sold to a website of the electronic written press). *Thirdly*, the use of Olympic results content always had to display a copyright tag ((c) IOC 2008) in a prominent position.⁵⁵ *Fourthly*, it was specified that Olympic results content⁵⁶ was able to be archived as historical records, provided it had not been used subsequently in any commercial manner.⁵⁷ *Fifthly*, the Olympic symbol, the word "Olympic", and other Olympic related words and designs could be used solely for editorial purposes in conjunction with Olympic content, and were not to be associated with any third party or any third party's products or services in a way that might have given the impression that the third parties were to have an official relationship with the responsible organizing committees.⁵⁸ Also, the usage of domain names that contained the word "Olympic(s)" or similar words were explicitly forbidden.⁵⁹ *Sixthly*, the usage of flash quotes, wire reports or news stories originating from press agencies and newspapers pertaining to Olympic competition could be used by an NOC with the permission of the right holders, provided that such content was generated by third parties and not by NOC athletes or officials.⁶⁰ *Finally*, the IOC explicitly referred to the possibility of a "fair dealing or similar" provision in applicable national law, allowing the use by bona fide news organizations of Olympic material for news purposes on the Internet. In this case, the IOC attached as an additional condition that the broadcast of the material on the Internet was not to be accessible to persons outside the specific territory, and had to be "geoblocked".⁶¹ This territorial restriction can also be found in the agreement between the IOC and YouTube to broadcast highlights of the Olympic Games in territories in developing regions where the Games were not broadcast on television as no broadcasting deals had been concluded. The IOC's YouTube channel was made available in 77 territories across Africa, Asia and the Middle East, including India, the Republic of Korea, Nigeria and Indonesia. The content was blocked, however, in regions where broadcasters already held online rights to Olympic video.

4. Evaluation of the guidelines set forward by the IOC

Although the IOC stated itself in its *Internet Guidelines for the Written Press and other Non-Rights Holding Media* that these guidelines were not intended to limit the freedom of the media to provide independent news and pictorial coverage of the Olympic Games on their websites (Principle 1), we find that the IOC seemed to deviate from this fundamental principle quite easily.

4.1. The right to freedom of expression and information at stake?

a. Introduction

The central issue raised here is: to what extent can the right to freedom of expression of blogging athletes, journalists and other accredited persons, as well as the free flow of information to the public, be restricted to protect the exclusive broadcasting rights, intellectual property rights and copyright of the IOC, NOCs, broadcasters and other parties involved? This issue is continuing to grow in importance, given the increasing expansion of communication tools that can be employed by both traditional media and the general public. To provide an answer to this fundamental question, however, we should first clarify the scope of the right to freedom of speech, a human right

46 Art. 1 Blogging Guidelines.

47 Art. 2 Blogging Guidelines.

48 Art. 10 Blogging Guidelines.

49 Art. 3 Blogging Guidelines.

50 Art. 4 Blogging Guidelines.

51 Art. 7 Blogging Guidelines.

52 Art. 6 Blogging Guidelines.

53 J. Rogge, *Freedom of expression*, 10 April 2008,

http://www.olympic.org/uk/news/olympic_c_news/full_story_uk.asp?id=2535.

54 See: Statement NOC*NSF Beijing 2008,

<http://www.sport.nl/osbeijing/deolympischspel/en/statementnocsfbeijing2008/?cchannel=->.

55 Principle 1 IOC Internet Guidelines for Broadcast Rights holders; Principle 3 IOC Internet Guidelines for the Written Press and other non rights holding Media.

56 Any material which the NOC has obtained by virtue of its accreditation and access to the Games, including

results which are provided to the NOC by the IOC and/or BOCOG.

57 Principle 1 IOC Internet Guidelines for Broadcast Rights holders Games; IOC Internet Guidelines for National Olympic Committees Games.

58 Art. 5 Blogging Guidelines; Principle 2 d) IOC Internet Guidelines for athletes, coaches, trainers, officials and any other accredited participants; Principle 2 f) IOC Internet Guidelines for Broadcast Rights holders; Principle 3-4 IOC

Internet Guidelines for the written press and other non-rights holding media; Principle 4 IOC Internet Guidelines for the Written Press and other non rights holding Media.

59 Art. 8 Blogging Guidelines.

60 Principle 1 g) IOC Internet Guidelines for National Olympic Committees.

61 Principle 2 IOC Internet Guidelines for the written press and other non-rights holding media.

which is protected on the international,⁶² European as well as national levels.⁶³

Since Article 10 of the European Convention on Human Rights (ECHR) provides the most modern definition of the right, we will focus on the protection provided by this Convention and examine the hypothetical situation of a European athlete or journalist filing a complaint against either the relevant NOC (based in their home country) or the IOC (based in Switzerland) for restricting their freedom of expression by the adoption of the aforementioned guidelines.

- *Scope in personae*

Physical as well as legal persons can invoke this fundamental right. This includes - but is not limited to - bloggers (including athletes), broadcasters, publishers of newspapers, owners of contributors to discussion fora, new internet media players, etc.

- *Scope in materiae*

In principle, every expression of an opinion is legally protected, irrespective of its informative, artistic or commercial nature, news value or quality.⁶⁴ A website of a broadcaster, (a picture on) a weblog, a sports commentary in an electronic newspaper and even advertisements are protected. Yet case law of the European Court of Human Rights points out that some content is more protected than others.⁶⁵

- *Medium*

As Article 10 of the ECHR is phrased in a technologically-neutral way and makes no distinction according to the medium or channel to which it is being applied, its protection is applicable to any medium, whether it be print, audiovisual or electronic.⁶⁶ Furthermore, the Committee of Ministers of the Council of Europe has confirmed that the freedom of opinion should be respected in a digital as well as non-digital environment.⁶⁷

- *Restrictions*

But, of course, the right to freedom of expression is not an absolute right; it also entails duties and responsibilities and can be subject to restrictions. After all, the unrestricted exercise of a freedom can cause unacceptable abuses and harm that cannot be tolerated. Furthermore, two fundamental rights often have to be weighed against each other. Article 10 of the ECHR determines three conditions for restrictions. *Firstly*, the restriction has to be prescribed by law.⁶⁸ One of the requirements flowing from this expression is that the regulation (legislation, deontological code, implementing orders, etc.) must be adequately foreseeable, i.e., it must be formulated with sufficient precision to reasonably foresee the consequences that a given action may entail. *Secondly*, there has to be a pressing social need; the legitimate grounds upon which restrictions can be allowed are enumerated by Article 10.2. of the ECHR in a limitative list.⁶⁹ As already explained in the paragraphs above, the rights at stake here are defined by Article 10.2. of the ECHR as “the interests of third parties” (namely: the exclusive broadcasting rights, the related rights of the producer / broadcaster, and the intellectual property rights of other parties involved). *Thirdly*, the restriction must be pertinent and proportion-

ate to the legitimate aim pursued. Although a certain margin of appreciation is left to the states, the European Court of Human Rights will always make the final decision and evaluate whether the measure at stake is “proportionate to the legitimate aims pursued”, and whether the reasons brought forward by the national authorities to justify it are “relevant and sufficient”. To find out whether that is indeed the case, the Court evaluates interferences in the light of the case as a whole, including the content of statements that were made, the harmful consequences of a publication, the intentions of the journalist, etcetera.

- *The indirect horizontal effect and positive obligations of the state*

An interference may originate from the legislator, the executing power, police forces, courts and tribunals, or other persons representing the government. The interference itself can also take several forms: a publication ban, the refusal of broadcasting rights, a condemnation for libel and slander, the obligation to grant a right of reply, etc.⁷⁰ At first sight, actions of companies, non-governmental organizations and private persons such as the IOC⁷¹ and an NOC⁷² fall outside the scope of application of Article 10 of the ECHR. Yet there is also an indirect horizontal effect flowing from Article 10 ECHR, when a court case between private parties (e.g., a European blogging athlete or journalist who states that his or her fundamental right has been restricted in a disproportionate or unjustified way by the Internet or blogging guidelines imposed on him by the NOC or IOC) leads to a judgment in favor of the NOC or IOC. Another possibility is to bring the national public authority before court for its shortcoming to fulfill its positive obligations, namely: to adequately protect the freedom of expression. As established in the case law of the European Court of Human Rights,⁷³ public authorities can - in some circumstances - be obliged to guarantee that the right to freedom of expression and information may be effectively exercised, and not restricted by private persons or organizations.⁷⁴ If national authorities do not take sufficient measures to protect the fundamental right of bloggers, journalists and other accredited persons to report and express their opinion on a sports event such as the Olympic Games (without overstepping the boundary of interfering too much) the state may be held responsible for violations of that right.

- *The special status of journalists as watchdogs*

Although all citizens should usually be treated equally, journalists have always been treated a little differently than the average citizen when practicing his or her right to freedom of expression. In its well established case-law, the European Court of Human Rights has stated several times that journalists are the “watchdogs of our society”.⁷⁵ The press has to ensure the proper functioning of a democracy, which means it is their right and duty to inform the public on matters of public interest. It is incumbent on the press to impart information and ideas, even when they are shocking, disturbing or divisive.⁷⁶ Furthermore, the press not only has the task of imparting such information and ideas, but the public also has the right to receive them.⁷⁷

However, exercising the right to freedom of expression also implies the need to follow duties and responsibilities. Certain boundaries can-

62 Article 19 International Covenant on Civil and Political Rights.

63 In Treaties, Charters, Recommendations, Resolutions and Constitutions.

64 Declaration on the freedom of expression and information, adopted by the Committee of Ministers on 29 April 1982 at its 70th Session.

65 E.C.H.R. Casado Coca vs. Spain, 24 February 1994. Political statements, for example, will receive more protection.

66 E.C.H.R. Murphy v. Ireland, 10 July 2003; E.C.H.R. Association Ekin v. France, 17 July 2001; E.C.H.R. Ozturk v. Turkey, 28 September 1999; E.C.H.R. Piermont v. France, 27 April 1995;

E.C.H.R. Open Door and Dublin Well Woman v. Ireland, 29 October 1992; E.C.H.R. Autronic AG v. Swiss, 22 May 1990; E.C.H.R. Groppera Radio AG v. Swiss, 28 March 1990.

67 Declaration on freedom of communication on the internet, adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies; Declaration on Human Rights and the Rule of Law in the Information Society, CM (2005)56 final, 13 May 2005.

68 A legal basis can also be found in deontological codes.

69 The interest of the state (public security, public order), the interest of the public (protection of public health), the interest of private parties, the protection of public

decency, and safeguarding the authority and impartiality of the judiciary.

70 J. Vandelanotte & Y. Haeck, *Handboek EVRM Algemene Beginselen*, Intersentia, Antwerp, 2005, 927-932.

71 Article 15.1. Olympic Charter: “The IOC is an international non-governmental not-for-profit organisation, of unlimited duration, in the form of an association with the status of a legal person, recognised by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2000”.

72 The status of an NOC is less clear. The Olympic Charter merely describes the role of NOCs. However the *Bye-law to Rules 7-14 Olympic charter*, article 3.2

does state that: “The NOCs may only use the Olympic symbol, flag, motto and anthem within the framework of their non-profit-making activities”.

73 D. SPIELMANN, “Obligations positives et effet horizontal des dispositions de la Convention”, in X., *L'interprétation de la Convention européenne des droits de l'Homme*, Bruxelles, Nemesi, 1998, 136; F. SUDRE, “Les ‘obligations positives’ dans la jurisprudence européenne des droits de l’homme”, 169.

74 E.C.H.R. Fuentes Bobo v. Espagne, 29 February 2000, *Recueil/Reports* 2000.

75 E.C.H.R. Sunday Times v. U.K., 26 April 1979, *Publ. Eur. Court H.R.*, Series A, Vol. 30.

not be overstepped, not even by “the press”. As noted before, Member States can, when there is a pressing social need, restrict the freedom of expression, by law, for certain legitimate aims. As a consequence, a person who claims he or she acted as “watchdog of the democratic society”, and wants to make use of the privileges that case law attaches to that notion, should also bear in mind the duties and responsibilities that must be respected.⁷⁸

b. The Internet Guidelines and Blogging Guidelines put to the test of article 10.2 ECHR

• The repercussions for all media players

As already stated, the IOC issued specific guidelines for Internet usage and blogging to ensure that the integrity of broadcasters’ and sponsor rights during the 2008 Games were respected. The question we will now turn to is whether these restrictions would pass the test in Article 10.2 of the ECHR, or if they would infringe the freedom of expression. It will of course be up to the courts to evaluate this *in concreto* by taking into account all factual circumstances into account. In our opinion, difficulties may especially rise with regard to the proportionality test. We believe that the protection of exclusive rights must be carefully weighed against the right of the press to report on a major event such as the Olympic Games and the right of the public to be informed.

At this moment in time, new media do not seem to be replacing existing mainstream media, but are instead providing new opportunities to experience sport by providing fans with a wider choice of sports-related information, fixtures and results, information about the athletes, highlights, interviews, discussion and debate fora for fans, and football-related games.⁷⁹ Mobility and on demand services lay at the core of their success. Sports fans can now watch live matches on their PC or mobile phone, for example, on the train, in the doctor’s waiting room, or during non-active periods during the day such as lunch breaks. Furthermore, watching sports games is often a social event, whereas online media tend to be a more individual experience. We tend to believe that traditional media and on line services fulfil different needs of viewers, hence it is clear that the latter will not replace or “cannibalize” traditional media consumption any time soon. Consequently, one might wonder whether the fear expressed by the IOC that online piracy would seriously undermine the exclusive rights of the IOC, NOC and traditional broadcasters, is sufficiently founded to restrict the usage of audiovisual material on line so severely. Is this a real “pressing” social need which can justify the additional restrictions on the exclusive broadcasting and intellectual property right as established by the IOC?

Finally, the IOC requires a very strict compliance with the guidelines. The sanctions for media who infringed the IOC internet guidelines that applied to all media, were put into practice even before the official start of the Olympics when a South-Korean TV station broadcasted footage of one minute of a secret rehearsal of the opening ceremony, which up to then had been kept strictly confidential.⁸⁰ Also, the Australian commercial broadcaster Nine Network was banned from the Games for one week after breaching the broadcasting rules by filming at the Water Cube swimming venue, which was not allowed according to the news access rules.⁸¹

• The repercussions for athletes

The 2008 Olympics were the first ever Games in which athletes were given the opportunity to blog, provided they respected the strict conditions of the *IOC Blogging Guidelines*. The sanction imposed by the IOC was quite severe: an athlete caught infringing the guidelines would have been thrown out of the Olympics. (*supra*). We wonder whether these sanctions would have actually been carried out. It seems doubtful, and, to our knowledge, it did not take place during the Beijing Games despite the fact that several athletes played “fast and loose” with the guidelines produced by the IOC and NOCs.

A closer examination of the websites of several athletes who blogged at the Games lead us to conclude that Principle 6 regarding advertisement and sponsorship was often breached. For example, on Rafael Nadal’s personal blog on his official website,⁸² we found the Nike emblem on the same page as the Olympic content. This infringes the rule that only the IOC “Top Partners” could be visible at the same time Olympic content was being shown (Adidas, not Nike, was an official sponsor of the Beijing 2008 Games).⁸³ Dirk Van Tichelt’s 2008 European Champion Judo website⁸⁴ also contained an advertising scroll continuing on the page with his personal blog.

For athletes, the difficulty of blogging without mentioning their sponsors is high, if not insurmountable. So, in the end, athletes are, in effect, silenced anyway. In addition, one might argue that blogging athletes might just as well be qualified as journalistic watchdogs, contrary to what the IOC claims (*supra*). Some athletes, however, did not take any risk whatsoever. The athlete Ben Fouhy, for example, explicitly referred on his website to the IOC Blogging Guidelines: “*Due to IOC Blogging rules and regulations I am not permitted to Blog about my Olympic experiences while displaying my sponsors that have supported me all this time. Rather than removing my sponsors from my official Blog, I have created a temporary Blog for the next month which I will keep up-to-date on how things are going*”.⁸⁵

And what about the Olympic contract that the British and New Zealand athletes were obliged to sign, prohibiting them to comment on any politically sensitive issues such as Darfur, China’s role in Tibet and human rights abuses in China? This clause breaches the freedom of expression guaranteed by New Zealand’s *Bill of Rights*, the UK’s *Human Rights Act*, and International Conventions such as the ECHR. Can national Olympic officials push this right aside? We doubt it, especially since restrictions on the freedom of “political speech” - which is one of the strongest protected content given its importance for the public debate in a democratic society - are strongly protected by the ECHR.⁸⁶ Politicians should tolerate more things said about them than what private persons should tolerate, because of the public role politicians play in society.⁸⁷ In sum, therefore, there is little scope under Article 10.2 for restrictions on political speech.⁸⁸

Furthermore, this restriction is against the spirit of the Olympic Charter which states that the goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised in accordance with Olympism and its values. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of setting a good example and “*respect for universal fundamental ethical principles*”. The goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the “*preservation of human dignity*”.

76 E.C.H.R. *Sunday Times v. U.K.*, *op.cit.*

77 E.C.H.R. *Sunday Times vs. U.K.*, *op.cit.*; E.C.H.R. *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, *Publ. Eur. Court H.R.*, Series, A, Vol. 239.

78 E. Lievens, E. Werkers & P. Valcke, “Exploring the legal boundaries of online journalism”, in Masip, P. & Rom, J. (eds), *Communication crossroads: limits and transgressions*, IV International Conference Communication and Reality, Barcelona, Facultat de Comunicació Blanquerna Universitat Ramon Llull, 2007, Volume I, 457-469.

79 R. Boyle & R. Haynes, *Football in the new media*, London, Routledge, 2002, 139.

80 T. Branigan, “Chinese anger after TV station leaks Olympics opening ceremony rehearsal”, *The Guardian*, 31 July 2008.

81 IOC bans Nine Network, 7 August 2008, <http://www.sportbusiness.com/news/1676-26/ioc-bans-nine-network>.

82 www.rafaelnadal.com/nadal/en/home.

83 Listed on: <http://www.olympic.org/marketing>; <http://en.beijing2008.cn/bocog/sponsors/sponsors/>.

84 <http://www.dirkvantichelt.be/>.

85 <http://benfouhy.com/2008/07/31/ioc-blogging-rules/>.

86 E.C.H.R. *Feldek v. Slovakia*, 21 July 2001, *Recueil/Reports*, 2001; E.C.H.R.

Unabhängige Initiative Informationsvielfalt v. Austria, 26 February 2002, *Recueil/Reports* 2002; E.C.H.R. *Roemen and Schmidt v. Luxemburg*, 25 February 2003, *Recueil/Reports* 2003.

87 E.C.H.R. *E.K. v. Turkey*, 2 February 2002, *Recueil/Reports* 2002; E.C.H.R. *Scharch and News Verlagsgesellschaft*

mbH v. Austria, 13 November 2003, *Recueil/Reports* 2003; E.C.H.R. *Diena and Ozolins v. Latvia*, 12 July 2007, *AM* 2007/5, 488; E.C.H.R. *Gorelishvili v. Georgia* 5 June 2007, *AM* 2007/4, 372.

88 Council of Europe, *Freedom of expression in Europe: case law concerning article 10 of the European Convention on Human Rights*, Strasbourg, Council of Europe, 2007, 88.



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The IOC proclaims that the promotion of human dignity is one of its core objectives. Since human rights are an essential element of human dignity, the British and New Zealand Olympic Committee, in effect, opposed this objective by denying their athletes the freedom of expression.

c. The convergence of media

The IOC maintains a strict differentiation in treatment between accredited media players as according to the IOC's statute (right holders or not), and the technique used to transmit sport creative content (print, audiovisual, electronic). In the end this leads to a "patchwork" of rules that leads to complexity, especially for persons active in more than just one role: for example, a blogging journalist of the written press has to make a clear distinction between his or her activities as a blogger and his or her activities in the written press. This may lead to absurd situations and raises the question whether the difference in treatment between the diverse media can be upheld. The same remarks can also be made with regard to the copyright guidelines adopted by the IOC. For example, why is the fair deal / legal exception for the press to quote Olympics content only mentioned in the IOC guidelines with regard to the written press? Or why is the archiving exception only mentioned in the guidelines for broadcasters, and not for the written press? This situation is made even more questionable when one considers that, in contrast, for example the European Directive 2001/29 calling this exception into life,⁸⁹ does not make a distinction between the different media with regard to these exceptions.

5. Conclusion

We should be cautious of organizations trying to monopolize news content in an attempt to control the production and distribution of all audiovisual content related to the sports events such as the Beijing Olympics. It starts with the Blogging Guidelines, but where will it end? We could end up with pure censorship: controversial images being "deleted", negative publicity being covered up, access being limited to a very small delegation of the press paying the highest fee. Such concerns emerged for example during EURO 2008 when for the first time in history, UEFA had its own International Broadcast Centre producing the television signal itself. This implies that UEFA could have decided at its own discretion what exactly was being broadcasted of the match. The Swiss and Austrian public broadcasters accused UEFA of censorship for not having shown smoke bombs fired by some fans in the Austria-Croatia match during the live report of that game. Although UEFA officially denied that claim, a UEFA spokesman admitted that there had been images which UEFA had preferred not to show.⁹⁰ Obviously, the freedom of the press to independently report on a sports event and the right of the public to be informed is in serious danger. It is incumbent on the press (in the functional meaning of the word) to report on all matters of general interest - including sports events and especially political developments- irrespective of whether the outcome of a report turns out to

generate positive or negative publicity for the athlete or sports organization involved.

Mere facts like sports events are principally not copyrightable, and should remain in the public domain. Copyright should not be used as a tool to prevent new uses (like blogging), or to restrict the dissemination of mere facts or information that can be derived from a sports event, in order to sell the right to report (broadcast) to the highest bidder. Information should not be owned by an enclosed circle of privileged owners.

As new technologies continue to emerge, freedom of expression and interests in exclusive rights will increasingly conflict with each other. It is up to the courts to seek an appropriate balance between the competing interests of the many different actors involved in an area in which legislators can hardly keep up with technological developments. Although it should be noted that the IOC's guidelines certainly contain many good things - such as the reference to the personal liability of bloggers making statements on their own account, limits that have to be taken into account (no libel and slander), and the importance of keeping the integrity of the Olympic Games intact (which principal focus should remain sports instead of politics) - we doubt that the more restrictive rules we discussed in this article, would always pass the proportionality-test of Article 10.2. of the ECHR. It is up to the states to adequately protect the freedom of expression of blogging athletes and journalists and up to the courts to continue to seek for that appropriate balance which has always been found so far.

Finally, questions arise with regard to the difference in treatment of different media to which the IOC seems to be (desperately) clinging. Though the importance of new Internet media is recognized, we still have the impression that the core purpose of all of the IOC's guidelines is to preserve (besides the sponsors of the Olympics) the broadcasters' rights. Written media and electronic lookalikes are merely seen as an additional media source, not as a substitute. We wonder how much longer this treatment can be justified while media seem to converge (and collaborate / merge) more than ever before and are on the verge of providing the same sports content in very similar (almost identical) formats. To diffuse the Olympic spirit, the IOC should embrace online media with all their new characteristics instead of trying to fit them into old categories.

89 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, *O.J. C.* 167, 22.06.2001, p. 10

90 UEFA denies TV censorship allegations, 18 June 2008, <http://www.eufootball.biz/Television/1806083-UEFA-euro-2008-TV-censorship.html>; UEFA beticht van censuur [UEFA accused of censorship], 15

June 2008, www.hln.be/hln/nl/1319/Euro-2008/article/detail/313487/2008/06/15/UEFA-beticht-van-censuur.dhtml; Is UEFA censoring pictures of Euro 2008?, 11 June 2008, http://64.233.183.104/search?q=cache:2RB_t6DHjMEJ:blogs.rnw.nl/euro2008/page/3/+Austria%2BCroatia%2Bsmoke+bo+mbs%2BUEFA%2Bcensorship&hl=nl&clnk&cd=1&gl=be.

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The Legal Nature of Premium Sports Events: 'IP or Not IP - That is the Question'

by Oles Andriychuk*

1. Introduction

Revenue from distribution of the media rights to premium sports events is the largest source¹ of funding for professional sports clubs and leagues.² Traditionally there were five major forms of broadcasting³ of these events: free-to-air television TV, pay-TV, radio rights, streaming over the Internet and 3G mobile phones services. The situation is changing rapidly⁴ due to technological development, which removes existing borderlines between media-platforms. Digitisation substantially decreases the entrance barriers for new media actors. Couchman and Harrington⁵ for instance provide a new classification of these platforms, with the view of their following enhancement, fragmentation and convergence: free to air TV; pay-TV; pay-per-view TV; enhanced TV; interactive TV; video; other fixed media, e.g. CD-ROM, DVD etc.; video on demand; Internet (including broadband); radio; wireless telephony (WAP, SMS, 3G); telephony (DSL, ADSL).

Such diversification allows realisation of sports media rights in a much more refined way, or as Fisher⁶ eloquently suggests, 'in many ways, the marriage between the professional sports industry and the emerging new media technologies has been a textbook example of mutually beneficial synergy'.

This 'mutually beneficial marriage', in particular, reinforces creativity in sports industry, facilitates the establishment of new forms of media content from those sports events, which previously have been seen as homogeneous and undividable broadcasting products. Inasmuch as a value of sports media rights is rising up exponentially, the same occur with the importance of a proper defining of their economic status and legal regulation.

There is a consensual agreement that the broadcast of sports event constitute a copyrighted work. In the EC it is protected inter alia by InfoSoc Directive,⁷ while in the US there is a special amendment to the Clayton Act,⁸ commonly known as Sports Broadcasting Act of 1961.⁹ In the context of new media, the violation of copyright might have a form of unauthorized or circumvented access to the media platform, which broadcasts the event, using without permission the direct hyperlink¹⁰ to the online broadcast or applying for the purpose of webpage's access login or password information, received without permission of the holder/transferred to another person without concern of right owner.

The focal point of the discussion about the nature of sports media rights is in the qualifying of the moment, starting from which a broadcasting of sports event receives its copyright protection. In other words: 'can an event itself be protected by copyright law, or it is only

its broadcast, which receives its intellectual property law protection?' If the former is the case, then sports media rights would be protected much more rigidly. This, consequently would reinforce their commercial value, increase revenue of the holders of those rights and stimulate long-term strategic investment in the industry. On the other hand, if sports media rights are protected only as broadcasting rights, it would give the incentives to the competitors of the exclusive operators, to seek the ways of exploitation of sports event, by creating an alternative content, which might be of interest to particular segments of audience. This situation would be positive for the invention of new formats of sports media rights exploitation. It will foster technological innovation in the industry by introducing advanced formats of premium sports media content.

Inasmuch as those two positions are mutually exclusive, there is a tendency to consider the tension between them in terms of a zero-sum-game relationship. A winner in the doctrinal battle on a definition of legal nature of sports media rights is likely to get most if not all commercial revenue within the sector.

This paper poses and analyzes the arguments of both positions and concludes that sports media rights have to receive their copyright protection already at the stage of sports performance. Such 'owner-friendly' approach is justified by a range of mainly legal evidences, which are summaries in a formula 'each commercially attractive event of an artistic nature, regardless of predictability of its results and its aesthetic creativity, shall be granted a copyright status'.

On the other hand, to counterbalance the outcomes of this strict conclusion, the paper suggests that copyright as such is not an absolute right. It can be compromised, limited or overruled by other rights and public interests, such as, for instance, right to fair competition, right to information, right to access to artistic heritage, right to coherent cultural development, right to innovations and expansion of new forms of media products, fair use, sports parody, etc. The conflict between different public values is inevitable¹¹ and, in general, productive. Thus, an internal protection of sports event as such by copyright law does not neglect the legitimate societal benefits from the limitation of its commercial exploitation. It has to be acknowledged that all legitimate public interests are not entirely coherent, therefore the most appropriate doctrinal instrument for their regulation lies in the application of legal pluralism, which recognizes inconsistencies between the different legal regimes and, in general, leaves a big margin for appreciation for policymakers on a case-by-case basis, rather than strives to reconcile all the conflict within the system, by syn-

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1 For instance, according to the UK House of Commons Culture, Media and Sport Committee Seventh Report of Session 2007/2008, these revenues constitute 80% of the England and Wales Cricket Board total incomes. (House of Commons Culture, Media and Sport Committee, European Commission White Paper on Sport, Seventh Report of Session 2007/2008, United Kingdom).

2 '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', Explanatory Statement, European Parliament Report on the White Paper on Sport (2007/2261(INI)), 14.4.2008.

3 The term 'broadcast' is used in its broader sense as any form of transmission of visual images and sounds.

4 'The pace of change is so rapid that solutions to some of the problems that we sought to address have already begun to emerge', 'New Media and Creative Industries', House of Commons - Culture, Media and Sport - Fifth Report, 2006/2007.

5 Nic Couchman, Dan Harrington, 'New Media Sports Rights', Couchman Harrington Associates, London, 2001.

6 William W. Fisher and col., 'Nothing But Internet', Harvard Law Review, Vol. 110, No. 5, 1, March, 1997.

7 Directive 2001/29/EC of the European

Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; OJ L 167/10 (22.06.2001): 'This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts'. See also Council Directive 93/83/EEC, On the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Official journal NO. L 248 ,

06/10/1993 P. 0015 - 0021. 27/09/1993, Council Directive 92/100/EEC On rental right and lending right and on certain rights to copyright in the filed of intellectual property, Official Journal L 346 , 27/11/1992 p. 0061 - 0066, 19/11/1992.

8 The Clayton Antitrust Act of 1914, (October 15, 1914, ch. 323, 38 Stat. 730, codified at 15 U.S.C. § 12-27, 29 U.S.C. § 52-53).

9 Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-1295 (1961).

10 See 'Live Nation Motor Sports, Inc. v. Davis', No. 3:06-CV-276-L, 2007 US Dist. WL 79311, N.D. Tex. 9 January 2007.

11 The terms 'rights', 'freedoms', 'liberties', 'values' and 'interests' are used in this context as synonyms.

cretizing them into non-critical theoretical belief. Thus, sports events have to be copyrightable as such, though their protection by copyright law does not give the rights holders an absolute immunity from their potential parallel exploitation.

2. Regulation of copyright in the EC

Regulatory intentions of the European Union are predetermined by many interests. One of the most influential is the support of new technological and business solutions of media operators.¹² It requires adoption of the European legislation, designed to fostering market entry and the development of such innovative digital services as international online digital content shops; video-on-demand services; making available of scheduled programming; and new generation of 'live' online television services.¹³ Such a proactive approach of policy-makers means that regulation of sports media rights in the EC context belongs to sensitive political area. Although the EC cannot explicitly define the system of property rights, it can make influence on it, since it has some competence in respect to their exercising.¹⁴ From the national copyright mindset these distinctions are rather opaque,¹⁵ inasmuch as a 'right' encompasses the notion of both its 'existence' and 'exercise'. Regardless of its legal ambiguity, this judicial algorithm plays a significant political role within the EC context.

2.1. Primary EC law

Sports media rights are property rights. Article 295 of the EC Treaty unconditionally provides that the Treaty 'shall in no way prejudice the rules in Member States governing the system of property'.¹⁶ This provision had been existed in the first version of the EC Treaty from 1957 and has not been changed up until present.¹⁷ This does not mean, however, that EC competences go outside the regulation of media rights to sports event.¹⁸ There are several domains, in which the EC authorities are granted with substantial competences to regulate property rights. These areas, inter alia, include EC rules on competition, accomplishment and functioning of internal market, common commercial policy, free movement, approximation of national laws, promotion of research and technological development, strengthening of consumer protection and encouragement of trans-European networks.

According to Article 133(1) EC, 'the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event

of dumping or subsidies'.¹⁹ The decisions in these fields are adopted by Council, acted by qualified majority. Article 133(5) EC expands the competences of the EC, which are stipulated in Article 133(1) EC and 133(4), to the fields of trade in services and the commercial aspects of intellectual property, 'in so far as those agreements are not covered by the said paragraph and without prejudice to paragraph 6',²⁰ which restricts the competence of the Council 'to conclude an agreement, which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation'.²¹ However, according to Article 133(7) EC, 'the Council, acting unanimously may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property in so far as they are not covered by paragraph 5'.²²

The EC Treaty recognises a particular status of intellectual property also in its procedural provisions.²³ According to Article 53 of the Protocol _6 on the Statute of the Court of Justice 'the specific features of litigation in the field of intellectual property (can be taken into account)'.²⁴ Rules of Procedure may derogate from the general procedural requirements of the EC Treaty.

European Constitutional Treaty²⁵ contained more explicit provisions on the competences of the EU in the field of intellectual property. Those provisions have been transposed as well to Article 118 of the Lisbon Treaty, which requires in the context of the completion and functioning of the internal market the European Parliament and the Council, 'to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements'.²⁶

2.2. EC legislation and soft-law

Because of the political sensitivity and commercial importance of the regulation of copyright in the European legal regime these issue have received a big public resonance. Different stakeholders advocate different visions of the level of copyright protection in the EC.²⁷ The Community intervention in the field of copyright has been started in the 1970s.²⁸ Inasmuch as Article 295 EC did not allow any direct Community influence in the field of property rights, the proxy has been found in the form of regulation of other public policies, such as establishing of internal market, ensuring of undistorted competition and similar legitimate Communities' goals of economic and trade nature.

12 E.g. see presentation of the Head of the Copyright Unit, DG Internal Market and Services of the European Commission Dr. Lueder at the 14th Fordham Conference on International Intellectual Property Law & Policy: Tilman Lueder, 'Working toward the next generation of copyright licenses', 14th Fordham Conference on International Intellectual Property Law & Policy, April 20-21, 2006.

13 Tilman Lueder, 'Working toward the next generation of copyright licenses', *ibid.*

14 Case 78-70, 'Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG', ECR 1971, 00487: 'It is clear from Article 30 that, although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty'.

15 See for instance their evaluation by Cornish and Llewelyn in William Cornish, David Llewelyn, 'Intellectual Property: Patents, Copyright, Trademarks and Allied Rights', 6th Edition, Sweet & Maxwell, London, 2007: 'the Court ven-

ured upon legalistic distinctions whose obscurity served only to disguise their essential banality'.

16 Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, OJ C 321E of 29 December 2006.

17 Lisbon Treaty, Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, OJ C115, 9.5.2008.

18 A theoretical reason for this *prima facie* inconsistency is analyzed in many studies and it constitutes a central part of European legal and political sciences, metaphorically summarised by Christian Joerges 'European law has a lot in common with a sleeping dog. It is there, but does not get much attention. And yet, suddenly the sleeping dog becomes a watchdog, wakes up and bites'.

19 EC Treaty, *ibid.*

20 EC Treaty, *ibid.*

21 EC Treaty, *ibid.*

22 EC Treaty, *ibid.*

23 Protocol _6 on the Statute of the Court of Justice, 2001, Protocols annexed to the Treaty on European Union, to the Treaties establishing the European Community and to the Treaty

Establishing the European Atomic Energy Community, OJ C 321E of 29 December 2006.

24 EC Treaty Protocol _6, *Ibid.*

25 Treaty establishing a Constitution for Europe, Official Journal of the European Union, C 310, Volume 47, 16.12.2004.

26 Lisbon Treaty, *ibid.*

27 As an example compare the positions of Association's of European Performers' Organisations Remarks concerning the Commission Staff Working Paper on the Review of the EC Legal Framework in the Field of Copyright and Related Rights (SEC (2004) 995): 'The AEPO considers that some existing provisions of the already adopted directives could be improved in order to better protect performers. Moreover the *acquis* does clearly not constitute a satisfactory level of protection for performers' rights, some basic uses of their recorded performances being not protected at all. The AEPO can only express its concern with regard to the future of performers' rights' and The European Consumers' Organisation 'BEUC' response to the same Commission Staff Working Document: 'We understand that the Commission is undertaking a tidying up exercise rather

than a reform or in-depth review of the existing *acquis*. We fear that this approach in the context of the new copyright protection framework forecloses the proper assessment of some Directives, in particular the InfoSoc Directive, as to their economic benefit and to the balance between exclusive rights in works and the public interest at stake. It is thus wholly inappropriate at this stage. Protection should be strong enough to ensure innovation but not so strong as to stifle the benefits to the public, the consumer and competition. Intellectual property thus may confer time-limited monopoly privileges but these must not be excessive, and abused in an anti-competitive way to the detriment of consumers'.

28 A study on an eventual intersection between the EC law and copyright has been conducted by Dietz: Adolf Dietz, 'Copyright law in the European community: a comparative investigation of national copyright legislation, with special reference to the provisions of the treaty establishing the European Economic Community', Alphen aan den Rijn: Sijthoff & Noordhoff, 1978.

The 'first generation'²⁹ of the EC copyright regulation also has introduced in its objectives certain cultural priorities with reference to Article 151 EC in a quite precautionary manner.³⁰ It has been done by putting the emphasis on the obligation of the Community 'to contribute to the flowering of the cultures of the Member States', 'dissemination of the culture of the European peoples' and 'artistic and literary creation'.³¹ These incentives have been coherently systematized by the Commission in a Green Paper 'Copyright and the Challenge of Technology'.³² The document marked out six principle areas, which require their Community harmonization.³³ Such an expanded interpretation of the Communities' competences apparently includes the fight against piracy and right to information.³⁴ However, European copyright protection for audiovisual work has not been granted in an absolute manner, but it required the following cross-checking with other legitimate public goals, such as completion of internal market, free movement and undistorted competition.³⁵

In order to make the copyright acquis more coherent and as a regulatory reaction to big technological and political pressure, the 'second generation'³⁶ of the EC copyright law had been adopted in the last decade. The legislative package has been consisted of the amendment to older regulatory acts, as well as several new ones. The most broad and systematised of them is the 'InfoSoc Directive',³⁷ followed by adaptation of the Commission's Green Paper of 1995 on Copyright and Related Rights in the Information Society.³⁸ As a regulatory proxy had been selected four major dimensions: (a) the Internal Market;³⁹ (b) the cultural context;⁴⁰ (c) the economic context;⁴¹ and (d) the social context.⁴²

According to Copyright Directive,⁴³ the competence of the EC to regulate this sector derives from its obligation in respect to establish-

ment of internal market and 'harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives'.⁴⁴ The main technological impetuses for the adoption of the Directive was the EC understanding that the regulatory challenges of technological development require the EC to adapt, supplement and harmonize its regulation of copyright. The similar legal ground for the EC regulation is provided in InfoSoc Directive.⁴⁵

In July 2008 the Commission has adopted the Green Paper 'Copyright in the Knowledge Economy',⁴⁶ with the purpose to stimulate a debate on the role of copyright in the Internet-environment. The document reemphasized the importance of knowledge, calling it a 'Fifth freedom' in the Internal Market. The Commission has stressed that the 'new modes of delivery should allow consumers and researchers to access protected content in full respect of copyright'.⁴⁷

The importance of copyright protection for sports event has been reemphasised also in the Commission's White Paper on Sport.⁴⁸ In the document the Commission pointed out that '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'.⁴⁹

In April 2008 the European Parliament has adopted the Report on the White Paper on Sport,⁵⁰ in which it has acknowledged that 'media rights are the primary source of income for professional sport in Europe, income which is inter alia, also reinvested in grass-roots training, facilities and community projects, and sport events are a popular source of content for many media operators'.⁵¹ This approach to sports events implicitly recognises 'the moral rights' of sports event organizers to utterly benefit from their risky and costly investments.

29 I.e. 'Database Directive' (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077/20 (27.03.1996)); 'Term Directive' (Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9 (24.11.1993)); 'Satellite and Cable Directive' (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15 (06.10.1993)); 'Rental Directive' (Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346/61 (27.11.1992)); and 'Software Directive' (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42 (17.05.1991)).

30 Article 151(1, 2) EC, *ibid.*: '1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. 2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: improvement of the knowledge and dissemination of the culture and history of the European peoples, conservation and safeguarding of cultural heritage of European significance, non-commercial cultural exchanges, artistic and literary creation, including in the audiovisual sector'.

31 Article 151 EC, *ibid.*

32 Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action. COM (88) 172 final, 7 June 1988.

33 Inter alia, the legal protection of computer programs; rental rights, lending rights and the main neighbouring rights; satellite broadcasting and cable retransmission; the duration of protection of authors' rights and neighbouring rights; the legal protection of databases; and artists' resale rights.

34 'The directly applicable provisions of the Community Treaty concerning the free movement of goods and freedom to provide services have produced a number of leading cases on the extent to which copyright, of necessity national in scope, may be relied upon if the result is to prevent goods and services being supplied across the Community's internal frontiers. As elsewhere in the field of intellectual property rights, the European Court of Justice quickly established the principle that, where goods are lawfully placed on the market in a Member State, copyright cannot be relied upon to restrict the free circulation of those goods elsewhere in the Community', Green Paper 'Copyright and the Challenge of Technology', *ibid.*, 1.1.2.

35 'Copyright protection for audio-visual works should not prejudice the functioning of a competitive market in such works nor the development of new audio-visual technologies. On the contrary, copyright should provide an important part of the legal environment which favours creativity, innovation and competition', Green Paper 'Copyright and the Challenge of Technology', *ibid.*, 3.10.3.

36 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related

rights. OJ L372/12 (27.12.2006); Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. OJ L376/28 (27.12.2006); Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. OJ L195/16 (02.06.2004); Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. OJ L 157/45 (30.04.2004); Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art. OJ L 272/32 (13.10.2001); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; OJ L 167/10 (22.06.2001).

37 'Information Society Directive', 2001/29/EC *ibid.*

38 European Commission, Green Paper on Copyright and Related Rights in the Information Society, Brussels, 19.07.1995, COM(95) 382 final.

39 'The information society will facilitate creation, access, distribution, use and similar activities, and consequently increase the number of situations in which differences between the laws of the Member States may obstruct trade in goods and services', Green Paper on Copyright and Related Rights in the Information Society, *ibid.*

40 'The information society, and in particular multimedia products, have a cultural dimension which must be fully taken

into consideration (Article 128(4) of the Treaty on European Union)', Green Paper on Copyright and Related Rights in the Information Society, *ibid.*

41 'The protection of copyright and related rights has become one of the essential components in the legislative framework which underpins the competitiveness of the cultural industries', Green Paper on Copyright and Related Rights in the Information Society, *ibid.*

42 'In a situation where a range of new services are developing and being diffused, the opportunities for employment creation, in particular those which are employment intensive, should be exploited to the full', Green Paper on Copyright and Related Rights in the Information Society, *ibid.*

43 Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', *ibid.*

44 Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', *ibid.*

45 'Information Society Directive', 2001/29/EC *ibid.*

46 Green Paper 'Copyright in the Knowledge Economy', Commission of the European Communities, Brussels, COM(2008) 466/3.

47 Green Paper 'Copyright in the Knowledge Economy', *ibid.*

48 'White Paper on Sport', Commission of the European Communities, Brussels, 11/07/2007, COM (2007), 391.

49 White Paper on Sport, *ibid.*

50 European Parliament Report on the White Paper on Sport (2007/2261(INI)), 14.4.2008.

51 European Parliament Report on the White Paper on Sport, *ibid.*

In the section of the report, related to economic aspects of the European sport, the Parliament has also pointed out to the Commission and Member State the necessity to reinvigorate the respect to intellectual property rights, which are inevitable to protect sport economy. On the other hand it called on the respecting of the rights of public to be informed 'without putting at stake the proper balance between a sporting organisation's legitimate concerns and the needs of the public to be able to access and create objective, informative and topical information in the forms of written, pictorial and audio content'.⁵² The particular attention has to be paid on the ability of the EC and its Member States to guarantee 'the possibility of having distance access to sports events at cross-border level within the EU',⁵³ as well as protect rights holders from ambush marketing, Internet piracy and unlawful sports betting. In addition the Parliament demands concrete action from the Commission and the Member States 'which protects the intellectual property rights of sport event organisers with regard to their sporting event as a whole'.⁵⁴ This request can be interpreted as a benevolent approach to copy-rightability of the event itself.

In its Opinion on the European Parliament Report on the White Paper on Sport⁵⁵ the Committee on Economic and Monetary Affairs has expressed has even more explicitly acknowledges 'the rapidly changing nature of the European sport economy which is increasingly based on investment in and development of innovative sport content through digital technologies and recognises the need to prevent the undermining of intellectual property rights and goodwill, to minimise piracy and reduce the scope for illegal operations on the Internet'.⁵⁶ This means that the EC authorities are not only concerned about violation of broadcasting rights to sports event, but also express their support to goodwill principles and fight against unfair competition conduct. The latter, inter alia, can have a form of unauthorized shooting of sports event by any sort of digital recorder. All abovementioned concerns have been included into the final version of the Parliament's resolution⁵⁷ on the White Paper on Sport.

There were several proposals to express more explicitly the support of the Parliament for the legislative protection of sports rights, in particular, in terms of granting *sui generis* copyright protection to the events as a whole. They have been expressed by the Sports Rights Owners Coalition, which represents the major sports events organizers.⁵⁸ These amendments, supported by the most influential sports federations and leagues, have been rejected. The attention of the Sports Rights Owners Coalition has been directed also to the Commission White Paper on Sport. In the Memorandum submitted by the Sports Rights Owners Coalition to the Select Committee on Culture, Media and Sport⁵⁹ they have criticized White Paper on Sport for its failure to adequately address the issues, related to modernization of the EU Copyright Directive; the EU Satellite and Cable Directive; the implementation of the revised Audiovisual Media Services Directive; the revision of the IP Enforcement Directive; the

Content Online (and related Mobile TV) initiatives; the revision of the 'Communications Package'; and the review of the EU Conditional Access Directive. From the perspective of the Sports Rights Owners Coalition these documents have to be amended, bearing in mind the vital importance of sports rights protection in a digital environment.

On the whole, the Report demonstrates that the Parliament has taken a moderate political position, which enables the broad audience to have an access to sports events of major importance, while simultaneously guarantees a strong protection for intellectual property of the event organizers. Such approach perfectly fits into pluralistic interpretation of rights. It acknowledges the entire protection for all major interests of societal groups and sees the clashes between them as inevitable practical challenges for policy makers and regulators. This approach is inductive. It does not strive to provide a universal theoretical model for resolving all doctrinal conflicts between them, considering these attempts as utopian and instrumental.

2.3. Hierarchical balance

The competence of the Commission to regulate copyright policy remains to be limited. It is so, since the Community copyright legislation and IP soft law have to be in conformity with the provisions of the EC Treaty, inasmuch as hierarchically the former is subordinated and predetermined by the latter. In their substantive dimension these sources of the EC copyright law are simultaneously in the relationship 'lex specialis v. lex generalis'. Theoretically each *lex specialis* deviates, to a certain extent, from *lex generalis*. Such a deviation, however, does not authorize restriction of the EC Treaty by the secondary norms. Hence, theoretically the Hegelian 'tragic clash between right and right' is unavoidable.

This principle is fully applicable in the relationship between the norms on the same hierarchical level, provided the norms at issue do regulate the same domain by applying coherent or comparable substantive apparatus and regulatory techniques.⁶⁰ The Commission itself is aware about the inconsistencies on the definitions between the different copyright-related Directives,⁶¹ which might lead to a negative impact on the precise definition of media rights, their status and legal regulation. In addition, the Conditional Access Directive,⁶² which is another instrument of copyright protection of sports broadcast, does not define the legal status of sports rights and is designed only for the protection of copyrighted materials.

2.4. EC case-law

According to existing jurisprudence of the ECJ, the decisions of national courts, which are ruled under the national intellectual property provisions, may be declared to be a measure having equivalent effect to the quantitative restrictions and are prohibited by Article 28 EC.⁶³ The decisions of national undertakings to restrict the territory of circulation of their products and services do not fall under the

52 European Parliament Report on the White Paper on Sport, *ibid*.

53 European Parliament Report on the White Paper on Sport, *ibid*.

54 European Parliament Report on the White Paper on Sport, *ibid*.

55 Opinion of the Committee on Economic and Monetary Affairs on the European Parliament Report on the White Paper on Sport, (2007/2261(INI)), 14.4.2008.

56 Opinion of the Committee on Economic and Monetary Affairs on the European Parliament Report on the White Paper on Sport, *ibid*.

57 European Parliament Resolution on the White Paper on Sport P6_TA(2008)0198, 08.05.2008.

58 The Sports Rights Owners Coalition represents inter alia 6 Nations Rugby; All England Lawn Tennis and Croquet Club; Amateur Swimming Association; Australian Football League; Australian

Rugby; British Horseracing Authority; British Olympic Authority; Bundesliga; Cricket Australia; England and Wales Cricket Board; European Professional Football Leagues; European Tour; Federation Francaise de Tennis; FIFA; Formula One; International Amateur Athletic Federation; International Cricket Council; International Federation of Horse Racing Authorities; International Rugby Board; International Tennis Federation; Le Tour de France; Ligue du Football Professionnel (LFP); London Marathon; PGA European Tour; PGA Tour Australia; Premier League; Rugby Football League; Rugby Football Union; Ryder Cup; Scottish Premier League; Scottish Rugby Union; Tennis Australia; The Football Association; The Football League; UEFA; World Marathon Majors; and World Snooker.

59 Memorandum submitted by the Sports

Rights Owners Coalition to the Select Committee on Culture, Media and Sport, January, 2008.

60 For the analysis of eventual problems in copyright, which arise from this theoretical issue see Michel M. Walter, 'Updating and Consolidating of Acquis. The Future of European Copyright', Santiago de Compostela Conference, June 2002, inter alia: 'The relationship between the different directives in the field of copyright and related rights is governed by the rule of speciality. As far as the particular rulings of each directive are concerned, such provisions take priority over more general provisions of other directives. For this purpose all directives provide for safeguard-clauses stating that its provisions shall apply without prejudice to other Community provisions and shall leave intact and in no way affect such existing provisions. Thus the rule *lex posterior*

derogat legi priori does not apply. However, the rule of *lex specialis* may create inconsistencies and problems of interpretation, since some of such differences may have been provided for intentionally, whereas others not'.

61 See The Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, Brussels, 19.7.2004, SEC(2004) 995.

62 Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, Official Journal L 320, 28/11/1998 P. 0054 - 0057.

63 Article 28 of the EC Treaty, *ibid*: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited.'

scope of Article 28 EC, since this requirement of the EC Treaty concerns only public authorities, unless those undertakings are not commissioned by state to fulfil some public duties.⁶⁴ This violation can be counterbalanced by public safety and protection of industrial and commercial property provisions of Article 30 EC.⁶⁵

In such circumstances the conduct of private companies can still violate other provisions of the EC Treaty, particularly Community's rules on competition. The notion of industrial and commercial property in terms of Article 30 EC is considered in its broader sense,⁶⁶ which allows to include into it copyright-related protection. Thus in *Deutsche Grammophon case*⁶⁷ the ECJ declared that 'the provisions of Article 30 of the Treaty may be relevant to a right related to copyright, in the same way as to an industrial or commercial property right'.⁶⁸

In its *Centrafarm*⁶⁹ judgement the ECJ specified the vagueness of the 'exercisability' of intellectual property rights as: 'the guarantee that the owner (...) has the exclusive right to use that (...) (property) for the purpose of putting goods into circulation for the first time (...) it is therefore intended to protect him against competitors wishing to take advantage of the status and reputation of the (...) (property) by selling products illegally bearing that trade mark'.⁷⁰

Intellectual property rights also can be limited due to a balanced public policy. In a series of the EC antitrust cases it has been proved that intellectual property is not an absolute right, and its exercise has to be crosschecked *inter alia* with competition law. Thus in *Volvo v. Veng*⁷¹ the ECJ decided that 'the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right (...). It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 82 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct'.⁷² Similarly in its landmark *Magill*⁷³ judgement the ECJ held that 'the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct'.⁷⁴ The proportionality threshold for limitation of intellectual property rights remains to be high.⁷⁵ The most plausible instrument to override intellectual property rights remains to be the essential facility doctrine, the legal nature of which is quite controversial and the practical application of which is fairly exceptional.

3. Sports media rights in the US and other common law jurisdictions

In the US case law sports media rights enjoy much stronger copyright protection than it is in the European countries. Sport match organizers are supposed to inherently possess the right to an entire commercial exploitation of the event. This protection has been established by the common law courts over last hundred years.

3.1. Pittsburgh Athletic

The landmark case in the domain of copyright to sports event is *Pittsburgh Athletic*.⁷⁶ An unauthorized broadcasting radio company

has rented the facilities in the neighbourhood of the venue. The purpose of that was the establishment of media coverage of baseball games of Pittsburgh Athletic team. In addition to that several commentators were provided with the tickets in order to follow and report the event.

The court decided that both sorts of commentaries were violation of Pittsburgh Athletics' property rights, which include *inter alia* the ability of event organizer to effectively control the venue and neighbour territory during the game, as well as for a reasonable time before its beginning and ending. As Burch⁷⁷ suggests, the significance of the case rests in the court's conclusion that the right to broadcast belongs to the team and any attempt to cover the event by unauthorized broadcaster is illegal.

Indeed, according to the court, 'the Athletic Company has at great expense, acquired and maintains a baseball park, pays the players who participate in the game, and have, as we view it, a legitimate right to capitalize on the news value of their games'.⁷⁸ This position of the court has been elaborated in *Zaccini*⁷⁹ case, in which the judge held that 'no social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay'.⁸⁰

3.2. WCVB-TV v. Boston Athletic Association

Regardless the fact that a US property law is much more benevolent in respect of recognition of copyright in a sports event itself, this right still has its doctrinal roots in the ability to control the access to the venue. If an event organizer is not able to control the facility or if a competition is conducted in public places, the copyright is compromised by other public rights, such as freedom of information and unrestricted access to public facilities. Thus, in *WCVB-TV v. Boston Athletic Association*⁸¹ public broadcasting company Channel 5 has been restricted by the Boston marathon organizers to cover the event, inasmuch as the exclusive media partner of the event has been Channel 4. However, taking into account that Boston Athletic Association did not own the streets of Boston, their right to the event as such has been substantially limited. This enabled Channel 5 to continue coverage of the event.

Simultaneously the court rejected the claim of Boston Athletic Association that unauthorized usage of their registered trademark 'Boston Marathon' causes substantial damages for the brand. The US Court of Appeal held that since the legal nature of trademark is in a prevention of 'customer confusion', Channel 5 is authorized to use 'Boston Marathon' trademark when it is in fact broadcasting Boston Marathon: 'No one here says that Channel 5 is running its own marathon on Patriot's Day, which a viewer might confuse with the BAA's famous Boston Marathon'.⁸²

3.3. Victoria Park Racing

In the Australian *Victoria Park Racing case*⁸³ with similar factual background the Australian High Court held that building of a temporal broadcasting tower in the neighbourhood of the venue for the purpose of broadcasting of racehorse did not violate property rights of

64 See e.g. the Case C-325/00 'Commission of the European Communities v Federal Republic of Germany', ECR 2002, I-09977. In this case the ECJ declared that 'by awarding the quality label 'Marenqualität aus deutschen Landen' (quality label for produce made in Germany) to finished products of a certain quality made in Germany, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC)'.

65 Article 30 of the EC Treaty, *ibid.*: 'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public

policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

66 Case 258/78, 'L. C. Nungesser KG and Kurt Eisele v. EC Commission', ECR 1982, 2015.

67 'Deutsche Grammophon', *ibid.*

68 'Deutsche Grammophon', *ibid.*

69 Case 15/74, 'Centrafarm B.V. and de Peijper v. Sterling Drug Inc.', 1974. ECR 1147.

70 Case 15/74, 'Centrafarm', *ibid.*

71 Case 238/87, 'AB Volvo v. Erik Veng (UK) Ltd', ECR 1988, 06211.

72 Case 238/87, 'AB Volvo v. Erik Veng (UK) Ltd', *ibid.*

73 Joined cases C-241/91 P and C-242/91 P, 'Radio Telefís Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities', ECR 1995, I-00743.

74 Joined cases C-241/91 P and C-242/91 P 'Magill', *ibid.*

75 Case T-561/93, 'Tercier Ladbroke SA v. Commission of the European Communities', ECR 1995, II-02755.

76 'Pittsburgh Athletic Co. v. KQV Broadcasting Co.', (D. C. Pa. 1938) 24 F. Supp. 490.

77 Holly M. Burch, 'A Sport Explosion: Intellectual Property Rights in Professional Athletic Franchises', *Sports Lawyers Journal*, Vol. 5, 1998.

78 'Pittsburgh Athletic Co. v. KQV Broadcasting Co.', *ibid.*

79 'Zaccini v. Scripps-Howard Broadcasting Co.', 433 U.S. 562 (1977).

80 Zaccini, *ibid.*

81 'WCVB-TV v. Boston Athletic Association', 926 F.2d 42, 45 (1st Cir.1991).

82 'WCVB-TV v. Boston Athletic Association', *ibid.*

83 'Victoria Park Racing and Recreation Grounds Co Ltd v. Taylor', 1937, 58 CLR, High Court of Australia.

sports event organizer. The court concluded that the argument that 'by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-property in the spectacle which the law will protect. The vagueness of this proposition is apparent on its face. What it really means is that there is some principle (apart from contract or confidential relationship) which prevent people in some circumstances from opening their eyes and seeing something and describing what they see. The court has not been referred to any authority in English law which supports the general connection that if person chooses to organize an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see'.⁸⁴ It has been concluded that a 'spectacle' cannot be 'owned' by any ordinary sense of the word.

Following the rationale of the court, according to Taylor,⁸⁵ if an event organizer cannot control access to the facility, which makes him impossible to prevent an unauthorised reporter attending and media content, the organizer cannot stop that person by invoking some proprietary right in the event per se.

3.4. *S&GPA v. Our Dog Publishing*

There is another conceptually similar case: *S&GPA v. Our Dog Publishing*.⁸⁶ Here an unauthorized photographer had created pictures from a dog show with a following selling to the specialised dog magazine. The court held that 'it is not right to speak of the right of taking photographs as property',⁸⁷ stipulating the right to property solely to the ability to access the venue: 'it might be a condition that viewers should not use cameras or should not take photographs or make sketches. The plaintiffs could have acquired by contract such a right as they claim, and (...) they fail to do'.⁸⁸

3.5. *NBA v. Motorola*

In another leading case in the area of sports right (decision of the New York District Court '*NBA v. Motorola*')⁸⁹ claimant brought the action against Motorola complaining of the introduction to the market an electronic communication device which provides 'live' information about various sports tournaments, including NBA games.⁹⁰ In its claim NBA presupposed its possession of the information, related to sports events, which are organized under its auspice. In its decision the court concluded that 'through the SportsTrax product, defendants disseminated to NBA fans game information on a real-time basis. In so doing, they have misappropriated the essence of NBA's most valuable property, the excitement of an NBA game in progress'.⁹¹

The court held that all copyright-related claims have to be denied. The conduct of defendant had been declared a commercial misappropriation and NBA is entitled to permanent injunctive relief, according to National Exhibition⁹² precedent, which declares each depriving of the just benefits in respect of the creation and production of the games as a commercial misappropriation.

The court refers to recoupment theory of intellectual property protection, by taking into account that 'much of (...) (NBA games) value (...) is attributable to years of NBA's promotional investments'.⁹³ Not mentioning the idea of copyrightability of sports events themselves, the court, applied functional approach to intellectual property, concluding that NBA's media license agreements represent a guarantee of NBA's media credentials and facilitate preservation of NBA's ability to

derive revenue from the management of real-time information. Thus, real-time information about matches is not 'right to own the event', but rather 'remedy to prevent its unauthorized exploitation'. At the same time the court acknowledged the US intellectual property doctrine that the main purpose of copyright protection is not to reward the labour of authors, but to promote the progress,⁹⁴ which is more utilitarian, community oriented objective.

NBA has stipulated in its Media Pass that 'all ownership, copyright and property rights in the NBA games, telecast thereof and in the events and activities conducted in the arena shall remain the sole property of the NBA'.⁹⁵ Since copyright in the NBA games and telecast thereof are considered to be separate rights, the copyright to sports event itself has been claimed by NBA.

The Court held that sports events are not protected by property rights: 'with respect to the NBA games, NBA is not seeking to protect a written book of NBA rules or coaches' plays or a tangible recording of an NBA game. Instead, it seeks to protect the NBA games themselves, the culmination of interaction of these NBA rules and coaches' plays, the referees, the players, and perhaps even the announcers, members of the press, vendors, patrons, security guards, ticket takers, and the like who are present at the arena during an NBA game and whose interaction comprises an NBA game'.⁹⁶ Thus, according to the position of the court, sports event does not constitute 'original work of authorship' as it is required by the US Copyright Act,⁹⁷ and therefore cannot be protected by copyright.

In its decision the court has developed also another line of reasoning. It attempted to justify non-copyrightability of sports event by referring to the fundamental principle of copyright that no ideas may be protected by intellectual property law. In my opinion the reference to this principle is not entirely helpful, inasmuch as sports rights are not 'mere ideas', but rather their performance. For instance, no reasonable content owner would claim prohibition of the rules of the game, developed by him. Such a claim appears to be more comparable with an attempt to copyright ideas, than a legitimate (although not-legal) attempt to restrict unauthorized 'free riding' on their performance.

Considering the problematic outcomes of according copyright to a sports event, as opposed to its broadcast, the court mentioned four major difficulties: (i) problems in defying the owner of those rights and consequently, whose consent an actor would have to receive; (ii) unauthorized copying of the tactic of the game by another coach; (iii) 'unregulatability' of the situation, in which each event would be potentially copyrighted; (iv) sports right protection is not mentioned in the relevant legislative act.

All these arguments appear to be of a practical nature. They sound 'reasonable', yet 'reasonability' is not indispensable attribute of law.⁹⁸ One could not deprive right protection basing solely on utilitarian arguments of legal convenience.

As to the first argument the doctrine has elaborated a concept, according to which if a picture contains many persons on it (e.g. viewers at the facility), the author is not required to obtain an explicit concern of all of them. Speaking of passing off the tactic of the game, it is enough to say, that if a sports event would be running solely in accordance with the coach's intentions, there would be no need in a game, and football match would be more akin to chess or event to computer strategy game.

84 'Victoria Park Racing', *ibid*.

85 Jonathan Taylor, 'Commercialisation of Sport (1), Proprietary Rights in Sports Properties', King's College, London, Lecture _ 6, November, 2006.

86 Sports and General Press Agency Limited v. 'Our Dogs' Publishing Company, Ltd. (1916) 2 KB 880.

87 'S&GPA v. Our Dog Publishing', *ibid*.

88 'S&GPA v. Our Dog Publishing', *ibid*.

89 'The National Basketball Association and NBA Properties, Inc. v. Sports Team Analysis and Tracking Systems, Inc., d/b/a Stats, Inc. and Motorola Inc., d/b/a

Sportstrax', 96 Civ. 1615 (LAP), United States District Court For the Southern District of New York, 1996 U.S. Dist. LEXIS 10262.

90 According to the findings of the court, it allows the consumer to follow all NBA games, including playoff games, being played around the nation at any particular time by regularly updating its displays of the score, quarter, ball possession, time remaining, and team in the bonus while the games are in progress. It has also audible alerts which indicate the start of a game, the end of a period, the six

minute warning, the two minute warning, and all game updates. Motorola updated game information direct from each arena which originates from the press table in each arena.

91 'NBA v. Motorola', *ibid*.

92 'National Exhibition Co. v. Fass', 143 N.Y. S.2d 767 (1955).

93 'NBA v. Motorola', *ibid*.

94 'Harper & Row, Publishers, Inc. v. Nation Enters', 471 U.S. 539: 'the monopoly created by copyright thus rewards the individual author in order to benefit the public'.

95 'NBA v. Motorola', *ibid*.

96 'NBA v. Motorola', *ibid*.

97 The US Copyright Act, 'An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes', 90 Stat. 2541 (1976).

98 From the positivist perspective an unreasonable law remains to be a law. Reasonability might be sufficient impetus for its change, but not for its omission. There are many examples of unreasonable law. One of the most vivid of them is sentencing a person for several life sentences.

In addition, the notion of 'tactic' has much more similarities with the notion of 'idea', which is not copyrightable by definition. For instance, Moberg⁹⁹ argues that application of the copyright law to the play scripts could have severe ramifications for the sports games and may highlight certain flaws in copyright law. If sports game is compared with performance work, protection for this work can exist with no prior dramatic script, which in case of sports game is a play tactic. Indeed, even assuming that the original coaches' strategies can be provided their own copyright protection, this would merely 'complicate' the exercise of copyright of sports game, but this would neither neglect, nor deny such copyright to sports event.

The third argument is the most important and persuasive, yet again from the political and not legal perspective. Inasmuch the rights are bestowed not due to their effectiveness, but because of their essentiality, the difficulty to regulate them is a technical problem rather than substantial obstacle. Although it is true that statutory copyright to sports event would lead to potential copyrightability of each public (and private) event, there is the reason to protect sports event to the same extent, as each artistic work is protected. The weakness of fourth argument is acknowledged by the court itself. It agrees that a list of the events, which obtain copyright protection, is illustrative and not limitative.

3.6. *INS v. AP*

*INS v. AP*¹⁰⁰ is a landmark unfair competition case in the US. The case was based on unfair competitive practice of one newsgathering company (INS) with respect to another (AP). AP has generated news and stories, while INS has produced most of them by, essentially rewriting the digests of AP's news. Inasmuch as news themselves do not constitute copyrighted work, the court held that the very commercial strategy of INS, which could compete with AP without spending any of the efforts that are necessary while gathering the news, is unfair competition.

The fact that two companies were engaged in the same field of commercial activity means that they are under a duty to conduct their own business in a manner, which will not unnecessarily or unfairly injure their vis-à-vis. The court held that 'the practice of taking respondent's news from early editions and bulletins and selling and distributing it without any original investigation and without any expense is unfair business competition'.¹⁰¹ This practice of unfair competition is also known as 'unclear hand doctrine'.¹⁰²

3.7. *Chicago NLBC v. Sky Box*

One of the recent cases, which is directly related to copyrightability of sports events is the US case 'Chicago National League Ball Club, Inc. v. Sky Box on Waveland, L.L.C.'. ¹⁰³ In this case Chicago Cobs, a baseball team playing its home games at the Wrigley Field venue, had sued owners of the close-fitting buildings for copyright infringement, unfair competition and unjust enrichment. The roofs of these buildings are situated in a position, which enables a good view of the games. The owners are providing paid access for the viewers to

observe the matches of Chicago Cubs.¹⁰⁴ This commercial strategy was very successful, and brought to the buildings owners millions of dollars revenue yearly. Chicago Cubs team has come to an agreement¹⁰⁵ with most of the owners of the building-top seats, according to which in the next 20 years the owners of the building-top seats will share their revenues from the access to the view with the club.

The point at issue was the conflict of rights: the Chicago Cubs considered that they, according to Pittsburgh Athletics doctrine¹⁰⁶ have the right to benefit from the event, they organized. The position of rooftop owners was that they have the right to fully exploit their property. Despite the fact that copyright part of the claim has been related to the public performance of Chicago Cubs game via TV-set within the rooftop, it can also be expanded to the very notion of commercial exploitation of sports event without the concern of the organizers, provided that sports rights is copyrightable work.

Finally the Court has adhered Pittsburgh Athletic and *INS v. AP*¹⁰⁷ doctrine, holding that rooftop owners have misappropriated the Chicago Cubs' rights to property. This has been decided despite the arguments of rooftop owners that they essentially have provided a new service, inasmuch as an experience of viewing the game from the rooftop is different than from the usual venue seats.

The literature is predominantly supportive to the claim. Thus Gosain¹⁰⁸ suggests, rather rhetorically, that 'if the rooftops are allowed to misappropriate the Cubs product, what is to stop others from doing the same? What is the incentive for the Cubs to remain competitive if their revenue stream is stifled while the revenue of others is allowed to grow?'¹⁰⁹ Having conceptual sympathy to this approach, I suggest that on a practical level the clashes between the rights are unavoidable. It means that both sides can have perfectly legitimated claims, yet the solution of courts and regulators should be targeted to solving the conflicts and not declaring the victory of one doctrine over the other.

3.8. *Skysign v. Honolulu*

In this case the 9th U.S. Circuit Court of Appeals has decided that a Honolulu city requirement banning the use of helicopters to demonstrate signs or advertising devices was not pre-empted by federal regulation of aerial navigation.¹¹⁰ The Centre for Bioethical Reform challenged the ban, claiming that the ban restricts their free speech rights and infringes on their right to public advocacy.

Apart from economic, aesthetic and safety justifications, the local authorities have argued that aerial advertising degrades the natural beauty of their cities. The same rationale can be also instrumentalized by organizers of sports events in order to prevent unauthorized advertising as well as broadcasting of the event. This, however, would be only the case within the explicit regulatory intervention of the local authorities. The similar prohibitions of aerial advertising and broadcast have been already introduced by the Australian legislation¹¹¹ (Commonwealth Games Arrangements Act 2001)¹¹² inter alia during Melbourne 2006 Commonwealth Games.¹¹³

99 Brent C. Moberg, 'Football Play Scripts: A potential Pitfall For Federal Copyright Law', *Marquette Sports Law Review*, Vol. 12:2, 2004.

100 The decision of the US Supreme Court in *International News Service v. Associated Press* 248, US 215, 63 L Ed 211, 39 S Ct 68 (1918).

101 'INS v. AP', *ibid.*

102 'INS v. AP', *ibid.*

103 'Chicago National League Ball Club, Inc. v. Sky Box on Waveland, L.L.C.', No. 02 C 9105 (N.D. Ill. filed Dec. 17, 2002).

104 An advertisement on the website of Skybox on Waveland, L.L.C.: 'The Rooftop Skybox is an unparalleled facility with entertaining space on two levels. The rooftop itself is an open-air

space offering an unobstructed view of Wrigley Field where you will view the game from a double-decker structure featuring extra-wide stadium seats. In addition, the rooftop contains a bar and grill with a generous food service area and an outdoor deck with café-style seating for dining and conversation. The third floor contains two climate controlled rooms: the front room has floor-to-ceiling windows overlooking the park and seating for two dozen people; the backroom is a theatre with three televisions, a sports ticker and auditorium seating'.

105 The owners of these buildings will pay the Chicago Cubs 17 percent of their revenue (around \$2 million a year).

106 'Pittsburgh Athletic Co. v. KQV Broadcasting Co', (D. C. Pa. 1938) 24 F. Supp. 490, *supra*.

107 The decision of the US Supreme Court in *International News Service v. Associated Press* 248, US 215, 63 L Ed 211, 39 S Ct 68 (1918), *supra*.

108 Ajay Gosain, 'Too Late to Misappropriate? Chicago Cubs v. Rooftop Owners', *Centre for Intellectual Property Law News Source*, Vol. VI, 1, Spring 2005.

109 Ajay Gosain, 'Too Late to Misappropriate? Chicago Cubs v. Rooftop Owners', *ibid.*

110 *Skysign International, Inc. v. City and County of Honolulu*, (No. 99-15974, Jan. 9, 2002).

111 The impact of ad hoc legislation on the legal status of sports rights is explored in a relevant paragraph of the paper.

112 'Commonwealth Games Arrangements Act', Act No. 57/2001, Version incorporating amendments as at 5 April 2005, *Government Gazette*, April 2005, Victoria, Australia.

113 According to 'Melbourne 2006 Commonwealth Games Aerial Advertising Policy', 'it is an offence to display an advertisement, or cause an advertisement to be displayed during March 2006 in airspace within sight of a Commonwealth Games venue, or a Commonwealth Games event, without an aerial advertising permit'.

3.9. *Baltimore Orioles v. MLBPA*

In the 'Baltimore Orioles v. MLBPA'¹¹⁴ case the court has been asked whether baseball clubs own the televised performance of their matches. The Players Association argued that despite the possession of copyright to telecast of sports event, the players can claim copyright protection of the event itself, since they are the main (and perhaps, the only) majors actors on the field. The baseball clubs insisted that the broadcasts of the matches have to be considered as copyrighted works made for hire in which the players had no additional rights.

With respect to copyright protection of sports event this case is important because it has been pointed out again that the level of aesthetic or artistic creativity is not a decisive factor for the establishing copyright protection of the event. It has been held, in particular, that 'Courts thus should not gainsay the copyrightability of a work possessing great commercial value simply because the work's aesthetic or educational value is not readily apparent to a person trained in the law. That the Players' performances possess great commercial value indicates that the works embody the modicum of creativity required for copyrightability'.¹¹⁵

It has been also re-emphasised in this case that according to 'work-for-hire' doctrine if the sportsmen provide their job within the scope of their employment, the broadcasts of sports matches, it is presumed that the clubs remain to be the only owners of broadcasting rights to sports event.

4. Ad hoc legislative protection of sports media rights

The most plausible solution to the control of public places during major sports events is the introduction of a special *ad hoc* legislative protection. For instance Eccles¹¹⁶ illustrates the importance of *ad hoc* legislation by the Sydney 2000 Olympic Games, when the Sydney Games Legislation provided in fact the Sydney Organizing Committee of the Olympic Games control of the streets of the city. Curthoys and Kendall¹¹⁷ after analyzing the conditions of the auction and legislative measures of the Australian Parliament in details, conclude that 'the Sydney 2000 Act (...) did not achieve that which its proponents had hoped for. As such, it does not stand out as an acceptable alternative for those charged with organising future events and raises the question as to whether more can indeed be done to ensure better protections. The challenge now for lawyers and non-lawyers alike is to determine what these strategies should entail'.¹¹⁸

Such *ad hoc* legislative practices are very common for all major sports events. Thus, in the course of preparation for football World Cup 2010 in South Africa,¹¹⁹ international football governing body FIFA has required the government to adopt several legal acts, which would strengthen copyright protection for sports event. These conditions were *sine qua non* for obtaining the possibility to organize this one of the most commercially successful public show. According to the FIFA's requirements South Africa has adopted three legislative acts.¹²⁰ Thus, the very format of auctions for the selection of the organizers of major sports events enables right holders to leverage their commercial power in order to reach better protection of their media products. Inasmuch as these *ad hoc* legislative acts to my knowledge have not been successfully challenged in the national courts on the argument of violation the right to information, the con-

flict of copyrightability of sports event lies in a practical, but by no means in constitutional dimension.

On the other hand, regardless of the efficiency of such legislative remedies, they can disproportionately prioritize the organizers of sports events over the other industry players. The right to protect the property from ambush commercial practices is essential and legitimate, yet it has to be balanced with interests of other stakeholders and should violate their rights as little as possible. For instance, it would be hardly acknowledgeable that unauthorized broadcasting companies would not be able to report from the Olympic Games or create media programs, except of those, which are directly based upon live coverage of sports event. Another example of disproportional application of an authorized-partnership principle would be an expenditure of the exclusivity zone for merchandising and selling of sponsored food and beverages¹²¹ to the scope of the neighbour blocks or the city altogether.

Inasmuch as competition for the right to hosting the major sports events is highly fierce, because the very commercially attractive market is at stake, the conditions regarding legislative restriction of unauthorized broadcasting and unselected merchandising can be imposed by the event organizers during the tender procedure. The country/city, which wins the auction, would become bound by the obligation to provide the strongest protection for media rights. Such restrictions from event organizers, to a large extend, is a forced measure. Right holders seek to protect their investment and maximize revenue. The lack of legal protection forces them to lobby *ad hoc* legislation of a highly political nature. Such a 'bargaining' between right holders and the countries/cities can be eliminated if sports media rights themselves would receive copyright protection.

5. Arguments in favour of non-copyrightability of sports events

A legal nature of media rights to sporting events is ambiguous. This ambiguity of sports events decreases certainty of rights-owners and subsequently diminishes commercial value of those sports media product. Sports events as such traditionally are not considered to be copyrightable products. It is only a broadcast of those events, which is protected by copyright. From this perspective, the notion of 'sports rights' *sensu stricto* is insolvent, inasmuch as it is only a broadcast of the event, which receives copyright protection. It is thus not sports performers' right, which is protected, but right of broadcast operator to prevent unauthorized usage of its media product. This right is similar to the category of 'related rights' in terms of Berne Convention,¹²² 'broadcasting rights' in terms of Roma Convention,¹²³ and 'neighbouring rights' in terms of Geneva Convention,¹²⁴ even despite the fact that sports event as such is not considered to be an artistic or dramatic work.

The main reason for this approach is that unlike 'dramatic work', sports games are predominantly spontaneous events with no or minimal artistic direction.¹²⁵ It is argued that the very essence of sporting game is in its unpredictability neither for its viewers nor for performers themselves, whilst the classical meaning of 'dramatic work', on the contrary, presupposes its former preparation and the following performance in accordance with the format, planned in advance.

This is the case even despite the fact that for many viewers there is

114 'Baltimore Orioles, Inc. v. Major League Baseball Players Association', 805 F.2d 663 (7th Cir. 1986).

115 'Baltimore Orioles v. MLBPA', *ibid.*
116 MATTHEW Eccles, 'Broadcasting and New Media', in Adam Lewis, Jonathan Taylor, 'Sport: Law and Practice', Butterworths LexisNexis, 2003.

117 Jeremy Curthoys, Christopher N Kendall, 'Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective', Murdoch University Electronic Journal of Law, Volume 8, Number 2, June 2001.

118 Jeremy Curthoys, Christopher N Kendall, 'Ambush Marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: A Retrospective', *ibid.*

119 For a detailed analysis of the FIFA's protection of their intellectual property rights during World Cup 2010 see Roshana Kelbrick, 'The WORLD CUP of 2010: FIFA's intellectual property rights in South Africa', Journal of Intellectual Property Law & Practice, Vol. 3, No. 5, 2008.

120 '2010 FIFA World Cup South Africa Special Measures Act', 2006, Government Gazette, Republic of

South Africa, Vol. 495 Cape Town 7 September 2006 No. 29198; 'Merchandise Marks Amendment Act', 2002, Government Gazette, Republic of South Africa, Vol. 451 Cape Town 17 January 2003 No. 24278; 'Revenue Law Amendment Act', 2007, Government Gazette, Republic of South Africa, 7 February, 2007, No. 29603.

121 As it was the case with selling beer during World Cup in Germany, 2006.

122 The Convention for the Protection of Literary and Artistic Works, Berne, September 9, 1886.

123 International Convention for the Protection of Performers, Producers of

Phonograms and Broadcasting Organizations, Rome, October 26, 1961.

124 The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, October 29, 1971.

125 Inter alia see the Canadian case 'FWS Joint Sports Claimants v. The Copyright Board', 36 CRR (3d) 483 (F.C.A.), 1991: 'unlike dance, a sporting event is for the most part a random series of events. The unpredictability of the action is inconsistent with the concept of choreography'.

no more 'dramatic' work than football match. As Ferrari¹²⁶ suggests, while analysing Italian legal regulation of sports rights, 'Italian scholars traditionally tend to emphasize the importance of a systematic and juristic collocation of the situations which require legal recognition and protection. In relation to media rights, they have proposed, tried and rejected several possible juristic conceptualizations. All seem to reject the possibility to have such rights fall directly into the notion of copyright'.¹²⁷ The main explanation of such reluctance to the eventual copyrightability of sports event is that Italian law of intellectual property does not recognize these rights. They are not explicitly mentioned in no legislative act and hence do not constitute in terms of Blais¹²⁸ the orthodox intellectual property. Although some believe that media right to a sport event can be encompassed in a *sui generis* intellectual property.

If this would be the case, then the right to sports event will have an absolute nature. Such a situation would inevitably cause many theoretical problems of correlation of sports right with other legitimate rights and liberties. If an event organizer 'owns the view', then this right would go outside of traditional concept of copyright (i.e. right to exclusive reproduction, exploitation of derivative works, dissemination of copies or records and public performance). The only plausible protection would be a reference to unfair competition or unjust enrichment, which is a possible, but not a guaranteed remedy.

It is difficult to accept the conclusion of the US 7th Circuit court in the Baltimore Orioles¹²⁹ case that 'there is no distinction between the performance and the recording of the performance for purposes of pre-emption'.¹³⁰ In my opinion broadcasting of sports event brings an added-value to it. The same event can be broadcasted differently and it is a creativity of broadcaster's team, which at first deserves copyright protection. The question is whether the creativity of broadcasters is the only element, which enables copyright protection of sports event. The answer to this question is decisive for defining the legal status of sports events. If the sports event can be copyrighted, this would inevitably increase their commercial value. If copyright protection can be granted only to the broadcast, this would foster fierce competition for obtaining the access to the event in order to create a new sport content.

5.1. Innovations and development of New Media

If sports events are not copyrightable, rights-holders cannot refer to a presumed right in the sports event itself, but have to rely solely on some ancillary forms of legal protection. Those forms can include *inter alia* safety requirements, physical limitation of the usage in the venue unauthorized audiovisual equipment, restrictive access to the media-sectors and zones, assigned for flash-interviews and commentaries, electricity facilities, accreditation of journalists, reporters and technical personnel. Otherwise, according to this copyright doctrine, it would be difficult to prohibit the entrance to the facility with the personal, non/semi-professional audiovisual recorders, neither to restrict ambush commercial practices,¹³¹ such as generation of content from the outside of the venue: rooftops of the close-fitting build-

ings,¹³² trees, mobile broadcasting towers¹³³ or even zeppelins.¹³⁴ Unauthorized recording is even more plausible for the competitions such as marathons and cycle races, inasmuch as they are played in public places. Those actions would not be considered as a violation of copyright.

To create sport content in such an 'adventurous' manner, one would need a courageous and risky marketing strategy. Furthermore, the conditions of shooting would inevitably reflect upon a quality of the final product. Regardless of its practical unlikelihood to create an alternative sports media program of professional level, such content could be of potential interest for the operators of 'Web 2.0.' and 'user generated' types of media, which nowadays are transmitted predominantly via the Internet.¹³⁵ Those kinds of broadcasting channels can attract the many 'advanced' young viewers, which constitute the most lucrative segment for advertisers and sponsors of sports events.

There are already several claims from the owners of premium sports rights to initiate legal proceedings against the web-sites, which serve as platforms for user generated media. Although nowadays most of them¹³⁶ are related to violation of broadcasting rights, in the future it will be possible to have the similar cases, related to footage of sports events, made by users themselves.

6. Non-copyrightability of fixture lists

There are not many doubts that copyright cannot expand its limit to being able to restrict the provisions of the facts about the game (such as a real-time score).¹³⁷ This approach has been supported, *inter alia*, by Fisher,¹³⁸ who concludes that sports event organizers should not be permitted to prevent dissemination of real-time sport information, which is a fundamental public right. The same has been said in a British case 'Football League v. Littlewoods Pools'.¹³⁹ The similar argumentation has been applied by British court in the case 'Goodwood v. Satellite Information Services',¹⁴⁰ in which the claimant was striving to restrain a real-time dissemination of sports related data in pure text format.¹⁴¹ According to the court's conclusions, such data are not confidential information. It does not mean, however, that sports right as such cannot be protected by copyright.

7. Legal protection and remedies

If sports event is not considered to be protected by copyright, the shift of its commercial defence moves from a legal to practical dimension. In such a case, rights holders and events organizers concentrate their efforts on a limitation the ability of all potential competitors to physically access the facility at stake for the purpose of creation of their own alternative media content from the sports event. The first instrument to restrict unauthorized coverage of sports event is claiming copyright and trademark violation of some neighbouring rights, such as shooting of music, advertisement and logotypes. Unauthorized broadcasters, however, are able relatively cheaply escape from covering copyrighted parts of sports event, unless the event is not copyrighted itself. In this case there are still several possibilities to defend their rights.

126 Luca Ferrari, 'Legal Aspects of Media rights on Football Events under Italian Law Ownership, Exploitation and Competition Issues', *International Sports Law Journal*, 3, 2003.

127 Luca Ferrari, 'Legal Aspects of Media rights on Football Events under Italian Law Ownership, Exploitation and Competition Issues', *ibid*.

128 Jean-Pierre Blais, 'The Protection of Exclusive Television Rights to Sporting Events Held in Public Venues: An Overview of the Law in Australia and Canada', *Melbourne University Law Journal*, Vol. 18, June 1992.

129 'Baltimore Orioles, Inc. v. Major League Baseball Players Association', 805 F.2d 663 (7th Cir. 1986), *supra*.

130 Baltimore Orioles, *ibid*.

131 Ambush practices are defined by Cornish and Llewelyn as 'not isolated acts of infringement but actual or threatened repeat marketing or sales that provoke the owner of intellectual property into taking action.

Accordingly, a defendant's stake is likely to be high', William Cornish, David Llewelyn, 'Intellectual Property: Patents, Copyright, Trademarks and Allied Rights', *ibid*.

132 'Chicago National League Ball Club, Inc. v. Sky Box on Waveland, L.L.C.', No. 02 C 9105 (N.D. Ill. filed Dec. 17, 2002), *supra*.

133 'Victoria Park Pacing and Recreation Grounds Co Ltd v. Taylor', 1937, 58 CLR, High Court of Australia, *supra*.

134 Skysign International, Inc. v. City and

County of Honolulu, No. 99-15974, Jan. 9, 2002), *supra*.

135 See for instance the decision of the British High Court in 'UEFA and BSKyB v. Sportingstrem.com', 1996.

According to the decision the plaintiffs have managed to shut down a website which re-broadcast without permission Champions League games over the Internet.

136 Thus for instance in its statement the British FA Premier League requires Youtube to remove all highlights of football matches, which have been uploaded by Youtube's users.

137 See, e.g. the cases 'NBA v. Motorola', *ibid*.; 'Tiercé Ladbroke SA v. Commission of the European Communities', *ibid*.; The British Horse

Racing Board [2005] EWHC 3015 (Ch), 21/12/2005.

138 William W. Fisher and col., 'Nothing But Internet', *Harvard Law Review*, *ibid*.

139 'Football League Ltd v. Littlewoods Pools Ltd' [1959] 2 All ER 546 (HL).

140 'Goodwood Racecourse Ltd & Ors v. Satellite Information Services Ltd & Ors Ch D', *ibid*.

141 See also the relevant ECJ decisions: Case C-203/02 British Horseracing Board Ltd v. William Hill Organisation Ltd; Case C-46/02 Fixtures Marketing Ltd v. Oy Veikkaus Ab; Case C-338/02 Fixtures Marketing Ltd v. Svenska Spell; Case C-444/02 Fixtures Marketing Ltd v. OPAP 9 November 2004.

7.1. Contractual obligations

An authorised broadcaster can stipulate exclusive rights to access the venue with professional equipment in the contract with sports event organizer. This right can be assured by the obligation of event organizer to impose a contractual limitation for the audience to bring any recording devices to the venue or use them in the course of the event for other than personal use.¹⁴² By issuing abovementioned condition in the ticket, a seller can protect exclusivity of the rights to commercial exploitation of sports event.

In some jurisdictions rules of media coverage, established by sports event organizer may receive semi-statutory status,¹⁴³ despite being formally a contractual obligation.

It is not likely that such contractual obligations can be a sufficient ground to claim compensation for diminishing the value of media rights, which is caused by unauthorised shooting and the following creation of a competitive broadcasting product. The liability will be limited to prohibition to access the facility, since this right is a direct objective of the contract between the event organizer and the viewer.

In the 'Goodwood v. SIS'¹⁴⁴ case even contractual obligations to refrain from dissemination of the exclusive footage of sports event outside the limited territory have not been considered by a British court as a sufficient reason for coverage restriction. The court's judgement essentially allowed to the exclusive broadcaster to use created content outside the limits, permitted by contract. This would be the case, because event organizer's rights were considered to be expanded by its ability to allow access the venue.

All this provides rights-holder with less favourable economic protection, in comparison with the owners of copyrighted work, inasmuch as it is not likely that he will be enabled to claim damages, including loss profits.

In the US jurisprudence the restrictions of unauthorized broadcaster's commercial practices is significantly more rigid. In the 'Twentieth Century Sporting Club'¹⁴⁵ decision the court held that 'by appropriating or utilizing the whole or the substance of the plaintiff's broadcast the defendants would be enabled to derive profits from the exhibition without having expended any time, labour, and money for the presentation of such exhibition. It is to be borne in mind that this exhibition will only be possible as a result of an expenditure of considerable time, labour, and money by the plaintiffs'.¹⁴⁶ The court thus concluded that plaintiffs are entitled to recoupment by means of granting the exclusive broadcasting rights to the authorized media operator.

7.2. Tort law

In theory violation of real property right would be also protected by tort law, which can potentially lead to prohibition of commercial

exploitation of unduly created media products. However, this option is rather hypothetical, inasmuch as the unlawfulness of the circumstances, under which the media product has been created, does not deprive the trespasser from its authorship in terms of intellectual property law. Law enforcers would have to justify the prohibition of commercial exploitation of such content rather by referring to general principles of good faith, 'no benefits from wrongdoing' and responsibility for acts which are not themselves violations of property rights¹⁴⁷ on a case-by-case basis.

The US copyright law has the Rudolf Mayer Pictures¹⁴⁸ precedent, in which sending unauthorized photographer to produce motion pictures from the box event has been declared as violation of property rights. A preliminary injunction from distributing these pictures has been issued.

7.3. Trademark rights

In case of a broadcasting of unauthorized sports match it is plausible that the event organizer can also claim a protection of his trademark rights, inasmuch as these rights would be commercially exploited by content creator with no consent of the owner.¹⁴⁹ However given that the ECJ jurisprudence within the area of trademarks is not particularly benevolent towards right holders, the success of such judicial claim is disputable. Provided that an unauthorized shooting of non-copyrighted sport event would have inter-state dimension, the EC law may be applicable.

Since the European dimension of intellectual property is predominantly predetermined by completion of internal market and/or competition policy,¹⁵⁰ if defender would be able to prove that the violation of trademark is proportional and inevitable, trademark right may be limited to their functionality with a following shift of burden of prove to a plaintiff. In this case a trademark holder would have to show that his reputation and commercial strategy are damaged by unauthorized exploitation of his trademark. Such a claim would be difficult to justify, inasmuch as sports match is a public event, which is targeted to a broad audience. Since the viewers of unauthorized media sports product are not distinguishable from 'legitimate' audience and the content creator is not in a position to technically separate sports event from the shooting of sponsored trademarks, the plausibility of the injunction, based on trademark violation, is quite low. The ECJ jurisprudence in a trademark area¹⁵¹ shows the reluctance of the Court to protect substantive trademark rights even in cases when their violation was the main and the only commercial intention of the defendant.

Trademark problems with respect of fantasy sports leagues, will increase following irrepressible development of digital technologies. Already now some studies¹⁵² estimate that this industry attracts more

¹⁴² Taylor and Lawrence provide an example of such condition: 'the purchaser of this ticket does not have the right to make a recording or transmission, in any medium, of events taking place within the stadium. Entry to the stadium will be denied to persons with audio, visual and/or audio-visual recording equipment of any sort, including without limitation cameras, video cameras, cassette recorders and microphones. In any event, no photographs, video recordings or similar may be taken or made in the stadium. You may not use recording equipment or camera devices for any purposes other than for private and domestic use... Images and sound recordings of the event taken by you... cannot be used for any purpose other than for private and domestic use, ie you may not sell, license, broadcast, publish or otherwise commercially exploit them. Mobile phones are permitted within the ground, provide they are used for per-

sonal private use only', Jonathan Taylor, Clive Lawrence, 'Proprietary Rights in Sports Events' in Adam Lewis, Jonathan Taylor, 'Sport: Law and Practice', Butterworths LexisNexis, 2003.

¹⁴³ See e.g. the US case 'NBA v. Motorola': 'No electronic media personnel shall transmit scores and/or other game information out of an NBA arena (by telephone or by any other means) more than three times during each quarter and once during each of the two quarter breaks without the prior specific written approval of the NBA', 'The National Basketball Association and NBA Properties, Inc. v. Sports Team Analysis and Tracking Systems, Inc., d/b/a Stats, Inc. and Motorola Inc., d/b/a Sportstrax', 96 Civ. 1615 (LAP), United States District Court for the Southern District of New York, 1996 U.S. Dist. LEXIS 10262.

¹⁴⁴ 'Goodwood Racecourse Ltd & Ors v. Satellite Information Services Ltd & Ors Ch D', 11 October 2004.

¹⁴⁵ 'Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.', 165 Misc. 71, 300 N.Y.S. 159 (Sup. Ct. N.Y. Co. 1937).

¹⁴⁶ 'Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.', *ibid.*

¹⁴⁷ See e.g. common law cases 'Chappell v. Lectra', 1914, 2 Ch. 745, CA and 'Dyson Appliances Limited v. Hoover Limited', High Court 1999, _ 02754: 'as part of its inherent equitable jurisdiction, the court could grant appropriate relief of a practical nature so as to prevent a party from continuing to enjoy the fruits of its own wrongdoing to the detriment of the party wronged, rather than merely pointing the party wronged to an appropriate future remedy in damages'.

¹⁴⁸ Rudolf Mayer Pictures, Inc. v. Pathe News, Inc., 235 App. Div. 774, 255 N. Y. Supp. 1016 (1st Dept. 1932).

¹⁴⁹ For the study on sports merchandising issues see Ian Blackshaw, 'Sports Licensing and Merchandising - The

Legal and Practical Aspects', International Sports Law Journal, 1, 2002 and Adrian Barr-Smith, Elliott Payne, Lee Sennett, 'Franchise United': The Beginning of 'Franchise Football? The Relocation by Wimbledon F.C.', International Sports Law Journal, 1, 2003.

¹⁵⁰ Joined Cases 56/64 and 58/64, 'Etablissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission. of the European Economic Community', 1966, ECR 299.

¹⁵¹ See cases of exhaustion of patent rights (e.g. Case 19/84, 'Pharmon BV v. Hoechst AG', ECR 1985, 02281); licensing parallel imports (e.g. Case 247/81 'Commission v Germany', ECR 1984, 1111); and repackaging (e.g. Joined cases C-427, 429 & 436/93 'Bristol-Myers Squibb v. Paranova A/S', ECR 1996, I-3457).

than 10% of the adult US population. Hence another dimension of trademark protection within the area of premium sports is developing rapidly.

7.4. Image and publicity rights

Another form of protection of exclusivity to broadcast sports event is the right to image, which exists in some countries.¹⁵³ To protect its image right the player is in a position to restrict any commercial exploitation of his portrait, which occurs without his authorisation. Sports players can assign (directly or via clubs, leagues or federations) their image rights to the exclusive broadcaster. This licence would lead to contractual liability of unauthorized media operators for distribution of content, generated without permission of event organizer. These restrictions are not in a direct connotation with copyright, inasmuch as the right to copy each artistic work belongs to its author regardless of the legality of the circumstances, in which this work has been created and the lack of a consent of the performer.¹⁵⁴ Thus, in case of unauthorized shooting of sports event, a copyright to the created artistic work would belong to the eventual broadcaster and by no means to the persons, which images have been broadcasted.

No jurisdiction provides the image rights with copyright status. If certain players have assured their names as a trademark, the responsibility for unauthorized usage would not prevent copyright of the broadcast, at least in the systems with implied protection of authorship.

As Taylor, Boyd and Becker¹⁵⁵ suggest, the main problem with an attempt to use trademark as a remedy against the unauthorised exploitation of a sportsman image is that that use is likely to be merely descriptive of the character of the products to which the name is attached, rather than an indication of trade origin, and therefore not an infringement of the trademark owner's rights. Korman¹⁵⁶ call this situation with publicity rights in sport paparazzi principle, in the sense that a content creator owns the rights in his picture, unauthorised photographer can take a picture of a celebrity or sports event, and sell that work legitimately to a third party who would then be able to use it in its own exploitation of such content. Regardless whether the commercial exploitation of this content may be legal or not, the very authorship of content is protected by copyright.

Image rights are by no means absolute.¹⁵⁷ One of the reasons for their limitation is the public interest in information. The latter, for instance prevail in German Copyright Act,¹⁵⁸ which providing in the general right to image, stipulates its enforcement, by imposing the public right to information requirements.

Publicity rights can be an effective remedy for protection sports marketing rights in computer game industry, where the names of the virtual teams and players have to have a linkage with real-world celebrities. Yet sometime using of names and titles is seen as the right

to information. For instance, in the 'CBC v. MLBAM'¹⁵⁹ case the US Circuit Court of Appeals for the Eighth Circuit upheld the previous ruling of lower court that CBC's exploitation of baseball players' names and some basic statistics in its virtual Fantasy baseball league is not a violation the publicity rights. The justification for this is based on the US constitutional principles (the First Amendment). In addition to that the Court concluded that such restrictions cannot be contractually imposed, because these matters go outside of the contractual jurisdiction of the parties.

Certain countries impose criminal responsibility for illicit recording and photos.¹⁶⁰ Such sanctions, however, would be applied in respect to violation of privacy and intimacy rights, which is hardly plausible to expect for the case of sports events.

7.5. Copyright

In case of the assignment to sports event itself a status of copyrighted artistic work, its legal protection would, by analogy, begin when such a playing 'is being performed, played or shown in public by means of apparatus for receiving visual images or sounds conveyed by electronic means'.¹⁶¹ All abovementioned defensive tools do not appear to be effective also because sports rights generate biggest part of economic value from their real-time exploitation. Unless an access to the facility has not been prohibited by administrative or judicial authority on a repetitive basis as *res judicata* with issuing an *estoppel*, each unauthorised shooting would require its individual trial. It means that as a matter of principle, producers of unduly created media content would be able to broadcast those rights in a free manner.

That is the main reason why copyright regime is more desirable for the incumbent than real property law, contract law or tort law. On the contrary, for new entrants copyright is more restrictive remedy than all other forms of legal protection. In practical terms the latter cannot provide sufficient protection of the commercial value of sports media rights, inasmuch as a new entrant might be ready to bear all plausible remedies for the violation of real property law, contract law and tort law and still profit from the commercial usage of created new media product, which would gain copyright protection itself.

Even in the countries, in which sports broadcasting rights are administratively assigned to sports federations¹⁶² such protection is not sufficiently strong in comparison with copyright to event itself.

7.6. Unfair competition and commercial misappropriation

While violated by unauthorized usage, sports events can be protected by their organizers by the reference to unfair competition conduct or commercial misappropriation. Historically¹⁶³ these two institutes turned out to be the most effective arguments both in the continental and common law jurisdictions.

Finding the proper correlation between copyright and unfair com-

152 'Memorandum of Amicus Curiae Fantasy Sports Trade Association in Opposition to Player's Association's Motion For Summary Judgement and In Support of Plaintiff's Cross Motion For Summary Judgement', Case No.: 4:05-CV-00252 MLM. 'CBC Distribution and Marketing Inc. v. Major League Baseball Advanced Media, L.P.'

153 As an example may serve the provisions of Article 10 of the Belgium Copyright Act from 30 June 1994: 'Neither the author nor the owner of a portrait nor any other possessor or holder of a portrait shall have the right to reproduce such portrait or to communicate it to the public without the consent of the person portrayed or the consent of his successors in title'. (for detailed analysis of Belgian copyright law in respect to image right see a relevant chapter of Tom Heremans and Philippe de Jong in Ian S. Blackshaw, Robert C.R.

Siekman (Eds.), 'Sports Image Rights in Europe', T.M.C. Asser Institute, Cambridge University Press, 2005. Unofficial translation of the Act is provided in the study, referred above).

154 Compare with Article 3(2, 3) of the Copyright, Designs and Patents Act 1988, UK: 'It is immaterial for the purposes of subsection (2) (copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise) whether the work is recorded by or with the permission of the author'.

155 Jonathan Taylor, Stephen Boyd, David Becker, 'Image Rights' in Adam Lewis, Jonathan Taylor, 'Sport: Law and Practice', Butterworths LexisNexis, 2003.

156 Andy Korman, Ownership, Protection and Licensing of Sports Rights, Postgraduate Certificate in Sports Law, King's College London, 2006-2007.

157 For a conceptual analysis of the origins

of image rights in sports domain see Darryl C. Wilson, 'The Legal Ramifications of Saving Face: An Integrated Analysis of Intellectual Property and Sport', Villanova Sports and Entertainment Journal, Vol. 4, 1997.

158 Sec. 23 of the German Copyright Act (Kunst-Urhebergesetz, Entwurf eines Gesetzes betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie vom 28. November 1905 (Reichstags-Drucksache Nr. 30)).

159 'CBC Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP', 505 F.3d 818, 84 USPQ2d 1328, 2007 WL 2990366, 8th Cir. 16 Oct. 2007.

160 According to Article 199 of the Portuguese Penal Code, '[whoever shall be punished with a prison sentence of up to 1 year who] photographs or films another person, even in events in which it has legitimately participated or... uses

or allows to use of the photos or videotypes above mentioned, even if legitimately obtained'. (for detailed analysis of Portuguese copyright law in respect to image right see a relevant chapter of Cesar Bessa Monteiro in Ian S. Blackshaw, Robert C.R. Siekman (Eds.), 'Sports Image Rights in Europe', T.M.C. Asser Institute, Cambridge University Press, 2005. Unofficial translation of the Code is provided in the study, referred above).

161 Article 19(4), Copyright, Designs and Patents Act 1988, UK.

162 It is the case inter alia for France, where media rights to sports event belong to the federation in the form of a statutory monopoly.

163 For the historic overview of common law principles in respect of sports events see Bruce P. Keller, 'Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection

petition is a very delicate undertaking. In the *INS v. AP*¹⁶⁴ case the New York court called commercial misappropriation 'a broad and flexible doctrine', which can encompass 'any form of commercial immorality'.¹⁶⁵

In the *NBA v. Motorola*¹⁶⁶ case this argument was the only one, which has been supported by the judge, though it appeared to be enough for plaintiff to be entitled to 'permanent injunctive relief to remedy defendants' ongoing unlawful conduct'.¹⁶⁷ Yet in this case the court did not support the point that plaintiff's misappropriation claim was not pre-empted as it relates to his proprietary rights in the sports games themselves, but as it relates to sports event organizer's property rights in the broadcast of the match.

Similarly, in 'National Exhibition'¹⁶⁸ the court held that the company which contributed nothing to the public performance, misappropriating descriptions from the exclusive broadcasts of sports games has committed unfair competition action.

This approach can be often in a conflict with a new product test, which on the contrary, emphasizes on the consumers' interests to have available more premium content. By creating an alternative telecast these companies can satisfy existing demand of consumers. In fact, if by committing presumably unfair competition action, the company creates a new media product, there is possibility to consider that no competition (in an antitrust sense) exists between these undertakings.

7.8. New product test

In case if sports event is granted with copyright protection, the question arises whether unauthorized shooting of such event can be considered as a copyrighted media product. In principle, intellectual property law does not consider the circumstances, under which a copyrighted content has been established. Even illegally produced content enjoys its copyright protection, provided it fulfils the compulsory criteria of creativity and authorship. It is another matter that such product would not be fully exploited by the author, inasmuch as violation of copyright of initial right holder would usually lead to injunction.

There is an alternative way to legalize such media product by means of applying to copyrighted sports event antitrust remedy, namely essential facility doctrine. From the perspective of intellectual property law, this artistic work is likely to be protected if a new product has been created. This would be the case regardless the fact that certain substantial rights of the authorized broadcaster would be inevitably violated. The idea is to prove that sports event is not a final media product. The same event can be broadcasted differently. By liberalizing the exclusivity clause, competition for the markets would be substituted by competition in the markets. This would lead to the increase of creativity of sports programs, technological innovation and development of new formats of sports related content.

The application of indispensability test in respect to broadcasting companies might be difficult, because nowadays it is commercially unjustifiable to rely solely on one media product, such as single football competition. The protagonists of application of essential facility doctrine to sports media rights would suggest that such a narrow interpretation of indispensability test would leave a room for application of essential facility doctrine in respect to each exclusive media program. This conclusion is particularly unrealistic, inasmuch as the very idea of competition between different broadcasting companies lies in the delivering of exclusive content. It is the case, because the competition in all other areas of broadcasting services, such as a technical quality of content, its accessibility and timing plays only marginal role in comparison with the competition between different programs as such.

This situation will inevitably change in the course of the following development of digital broadcasting services, since the problems with technical bottlenecks would be substituted by the scarcity of creative resources. 'Indispensability' argument can be already applied to independent production companies, which claim their entire commercial dependence on certain sort of sports media rights, particularly in these rights are declared to be a separate market in terms of competition law. The dependency on the premium content will exacerbate

also due to development interactive television services, such as betting-live, and selection of different styles of commentaries. Another argument in favour of new product test is protection by the British copyright law commentaries as a separate sort of artistic work.

8. Access right

Contemporary intellectual property doctrine recognizes at least three separate legal institutes with the title 'access rights'. This term is used (i) in a cultural sense as an indication of the ideological movement to liberalize and open the usage of digitized data, such as texts, music and software (copy-left philosophy); (ii) to regulate the relationships of content managers with end-users; and (iii) to indicate the rights of event organizers to assign media providers to report the event.¹⁶⁹ Despite their separate areas of regulation, sometime these three concepts do intersect, which makes it difficult to distinguish what sort of the access right is at stake. In the domain of sports media, access right is relevant in all three contexts. Apart from the obvious issues of the physical access to the venue, sports media is often transmitted via new platforms, which are regulated inter alia by the rules of the access to content. In addition, ideological dimension of access right is also relevant to sports media rights. Some, for instance, suggests that under a fair use conditions viewers can share the live stream of sports events, particularly in the cases, when a legitimate broadcaster does not operate on the relevant market of the particular end-user.

In the context of digitisation the decisive problem is whether copyright should be expanded to the right to access. Whether by 'merely' accessing copyrighted information, user violates this protection? The doctrine does not give an unequivocal answer to this controversy. Thus, in 'Chamberlain v. Skylink'¹⁷⁰ the United States Court of Appeals for the Federal Circuit has ruled that circumvention is not, in itself, a crime. For the Digital Millennium Copyright Act¹⁷¹ to apply, circumvention must be directly associated with an actual act of violation. The Court held that the copyright laws under some circumstances authorize members of the public to access a work, but not to copy it. In another American case¹⁷² the court, on the contrary, held that copyright grants its beneficiaries the right to control the access to content.

So, the question is whether access right has to be seen as a subject of evolution of copyright¹⁷³ or it is rather as Heide¹⁷⁴ argues the incorporation of a completely new rights structure into copyright law, one similar to that underlying cinemas and theatres. Does the fact that ability to control access can be granted by other rights, which are not directly related to copyright, mean that copyright cannot be expanded to the access right or access right is merely ability to control the way, in which the work is accessed?

In my view, granting a copyright protection to the broadcast of sports event provides a technical key for solving the more conceptual problem of whether in a digital domain copyright should or should

for Intellectual Property', Harvard Journal of Law & Technology, Vol. 11, 1997.

164 'International News Service v. Associated Press', 248 U.S. 215, 63 L. Ed. 211, 39 S. Ct. 68 (1918), *ibid*.

165 'International News Service v. Associated Press', 248 U.S. 215, 63 L. Ed. 211, 39 S. Ct. 68 (1918), *ibid*.

166 *NBA v. Motorola*, *ibid*.

167 *NBA v. Motorola*, *ibid*.

168 'National Exhibition Co. v. Fass', *ibid*.

169 For the analysis of some historical dimensions of the intersection between different 'access-rights' see i.a. Thomas Hoeren, 'Access right as a postmodern symbol of copyright deconstruction? - Some fragmentary considerations for the ALAI Congress in New York', University of Münster.

170 'The Chamberlain Group, Inc. v. Skylink Tech., Inc.', 381 F.3d. 1178, 1193 (Fed. Cir. 2004).

171 'Digital Millennium Copyright Act To amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes', 105th United States Congress, October 28, 1998.

172 'Los Angeles Times v. Free Republic', Civ. No. 98-7840, 2000 U.S. Dist LEXIS 5669 (C.D. Cal. Apr. 5, 2000).

173 Jane C. Ginsburg, 'From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law, in U.S.', Intellectual Property: Law and Policy, Hugh Hansen, ed., 2001.

174 Thomas Heide, 'Copyright in the EU and U.S.: What 'Access Right'?', SSRN-id270861.

not be expanded to access right.¹⁷⁵ Inasmuch as violation of copyright can occur without physical copying of content,¹⁷⁶ this principle can be borrowed to other areas of digital use of copyrighted works. Thus, if circumvention of the broadcast of sports event is considered to be an infringement of content operator's copyright, the same rationale can be applicable to the doctrine as such.

The very idea of copyright is inextricably related to the notion of the exploitation of the benefits from the creative work. In a traditional sense the biggest threat to this right has been arising from the copying. This was the case, since barriers to enter the printing industry have been always very high. In these circumstances each publisher was in a position of a natural monopoly and publishing products have been distributed on the point-to-multipoint principle. Present-day situation is drastically different. There is essentially no or only marginal barriers to enter the markets. Copyrighted works can be technically disseminated on the multipoint-to-multipoint principle. It means that the obligation to be under the control of copyright has been shifted now from the publishers directly to the consumers, who at the same time are potential copiers of the protected work. Furthermore, inasmuch as in digital world the value of a physical copy is dramatically inflated, copyright protection has to be redirected to the issues of the access to copyrighted work, which in most of the cases can substitute physical copy.¹⁷⁷ This notion can receive another justification from the historical perspective, because of the gradual expansion in the kinds of works accorded copyright protection, following invention of each new form of content dissemination.

Hence, the word 'copy' in a traditional copyright doctrine should not be interpreted as a literal physical object, but rather as the main source of the authors' revenues and their indispensable right to hold a control over its creations. Ginsburg¹⁷⁸ names this phenomenon 'copyright without hard copies'. If copyright is not expanded to the right to control access to protected work, the industry would end up with situation, when all variety of access passwords will be generated by some digital operators or will be treated in the online-auctions, inasmuch as these practices would violate *sensu stricto* copyright neither. Such 'one-click' infringements, when 'what is yours is mine' represent the main threat for artistic works.

8.1. Territorial restrictions

Traditionally marketing of sports media rights is performed on a country-by-country basis. Some concern has been already expressed by rights owners about unauthorized reception of the signals of foreign channels, which enables circumvent territorial protection. Thus is it quite common in the UK to offer for the pubs' customers a preview of all Premier League matches, broadcasted by foreign satellite channels. These matches are sold by rights holders abroad without permission for their re-broadcast in the UK. Yet technically each satellite owner in the UK by acquiring a foreign broadcaster's decoder card receives an access to the event. This diminishes the value of sports rights and impels rights owners to sue infringers. Thus in Karen Murphy case¹⁷⁹ the landlord of a British pub has acquired the decoder card for Greek satellite channel, which broadcast Premier League

matches. According to British Copyright Act,¹⁸⁰ such unauthorized receiving of broadcasting service, provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme constitutes an offence. However inasmuch as interstate trade has been potentially affected, the case has to be evaluated under the EC rules on the Internal Market. European Coditel doctrine¹⁸¹ recognizes under certain circumstances this practice as a fair protection of investment. Although up till now the jurisprudence of the ECJ has been related to cinema industry, many parallels between movies and live sports can allow its expansion to the premium sports industry.

As O'Flynn and Smith¹⁸² suggest in their report on a conceptually similar case 'FAPL v. QC Leisure',¹⁸³ legal battles over territorial restriction 'offer useful guidance on the application of the Coditel case regarding the narrow scope and limited effect of that judgment in cases where exclusive licences are granted which also contain additional provisions requiring licensees to procure or take other action to prevent circumvention by customers or other third parties of the exclusivity granted to the licensee under the licence'.¹⁸⁴ The defendant in this case supplies British pubs with satellite decoder cards. In the course of a proceeding he has chosen EC competition law line of defence. FAPL, on the contrary, refers on the violation of their property rights, committed by QC Leisure by means of circumventing access rights to sports events. As has been pointed out by the court Coditel doctrine cannot be fully applied in this case, inasmuch as it merely presumes potential defence against *per se* violation of Article 81 EC, but does not offer for right holder an entire immunity and absolute protection.

8.2. Public viewing

Public viewing of major sports events can potentially generate substantial revenue. That is the reason, why event organizers strive to set up additional requirements in terms of the licensing agreements. For instance, during the 2006 FIFA World Cup in Germany the company, in charge of sports rights marketing 'Infront' has announced the Public Viewing Guidelines. In this document Infront has required public viewing organizers not to alter the signal, restrict advertising as well as to acquire a licence.

As Baars¹⁸⁵ suggests, 'public viewing events cannot be held without a licence from Infront. In this respect, the Infront/FIFA guidelines only reflect legal requirements established by Sec. 87 Para. 1 No. 3 German Copyright Act'.¹⁸⁶ This would be undoubtedly the case for most jurisdictions, provided that sports event is granted copyright protection. It would be difficult, however, to prevent public viewing of the event, which has been shot without permission of the FIFA/Infront.

9. Off-tube rights

Regulation of the off-tube rights is one of the most sensitive areas of sports copyright domain. Off-tube rights occur when a person provides commentaries of the event, for unauthorized media platform. The commentator can either be at the venue himself or use coverage of the authorized broadcaster.

175 The problem of digital piracy has been broadly acknowledged by the main jurisdictions. Some measures have been already proposed in the area of premium sports content. For instance in its Report on White Paper on Sport, the European Parliament 'calls on the Commission to pay sufficient attention to sports piracy in its strategy for the online content sector and its fight against piracy'.

176 Physical copying, in fact, occurs every time the information arises on user's machine interface, yet this sort of 'copying' has rather technological than consumer dimension and, perhaps, may not be considered as a copying in the traditional sense of the action.

177 This approach is in line with CERNA and KEA's Study on the Impact of the Conditional Access Directive, which also suggests that 'before digitisation, content markets were attached to each form of media, books, newspapers, paintings, cinema, TV, etc. and were not studied *per se*. Economic and political institutions such as copyright and censorship have been progressively adapted to the roll-out of new media integrating new technologies'. ('Study on the Impact of the Conditional Access Directive', Study prepared on behalf of the European Commission Directorate General for Internal Market & Services, CERNA, KEA, December, 2007).

178 Jane C. Ginsburg, 'From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law', Columbia Law School, Public Law & Legal Theory Working Paper Group, Paper .8.

179 Karen Murphy v Media Protection Services Limited, EWHC, 2007.

180 The Copyright, Designs and Patents Act 1988.

181 Case 62/79, 'SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v. Ciné Vog Films and others', ECR 1980, 00881; Case 262/81, 'Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v. Ciné-Vog Films SA and others', ECR 1982, 03381.

182 Tom O'Flynn, Paul Smith, 'Protecting the value of sports broadcast rights', Sports Law Administration & Practice, (Vol. 15, No. 1), February, 2008.

183 The Football Association Premier League Ltd v QC Leisure and others, EWHC 44 (Ch), 2008.

184 Tom O'Flynn, Paul Smith, 'Protecting the value of sports broadcast rights', *ibid*.

185 Wiebke Baars, 'Public Viewing in Germany Infront Guidelines and the German Copyright Act', International Sports Law Journal, 1-2, 2006.

186 Wiebke Baars, 'Public Viewing in Germany Infront Guidelines and the German Copyright Act', *ibid*.

9.1. Off-tube rights and traditional media

BBC v. TalkSport,¹⁸⁷ is the leading case in this area. TalkSport is a commercial radio station, which has supposedly violated the BBC's exclusive rights to cover Euro 2000 football matches by providing to the listeners the commentaries of their own correspondent, who has been watching the games in a hotel room. In order to avoid accusations in a violation of the BBC's broadcasting rights the program has been supplemented by artificial sound effects, similar to original sports event, and accompanied by the headline 'live'. The specificity of the case was that no part of the BBC's content has not been used, since neither crowd noise nor footage of the game itself were 'borrowed' from the BBC's transmission, but from their Belgian vis-à-vis. Finally TalkSport acknowledge as a misleading calling their media content 'live' and 'directly from the event'.

This confession does not provide the remedy for copyright protection, but merely serves as an evidence of unfair commercial practice. The court said that the fact that the BBC has well-established reputation as a live-broadcaster does not automatically provide the BBC the right to the event *per se*. Consequently, the mere usage of the words 'live broadcasting rights' is just a matter of description of the activity and by no means the definition of the legal status of content at issue.

As has been deduced by Taylor¹⁸⁸ in his analysis on TalkSport case, the position of the court demonstrates insufficient protection for sports events, and serves as a good example of the problems faced by rights-holders in having to have resort to causes of action that were not created with them in mind at all. According to Eccles,¹⁸⁹ this practice is becoming something of an industrial standard in the UK. Virgin Radio offered its listeners live 'complete unofficial' commentary of England's matches in the FIFA World Cup 2002.

A narrow interpretation of sports media rights, which consider their copyrightability only at the stage of a transmission, would not support the allegations of sports right holder. That was the reason for BBC to rely on the tort law principles and claim that a headline 'live' and simulated crowd noise are damaging the BBC's reputation rather than to refer to its genuine right to the event.

9.2. Off-tube rights and new media

New formats of content delivery become very attractive way to reach the viewers. Their share in the media market increases exponentially. Digital technologies make consumer choices more diversified. End-users also are much more flexible as to the medium, be which they are following sports events.

It is quite plausible that for some segments of consumers new media platforms can be seen as a partial substitution of traditional ones. In this situation technological tensions are unavoidable, in particular if traditional broadcaster is not interested or simply unable to provide its content via new media.

In the domain of premium sports those tensions are even more severe, inasmuch as sports media rights constitute the major engine for development of new media platforms. Usually the companies, which operate in this market, are not able to obtain the rights to broadcast sports event, because most of these rights are distributed by event organizers on the principle of exclusivity.

This model is seen as a main requirement of traditional media, which prefer obtaining all media rights to sports event, even if some of them are not exploited in their entirety. This helps them to preserve *status quo* and does not allow dissemination of media rights between many potential content operators. That is one of the reasons, why traditional content operators strive to expand copyright protection to sports event itself. This would reinforce their control over the events and invigorate (allegedly dominant) position in the relevant markets.

Bottleneck problems which are faced by the operators of new media platforms, as well as a permanent increase of consumer demand impel them to invent alternative and more creative formats of content delivery, by applying new digital technologies. One of the new forms sports event coverage is an aggregation on the web-sites user generated sports content. For this technique some company can either commission their own staff to create content from the sports event or simply collect the footage of general audience.

Another way of applying new technologies to sports media coverage is delivering content over 3G mobile phones. Many customers are also interested in such services as real-time information about the event via small messages. SMS coverage is particularly attractive for mobile telephony providers, inasmuch as this option does not require more technologically advanced equipment, which is necessary for provision of 3G mobile phones' video services.

The Indian 'Marksman Marketing Services'¹⁹⁰ case is an example of the shift of the technological battles over sports content from the scientific discussions and public debates to a practical dimension. The Madras high court in India has not authorized mobile phone providers to inform their customers about the scores of the international cricket series through SMS, regardless the claim that mere information about the course of the event cannot be copyrighted.

In this case the Pakistan Cricket Board has granted the exclusive rights 'to disseminate information relating to scores, alerts and updates and/or other events or happenings in the tour via SMS on wireless and mobile telephones on a global basis to the VectraCom Private Limited'.¹⁹¹ However, contractual obligation of the parties cannot be expanded to the area, in which none of them is legally entitled to it. It means that under Indian intellectual property regime copyright protection is expanded to sports event itself. Finally, by its interim order Madras high court authorized these services, requiring mobile operators in turn to establish accounts of incomes received by this commercial practice to ensure that, if the suit consequentially went against them, they could compensate damages to exclusive rights holder.

Inasmuch as the right to information is traditionally considered as public right, the 'informing' customers about the course of the event cannot be confused with 'making the impression' of the event itself.¹⁹² The borderline between 'informing' and 'experiencing' is very vague. One might claim the right to be informed in the observing the high-lights of the event, another, on the contrary would suggest that online text commentary in the private webpage constitutes the 'experiencing' of the event. Yet in my opinion, this borderline should serve as a benchmark of copyrightability of sports event.

10. Arguments in favour of copyrightability of sports events

Historically the claim of copyright protection to sports events is as old as very broadcasting media. In the 1940^s the Association for the Protection of Copyright in Sports has been established in the United Kingdom.¹⁹³ The main legal purpose of the Association was protection of the interests of sports event organizers and granting them a protection akin to the authorship. Their main doctrinal rival has happened to be the BBC, which has strived to retain *status quo*, considering the rights of sports event organizers as 'facility rights', which are limited solely to physical control of access to property. In the same time the BBC has been the main protagonist of copyrightability of live broadcast of the sports events, successfully campaigning for changes in the UK Copyright Act of 1911. The main objective of the BBC and sports event organizers was to equalize in rights the status of sports content and recorded musical and dramatic performance, protected by 'Dramatic and Musical Performers' Protection Act' (1925). This campaign was successful and copyright protection has

187 BBC v. TalkSport Ltd., FSR 53, 2001.

188 Jonathan Taylor, 'Commercialisation of Sport (i), Proprietary Rights in Sports Properties', *ibid*.

189 Matthew Eccles, 'Broadcasting and New Media', *ibid*.

190 'Marksman Marketing Services Private Limited', application, Madras High Court, February, 2006.

191 'Marksman Marketing Services Private Limited', *ibid*.

192 As 'Eacademy' reports, the founder of Net4Nuts, an Ahmedabad based content providing company Chirag Patel has commented in this respect that they can deploy 'person in a live cricket

match who will then forward (...) the score continuously which we can forward to our customers and no other company can claim the rights on this information or the news of cricket score'.

193 For the detailed analysis of the history of relationship between sports promoters and broadcasters see Jean-Pierre Blais, 'The Protection of Exclusive Television Rights to Sporting Events Held in Public Venues: An Overview of the Law in Australia and Canada', *Melbourne University Law Journal*, Vol. 18, June 1992.

been expanded to broadcasting of sports events. The British legislator had refused to grant copyrightability to sports event *per se*, considering such a broadening of copyright as eventual “Pandora Box” for the following recognition of all other eventual public events of commercial nature.¹⁹⁴ The second argument has been related to the technical conditions of that time. Since copyright to broadcast essentially has covered all potential violation of sports rights, there was no necessity to expand this right to the events themselves.

Despite the reluctance to render to sporting events the status of copyrighted work, there are several legal and economic arguments in favour of this view. Thus, Arnold suggests that predictability of the event cannot be considered as a distinctive feature between sports games and dramatic work, inasmuch as in this case no improvised dramatic work would attract copyright.¹⁹⁵ His argument is even more persuasive in the time of rapid development of entertainment services, such as computer games and movies with elements of interactivity.¹⁹⁶

The genuine reason for protection of artistic work is not its predictability, but rather originality and creativity.¹⁹⁷ The performance of sports teams and individual players does encompass both. Following this logic, the only reason for not granting to sports rights copyright protection is rather a formalistic interpretation of the positive law than a commercial reality. Yet even from the formalistic perspective one could not find persuasive arguments, why such sports events as figure skating or rhythmic gymnastics could not be considered as dramatic or artistic work. These sports are entirely prepared in advance and satisfy traditional copyright requirements of predictability.

In fact, there are several decisions of the US courts, which directly or implicitly recognize the possibility of sports events being copyrighted. For instance, in ‘National Exhibition’¹⁹⁸ case the court held that an unauthorized broadcasting of sports event can adversely affect the event organizer’s investment and can ‘destroy the value and marketability of (...) event organizer’s property and render it impossible for plaintiff to realize in full the benefits of its rights’.¹⁹⁹

This argument is elaborated further by Taylor.²⁰⁰ He considers that where the gymnastic routine is in fact a form of dance, there appears to be no sense in principle ‘why the fact that the dance is performed as part of a sports event should disqualify it from protection as an artistic work [; t]here is still uncertainty of outcome, in the sense that the participants are competing against each other, but the competition takes the form of a series of scripted individual performances, all judged against a common (artistic or quasi-artistic) standard’.²⁰¹ Furthermore, the performances of the participants are conducted separately with no direct influence on one another.

Agreeing conceptually with the idea of copyrightability of sports event and supporting the argument about undistinguishable similarities between some sports and artistic performance, I suggest that the parallels between ice-skating and dance on one hand and football match and theatrical performance on the other is not undisputable. Indeed, considering for the sake of argument the idea of non-copyrightability of sports event, one might explain that what distinguish gymnastic competition from dance performance is the very notion of contest, which is unpredictable by definition and hence, un-copyrightable. What can be copyrighted in this case is a gymnastic performance itself, but not a competition between the performers, which

constitutes the very essence of sports event. Thus, to be consistent, one should acknowledge copyright to each gymnastic or figure skating performance separately but not to the contest as such. This would give to event organizers significant legal tools to protect their contests from unauthorised recording and can serve as a sufficient guarantee for their exclusive broadcasting agreements.

The same approach would provide manifestly different outcomes for team sports contests, which are entirely unpredictable (as most of the sceptical supporters would suggest). These events are incapable of being managed ex-ante. Thus, even accepting the argument of predictability as an indispensable element of artistic work, the argument of non-copyrightability of sports events would be partly destroyed, inasmuch as the borderline between some sports and artistic works in entirely washed out. Indeed, there are also many contests (e.g. cinematographic and artistic festivals, fashion shows etc.) between dramatic works themselves, which factually make some sports events and dramatic works almost undistinguishable.

In most major jurisdictions (and particularly in common law countries) copyright does not provide legal protection to the contests between artistic works (e.g. Oscar ceremony). This is not exactly the case in some civil law legal systems. Thus, French intellectual property law encompasses rather broad scope of protection, providing it to all works of the mind regardless of the genre, way of expression, merit, or objective, requiring from them, on the other hand, only originality condition.

Thus, as Derclaye²⁰² suggests, while reporting the decision of the French Court of Cassation ‘Roberts v. Chanel’²⁰³ that fashion shows can be protected by copyright, inasmuch as they appear to fall within the category of choreographic works, ‘the decision may sound surprising to a common lawyer but it is hardly so for a French one’.²⁰⁴ Indeed, civil law countries have rather broad list of author’s rights, which inter alia may include a colour, smell or hair style. The main argument of the claim of the French Federation of Couture and some separate fashion companies was that their copyright is not limited to cloth (which in itself is a very controversial issue), but is expanded also to the shows themselves.

Traditionally organisers of the major public events-organizers rely rather on their proprietary right to control the access to the venue. This is the case, since the very contest does not include a sufficient level of originality and creativity. In addition, copyrightability of the events themselves does not appear to be effective from the practical perspective.

Copyright is very consistent in this respect: what is protected is the artistic work itself, not the competitions between these works. Indeed, consistency is one of the key attributes of law. This does not mean, however, that the situation cannot be changed and copyright protection would not be expanded to team sports. In my opinion it should. Its main doctrinal justification is based upon the liberal idea of property rights. This approach considers property rights as natural rights. In the content of sports media industry it is advocated inter alia by the British Parliament: ‘some have argued that the rights of intellectual property owners should be limited in order to promote the spread of knowledge and creativity. However, we take the view that this is a matter of choice for the creators and that rights owners who wish to

194 The Report of the Copyright Committee, 1951, of the United Kingdom (Cmd.8662), ‘the Gregory Committee’. It recommended most of the provisions now contained in the Copyright Act 1956, of the United Kingdom.

195 Richard Arnold, ‘Copyright in Sporting Events and Broadcasts or Films of Sporting Events after *Norouzian*’, The Yearbook of Copyright and Media Law, 2001/2002, Oxford University Press, 2002.

196 On the impact of the interactivity and convergence in the domain of European copyright regulation see inter alia Part I of the ‘Study on the Implementation

and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’, Institute for Information Law, University of Amsterdam, The Netherlands February 2007.

197 The term ‘creativity’ has to be understood in its broader sense. As Cornish and Llewelyn point out: ‘Today’s philosophical penchant for pointing up the relativity of artistic judgement, and for showing how dependent nay creator is both upon his or her own intellectual inheritance and upon the perceptions of

those who receive the work, is antagonistic to any idea of ‘greatness’. Deconstructionist argument is among other things deployed to undermine the copyright of authors’, William Cornish, David Llewelyn, ‘Intellectual Property: Patents, Copyright, Trademarks and Allied Rights’, *ibid*.

198 ‘National Exhibition Co. v. Fass’, *ibid*.
199 ‘National Exhibition Co. v. Fass’, *ibid*.
200 Jonathan Taylor, ‘Commercialisation of Sport (i), Proprietary Rights in Sports Properties’, *ibid*.

201 Jonathan Taylor, ‘Commercialisation of Sport (i), Proprietary Rights in Sports Properties’, *ibid*.

202 Estelle Derclaye, ‘French Supreme Court rules fashion shows protected by copyright, what about the UK?’, *Journal of Intellectual Property Law & Practice*, Vol. 3, No. 5, 2008.

203 ‘Roberts A. D. et al. v. Chanel et al.’, French Court of Cassation, 5 February 2008.

204 Estelle Derclaye, ‘French Supreme Court rules fashion shows protected by copyright, what about the UK?’, *ibid*.

205 ‘New Media and Creative Industries’, House of Commons - Culture, Media and Sport - Fifth Report, 2006/2007.

retain control over the use and exploitation of their material should be able to do so'.²⁰⁵ This approach is against utilitarian interpretation of property rights, which considers the importance and the level of their protection, deriving primarily from the societal interests.

The idea of expanding the field of the events, which are granted copyright protection is supported by a general approach in intellectual property doctrine, which does not express its interest in a value-based assessment of the work, but rather applies a *provisio de minimis* standard to its eventual public usefulness irrespective of the question whether the quality or style is high:²⁰⁶ 'the word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought.'²⁰⁷ Until now of the theoretical reasons for reluctance to accept sports event as a copyrightable work is still a doctrinal tradition to consider sports performance as an act, which does not encompass sufficient elements of the art.

These arguments sound even more substantiated from the practical point of view, due to the increasing ability of viewers to consume sports media services via unauthorized platforms. Such forms of presumably restrictive practices include peer-to-peer Internet protocols and foreign broadcasting channels, together with increasing overuse of fair dealing clauses for delivering news and highlights of listed sports events.²⁰⁸ These 'soft-piracy' (or in terms of Blais²⁰⁹ 'parasitic conduct') practices noticeably diminish the value of premium media products and impede the ability of owners to fully benefit from their rights.²¹⁰ This may gradually lead to a decrease of investments, innovations and sustainable growth of the industry. All those factors foster rights-holders to seek their protection in copyright law.

The idea that sports rights are not copyrightable appears to be insolvent also from the comparative perspective. Thus, in a regulation of the 'virtual world' copyright is granted to computer games, inter alia to those, created on the basis of major sports events. In addition, according to the typical end user license agreement (EULA) producer of the game preserves copyright not only to the game itself, but also to the characters, created by users and virtual relationships,²¹¹ established by them. Although, these are contractual obligations, which do

not provide the unequivocal answer to whom these rights actually belong.

From the perspective of European jurisprudence, copyrighted sports event is likely to receive a sufficient protection of the Community legal regime. It would be exempted from the requirements of free movement, completion of internal market and competition policy. The parallels can be established with the European policy of cinema windows, acknowledged by the ECJ in its *Coditel I*²¹² and *Coditel II*²¹³ decisions. Together with professional sports events, Hollywood movies are another example of premium content, which is decisive for commercial success of broadcasting media operators. Regardless of their segmental particularities, from the regulatory perspective, as well as from the judicial reasoning in *Coditel I*,²¹⁴ both can be considered as genuinely similar products and services, provided sports events would get their eventual copyright protection. This approach does not immunise copyrighted sports event from application the Community rules on internal market homogenisation²¹⁵ and competition.²¹⁶ However it is important that from the doctrinal perspective the restrictions, which are inevitable in the course of legitimate exercise of copyright to sports event, would not be considered as per se violation of different European policies.

11. Virtual and targeted advertising in sports content

There is also another form of exploitation of sport rights, which impel their unauthorised footage; it is a virtual and targeted advertising.²¹⁷ This marketing technique became possible with development of digital technologies. Virtual advertising allows bigger and, perhaps, more intrusive influence of content provider on end-users. Essentially virtual advertising is a technology, which provides media content operators to pose advertisement in their products. This commercial technique allows expanding the ability to advertise and opens the markets for small and medium-size locally sponsorship. This can lead to a conflict between 'real' advertisers, who are bound by the contract with event organizers and 'virtual' ones, who would establish their commercial cooperation with unauthorized content creators in a much more flexible manner.

Virtual advertisement enables to circumvent strict requirements in

206 See the British case 'University of London Press v. University Tutorial Press', 1916, 2 Ch..

207 'University of London Press v. University Tutorial Press', *ibid*.

208 One of the main actors in the market of sports media rights, European Broadcasting Union, which is association of national broadcasters, provides a list of such acts, which includes inter alia retransmission of live or recorded broadcasts by a station operating in a neighbouring country; commercial sale to the public of storage medium of unauthorized copies of a sports programme, in the broadcaster's country and abroad; cable distribution of complete broadcast programmes in the broadcaster's neighbouring country; sale to the public of records of a music concert derived from an unauthorized reproduction of the soundtrack of a live television broadcast; rental of unauthorized recordings of a television broadcast by a video club; offering the 'service' of making an unauthorized copy of a pre-selected television programme with a view to the sale thereof in video form; commercial use by a business firm of privately-made copies of a radio broadcast; manufacture, importation and distribution of pirate decoders and/or smart cards specifically designed to permit unauthorized access to encrypted television services; public 'large-screen' showing of live broadcasts

of international sports events; showing of unauthorized copies of television programmes to customers in various types of shops, or to the public at fairs or exhibitions; sale to the public of unauthorized recordings of broadcast programmes by a dealer in radio or television equipment; broadcasting or cable distribution of pre-broadcast satellite signals, which carry sports programmes; publication in newspapers, magazines and books of still photos taken from the television screen, particularly of broadcasts of news and sports programmes; distribution of television and radio broadcasts to hotel rooms by internal hotel cable services; retransmission of live broadcasts of football matches via the Internet, partly 'framing' the broadcast images with the infringer's own advertisements.

209 Jean-Pierre Blais, 'The Protection of Exclusive Television Rights to Sporting Events Held in Public Venues: An Overview of the Law in Australia and Canada', *Melbourne University Law Journal*, Vol. 18, June 1992.

210 See 'Union des Associations Européennes de Football (Union of Football Associations) & Ors v. Briscock & Ors Ch D' (Lindsay J) 8/5/2006 case, in which the British court held that unauthorized broadcast of UEFA Champions League constitutes an infringement of copyright.

211 See e.g. Terms of Service of the 'Second

Life', the multi-user online service offered by Linden Lab: 'you retain copyright and other intellectual property rights with respect to Content you create in Second Life, to the extent that you have such rights under applicable law. However, you must make certain representations and warranties, and provide certain license rights (O.A.: these 'certain representations and warranties' are covered in more than 600 words), forbearances and indemnification, to Linden Lab and to other users of Second Life'.

212 Case 62/79, 'SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v. Ciné Vog Films and others', ECR 1980, 00881.

213 Case 262/81, 'Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v. Ciné-Vog Films SA and others', ECR 1982, 03381.

214 *Coditel I*, *ibid*: 'A cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect, the problems involved in the observance of copyright in relation to the requirements of the treaty are not the same as those which arise in connection with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records. In these cir-

cumstances the owner of the copyright in a film and his assigns have a legitimate interest in calculating the fees due in respect of the authorisation to exhibit the film on the basis of the actual or probable number of performances and in authorising a television broadcast of the film only after it has been exhibited in cinemas for a certain period of time'.

215 *Coditel II*, *ibid*: 'The distinction, implicit in Article 30 between the existence of a right conferred by the legislation of a Member State in regard to the protection of the artistic and intellectual property, which cannot be affected by the provisions of the Treaty, and the exercise of such right... might constitute a disguised restriction on trade between Member States'.

216 *Coditel II*, *ibid*: 'It is conceivable that certain aspects of the manner in which the right is exercised may prove to be incompatible with Article 81 where they serve to give effect to an agreement, decision or concerned practice which may have as its object or effect the prevention, restriction or distortion of competition within the common market'.

217 For an in-depth study of virtual advertising see Askan Deutsch, 'Sports Broadcasting and Virtual Advertising: Defining the Limits of Copyright Law and the Law of Unfair Competition', *Marquette Sports Law Review*, Vol. 11/41, 2000.

respect to the sponsorship of public events. For a time being in most developed countries tobacco and alcohol advertisement is not allowed during the broadcasting of sports events. These safety requirements are imperatively imposed by regulators in order to protect public health. Technically premium sports events are still capable to generate big investments from tobacco and alcohol sponsors. Furthermore, such media content is considered to be the most attractive for these industries, because it attracts the audience, which constitutes the core of tobacco and alcohol consumers. In fact the marketing segments of both are overlapping to a large extent. Thus a prohibition of tobacco and alcohol advertisement is seen by many sports events organizers as an important commercial disadvantage.

Since Internet operators and satellite broadcasters hold much stronger control over the footage of the sports event, they can easily circumvent the ban for tobacco and alcohol advertisement in public places by placing them directly on the interface of the viewers' computers. It is not very likely, that an exclusive broadcaster would abuse its right by evading national public health requirements in order to generate some additional revenue from the tobacco and alcohol advertisers.

The similar is the situation with online betting and gambling. In many jurisdictions such commercial services are prohibited or severely restricted and highly regulated.²¹⁸ That is the reason why advertising from those industries in major sports events is very limited. Virtual and targeted advertising open many commercial possibilities for those companies, which are ready to invest in such content even regardless the fact that its technical quality would be much weaker than a coverage of the authorized broadcaster. Although technically it is still possible, especially when sports event is transmitted via Internet on a worldwide basis (inasmuch as the level of public safety requirements is varying from country to country), an exclusive broadcaster is much more likely to refrain from doing such image-damaging activity. It is not the case for unauthorized, small operators, which in course of technological development would receive more convenient techniques to produce their own coverage from the sports event with generating advertisement from the industries, which are unable to advertise officially in a certain territory or simply from the less successful/generous sponsors.

Major sports rights holders strive to regulate the conditions of virtual advertising, by imposing in their content distribution agreements strict contractual obligations.²¹⁹ These requirements, however, are binding solely in respect to authorized sports right buyers. The companies, which are capable to produce their own, 'unauthorized' media content from not copyrighted sports event, are not bound by these regulations. Hence, an intensive development of digital technologies and marketing techniques can serve as a practical reason for according a copyright protection to sports event themselves.

11.1. Virtual and targeted advertising in sports content in the EC

According to the ECJ ruling on 'Commission v. France',²²⁰ 'By making television broadcasting in a Member State by French television channels of sporting events taking place in other Member States conditional on the prior removal of advertising for alcoholic beverages, the Member State concerned has not failed to fulfil its obligations under Article 49 of the EC Treaty'.²²¹ In fact, this case shows that pursuing national requirements of public health, if proportional, serves as a sufficient ground for certain restrictions of free movement principles. Unauthorised sports broadcasters can much easier evade these rules. Hence, provided sports events are not protected by copyright, exclusive broadcasters can be economically disadvantaged over their more strategically flexible *vis-à-vis*.

In the 'Tobacco advertising I'²²² 'Tobacco advertising II'²²³ the Directive 98/43 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, adopted on the basis of Articles 47(2), 55 and 95 of the Treaty has been annulled, because those articles do not constitute a sufficient and appropriate legal basis for the adoption of this act. Hence, the ECJ held that the Commission's and Council's attempts to instrumentalize their compe-

tences in order to regulate public health matters are incompatible with the provisions of the EC Treaty. It means that the Member States will be able to continue their regulation of tobacco and alcohol advertising in accordance with national public health priorities and standards.

For the media operators of sports content it means that these requirements would be in the future even stronger, than with the Community's eventually harmonized legislation. This is so, because of the interstate nature of most major sports competitions. In order to be accessible for the viewers in all the other EC countries, sports content has to correspond with the regulatory standards of each national market. As defendants in the 'Tobacco advertising I' claimed that 'professional sports teams are undertakings competing with each other, and the conditions of such competition would be affected if teams in different Member States could not receive the same subsidies from the tobacco industry, which is particularly willing to sponsor sports events in order to counteract the association of those products with bad health'.²²⁴

Even if the event is organized in a country with relatively liberal regulation of alcohol and tobacco advertising, its right holders have to take into account more severe regulation of these products in the other Member States. If they would not adopt their media coverage to these standards, they would face the possibility to be disqualified by media regulators from the markets due to public health reasons. Unauthorized sports content operators are much more flexible in this context and can easily provide different virtual advertising for the territories with the different regulatory regimes. The second advantage of unauthorized content operators is based in their decentralized and 'semi-official' nature, which helps them to remain 'invisible' for the regulators. Lastly, their commercial flexibility enables them easily to adapt to the regulatory requirements of each national market.

11.2. Digital copying

Another argument against the assignment of copyright protection to broadcasting of sporting events lies in its presumable unenforceability. The rationale behind this claim is that inasmuch as the biggest part of revenue from commercial exploitation of sports media rights comes from their live coverage, the eventual infringer would not have to copy this content, but 'merely re-broadcast a signal' to its viewers. However, this practice has been declared as an infringement of copyright by all main jurisdictions. The main reason for legislators to equate live broadcasting with copyrighted work was the circumstances, in which premium sports content is produced and the main features of its commercial exploitation. In either case even from a technological perspective, re-broadcasting of each event inherently presupposes its prior copying. Regardless the fact that such a process is continuing for only milliseconds, formally it falls within the scope of copyright violation.

218 For the outline of the regulation of online sports betting services see Lori K. Miller, Cathryn L. Claussen, 'Online Sports Gambling - Regulation or Prohibition?', *Journal of Legal Aspects of Sport*, Vol. 11:99, 2001.

219 For instance see FIFA Regulations for the Use of Virtual Advertising: 'Virtual advertising (VA) is permitted only when the following conditions are all fulfilled: (i) to do so does not constitute an illegal act; (ii) all involved parties, especially the Host Broadcaster, sub-licensees and marketing rights-holders are fully informed and contractually bound with regard to the application of VA and the contents of these Regulations; (iii) outside the field of play, VA may only be applied during the transmission to appear on existing flat surfaces which may or may not be used in reality for publicity purposes (including advertising boards standing

beside the field of play). In particular, VA is expressly forbidden a) on surfaces specially created for the purposes of being used for VA; b) on all persons in the stadium; c) on all mobile or stationary objects not originally intended to carry publicity of any kind'.

220 Case C-262/02, 'Commission of the European Communities v. French Republic', ECR I-06569, 2004.

221 'Commission of the European Communities v. French Republic', *ibid*.

222 Case C-376/98, 'Federal Republic of Germany v. European Parliament and Council of the European Union', ECR I-8419, 2000.

223 Case C-380/03, 'Federal Republic of Germany v. European Parliament and Council of the European Union', ECR I-11573, 2006.

224 Case C-376/98, 'Federal Republic of Germany v. European Parliament and Council of the European Union', *ibid*.

12. Conclusions

The value of sports media rights is increasing exponentially. This requires its proper legal regulation. Traditional doctrine of intellectual property law does not grant copyright protection to sports events as a whole, but merely protects the broadcast of such events. The alternative proposals suggest that the event itself has to be protected by *sui generis* copyright as well.

Both approaches have their protagonists and opponents. The former argue that copyright cannot be logically expanded to such a broad scope, which would enable a legal protection for the events themselves.²²⁵ The latter refer to their legitimate protection of risky investments and advocate liberal approach to property rights. This economic understanding of property²²⁶ is benevolent to rights owner *ipso facto*, it assumes that all sorts of media content can be granted a copyright protection,²²⁷ provided that they are organized with the purpose to create media attraction; are capable to generate revenue (hence can establish markets); are not spontaneous or unplanned events and contain at least a marginal degree of creativity.

Theoretical background of this paper is based on a concept of legal pluralism, which recognises an absolute protection for all rights and interests, while assuming that their exercising inevitably leads to the clashes. These clashes have to be solved by policymakers and courts on a case-by-case basis, without diminishing the ontological status of restricted rights. Such inductive interpretation of legislative and judiciary tasks enables recognition of absolute copyright protection for the sports events as a whole, while simultaneously leaves a room for

appreciation during solving the conflicts between sports rights holders and their vis-à-vis, who are allowed to strive to exploit these rights under a fair use principle.

225 This approach has been summarized by Arnold in a following manner: 'Media rights consist essentially of the exclusive right to cover the event in question in the medium in question. All that the promoter grants the right-holder is the exclusive of physical access to the event for the specified purpose or purposes. Thus in the case of television rights in football matches, it is the right to bring cameras, microphones and other equipment into the stadium where the match is being played and to operate the equipment while the match is being played to produce signals for the broadcast. Usually the right-holder will also wish to have presenters, commentators and interviewers present in the stadium as well, again, with access to the relevant technical facilities. The right of physical access is a purely contractual right granted by the promoter to the right-holder. It is not a proprietary right' (Richard Arnold, Copyright in

Sporting Events and Broadcasts or Films of Sporting Events after Norowzian, *The Yearbook of Copyright and Media Law*, 2001/2002, Oxford University Press, 2002).

226 Property is considered as an economic category, which corresponds to its owner's right to hold, possess, operate and use it legally.

227 The term 'media content' shall be interpreted in a broader sense, as it is defined *inter alia* in the CERNA and KEA's Study on the Impact of the Conditional Access Directive: 'In a digital environment, any kind of event meaningful to an audience can generate media content: war, a fire, a speech, a concert, a royal wedding, sports competitions, a concert, etc.'. ('Study on the Impact of the Conditional Access Directive', Study prepared on behalf of the European Commission Directorate General for Internal Market & Services, CERNA, KEA, December, 2007).



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This year marks the 20th anniversary of the teaching of sports law in the Melbourne Law School. In July 1988, students in the new subject Sport, Commerce and the Law grappled with the legal aspects of Ben Johnson's disqualification from the Seoul Olympic Games for a positive doping test. They also analysed the then frequent court challenges to the player transfer rules of Australian professional sports leagues, the outcome of which helped shape today's sports landscape.

Twenty years on, some things have not changed. Sport, Commerce and the Law remains a popular subject providing an overview of the whole field. Current events and controversies continue to flavour whichever of our eight sports law subjects are on offer.

Looking back, the work of past and present students in the form of their published research papers and their direct involvement in managing the legal affairs of sports organisations around the world demonstrates the unique contribution to sports law scholarship and practice made by the Melbourne Law School. A big difference between now and then is the size and complexity of the field. This is demonstrated by the breadth of territory covered by our sports law subjects and the leading edge nature of many legal issues generated by sport. As Robert Cotter says in his review: expect to be challenged, but pleasantly so.

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Education and Culture DG



**European Commission
EU Sport Forum,
26-27 November 2008, Biarritz**

To the President of your organisation

Dear Madam or Sir,

The European Commission will organise the first **EU Sport Forum** after the adoption of the 2007 White Paper on Sport **on Wednesday, 26 and Thursday, 27 November 2008 in Biarritz (France)**. The EU Sport Forum is the key annual event in the framework of the strengthened structured dialogue on sport at EU level that the Commission has set up in line with the White Paper on Sport.

The sessions will take place in the afternoon of 26 November and the morning of 27 November (including lunch), so that participants will be expected to travel to Biarritz in the morning of the first day and return in the afternoon/evening of the second day. The Forum is being organised in close connection with the EU Sport Ministers meeting under the French Presidency on 27-28 November.

The Forum will be organised in three thematic sessions: one on the "Implementation of the White Paper on Sport", and two panel discussions on "The specificity of sport" and "Support for grassroots sport in Europe".

The Commission would be delighted to welcome you to the Forum. You will receive an official invitation via e-mail in the coming weeks. **We would kindly ask you to already bookmark these dates in your calendar.**

Contact person:

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Best regards,

MEDIA CONSULTA

Image Rights in South Africa

by Steve Cornelius*

1. Introduction

The second half of the Twentieth Century was marked by an unprecedented growth in the entertainment industry - not only as far as theatre, film, music and fashion was concerned, but also sport. There was a sudden awareness that film stars, musicians, models and sport stars were often worth more, far removed from the silver screen, radio, catwalk or playing field, than they would ever earn on it.

One of the consequences was that the outward image and physical attributes of the individual suddenly became commodities. The advertising world took notice of the popularity enjoyed by the stars and realised the value of associating merchandise or trade marks with superstars. On the one hand, this led to a whole new source of income for the superstars themselves and hopefully greater profit for the enterprises that associate their products with the stars. But on the other hand, it led to difficulties when the attributes of a person was apparently used without consent.

And it is precisely this unauthorised usage which poses new questions to the law: Should the law protect the individual against unlawful use of his or her image? If so, to what extent should such protection be granted?

At first glance the answers to these questions seem rather simple. But closer analysis reveals a controversy which makes the whole matter quite complex. Firstly, we have to determine to what extent the individual should be protected against the unlawful use of his or her image. Exactly which attributes of the individual should enjoy protection? Is it only the hereditary traits, such as physical features and voice? Our should other acquired attributes, such as hand writing, autograph, skills, qualifications, experiences or even habits and customs, opinions and points of view also be protected?¹ And what about apparent attributes, such as when a fictitious *persona* is created? To what extent should they be protected?²

Secondly, if protection should indeed be granted, what is the legal nature of such protection? Does the individual have any subjective right which is worthy of protection? If so, what is the nature and extent of such right?

And against whom do these rights apply? After all, it is well known that different people may have the same name or that people may naturally by coincidence or artificially through design look or sound alike. Does protection of a particular person's right to identity mean that the rights of all other persons with similar attributes will be affected thereby? And how long should this protection last? As long as the individual is alive? But stars such as Elvis Presley, Marilyn Monroe

and James Dean still earn millions of dollars even decades after their apparent demise. Should the rights then devolve on the estate of the individual? And if it can devolve, can it also be traded during the lifetime of the individual?

Thirdly, protection of the individual's right to identity must be weighed against the fundamental right to freedom of expression. Can an artist be sued merely because a subject in a portrait purposefully or coincidentally looks like a particular individual? Can a newspaper or magazine be sued because a photo of an individual appears next to a news report which involves that individual? And where does that leave the cartoonist who pokes fun at famous people?

These questions require a fundamental analysis of the principles involved, firstly to determine whether there is indeed a right to identity in the South African law and, secondly, to define the nature and extent of such a right.

2. Comparative analysis

From an analysis of various legal systems, it is apparent that there are mainly two approaches to protection of the individual against unauthorised use of his or her image. This distinction also generally coincides with the distinction between continental systems where the law is largely codified and systems that are generally based on common law. In some systems, the matter is regulated by statute,³ while there are attempts in other systems to afford protection within the confines of existing common law measures of mainly the law of tort or delict.⁴ There is, however, also a third category of systems where both statutory and common law measures are applied to protect the individual against unauthorised use of his or her image.⁵

3. Position in South Africa

In South Africa the common law approach has thus far been followed where the attributes of a person has been used without consent for commercial purposes. At the risk of over-simplification, the South African law of delict or tort is essentially based on three remedies: the *Actio legis Aquiliae* or Aquilian action, with which damages for patrimonial loss is claimed; the *Actio Iniuriarum*, with which compensation is generally claimed for intentional conduct which results in injury to person or personality; and the Action for Pain and Suffering, with which compensation is claimed for negligence which results in impairment of the physical and mental integrity of an individual.⁶

The matter first ended up before the courts in South Africa in *Van Zyl v African Theatres Ltd.*⁷ This case dealt with a claim for damages

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1 McGee, Gale and Scanlan "Character merchandising: aspects of legal protection" 2001 *Legal Studies* 226-230.

2 McGee, Gale and Scanlan (n 1) 231.

3 See for instance art 22 of the *Kunsturhebergesetz* in Germany; section 21 of the *Auteurswet* in the Netherlands; art 32-13-1-1 *et seq* of the Indiana lawbook; chap 4 par 3A of the Massachusetts lawbook; art 5 par 50 of the New York Civil Rights Law; arts 8.01-40 and 18.2-216.1 of the Virginia Code and art 63.60.010 *et seq* of the Washington Code.

4 See for instance *Irvine v Talksport Ltd* [2003] 2 All ER 881 (CA) in England; *Allison v Vintage Sports Plaques* 136 F3d 1443 in Alabama; *Olan Mills Inc v Dodd* 353 SW2d 22 in Arkansas; *Venturi v Savitt Inc* 468 A2d 933 in Connecticut; *Vassiliades v Garfinnckel's Brooks Bros* 492 A2d 580 in the District of Columbia; *Martin Luther King Jr Center for Social Change Inc v American Heritage Products Inc* 296 SE2d 697 in Georgia; *Ferguson v Hawaiian Ocean View Estates Inc* 441 P2d 808 in Hawaii; *Johnson v Boeing Airplane Co* 262 P2d 808 in Kansas; *Prudhomme v Proctor and Gamble Co* 800 F Supp 390 in Louisiana; *Lawrence v AS Abell Co* 475 A2d 448 in Maryland; *Carson v Here's Johnny Portable Toilets Inc* 698 F2d 831 in Michigan; *Candebat v Flanagan* 487 S2d 207 in Mississippi; *Haith v Model Cities Health Corp* 704 SW2d 684 in Missouri; *Gilham v Burlington Northern Inc* 514

F2d 660 in New Jersey; *Benally v Hundred Arrows Press Inc* 614 F Supp 969 in New Mexico; *Reeves v United Artists Corp* 765 F2d 79 in Ohio; *Martinez v Democrat-Herald Publishing Co* 669 P2d 818 in Oregon; *Gee v CBS Inc* 612 F2d 572 in Pennsylvania; *Staruski v Continental Telephone Co* 581 A2d 266 in Vermont and *Crump v Beckley Newspapers Inc* 320 SE2d 70 in West Virginia.

5 Compare art 3344 of the California *Civil Code* and *Michaels v Internet Entertainment Group Inc* 5 FSupp2d 823; art 540.08 of the Florida Lawbook and *Zim v Western Publishing Co* 573 F2d 1318; the Illinois Right of Publicity Act and *Douglas v Hustler Magazine Inc* 769 F2d 1128; art 391.170 of the Kentucky lawbook and *Foster-Milburn Co v Chinn* 120 SW 364; art 20-202 of the Nebraska Statutes and *Carson v National Bank of Commerce* 501 F2d 1082; art 597-770 *et*

seq of the Nevada Statutes and *People for the Ethical Treatment of Animals v Berosini Ltd* 895 P2d 1269; art 1449 of the Oklahoma Statutes and *McCormack v Oklahoma Publishing Co* 613 P2d 98; art 47-25-1101 *et seq* of the Tennessee Statutes and *Elvis Presley International Memorial Fund v Crowell* 733SW2d 89; art 26.001 *et seq* of the Texas *Property Code* and *National Bank of Commerce v Shaklee Corp* 503 FSupp 533; art 76-9-407 of the Utah Statutes and *Cox v Hatch* 761 P2d 556) and art 895.50 of the Wisconsin Statutes and *Hirsch v SC Johnson and Sons Inc* 280 NW2d 129.

6 Obviously, other remedies may also apply, such as an interdict (injunction) to provide urgent interim relief, or the *actio de pauperie* with which damages is claimed for harm caused by animals.

because the defendant wrongly advertised in a local newspaper that the plaintiff, a famous singer, would appear at the defendant's theatre. While the claim failed because the plaintiff did not succeed in proving *animus iniuriandi* or actual damage, it is significant that neither the court nor counsel for the defendant questioned the basis for the claim, namely the unauthorised publication of the plaintiff's name. Judge Watermeyer expressly stated that the plaintiff would probably have succeeded had he, from a factual point of view, followed a different approach and satisfied the burden of proof.⁸

In *O'Keefe v Argus Printing and Publishing Co Ltd*⁹ the matter was again put under the microscope. In this case the plaintiff succeeded with a claim where the respondent, without the plaintiff's consent, had used a photograph of the plaintiff aiming a pistol in an advertisement for an arms dealer.

Judge Watermeyer, with whom judge president De Villiers concurred, held that publication of a person's photograph and name for the purposes of advertising, constituted a violation of that person's identity and consequently the person's dignity so that it could found an action with the *actio iniuriarum*. Of particular interest in this case is that the respondent, *inter alia*, opposed the claim on the basis that in the case of infringement of dignity, a party could only succeed with a claim if there was also an insult. Judge Watermeyer considered this argument and concluded that insult or derision is not a requirement to found liability for injury to dignity with the *actio iniuriarum*. This judgment was a true beacon in the development of the right to identity, but has nevertheless received little attention in the years since.

The matter was apparently again raised in *Kidson and others v SA Associated Newspapers Ltd*,¹⁰ where a photo of three nurses appeared next to a newspaper article of which the headline and introductory text stated that lonely nurses were looking for boyfriends to provide (probably more than) company. Here the court held on to the requirement of insult, with the result that the plaintiffs, with the exception of one who was married, failed with their claims.

It would take more than half a century before the pioneering work in *O'Keefe*¹¹ was taken further. In *Grütter v Lombard*¹² the Supreme Court of Appeal at last got the opportunity to further investigate the rights of the individual with regard to the commercial exploitation of his or her image. The appellant and respondents practised as attorneys on common premises under the name "Grütter and Lombard". In 2005 the appellant terminated his ties with the respondents and went into partnership with another attorney under the name "Grütter and Grobbelaar". The respondents nevertheless continued to practise under the name "Grütter and Lombard". The appellant demanded that the respondents cease the use of the name "Grütter" in the description of their practise, but they refused. The court *a quo* dismissed the application and that gave the Supreme Court of Appeal the opportunity to consider the matter.

It is significant that the appellant did not claim any exclusive right to use the name "Grütter", nor did he allege that the respondents made themselves guilty of passing off. The appellant merely made the case that it was well-known that he was one of the persons to whom the name "Grütter and Lombard" referred and that he no longer wished to be associated with the firm now that his relationship with them has ceased. In a unanimous judgment, judge Nugent referred with apparent approval to the judgment in *O'Keefe*¹³ and concluded that that case rested on violation of the right to privacy. This is, however, a loose interpretation of the judgment in *O'Keefe*¹⁴ and judge Watermeyer only once mentioned the right to privacy in relation to the unauthorised use of a person's image and only when he discussed the position in the United States of America. Judge Nugent nonetheless held that privacy is merely one of a variety of interests that enjoy recognition in the concept of personality rights in the context of the *actio iniuriarum*. The interest which a person has to protect his or her identity against exploitation cannot be distinguished therefrom and is similarly encompassed by that variety of personality rights which is worthy of protection.

Judge Nugent further referred to Neethling¹⁵ who explains that

[i]dentity is that uniqueness which identifies each person as a particular individual and as such distinguishes him from others. Identity manifests itself in various *indicia* by which the person involved can be recognised: that is, facets of his personality which are distinctive or peculiar to him, such as his life history, his character, his name, his creditworthiness, his voice, his handwriting, his outward shape, etcetera. A person has a definitive interest that the unique nature of his being and conduct must be respected by outsiders. Similarly, identity is infringed upon if *indicia* thereof is used without consent in a way which is not compatible with the image of the right holder.

On the basis of these principles, judge Nugent ruled that the appellant was entitled to insist that there should be no potential for error and ordered the respondents to desist from using the name 'Grütter' and rectify the matter within a period of 30 days.

It is clear from the apparent approval of the text by Neethling¹⁶ that the court defined the right to identity in rather broad terms so that more than just the name or outward appearance of the individual is considered worthy of protection. The court confirms this conclusion when judge Nugent indicates that the principles applicable to the exploitation of the individual's outward appearance, applies equally to other aspects of the individual's personality. It is now clear that the identity, as personality right, encompasses that variety of personality traits, both congenital and acquired, which identifies a person as an individual and distinguishes him or her from others.¹⁷ This is important, because not only are aspects of identity such as handwriting, autograph and life history protected, but it would also mean that Reginald Dwight is protected to the same extent as Elton John, or that Sacha Baron Cohen is protected to the same extent as Borat Sagdiyev.

Neethling¹⁸ is apparently of the opinion that the right to identity is only infringed if the attributes of a person is used without consent in a way which cannot be reconciled with the actual image of the individual concerned. To succeed with a claim where the attributes of a person are used without permission, it is therefore a requirement that the person concerned should indicate that there was some misrepresentation of his or her personality. In this regard, it may be sufficient if the unauthorised use of a person's attributes could create the impression that the person concerned consented to such use of has been compensated for such use.

This approach is also followed on the one hand in *Grütter*,¹⁹ but on the other hand there is also a second seminal principle intertwined in the judgment of judge Nugent. This is namely the unjustified use of an individual's image for commercial gain. Judge Nugent indicated that the interest of a person to protect his or her image from commercial exploitation cannot qualitatively be distinguished from and is equally encompassed by the variety of personality rights which are protected under the concept of dignity.²⁰ He further indicated that *in casu* there was no justification for the respondents to use the appellant's name for their own commercial benefit.²¹ This apparently coincides with the opinion of judge Watermeyer in *O'Keefe*,²² in terms of

7 1931 CPD 61.

8 He mentions at 69 "The reason why he thought the plaintiff was to blame was because a false explanation of his failure to appear was given by the defendants, and if damages had been claimed for the publication of that explanation, then plaintiff might have succeeded, but that is not the form of action which has been chosen."

9 1954 3 SA 244 (C).

10 1957 3 SA 461 (W).

11 n 9 above.

12 2007 4 SA 89 (SCA).

13 n 9 above.

14 n 9 above.

15 Neethling *Persoonlikheidsreg* (1998) 44 *et seq.*

16 (n 15) 44 *ev.*

17 Neethling "Die Hoogste Hof van Appèl verleen erkenning aan die reg op identiteit as persoonlikheids- en fundamentele reg" 2007 *TSAR* 834.

18 Neethling (n 15) 308 *ev.*

19 n 12 above.

20 95D. "The interest that a person has in preserving his or her identity against unauthorised exploitation seems to me to be qualitatively indistinguishable and equally encompassed by that protectable 'variety of personal rights'."

21 96B. "... I can see no such considerations that justify the unauthorised use by the respondents of Grütter's name for their own commercial advantage."

22 n 9 above.

which the mere unauthorised publication of a person's photograph and name for purposes of advertising, *prima facie* amounts to violation of that person's right to identity.

It is further significant that judge Nugent apparently agreed with McQuoid-Mason²³ who opines that the unauthorised use of an individual's image amounts to violation of the person's right to determine who should have access to his or her likeness or image and that lies at the base of individual self-determination and privacy. This reference is also significant, since McQuoid-Mason in the quoted section,²⁴ distinguishes expressly between false light publication where non-defamatory but untrue information relating to a person is disseminated, and *appropriation*, where someone's identity is used without consent.

The reference to McQuoid-Mason²⁵ also draws attention to another ground on which the distinction between false light publicity and appropriation can be viewed as separate ways in which the right to identity can be violated. The court touched almost coincidentally on the Constitutional principles which underly the right to identity.²⁶

Section 8 (2) of the Constitution²⁷ provides that

[a] provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

As a result, the fundamental rights in the Constitution can also in appropriate cases be applied in private disputes between individuals. Since the right to identity is recognised under the concept of dignity, it ties in with section 10 of the Constitution which provides that

[e]veryone has inherent dignity and the right to have their dignity respected and protected.

But it seems that neither the court nor counsel in the case saw the unauthorised use of a person's image in relation with section 18 of the Constitution which provides that

[e]veryone has the right to freedom of association.

This right is of seminal importance as far as commercial exploitation of the individual's image is concerned and lies at the heart of individual self-determination. Every person is free to decide with whom or with what he or she can be related. This in itself means that the mere commercial use of a person's attributes without his or her consent, invariably associates the person concerned with someone or something and amounts to infringement of his or her right to freedom of association, which is consequently *prima facie* unlawful.

Neethling²⁸ also explains in this regard that

the so-called "appropriation"-cases of the American law are mentioned here. Here the typical case of appropriation of personality for commercial purposes entails the improper appropriation of a person's name or image for advertising purposes. Consequently, in *O'Keeffe v Argus Printing and Publishing Co Ltd*, where a lady's photo was used without her permission in an advertisement for guns, pistols and ammunition, we are primarily confronted with a case of "appropriation" and consequently with violation of identity rights.

Appropriation is however not limited to improper use of personality for purposes of advertising. Aspects of personality, such as the name or likeness can also be used without authorisation on the merchandise itself, such as the image of a public figure or the names of famous sports people on the board for a game on golf.

This second principle is of seminal importance. If too much is made of the requirement that unauthorised use of an individual's image is only actionable if there is some false impression created concerning the plaintiff, it would mean that South African law with regard to the unauthorised use of the individual's image, runs the risk of heading for the same trap that English law found itself in after the *Elvisly Yours* case.²⁹ In that case the court ruled that the unauthorised use of Elvis Presley's name and image was not unlawful since it would not create confusion amongst the public. Consumers purchased the curios sim-

ply because it contained the image of Elvis Presley and not because it came from a particular source or because they believed that Elvis, wherever he may be, endorsed the particular products. In other words, as long as the defendant can show that no false impression was created, the plaintiff will not succeed with a claim based on unauthorised use of his or her image. Consequently it would be simple to use the image of any famous person for commercial gain by merely including a *caveat* which denies any tie with the person depicted. This would be the position despite the extent of any advantage which the respondent may gain parasitically on the back of the plaintiff through the unauthorised use of his or her image.

It seems, however, as if this anomaly can be avoided in South African law since the authorities seem to indicate a twofold approach which does not necessarily have to coincide. This would then mean that the right to identity can in this context be violated in one of two ways.

Firstly, a person's right to identity is violated in the attributes of that person is used without permission in a way which cannot be reconciled with the true image of that person, similar to the false light publicity tort in the American law.³⁰ Apart from the unauthorised use of a person's image, this kind of infringement also entails some kind of misrepresentation concerning the individual, such as that the individual approves or endorses a particular product or service or that an attorney is a partner in a firm, while this is not the case. The unlawfulness in this kind of case is found in the misrepresentation concerning the individual and, consequently in violation of the right to human dignity.

Secondly, the right to identity is violated if the attributes of a person is used without authorisation by another person for commercial gain, similar to the commercial appropriation tort in American law.³¹ Apart from the unauthorised use of the individual's image, such use also primarily entails a commercial motive which is exclusively aimed at promoting a service or product or to solicit clients or customers. The mere fact that the user may benefit or profit from any product or service in respect of which the individual's attributes have incidentally been used, is not in itself sufficient. This violation of the right to identity therefore also entails unauthorised use of the individual's attributes with a commercial purpose, whether it is done by means of advertisement or the manufacture and distribution of merchandise covered with the attributes of the individual. The unlawfulness in this case is mainly found in infringement of the right to freedom of association and commercial exploitation of the individual.

And if the *Martin Luther King Jr* case³² is compared with the *Elvisly Yours* case,³³ it is clear that an approach which is closer to the American model can provide a greater measure of protection than an approach closer to the English model can offer and the former should therefore be preferred.

The English court ruled in *Elvisly Yours v Elvis Presley Enterprises*³⁴ that the unauthorised use of Elvis Presley's name and image is not unlawful since it would not cause confusion amongst the public. There are two requirements that must be met before a party can succeed with a claim. Firstly, at the time when the conduct complained

23 "Privacy" in Chaskalson *et al* *Constitutional Law of South Africa* (1999) 38 - 9.

24 n 23 above.

25 n 23 above.

26 95D.

27 Constitution of the Republic of South Africa 1996.

28 (n 15) 313.

29 1997 RPC 543.

30 In *Allison v Vintage Sports Plaques* 136 F3d 1443 justice Kravitch in the *Eleventh Circuit* summarised the American common law position succinctly. He explained that in Alabama, as in various other jurisdictions in the United States, the right to the use of a person's image is protected under the *tort of invasion of*

privacy. This tort can be committed in any one of four ways. Firstly privacy is violated through entry on the plaintiff's physical and intimate secludedness, secondly through publication in conflict with generally accepted values of decency, thirdly through publication which places the plaintiff in a false light and fourthly through unauthorised use of the plaintiff's image for commercial gain. The third category is also known as the tort of false light publicity, while the fourth category is also known as the tort of commercial appropriation.

31 See n 30 above.

32 296 SE2d 697.

33 n 29.

34 1997 RPC 543.

of took place, the plaintiff should already have acquired some measure of fame. And secondly, the conduct complained of must be of such a nature that it would create an impression with a significant portion of the proposed market that the plaintiff endorses, recommends or approves the product of the defendant. It is particularly this second requirement which is problematic in the majority of cases. Consumers purchase the curios simply because it contains the image of Elvis Presley and not because it comes from a particular source or because they believe that Elvis, wherever he may be, endorses the particular products. The second requirement is therefore not satisfied.

On the other hand, the court in Georgia held in *Martin Luther King Jr Center for Social Change Inc v American Heritage Products Inc*³⁵ that unauthorised production and sale of stauettes resembling Martin Luther King was per se unlawful, without the need to show that members of the public will be confused as to the source or endorsement of the product.

There is however one important question relating to the right to identity which is not considered in the *Grütter* case,³⁶ and that relates to the question whether the individual, apart from the personality right, also has a patrimonial interest in his or her identity which is worthy of protection.

This apparent *lacuna* in the *Grütter* case³⁷ should not pose any difficulty at all. Even in common law³⁸ it was already accepted that violation of personality rights can also lead to patrimonial loss and there is sufficient authority which indicates that damages can be awarded in such circumstances to an individual whose personality rights have been violated.³⁹ Although the courts are not unanimous as to the appropriate remedy which should be used in this regard, Neethling⁴⁰ correctly indicates

with the *actio iniuriarum* satisfaction (*solatium*) is claimed for infringement of personality. This is to some extent still an *actio vindictam spirans* and as such not an action aimed at recovery of damages. In the case of patrimonial loss the *actio legis Aquiliae* must be instituted. This also applies to patrimonial loss cause by an *iniuria*. ... It must however be kept in mind that although these two actions are distinct in theory, in practise damages and satisfaction is claimed in a single process and that the two actions are hardly ever mentioned by name any more.⁴¹

This holds important consequences with regard to the right to identity. As personality right, the right to identity attaches to the individual and cannot devolve or be traded. Where the personality right to identity is infringed upon, the *actio iniuriarum* can before *litis contestatio* neither be inherited, whether actively or passively, nor can it be ceded.

As patrimonial right, the right to identity is distinct from the individual and forms an incorporeal asset in the estate of the individual. It can be inherited and the individual can trade the right. Where the patrimonial right to identity is infringed upon, the *actio legis Aquiliae* can even prior to *litis contestatio* devolve or be transferred.

35 296 SE2d 697.

36 n 12 above.

37 n 12 above.

38 *Digest of Justinian* 9.2.5.1 and Voet *Commentarius ad Pandectas* 47.10.18.

39 *Fichard Ltd v The Friend Newspapers Ltd* 1916 AD 1; *Bredell v Pienaar* 1924 CPD 203 en *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A).

40 (n 15) 84.

41 Own translation. The original text reads "[m]et die *actio iniuriarum* word genoegdoening (*solatium*) op grond van persoonlikheidskrenking verhaal. Dit is in 'n mate steeds 'n *actio vindictam spirans* en as sodanig nie 'n aksie gerig op die verhaal van skadevergoeding nie. In die geval van vermoenskade moet die *actio legis Aquiliae* ingestel word. Dit geld ook ten opsigte van vermoenskade wat deur 'n *iniuria* meegebring word. ... [Daar] moet nietemin goed voor oë

gehou word dat alhoewel hierdie twee aksies in teorie geskei is, in die praktyk skadevergoeding en genoegdoening in een [proses] verhaal word en dat die twee aksies omtrent nie meer by name genoem word nie."

42 n 12 hierbo.

43 (n 15) 314 *et seq.*

44 (n 15) 315.

45 Neethling, Potgieter en Visser *Deliktereg* (2006) 89.

46 (n 45) 313.

47 (n 45) 315.

48 (n 45) 317.

49 (n 15) 315.

50 2007 4 SA 89 (SCA).

51 Neethling (n 17) 834.

52 n 9 above.

53 n 12 above.

54 n 12 above.

55 n 9 above.

There is a further problem which is only touched upon as an aside in the *Grütter* case.⁴² Judge Nugent makes it clear that the right to identity is not absolute, but does not discuss this aspect of the right to identity any further.

However, it goes without saying that the use of a person's attributes must be unlawful before a plaintiff will succeed with any delictual claim. In other cases where satisfaction or damages were claimed due to infringement of dignity, the courts have already recognised certain grounds of justification which would mean that the apparent violation of personality rights would indeed be lawful.

Neethling⁴³ is of the opinion that only consent and privilege should justify infringement on the right to identity. This viewpoint only focuses on false light publicity violation of the right to identity. Such an approach does not appropriately limit the commercial exploitation of the right to identity.

With any action due to infringement of a subjective right, a variety of conflicting interests must be weighed against each other. With the use of a person's image, the rights to identity, human dignity and freedom of association of the individual must often be weighed against the user's right to freedom of expression.

Although Neethling⁴⁴ also correctly states that public policy can justify an apparent violation of the right to identity, it would in my opinion also make sense to consider the other grounds on which infringement of dignity can be justified. These grounds include consent,⁴⁵ truth and public interest,⁴⁶ fair comment⁴⁷ and jest.⁴⁸

Consent as justification for the use of a person's image is self-explanatory, not only because of the rule *volento non fit iniuria*, but also because the controversy surrounding the use of a person's image mainly centres around the unlawful use of the individual's attributes.

The other grounds of justification, to wit truth and public interest, fair comment and jest remind one of the grounds of justification such as *incidental use* or *public interest news reporting* and *parody* that are recognised elsewhere in the world in respect of apparent infringement on the right to identity. In addition Neethling⁴⁹ also indicates correctly that the public interest in art can in appropriate cases justify the use of a person's image.

The significance of the judgment in *Grütter v Lombard*⁵⁰ in the context of the commercial exploitation of an individual's attributes cannot be over-emphasised. It confirms without a doubt that the right to identity is recognised as distinct personality right which is worthy of protection within the concept of dignity.⁵¹

Because of the South African approach derived from a common law based on general principles, the law as laid down and contemplated in *O'Keeffe*⁵² and *Grütter*⁵³ is more advanced than similar principles in other legal systems.

Firstly, the South African approach avoids the casuistic nature of English law, where the right to identity cannot be definitively recognised because it does not fit into any of the existing torts, with the result that use of a person's image can only be dealt with by indirect means in limited cases. By contrast, the law on this point in South Africa is open and receptive to change so that current developments in commerce can be accommodated.

Secondly, the approach in *O'Keeffe*⁵⁴ and *Grütter*,⁵⁵ which protects the right to identity under the general dignity concept, is jurisprudentially more sound than the common law approach in the United States of America, which views the unauthorised use of a person's image as violation of the right to privacy. In most cases where the use of someone's image without consent in the United States of America leads to litigation, there is no talk of any intrusion into or familiarisation with personal facts about the person concerned. It is after all the public image of the individual which is exploited and not the privacy which is violated.

Thirdly, the South African approach provides more scope for protection. On the one hand the South African law avoids discrimination based on fame or the lack thereof. On the other hand, it seems as if South African law now recognises a variety of attributes that are worthy of protection, in contrast to statutory provisions which, by definition, can only protect specifically listed attributes.

4. Conclusion

The positive law in South Africa relating to the commercial exploitation of the individual's public image can, in conclusion be summarised as follows:

It is now trite that everyone has a right to identity. For these purposes, identity includes the collection of unique congenital and acquired attributes which are unique to the individual and distinguishes the individual from others.

When the attributes of a person is used without consent for commercial gain, the right to identity can be violated in one of two ways. Firstly, a person's right to identity can be infringed upon if the attributes of that person is used without permission in a way which cannot be reconciled with the true image of the individual concerned. Secondly, the right to identity is violated if the attributes of a person is used without consent by another person for commercial gain.

Where the right to identity is violated, a personality right is infringed upon, to wit the right to dignity and satisfaction can be

claimed by means of the *actio iniuriarum* from the wrongdoer. Violation of the right to identity can also result in patrimonial loss, in which case damages can be claimed with the *actio legis Aquiliae*.

The user can, in certain appropriate cases justify the unauthorised use of a particular person's attributes on the basis of public interest if such use takes place mainly in connection with public interest reporting, jest or art.

Although the authorities in South-Africa relating to the right to identity do not distinguish between the famous and the not-so-famous, a person's fame or lack of fame will in all likelihood probably play a part in calculating the amount of satisfaction or damages that will be awarded to an injured party.

What is clear though, is that the law in South Africa, because of the flexibility of a common law approach based on general principles, probably leads the way when it comes to protection of an individual against commercial exploitation of his or her attributes.

The International Sports Law Journal

Ambush Marketing: Criminal Offence or Free Enterprise?

by Luisa Leone*

1. Introduction

Sport sponsorship is big business. Major sporting events attract large sponsorship fees and, as a result, a high risk of ambush marketing. The term 'ambush marketing' is an expression invented by its critics, hence the pejorative label for what in many cases is a form of marketing activity which simply refers or alludes to an event, without suggesting any form of official endorsement from or relationship with the event organisers. Other forms of marketing activity might indeed go further and aim to imply some form of association with the event (without making any clear misrepresentations or involving any infringement of another's intellectual property rights). But are all these forms of ambush marketing bad, as the term 'ambush marketing' seems to suggest? From the perspective of the event owners ambush marketing is wrong because it threatens their ability to retain top-paying sponsors. Similarly, for the official sponsors ambush marketing is undesirable because it increases the risk to their investment. For the ambusher, on the other hand, ambush marketing is an important commercial tool and a natural result of free competition.

Outside the sporting context, ambush marketing or simultaneous marketing campaigns are perfectly legitimate marketing activities, regarded as part of the cut and thrust of normal commerce. Take in-store promotions: manufacturers will pay large sums to secure some form of exclusivity in-store only to find this exclusivity undermined by a rival. No one would suggest that such 'ambushes' should be banned. Even within the sporting context, we find that ambush marketing has had some respectable supporters over the years. Major brand-owning companies such as PepsiCO, Nike, Fuji, Kodak, Wendy's and Qantas have all engaged in it. Many companies who opposed ambush marketing for events which they officially sponsored have engaged in the practice themselves at other events.

In recent years, however, there has been a trend towards outlawing ambush marketing. I would argue that this trend benefits neither sport nor the wider economy. Of course, no one would dispute that any marketing campaign which misleadingly suggests that the company behind the campaign is an official sponsor of an event should be

unlawful, as should any marketing campaign which fails to respect another company's intellectual property rights, or is libelous or in breach of contract. But the opponents of ambush marketing are not content with such legal safeguards, which are already available to them. What the anti-ambush marketing lobby want is to ban all marketing which refers or alludes to the event in question, even if it does not suggest any form of official sponsorship or privileged relationship.

2. Some well-known examples of ambush marketing

Before considering the arguments for and against ambush marketing in greater depth, it is worth recalling a few well-known examples of ambush marketing.

- The American Express advertising campaign in the Visa-sponsored 1994 Lillehammer Winter Olympics, featured the slogan "If you are travelling to Lillehammer, you will need a passport, but you don't need a visa!"
- At a press conference before the men's 100 metres final at the 1996 Olympics Games, Linford Christie, the defending champion, arrived wearing the unforgettable electric blue contact lenses with a white Puma logo in the centre of each lens. Reebok was the official sponsor, but Linford Christie got more coverage that day than any of the medal winners.

It is not always easy to identify an ambush marketing activity. The European Sponsorship Association has highlighted the following as examples of activities where the position is not so clear:

- sponsoring media coverage of the event, without being an event sponsor;
- a team sponsor issuing branded messages of support for their team when the team is taking part in an event where the team sponsor is not the event sponsor;
- running generic football themed campaigns during the period of a major international football tournament (for example, the notable case of Lufthansa painting footballs on its aircraft during the 2006 World Cup).

The last three examples show how difficult it is to set limits once sweeping rights are granted to sponsors.

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3. Legislative trends

Governments began to outlaw virtually all forms of ambush marketing for certain large sporting events at about the start of this decade. This trend was started by Australia when it sought to protect the Sydney 2000 Olympic Games, followed by South Africa in relation to the 2003 Cricket World Cup, the UK in relation to the London 2012 Olympic Games, and, more recently, New Zealand which last year introduced legislation aimed at protecting any major event. Broadly speaking, their approach is to prohibit any form of advertisement which is likely to suggest an association between the ambusher and the event. The nature of the association suggested is open and very wide. There is no need for the association to have engendered any confusion in the mind of the public that the business has sponsored or is somehow officially connected with the event in question. The result of such a broadly worded prohibition is that any reference to the event is likely to fall foul of the law.

Furthermore, such legislation frequently gives government ministers the power to declare that key words will be protected. For example, Canadian legislation covering the 2010 Winter Olympic Games in Vancouver will severely restrict people from using generic expressions such as “winter”, “Vancouver”, “2010” and “games”. The London Olympic Games and Paralympic Games Act 2006 contains similar provisions to protect individual words such as “gold”, “London”, “summer”, “games” and “2012”. Moreover, the Secretary of State can add to the list by order. Seemingly innocuous phrases such as “Watch the Games here this summer” and “Come to London in 2012” have become unacceptable. Indeed, the legislation is so wide that the use of “The London Olympics 2012” as a subtitle to showcase my firm’s expertise might break the law. Such tight restrictions will mean that many businesses will be unable to benefit commercially from the Games.

Supporters of this kind of legislation argue that it is necessary to protect official sponsors, without whose funding the taxpayer would be more heavily exposed; but this claim is difficult to sustain when the actual contribution of the official sponsors towards the overall cost of staging major events is taken into account. For example, of the total budget for hosting the London 2012 Games (£9.3 billion at the time of writing), only about 10% is coming from corporate sponsors: the remaining 90% is coming from other sources, foremost among them the British taxpayer, especially Londoners, who are subject to a special levy. As the Institute of Practitioners in Advertising has pointed out, “local businesses in particular will be paying for these events but will be deprived of benefiting from them because they will basically have to pretend that they are not happening”.

Not content with outlawing ambush marketing, moreover, some governments have proceeded to criminalise it. South Africa was the first to make ambush marketing a criminal offence when it introduced anti-ambush marketing legislation for the 2003 Cricket World Cup. It has done so again in relation to the 2010 World Cup. New Zealand has followed suit with the recently enacted Major Events Management Act 2007. Although this new law was created with the 2011 Rugby World Cup in mind, it is not specific to that event. Unlike other jurisdictions, New Zealand has chosen to deploy ‘umbrella’ legislation that can be triggered by the Economic Development Minister in relation to any ‘major event’.

Is ambush marketing really the sort of activity that should be viewed as criminal? I do not believe so, particularly as these laws are not confined to specific instances of ambush marketing but have broad application subject to police and prosecutor discretion. There is also a broader statement of principle to be made in this regard. Laws such as these, which vest broad discretion in the officials applying them, open the way to abuse. The very flexible definition of ambush marketing which these laws have adopted will make it difficult for observers to ascertain whether or not their provisions have been applied reasonably and proportionately. Moreover, even if officials do not abuse their broad discretion, businesses will still have to deal with the uncertainties associated with their implementation, making litigation more likely.

4. Key questions

My arguments against a ban on ambush marketing consist in answering five key questions.

I. Does a ban on ambush marketing benefit sport?

Ambush marketing is often launched by businesses connected with sport, for example sponsors of sport federations, teams or individual athletes. Their interests inevitably conflict with those of businesses which sponsor the event itself and yet they are no less important to the prosperity of sport as a whole. Banning the marketing activities of such non-official stakeholders would adversely affect their sponsorship spend and is not therefore a strategy likely to commend itself to athletes or sports organisations.

II. Does a ban on ambush marketing benefit the economy?

This is an even more difficult proposition to support. In every other sector of the economy ambush marketing is an accepted practice which promotes competition. Banning it would constitute a major restraint of trade and, by benefiting a few major companies at the expense of many others, could well be anti-competitive. The fact is that major sporting events typically give rise to a multitude of business opportunities across the wider economy. A ban on ambush marketing would stifle the financial rewards associated with these opportunities. Moreover, it seems wrong to give a few major brands the sole right to refer, or even allude, to a sporting event at the expense of the wider economy, particularly when taxpayers’ money is also being used to stage the event. And yet this is the practical effect of most anti-ambush marketing laws.

III. How far can you go in limiting ambush marketing?

Ambush marketing takes many forms. I have already mentioned a few examples, such as sponsoring participating athletes or teams rather than the event, sponsoring television broadcasts of the event and painting footballs on airplanes during a major football tournament. I could add numerous others which one might not normally associate with ambush marketing but which have nevertheless been targeted by anti-ambush laws. Examples specific to the UK include the following:

- the novelist Robert Ronson was threatened with legal action by the London Organising Committee of the Olympic Games for publishing a novel entitled “The Donovan Twins: Olympic Mind Games”;
- a school or university deciding to hold an event to be called ‘Summer Games’ could well be acting illegally;
- according to the same London Organising Committee, a pub putting a chalkboard outside stating “watch the 2012 Games here” is breaking the law if the name of the pub is on the board. The same view is taken towards hotels or restaurants offering Olympic deals.

These examples show how difficult it is to draw the line between conduct that associates a business with the event and conduct that also suggests sponsorship or provision of other support. They also serve to illustrate the point that attempts to ban all forms of ambush marketing would limit not only commercial freedom but also freedom of expression, all for the benefit of a small number of major brands. The London Organising Committee of the Olympic Games has sought to reassure the public that it will aim to apply the law in a reasonable and proportionate manner. The London Organising Committee might indeed behave this way; but this still leaves the question whether anyone should be granted the right to govern the use of generic words such as “Olympic” and “summer”.

IV. Is a ban on ambush marketing necessary?

Why do governments consider that major sports events need such draconian protection? After all, many sports events have in recent years been staged without the same protection, for example, the 2006 World Cup in Germany and the 2008 European Cup in Austria and Switzerland, so it is clearly possible to finance and stage a successful major sporting event without commercially restrictive anti-ambush legislation. Governments do come under much pressure from event

controllers, like the IOC and FIFA, to introduce such legislation and one may query whether such actions on the part of event controllers comply with EC competition law. There are also some who might argue that certain major events, such as the Olympic Games, are a special case, but I would suggest that if the Olympics are indeed a special case, which cannot cope with normal competitive pressures such as ambush marketing, then it is not the practice of ambush marketing which needs to be reconsidered but the business model for the Olympic Games.

V. Does existing law adequately protect the legitimate interests of sponsors?

As I have already indicated, official sponsors are by no means defenseless under existing law. They already have intellectual property and unfair competition laws at their disposal. Any emblems or logos developed specifically for an event can be protected, especially by trademark or copyright. Unfair competition laws are available where a company engages in misleading or deceptive advertising. Deceptive advertising can happen where a company, by choosing a specific form or venue for its promotional activities, raises the impression of being the official sponsor of the event when it is not. For example, promoting football boots as official merchandise during the European Cup would be considered a misleading reference to the European Cup and could lead to other manufacturers of football boots taking legal action. But not all references to football would be prohibited under such laws. Consider the example of Lufthansa sporting footballs on its aircraft during the 2006 World Cup.

Sponsors and event organisers can also make use of various non-legal measures with which to combat ambush marketing and protect their investment. These include the following:

- Inserting appropriate contractual provisions into player and ticketing terms and conditions. The terms of participation in an event could preclude athletes from wearing logos or marketing other logos during the event. Ticket terms could state that spectators cannot enter the grounds with any branded goods. In addition, ticket

conditions could state that the ticket is not transferable and may not be used in any PR or promotional competition. However, the official sponsors would be permitted to use tickets in this way and are usually given a ticket allocation for this purpose.

- Acquiring any potential advertising space in and around the relevant venues to prevent use by third parties not associated with the event.
- Coordinating with local government officials to police unofficial merchandise.
- Arranging (as an event organiser) for airtime to be pre-sold to sponsors, but also ensuring that time is not made available to principal competitors.

Ultimately, sponsors' strongest weapon should be that of exploiting their sponsorship with other marketing initiatives such as point of purchase, on-pack signage and production merchandise. In fact, it is by focusing these efforts at the retail level that official sponsors can best exploit their authentic association with the event and thereby ambush the ambushers. A good example of such successful exploitation is General Mills during the 2000 and 2002 Olympic Games.

5. Conclusion

Rather than demanding ever more stringent legislation, sponsors should be expected to counter ambush marketing themselves by pursuing all the commercial opportunities afforded by a particular event. We should bear in mind that sponsors of major sporting events tend to be large transnational corporations well able to look after themselves, with little need for additional protection. Above all, governments should remember the adage that "he who pays the piper calls the tune"; it is one thing for sponsors to demand the exclusive right to exploit a major sporting event for which they have provided all of the funding, but quite another to expect the same degree of exclusivity when, as more often occurs, the bulk of the money is coming from the taxpayer.

The International Sports Law Journal

Price-Fixing between Horizontal Competitors in the English Super League

by Leanne O'Leary*

Introduction

The English Super League rugby league competition is one of few professional team sports in Europe that operates under a salary cap. The Super League salary cap limits the total amount that a club is permitted to spend on player wage payments and is currently set at a maximum limit of £1.6 million.¹ A Super League club is not permitted to spend more than the salary cap on payments to the twenty five registered players that comprise a club's first team squad.² Failure to observe the salary cap rule may result in a club being penalised by way of:³ a warning; a fine; a deduction of up to 20 competition points; a restriction imposed on the club's capacity to register new players;

and/or a recommendation to the Rugby Football League (the sporting code's governing body) that the club be withdrawn from participation in some competitions. Penalties also apply to players and other stakeholders who are subject to the salary cap rules.⁴

A salary cap is a mechanism which fixes the total amount individual clubs are permitted to spend on player wage payments. Frequently, professional sports leagues justify the implementation of such a restraint on the basis that, *inter alia*, it increases uncertainty of outcome and thus promotes competitive balance within a sports competition. Competitive balance within a sports competition purportedly increases spectator demand with a consequential positive effect for competition revenue.

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1 Rugby Football League ("RFL") Operational Rules 2008, section E:3.1. The form and amount of the salary cap has varied since the cap was introduced in 1997. For example, during the 2007 playing season, the salary cap was either:

the upper limit salary cap amount of £1.6 million; or 50% of a club's relevant salary cap income determined by agreement with the salary cap auditor: RFL Operational Rules 2007, section E:1.3. The salary cap regulations also contained a rule which limited to twenty, the number of players earning in excess of £25,000 which a club was permitted to register. The rule (known as the "20:25 rule") has subsequently been revoked.

2 The salary cap regulations provide com-

prehensive details of how to calculate the salary cap value of player wage payments. It lists the types of payments which are included in a salary cap calculation (such as, for example, gross salary, appearance bonuses, win bonuses, image rights payments etc); and the types of payments which are excluded (such as, for example, prize money and international representation bonuses up to a maximum of £5,000): RFL Operational Rules 2008, section E:5.

3 RFL Operational Rules 2008, section E:9.

4 RFL Operational Rules 2008, section E:9:1:6. The salary cap regulations are of broad application and apply to any of the Super League clubs, Super League club officials, players, licensed agents and any other party participating in any capacity in any competition events organised by the RFL, whether or not that person is a citizen of or resident in the United Kingdom: section E:1:4.

However, a salary cap also distorts competition between clubs on the market for playing services. Whilst employment contracts are individually negotiated, a club and player must negotiate the salary amount within the parameters of the salary cap regulations. Some rugby league players are represented by the Rugby League Players Association (“the union”) but the union is not involved with determining the content of the salary cap regulations.

This article contemplates the application of European competition law, - specifically Article 81 - to the Super League salary cap. It asserts: that the Super League clubs are engaged in price-fixing which restricts, distorts or prevents competition between the clubs in the market for rugby league playing services; that the salary cap fails to satisfy the test laid down by the European Court of Justice in *Meca-Medina*⁵; and accordingly breaches European competition law. The article also summarises the views of twenty seven industry stakeholders concerning the effects of the salary cap.⁶

The English Super League

The English Super League comprises of twelve professional rugby league clubs, eleven of which are located in England and one club located in Perpignan, France.⁷ The competition is organised under the umbrella of Super League (Europe) Limited (“SLE”). Each Super League club and the RFL hold a single share in SLE. The Articles of Association for SLE prescribe the decision-making process by which the salary cap regulations are promulgated. Amendments to the salary cap require the consent of the Super League clubs and the RFL. The RFL is responsible for enforcing the salary cap regulations.

Article 81

Article 81 prohibits co operation between independent undertakings which prevents, restricts or distorts competition in the single European market.⁸ Any agreement, decision or concerted practice which, prima facie, falls within the scope of Article 81 is prohibited and thus void,⁹ unless it is: a proportionate means of achieving a legitimate aim;¹⁰ has no appreciable effect on competition or inter-state trade (the “de minimus doctrine”);¹¹ or is justified under Article 81(3).¹² Additionally, a person, who suffers damage as a result of actions which infringe Article 81, can challenge the anti-competitive arrangement in the national court of a Member State.¹³

Article 81 is concerned with identifying collusion between economic entities irrespective of the form the collusion takes.¹⁴ Thus, the terms “agreement”, “decision” and “concerted practice” have been interpreted broadly so as to encompass a wide spectrum of collusive arrangements.¹⁵

It is also a well-established principle that an “undertaking” ‘encompasses every entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed’.¹⁶ Thus, the con-

cept of an undertaking is separate from the issue of an entity’s legal personality.¹⁷ In the context of professional sport, it has been determined that a football club engaged in economic activity is an undertaking.¹⁸ So too is a national or international sporting code’s governing body provided it is engaged in an economic activity.¹⁹

Each Super League club falls within the definition of an undertaking. The RFL also falls within the definition of an undertaking since it organises and administers the Challenge Cup competition in which all professional rugby league clubs participate (including the Super League clubs) and from which it derives income. The RFL is also a member of SLE. Whilst it does not share in SLE revenue, it is involved in the SLE decision-making processes, and it provides management services to SLE for which it receives a management fee.

SLE engages in economic activity associated with the organisation and administration of the Super League competition. It is responsible for the sale of television broadcast rights for the Super League competition; and arranging central sponsorship contracts. It also derives revenue from ticket sales for the Super League play-offs and grand final. All revenue (after deduction for the cost of the business’ administration) is distributed to the clubs. The economic activity which SLE engages in means the company falls within the definition of “an undertaking”. It may also be an association of undertakings since the clubs and the RFL form the SLE membership. The RFL and the clubs individually fall within the definition of ‘undertaking’. The salary cap regulations, thus, form an agreement between undertakings and/or a decision of an association of undertakings.

It could be argued that SLE, the RFL and the clubs comprise a single economic entity. In certain circumstances two or more undertakings may be treated as a single undertaking if the undertakings are closely related economically.²⁰ The essential issue is whether parties to an agreement engage in decision-making processes independent of each other, or whether one party exercises control over the affairs of the other such that the latter does not enjoy ‘real autonomy’ when determining its course of action on the market.²¹ The benefit of concluding that a group of undertakings forms a single economic entity is that relations within that entity can not amount to an agreement or concerted practice between undertakings for the purposes of Article 81.²²

The European Court of Justice has yet to consider the application of the doctrine to the organisation of European professional sport. However, in the United States of America - where a similar doctrine applies for the purposes of anti-trust law²³ - the issue has received judicial consideration. In the majority of cases the Courts have rejected the notion that a professional sports league is a single economic entity and thus exempt from s 1 of the Sherman Act 1890.²⁴ The Courts have determined that the teams participating in the league are separate and distinct entities, and do not form a single economic unit.

The conclusion has been criticised by some academics for failing to

5 Case C - 519/04 *Meca - Medina and Majcen v Commission* [2006] 5 CMLR 18.

6 The stakeholders interviewed included: the executives from ten Super League clubs; the Rugby Football League; ten professional rugby league players aged between 21 and 30; the Rugby League Players’ Association; two professional Super League coaches; and three professional sports agents. Interviews were conducted during the 2007 playing season.

7 Those clubs currently participating in the Super League are: Bradford Bulls (Bradford, England); Leeds Rhinos (Leeds, England); Wakefield Trinity Wildcats (Wakefield, England); Castleford Tigers (Castleford, England); Catalans Dragons (Perpignan, France); Hull FC (Hull, England); Hull KR (Hull, England); Wigan Warriors (Wigan, England); St Helens (St Helens, England); Harlequins RL (London, England); Warrington Wolves (Warrington, England); and Huddersfield

Giants (Huddersfield, England). From 2009 the number of clubs participating in Super League will increase to fourteen with the addition of Celtic Crusaders (Bridgend, Wales) and Salford City Reds (Manchester, England).

8 For a discussion of the objectives of European competition law generally see Paul Craig and Grainne de Burca, *EU Law Text, Cases and Materials* (4ed, 2008 Oxford University Press, Oxford) 950 - 952.

9 Article 81(2).

10 *Supra* (n 6).

11 See Commission Notice (EC) 2001/C 368/07 on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (de minimus) [2001] OJ C368/13; and Commission Notice (EC) 2004/C 101/07 Guidelines on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty OJ C101/81.

12 See Commission Notice (EC) 2004/C 101/08 Guidelines on the Application of Article 81(3) of the Treaty OJ C101/97.

13 Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297; Cases C-295-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

14 Case 49/92 *P Commission v Anic Partecipazioni* [1999] ECR I-4125.

15 For a detailed discussion of each term and how it has been interpreted in European law see Bellamy and Child, *European Community Law of Competition* (6ed, 2008 Oxford University Press, Oxford) 107 - 138.

16 Case C-41/90 *Hofner and Elser v Macroton GmbH* [1991] ECR I-1979.

17 *Polypropylene* [1986] OJ L230/1.

18 Case T-193/02 *Piau v Commission* [2005] ECR II-209.

19 *Distribution of Package Tours During the 1990 World Cup* OJ [1992] L326/31; *Piau v Commission*, *supra* (n 19) in which the Court of First Instance concluded that an

association - such as, for example, the Federation Internationale de Football Association (“FIFA”) - which groups clubs together is “an association of undertakings” for the purposes of Article 81: *ibid*, para 69. In *Meca-Medina and Majcen v Commission*, *supra* (n 6), the European Court of Justice confirmed that for the purposes of Article 81: the International Olympic Committee was an undertaking and ‘within the Olympic Movement, an association of international and national associations of undertakings’: *ibid*, para 38.

20 Case C-73/95 *P Vibo Europe BV v Commission* [1996] ECR I-5457.

21 Richard Whish, *Competition Law* (5ed, 2003 LexisNexis, London) 88.

22 Case C-73/95 *Vibo Europe BV v Commission* [1996] ECR I-5457.

23 See *Copperweld Corp v Independence Tube Corp* 467 US 752, 104 S Ct 2731, 81 L.Ed.2d 628 (1984).

appreciate the economic reality of the professional sports environment.²⁵ Individual clubs participating in a professional sports league must co operate to produce the sports entertainment product (which competes on a larger entertainment market with other products); a club can not produce a sports competition on its own accord. In some industries horizontal co operation between many undertakings may be considered collusion and evidence of economic entities failing to operate independently; in the professional sports industry, however, horizontal co operation is necessary for the production of the entertainment product at all.²⁶

There are a number of factor which militate against a finding that the Super League clubs, SLE and the RFL form a single economic unit. First, SLE, the RFL and the clubs do not share a common ownership. SLE's ownership comprises each of the Super League clubs and the RFL. The RFL's membership is in turn comprised of the English Super League clubs and the clubs are all owned independently. It is the separate and distinct ownership of the clubs which under current European legal authority would lead to a finding against single entity status. It can not be asserted that the entities form part of a corporate group which share a common ownership.

Secondly, each club: has a distinct brand which it is responsible for marketing. A club: retains income from its own ticket sales (excluding ticket sales for the Super League play-offs and Grand Final); recruits and pays its own players; is responsible for its own stadium costs; operates a separate administration; and in the case of some clubs, generates revenue streams which do not rely upon the Super League competition (for example, some clubs operate bars and restaurants, conference facilities, and earn rental income). Therefore, it can not be argued that the clubs act in all respects as a single economic entity. Thirdly, none of the clubs individually can influence or control the actions of SLE since each club holds only one share in the company to which voting rights attach.

Price-fixing

It is a requirement of European competition law that horizontal competitors act independently.²⁷ Some firms operating in an oligopolistic industry may collude - either tacitly or explicitly - to exploit each firm's joint economic power and thus achieve the economic benefits of a monopoly. This collusion can result in higher prices, restricted output and increased profitability for the firms in the industry and lead to inefficiencies in the market. An equally inefficient market scenario may arise in an oligopolistic market situation in which firms combine joint buying power in order to achieve the economic benefits of a monopsony.²⁸ Monopolistic and monopsonistic markets are generally considered to be inefficient unless inefficiencies are offset by a Pareto improvement for consumers.²⁹

The Commission guidelines on the application of Article 81(3) states the objective of Article 81 as 'to protect competition on the mar-

ket as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'³⁰ Thus, competition law usually seeks to protect free market competition in order to ensure the efficient allocation of scarce resources.³¹ An efficient allocation of resources can create tangible benefits for the consumer in the form of lower costs and prices, improvements in quality, choice and services, and the introduction of new and innovative products.³²

A price-fixing agreement by its very nature is anticompetitive since such agreements restrict a party's capacity to determine its own price on a free market. Price fixing has been held to include setting a maximum or minimum price,³³ determining components of the price or establishing a percentage increase or a range of prices.³⁴ It can also include (although it is less common) agreements which fix the purchase price of production factors.³⁵ The absence of buying price competition between horizontal competitors can lead to lower prices for the supplied product than would otherwise prevail under normal market conditions. Members of the cartel may benefit through a lower purchase price which can lead to increased profitability. Suppliers may also be forced from the industry because of low prices and there may be a negative effect for consumers in the downstream market (being the market in which the raw material is subsequently incorporated into a saleable product) unless the benefit derived by the cartel is passed on to consumers (for example, through lower prices).

A salary cap by its very nature has the object of distorting and restricting competition. An object of the Super League competition is 'to regulate the value of playing talent available to each club in the league competition'.³⁶ It prescribes a maximum price ceiling for each club's expenditure on player payments and determines the parameters within which the clubs and players may negotiate. In the absence of a salary cap the value of playing services would be determined according to market forces. The salary cap is reinforced by penalties which may also infringe Article 81.

Since the object of the salary cap is anti-competitive, an analysis of the cap's effects would not normally be required. Nonetheless, insofar as professional sport is concerned, the European Commission has indicated that any determination of whether rules adopted in the industry are anti-competitive requires consideration of the "specificity of sport".³⁷ Taking this into account and also the differing judicial views of whether the effects of a price-fixing arrangement must be considered when determining if the arrangement restricts or distorts competition,³⁸ it is useful to consider the effects of the Super League salary cap as described by stakeholders in the industry.

Synopsis of Interviews: The Effects of the Super League Salary Cap

According to those stakeholders interviewed, the salary cap has:

- Limited the amount clubs spend in total on player wages (which is the main cost incurred by each club) and limited the wage amounts paid to individual players;³⁹

24 See for example, *Levin v National Basketball Association* 385 F Supp. 149 (SDNY 1974); *NFL v National American Soccer League* 459 US 1074 S Ct 499 (1982); and *Chicago Professional Sports Ltd v National Basketball Association* 95 F3d 593 (7th Cir 1996); cf *San Francisco Seals Ltd v NHL* 379 F Supp 966 (CD Cal 1974); and *Fraser v Major League Soccer* 284 F 3d 47 (2002) (CA1 Mass).

25 See for example: Walter Neale, 'The Peculiar Economics of Professional Sports' (1964) 78 QJ Econ 1; T. Rosenbaum, 'The Anti-Trust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era' (1987) 41 University of Miami Law Review 729; and Gary Roberts, 'Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry' (1984) 32 UCLA L Rev 219; cf P J Sloane, 'The Economics of Professional Football: The

Football Club as a Utility Maximiser' (1971) 18 Scot J Poli Econ 121; and M Flynn and R Gilbert 'The Analysis of Professional Sports Leagues as Joint Ventures' (2001) 111 Econ J F27.

26 T. Rosenbaum, 'The Anti-Trust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era' (1987) 41 University of Miami Law Review 729, 741.

27 Joined Cases 40-48/73 etc *Suiker Unie and Others v Commission* [1975] ECR 1663, para 173.

28 A monopsony is a market characterised by only one buyer of a product: Office of Fair Trading (UK) 'The Welfare Consequences of the Exercise of Buyer Power' (September 1998, Research Paper 16, OFT 239). Welfare is likely to be adversely affected by the exercise of monopsony power in conditions where buyers have the ability to exploit a competitive supplying industry to depress

market prices below competitive levels: *ibid.*, 4.13.

29 A Pareto improvement is defined as including a change that would benefit at least one person and would through the use of transfer payments simultaneously eliminate harm to others: Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases and Materials* (3ed, 2008 Oxford University Press, Oxford), 14.

30 Commission Guideline on the Application of Article 81(3) of the Treaty [2004] OJ C101/97.

31 Philip Marsden and Peter Whelan, 'Consumer Detriment' and its Application in EC and UK Competition Law' (2006) 26(10) ECLR 569,569.

32 *Ibid.*

33 Case 123/83 *Bureau National Interprofessionnel du Cognac v Guy Clair* [1985] 2 CMLR 430.

34 *Supra* (n 16) 312.

35 *Re Roofing Felt Cartel: BELASCO v*

Commission [1989] ECR 2117; *Italian Raw Tobacco* (COMP/38.281) [2006] 4 CMLR 866 (the decisions are currently under appeal: see Cases T-11/06, T-12/06, 19/06 and 25/06); and *Spanish Raw Tobacco* (COMP/38.238) [2006] 4 CMLR 866 (also under appeal).

36 RFL Operational Rules 2008, section E.I.1.

37 Commission (EC), 'White Paper on Sport' COM (2007) 391 final, 11 July 2007, 70 - 73.

38 See: I, Kokkoris 'Purchase Price-Fixing: A Per Se Infringement' [2007] ECLR 473 and the approach adopted by the European Court of Justice in the following cases: Case C-250/92 *Gottrup-Klim Grovareforeninger and Others v Dansk Landbrugs Grovareselskab* [1996] 4 CMLR 191; and Case 61/80 *Cooperative Strensel-en Kleurselfabriek v EC Commission* [1981] ECR 851.

- Determined the level and range of player wage payments within some clubs;⁴⁰
- Decreased the range of salary amounts paid to players;⁴¹
- Limited the quality of playing services an individual club can recruit (since the highly-skilled players command the higher wages).⁴²
- Prevented the more affluent clubs from 'stock-piling' players;⁴³
- Created more uncertainty as to the outcome of matches within Super League which in turn has enhanced the competition's spectator appeal.⁴⁴
- Encouraged fiscal prudence within clubs;⁴⁵
- Increased the profitability of clubs;⁴⁶
- Contributed to players moving between clubs thus distributing playing talent throughout the competition;⁴⁷
- Contributed to some clubs losing players to professional rugby union clubs;⁴⁸
- Had no effect for the sport's business of those clubs that are not spending to salary cap;⁴⁹
- Assisted the less affluent clubs to be competitive by limiting the amount that the more affluent clubs can spend;⁵⁰
- Limited the growth potential of the more affluent clubs; and⁵¹
- Resulted in some clubs being penalised for spending in excess of the salary cap maximum level.⁵²

Overall, there was a marked difference between the views of two clubs interviewed that favoured a less restrictive approach to player wage payments, and the remaining clubs which were in favour of the salary cap.⁵³ Also, the majority of clubs interviewed considered the cap to be detrimental to players because it limited a player's earning potential. One club commented that the cap had no effect for its players since it was not spending to salary cap level. At least two clubs justified the restrictive effect for a player's earning potential by pointing to: the benefit to players of clubs not becoming insolvent by over spending; and the necessity of the cap for the game as a whole.

The RFL believed the salary cap had maximised revenue and kept spectators entertained by creating a situation where each club had a 'decent chance of winning a contest'. As a result of the salary cap, the

RFL commented that teams were winning games irrespective of a club's position on the Super League table, and match attendances were improving annually. The RFL accepted that some clubs were in a position to spend more than the salary cap permitted although not all clubs spent to salary cap level. Maximising the business growth of clubs was an aim of the RFL but 'not at the expense of the game as a whole'. In its view, 'the competition is only as strong as its weakest clubs not its strongest clubs'.

The RFL considered that the salary cap was 'not necessarily detrimental' to players because: players were still able to individually negotiate employment contracts; the earnings of individual players were not restricted; and a player was entitled to whatever was negotiated with the club. Also, clubs were less likely to become insolvent and thus players benefited from security of employment. The salary cap also created a contest which contributed to the financial growth of the game.

According to the RFL, 'the strategy is that if we have a better competition, revenues will grow and then everybody can... benefit as a consequence of a growing industry'. The RFL benefited from a salary cap applied to Super League clubs because the teams play in the RFL's Challenge Cup competition, from which the RFL derived revenue.

Four players interviewed reported that the salary cap had affected the amount of salary upon which they were employed. Their respective clubs had all cited the salary cap as the reason for not agreeing to the player's salary request. A fifth player stated that a club at which he was already employed referred to the salary cap as the reason for not entering into a new employment contract, whilst another player commented that during negotiations to extend his existing employment contract a request for additional bonus payments was refused owing to the club's position under the salary cap. Two players commented that the salary cap was usually always raised by a club during negotiations but did not refer to how the cap had personally affected their employment (if at all). Two players stated that the salary cap had had no effect on their individual contract negotiations. One of those players attributed this to his position as a high profile player within the industry.

In conclusion, for the purposes of Article 81 the salary cap regulations (and the salary cap rule within it) form an agreement between

39 Club H commented: 'I'm a big fan of the salary cap; I like it. But if I were a player you would have to say that potentially it might cap my earnings because I do have to say to players, they might say they want £60,000 and I have to say £50,000 because that is all that I am allowed by the Super League body to spend. Now I might have the £60,000 but I'm not allowed to spend it...'

40 Club D stated: '[Y]ou know how much you've got to spend and you know how many players can be on £25,000 or more so...basically how we operate it is, we take the players out of it and we break down the budget and put pockets of money from the highest earner to the lowest earner within the budget and fit the players to the budget...Basically the bottom line is to ensure that clubs budget.'

41 According to Coach A: 'The high earners still get a good wage but the low earners are pushing up a bit more...and the difference between the top earner and the low earner is big but it has been bigger.'

42 Club F commented: '[Y]ou can only spend so much. So...you have to cut your cloth accordingly. It's very frustrating when you need a certain key player but you can't afford him because you are restricted by the salary cap.'

43 Club G stated: '[I]f there was no salary cap the richest clubs would spend more money and eventually you would have to say, 'Well who are they playing?' because they could acquire all the best players and

they could stockpile them if there's no salary cap at all...Would the crowds be good if you wanted to see your team inevitably beaten easily by another club?'

44 Some clubs interviewed believed the cap had created uncertainty of outcome and contributed to competitive balance within the competition as a whole.

Improvements in for example, stadium facilities and coaching techniques, were not considered to have been as significant as the salary cap towards improving the spectacle of the Super League competition. Club B commented that: 'Most teams now have good quality of coaching and good quality facilities etc so the salary cap does become quite a significant factor in that because no matter how good a coach you've got or how good the facilities, if the amount of money that you can spend on your playing resource is half that of somebody else's, the chances are you have no chance of competing.'

45 Club B commented: 'It means that if we are going to run our business effectively, we will not be tempted to spend money we don't have and make short term decisions...I don't believe it restricts our ability to sign quality players. It does equalise the competition. There's no doubt about that but if we want to achieve one of our business aims and that is to make a profit then a salary cap is certainly of great assistance in that process.'

46 Club G stated that the salary cap, 'gives me the certainty that if we are doing

alright, I haven't got to spend the profit I'm making by giving it to the players that we've got or bringing in new players because we can afford it.'

47 One player interviewed stated that the salary cap was the reason provided by a former club for the non-renewal of his employment contract (the player subsequently obtained employment at another Super League club). A second player commented that the salary cap was a contributing factor to his club agreeing to release the player from his existing employment contract so that he could enter into a new contract with a second Super League club.

48 Club I commented: 'We can still only spend £1.6 million on players. So you can still only have a top squad of 20, with seven or eight kids in there and we are still losing players like [] and [] because we can't afford to pay them the rates that rugby union can afford to pay them because of the salary cap; not because we as a club can not afford it. We as a club can sustain paying them that kind of money but we are being held back by the salary cap.'

49 Club E stated that: '[W]e never reach the maximum so for the moment it is, there is no disadvantage to having a salary cap.'

50 Club D commented: '...a cap enables us to be able to meet some of the teams and doesn't let the top teams run away by putting a ceiling on.' Club E commented that, 'Thanks to the cap, the competition

is much more fair and we can enjoy close games. For example, we have beaten St Helens this year and...it would be more difficult to beat such teams with no salary cap as they will use their financial power to buy the best players during the season.'

51 Club I commented: 'I suppose what we want to do is generate more profit but ultimately that profit will get reinvested into the playing side of it. Now our frustration with the salary cap is that you get to a cut-off point where you can't spend anymore on the playing side...We've got a world class training facility, we've got more coaches...but the frustration for us is that the salary cap is now holding us back and other clubs. We can still only spend £1.6 million on players.' A similar view was expressed by Club J: 'We take the view that it is our responsibility to put out on that field over there, the best talent from anywhere in the world that talent originates that we can possibly afford having regard to what we can afford...We can't go and spend money that we haven't got but within the realms of what we can afford we should be putting out the best team and therefore the best entertainment we possibly can.'

52 In 2006 Wigan Warriors was fined and deducted competition points for spending in excess of the salary cap; and in 2007 Bradford Bulls, St Helens and Wigan Warriors were fined and/or deducted competition points for infringing the salary cap regulations.

horizontal competitors, (namely the clubs) and/or a decision of an association of undertakings. There is an effect on inter-state trade because the relevant market for playing services includes the French club, Catalans Dragons. Recruitment between the English clubs and Catalan Dragons is affected by the salary cap rule. The cap is anti-competitive and prima facie in breach of Article 81 owing to its restrictive and distorting effect for competition between clubs in the market for playing services.

Following the decision in *Meca-Medina*,⁵⁴ a rule adopted by a sporting code's governing body (or a professional sports league) may not infringe Article 81 if the rule seeks to achieve a legitimate objective; the consequential effects of the rule which restrict competition are inherent in the pursuit of that objective; and the restriction goes no further than is necessary (or proportionate) to achieve that legitimate aim.⁵⁵ The question considered in the following section is whether the salary cap satisfies the test outlined in *Meca Medina*.⁵⁶

The Aims of the Super League Salary Cap

The salary cap's paramount purpose is to 'protect and promote the long term health and viability of the game of rugby league'.⁵⁷ To fulfil that purpose, the RFL Operational Rules 2008 describes the following specific objectives of the cap:⁵⁸

'The RFL has adopted these salary cap regulations ('the Regulations') in order to regulate the value of playing talent available to each club participating in the league competition managed by the RFL and currently known as Super League. The overriding purpose of the Regulations is to protect and promote the long term health and viability of the game of rugby league. Within that overriding purpose, the specific objectives are:

- 1.1.1 to protect the integrity of the Super League competition by ensuring that the determinative factor in the sporting outcome is on-field sporting merit and not off-field financial considerations;*
- 1.1.2 to ensure that the Super League competition remains competitive and therefore attractive to spectators and commercial partners by preventing clubs with greater financial resources dominating the competition and by ensuring a balanced spread of players among the participating clubs;*
- 1.1.3 to protect and nurture a broad competitive playing structure by preventing clubs trading beyond their means and/or entering into damaging and unsustainable financial arrangements; and*
- 1.1.4 by means of the foregoing, to protect the welfare and interests of all players participating in the Super League competition and of all those aspiring to participate in the Super League competition.'*

Each of these aims is addressed below.

To Protect and Promote the Long-Term Health and Viability of the Game of Rugby League

It is unclear whether the reference to 'the game of rugby league' in the first of the salary cap's objectives refers to the game as a whole or whether it is limited to the Super League competition only. In any event, it is arguable that preserving the longevity of the competition (or the rugby league industry) is a legitimate aim to pursue by means of a salary cap. Excluding international matches, the Super League competition represents the pinnacle of the sporting code in Europe. SLE makes payments to the professional competition divisions below Super League. The individual clubs participate in community development initiatives and are involved with promoting the sport in

schools and throughout the local community. Additionally, the competition promotes the sport through its exposure on television. Were the competition to cease to exist, then there would be wide-ranging effects for those participants involved in the sport, for supporters of the game and for public perception of the sport as a whole.

Nonetheless, the Super League competition and the clubs that participate in it are businesses. When it comes to the sale of a product, most commercial businesses are concerned with a product's value in the short term and the long term, and the position of the industry overall. In this regard there is nothing different between the Super League competition and a general commercial business.

Moreover, many general commercial businesses get involved in community programmes or charitable causes for numerous reasons (for example, philanthropic, self-promotional etc). It is in a professional sports club's interests to have a high community profile and to encourage people to play the sport. First, it raises the club's profile in the entertainment market which can benefit the club financially through increased gate receipts or merchandise sales; and secondly, it encourages people to play the sport at a young age which serves, ultimately, to increase the talent pool available to professional clubs. Finally, the objective over states the salary cap's importance to the 'long term health and viability of the game'. In the author's opinion, the long term health and viability of rugby league requires increased numbers of people playing the sport and not the increased profitability of Super League clubs achieved at the expense of player wage payments.

To Protect the Integrity of the Super League Competition By Ensuring That the Determinative Factor in the Sporting Outcome is On-Field Sporting Merit and Not Off-Field Considerations

It is accepted as a legitimate objective, rules which ensure that on-field sporting merit determines the outcome of matches and not off-field conduct such as match fixing or anti-doping.⁵⁹ Regulations pertaining to these off-field considerations may fall within the category of rules aimed at the organisation and proper conduct of professional sport. Consideration of whether a salary cap is required for the organisation of a professional sports competition touches upon issues of the uncertainty of outcome hypothesis, competitive balance and talent distribution. These issues are discussed below in relation to the third objective of the Super League salary cap.

To Ensure the Super League Competition Remains Competitive and Attractive to Spectators and Commercial Partners

A third objective of the salary cap is to protect the commercial value of the Super League competition. The salary cap aims to do this by preventing a club with greater financial resources dominating the competition; and secondly, by distributing talent across the teams.

It is widely believed that a sports competition appeals to consumers when the result of a match is not able to be predicted prior to the game being played; in other words, when there is 'uncertainty of outcome'.⁶⁰ In circumstances where there is uncertainty of outcome, spectator interest is believed to increase with resultant increases in spectator attendance at matches and positive effects for the competition's sponsorship and television revenue. The aim of most sports leagues, therefore, is to reach a point of balance where each team has an equal chance of winning the league competition every few years and the results of a match are unpredictable.

The difficulty for a professional sports league is that an individual club - acting in its own best interests - may seek to improve the playing performance of its team by employing as many talented players as possible. The more money a club can spend on employing skilled players, the greater the chance of the club winning games. Furthermore, the greater the number of talented players a club has, the easier it is for the club to cover for injury or other player absences during a playing season. The depth of playing talent in a team is a factor which contributes to the success of a club throughout a playing season.

Whilst an individual club may benefit from increased spending on player wage payments through: improved attendance at games; and increased merchandise sales, club sponsorship or advertising con-

53 See the comments of Clubs I and J *supra* (n 52).

54 *Supra* (n 6).

55 *Supra* (n 6), para 42.

56 *Supra* (n 6).

57 RFL's Operational Rules 2008, section E:1.1.

58 *Ibid.*

59 *Meca-Medina supra* (n 6).

60 In economics literature, there are three categories of uncertainty of outcome:

match uncertainty; seasonal uncertainty (being a close championship race during a playing season); and championship uncertainty (which refers to a number of different teams winning the league over a period of years rather than domination by one or two teams): S Szymanski 'Economic Design of Sporting Contests' [2003] 41(4) *Journal of Economic Literature* 1137, 1155-1156.

tracts, other clubs - with differing financial circumstances - may find it difficult to field a competitive team. The outcome of a match or championship may become more certain as a result.

Economic research which considers the uncertainty of outcome hypothesis has produced mixed results. Of twenty two studies which sought to confirm the uncertainty of outcome hypothesis across different sports between 1974 and 2002: ten offered clear support for the theory; seven offered weak support; and five contradicted the theory.⁶¹ As Szymanski comments, 'even quite unbalanced matches, championships and leagues can be attractive to consumers'.⁶² Additionally, Szymanski notes that there are other reasons why the hypothesis needs to be treated with caution:⁶³

'First, while balance can be exciting, so can a contest between a Goliath and a David. Even if David seldom wins, the realisation of the completely unexpected can generate enormous satisfaction. Second, the performance of a perpetually successful team can also provide extra interest, either among those who support the dynasty, or among those who are rooting for it to fail...third, even if it were true that a completely predictable contest would be unattractive, it is hard to say what the effect of a small change in balance would be, starting from a given distribution of wins.'

The data testing the validity of the uncertainty of outcome hypothesis does not suggest the theory is false but rather that the importance of outcome uncertainty may be overstated.⁶⁴

The general view asserted by professional sports leagues is that the free market can not deliver competitive balance and requires artificial mechanisms to distribute talent in order to promote competitive balance. A seminal study conducted into the effectiveness of the reserve clause in Major League Baseball - a clause which prohibited a player from moving to another team without the permission of his current team's owner - came to the opposite view insofar as that restraint was concerned.⁶⁵ It concluded (*inter alia*) that:

- talent distribution under the reserve clause occurred in the same manner as the free market (that is, the reserve clause made no difference to the distribution of talent);
- through the clause the club controlled the player so as to drive down the player's wages and enhance the profitability of the club;
- the profit motive of teams would limit accumulated talent on a single team; and
- the free market was superior to a market restrained by a reserve clause since in the free market each worker received the full value of his service, and exploitation did not occur.⁶⁶

In 1976 the reserve clause was replaced by a free agency rule that permitted a player - after six years of employment with one team- to seek employment at another club without restriction. Since the free agency rule was introduced, economic studies have analysed whether or not limited free agency status has undermined competitive balance in baseball. Szymanski summarises the conclusions of those studies as follows:⁶⁷

'Most of the studies find either no change (seven cases) or an improvement in competitive balance (nine cases, contrary to the claim of the owners that free agency would reduce competitive balance (four cases only).'

Economic research concerning the effectiveness of a salary cap for levels of competitive balance illustrate that the success of such a measure may depend upon the salary cap's design, enforcement mechanisms and club observance of salary cap limits. Szymanski states that in theory a salary cap should improve competitive balance,⁶⁸ although he asserts that for a salary cap system to be fully effective: small revenue generating teams must raise spending to the level of the cap; and the salary cap system should be complemented by revenue sharing mechanisms as well.⁶⁹

Fort and Quirk suggest that 'an enforceable salary cap applied to all teams leads to competitive balance in a closed league' but that enforcement of the cap is often difficult.⁷⁰ Kesenne asserts that a salary cap imposed in a league comprising of profit maximising clubs: improves competitive balance; lowers salary levels; assists less affluent teams to maintain financial viability; but generally will not bring ticket prices down.⁷¹ Noll concludes that a salary cap does not assist weak teams so much as prevent wealthy teams from competing for each other's players.⁷² By contrast, Vrooman asserts that a salary cap promotes competitive imbalance since equal spending on players does not necessarily lead to equal playing strengths among teams.⁷³

Identifying and achieving the optimal level of competitive balance in a professional sports league is complex. Economic studies use a variety of methods to measure competitive balance and are based on assumptions which differ according to the subject sport. Competitive balance may also be affected by factors other than the wealth resources of one team over another (for example, technology, scientific advances in sports equipment, quality of training facilities, advances in coaching techniques, playing rules, the sports league structure and field conditions etc).⁷⁴ Moreover, to a certain degree 'imbalance is an inherent, intractable part of all competitions'.⁷⁵

61 Szymanski, 'Economic Design of Sporting Contests' [2003] 41(4) *Journal of Economic Literature* 1137, 1156. Economic research also indicates that insofar as attendance at home games is concerned demand for match tickets peaks at the point where a home team's probability of winning is about twice that of the visiting team: *ibid*.

62 Szymanski, 'Economic Design of Sporting Contests' [2003] 41(4) *Journal of Economic Literature* 1137, 1156. The example Szymanski uses is that of the English Premier League which in the twelve year period to October 2004 was won by Manchester United (eight times), Arsenal (three times) and Blackburn Rovers (one time) yet attendance increased from 9.8 million to 13.5 million: Szymanski, 'Tilting the Playing Field: Why a Sports League Planner Would Choose Less, not More, Competitive Balance', Tanaka Business School Discussion Papers: TBS/DP05/35, Tanaka Business School, London, October 2004) 32.

63 Stefan Szymanski, 'Uncertainty of Outcome, Competitive Balance And the Theory Of Team Sports' in Wladimir Andreff and Szymanski *Handbook on*

the Economics of Sport (2006 Edgar Elgar Publishing Limited, Cheltenham) 597, 597.

64 Stefan Szymanski, 'Uncertainty of Outcome, Competitive Balance And the Theory Of Team Sports' in Wladimir Andreff and Szymanski *Handbook on the Economics of Sport* (2006 Edgar Elgar Publishing Limited, Cheltenham) 597, 598. Uncertainty of outcome, the likelihood of home team success and the quality of the match (including the aggregate of player talent on show) is considered by Szymanski as the three main factors which determine demand for attendance at or viewing of matches: S, Szymanski, 'Economic Design of Sporting Contests' [2003] 41(4) *Journal of Economic Literature* 1137, 1163.

65 S, Rottenberg, 'The Baseball Players' Labor Market' [1956] 64 *Journal of Political Economy* 242, 255-258.

66 S, Rottenberg, 'The Baseball Players' Labor Market' [1956] 64 *Journal of Political Economy* 242, 255-258. Noll asserts that restrictions on competition for players: lowers player salaries, but does not prevent, 'the movement of players among teams through trades, sale of players contracts and the trade or sale of

draft choices. If one team values a player more than his current team, it will acquire him by offering a higher salary if the player market is competitive or by striking a deal with the player's current team if the market is not': Roger Noll, 'Professional Basketball: Economic and Business Perspectives' in Staudohar and Mangan (eds) *The Business of Professional Sports* (1991, University of Illinois, United States of America) 39; cf with Sloane's view that restricted measures are required to prevent a few teams dominating a sports league: P J Sloane, 'Sporting Equality: Labour Market versus Product Market Control - A Comment' *Journal of Industrial Relations* [1976] 18(1) 79.

67 S, Szymanski, 'The Champions League and the Coase Theorem' [2007] 54(3) *Scottish Journal of Political Economy* 355, 359.

68 S, Szymanski, 'Economic Design of Sporting Contests' [2003] 41(4) *Journal of Economic Literature* 1137, 1171.

69 S, Szymanski, 'Economic Design of Sporting Contests' [2003] 41(4) *Journal of Economic Literature* 1137, 1172.

70 James Quirk and Rodney Fort, *Pay Dirt*, (Princeton University Press, Princeton New Jersey 1997), 292.

71 Stefan Kesenne, *The Economic Theory of Professional Teams Sports* (2007, Edward Elgar Publishing Ltd, Cheltenham) 141. League profits are assumed to decrease because the inefficient allocation of playing talent means players are not playing for the team where their marginal product is maximised: Stefan Kesenne, *The Economic Theory of Professional Teams Sports* (2007, Edward Elgar Publishing Ltd, Cheltenham) 127.

72 Roger Noll, 'Professional Basketball: Economic and Business Perspectives', in *the Business of Professional Sports*, ed by Paul Staudohar and James A Mangan (1991, University of Illinois Press, Urbana Illinois) 38.

73 John Vrooman, 'A General Theory of Professional Sports Leagues' [1995] *Southern Economic Journal* 61(4) [1995] 971, 980.

74 Allen Sanderson, 'The Many Dimensions of Competitive Balance' [2002] 3(2) *Journal of Sports Economics* 204.

75 Allen Sanderson, 'The Many Dimensions of Competitive Balance' [2002] 3(2) *Journal of Sports Economics* 204, 204.

According to the European Commission, 'ensuring uncertainty of results' within a competition is a legitimate aim of a professional team sports league.⁷⁶ In *Bosman*⁷⁷ Advocate General Lenz stated that:

*'...it should be observed that I share the opinion that...a professional league can only flourish if there is a no too glaring imbalance between the clubs taking part. If the league is clearly dominated by one team, the necessary tension is absent, and the interest of the spectators will thus probably lapse within a foreseeable period.'*⁷⁸

The European Court of Justice also accepted 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.'*⁷⁹

In *Bosman*, however, the Court did not consider the effects of a restraint mechanism on competition within a relevant market; nor did it weigh up differing economic opinion on the validity of the uncertainty of outcome hypothesis.

Very little empirical research has been published concerning competitive balance in the English Super League or the effectiveness of the Super League salary cap for promoting and maintaining competitive balance in that competition. The RFL and the majority of clubs justify the salary cap on the basis of the uncertainty of outcome hypothesis and the cap's purported beneficial effects for competitive balance within the competition as a whole. In the majority's view, the cap has distributed the playing talent throughout the competition, created a 'level playing field' which in turn has promoted competitive balance within the competition and led to uncertainty of outcome. Those statements are the reported observations of the clubs and the RFL (entities which benefit financially from the salary cap). In the absence of empirical research to support a conclusion that a salary cap in Super League improves competitive balance it is difficult to confirm whether the salary cap has had that effect.

Furthermore, the salary cap directly affects player wages and also reduces consumer welfare. Some players interviewed confirmed that the cap had been raised by clubs during contracts negotiations; and in some cases had limited the amount of money eventually received. For clubs spending at salary cap limit who may forgo the opportunity to sign a player because of the cap limit (and yet can afford to pay the market value for the player), the club's supporters lose the opportunity to see the best quality team that the club can produce.

Even if it were accepted that competitive balance is a legitimate aim to pursue, it is asserted that the salary cap is not a proportionate means of achieving that aim. First, the salary cap is, to use the words of one club interviewed, 'artificially engineering the competition'. In a free market situation without a salary cap, and in the absence of any other restraints, a player would move to the club where he was most valued (in economic terms where the club's marginal revenue product is maximised). This would produce positive effects for consumers since the clubs would be fielding the best team possible and there would be an efficient allocation of resources within the market for playing services. Occasions like those described by Club I of being unable to retain players it values because of salary cap limitations would not occur.

Secondly, as a result of the salary cap the market value of playing services is artificially restrained. The sports agents interviewed confirmed that a players' salary is determined by market forces and the salary cap mechanism prevents some players from receiving the true market value for their playing services.

Thirdly, one club described how the salary cap had encouraged it to obtain the services of a player it valued whilst that player was still employed by another club. By doing so, the club incurred a "transfer fee" payment to the player's (then) employer but had saved on the actual market cost of the player's services. In this way, the salary cap influences transactions in the market for playing services to the detriment of players and the benefit of the clubs. The player does not receive his full market value; his former employer receives a payment;

and the player's new club obtains the benefit of the player's services at a lower salary cost. On the one hand, this type of transaction reflects market efficiency since the player is moving to the club that values his services the most. But as Rottenberg asserts the free market outcome is superior since in the absence of a salary cap, the player would receive the full value of his service, and exploitation would not occur.⁸⁰

Fourthly, the RFL states that the salary cap 'maximises revenue'. As demonstrated above, it also restrains the cost of player wages, thus enhancing the profit for clubs. Many of the clubs interviewed confirmed that they had made a profit at some time over the last five years. In the words of Club B, 'if we want to make a profit then a salary cap is certainly of great assistance in that process'. The RFL benefits financially from revenue generated by the clubs involvement in its Challenge Cup competition. Thus, the RFL and the Super League clubs have benefited from the salary cap. It is unclear whether consumers in turn have benefited from the increased profitability of clubs through lower ticket prices.

Fifthly, not all Super League clubs spend to salary cap level. Therefore, the likelihood of the cap promoting competitive balance is reduced. Also, the effectiveness of the cap is reduced by some clubs spending in excess of the cap level.

Sixthly, the RFL and the clubs consider that in the absence of a salary cap, a club will dominate the competition because it can afford to pay for the best players and 'stock pile playing talent'. Rottenberg stated that talent accumulation on one team would be limited by a club's profit motivations.⁸¹ Additionally, in the course of the interviews, players were asked to identify the factors considered when deciding whether to enter into an employment contract with a club. The factor most frequently identified by the ten players interviewed as of primary importance when choosing to contract with a club was: the opportunity to play regularly for the club's first team. Therefore, in a free market the ability of a club to stock pile talent may be restrained by the value a player assigns to playing. Players may be more likely to move to a team where the opportunity to play is present, and such opportunities are less likely in a team filled with many players.

Sixthly, in a professional sports league where the objective of clubs is win maximisation (as opposed to profit maximisation) economic theory asserts that revenue-sharing improves competitive balance.⁸² Win-maximisation is generally considered to be the objective of clubs in English Premier Football,⁸³ and may also apply to the English Super League (although further research is required before this can be asserted conclusively). If Super League clubs are win-maximisers, then revenue sharing would achieve competitive balance by ensuring less affluent clubs are provided with additional income in order to compete for professional players. Revenue-sharing would provide teams in financially weaker markets with extra income and likely increase the number of financially viable teams. It would also be a means of achieving competitive balance without distorting competition in the market for playing services. The clubs share SLE revenue and profits, although gate receipts from Super League round-robin games are not shared.

Finally, it is evident that the clubs and the RFL have benefited financially from the salary cap whilst some players may have encountered a reduction in earnings over the same period. As a matter of

76 Commission (EC), 'White Paper on Sport' COM (2007) 391 final, 11 July 2007, 68.

77 Case C-415/93 *Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

78 *Ibid*, para 219.

79 *Supra* (n 78) para 106. In *Bosman* neither the Advocate General nor the European Court of Justice considered economic theory when arriving at that conclusion. In *Re Televising Premier League Football Matches* [2000] EMLR 78, the Restrictive Practices Court (UK), with the benefit of economic opinion,

accepted that creating and preserving competitive balance was 'a vital factor in maintaining the equality and interest of Premier League football' - 174.

80 See text and accompanying footnotes *supra* at pages 23-24.

81 *Ibid*.

82 Stefan Kesenne, 'The Objective Function of a Team' in Wladimir Andreff and Stefan Szymanski *Handbook on the Economics of Sport* (2006 Edgar Elgar Publishing Limited, Cheltenham) 601, 608.

83 *Ibid*, 601.



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public policy, this raises the issue of whether and in what circumstances private enterprise profit considerations should outweigh an employee's interest of receiving the market value for work undertaken, particularly in circumstances where those profits may arise from employers engaging in anti-competitive conduct.

In conclusion, therefore, in the absence of strong empirical evidence to support the view that a salary cap promotes talent distribution, competitive balance and uncertainty of outcome in the English Super League, this aim of the salary cap should be rejected. Even if it were accepted as a legitimate aim, it is not a proportionate means of achieving competitive balance for the reasons set out above and particularly in light of the benefits the less restrictive option of revenue sharing provides.

To protect and nurture a broad competitive playing structure by preventing clubs trading beyond their means and/or entering into damaging and unsustainable financial arrangements

The White Paper on Sport states that a legitimate objective of sporting rules will normally relate to the organisation and proper conduct of competitive sport and may include 'the ensuring of financial stability of sports clubs and teams'.⁸⁴ In the history of the Super League playing competition two clubs have encountered serious financial difficulties: Paris St Germain (prior to the salary cap's introduction); and London Broncos in 2005 (following the salary cap's introduction). Both teams were located in a geographical area which did not have a supporter base with a strong tradition of following rugby league. In the case of London Broncos the club was permitted to reform and continue operating in the Super League competition. Paris St Germain was dissolved at the end of 1997. In both cases factors other than player wage costs, such as the geographical location of the clubs likely contributed to the difficulties that the clubs encountered.

Other rugby league clubs in competition divisions below Super League have encountered financial difficulties. In 2007 Widnes Vikings, a National League Division 1 club was placed in Administration following its unsuccessful attempt to secure promotion to the Super League competition. The Super League competition no longer operates under a rule of promotion and relegation thereby lessening the tendency for clubs to invest heavily in playing talent to gain promotion into the competition.

Additionally, the licensing regime recently introduced into Super League competition provides an incentive for clubs not to get into financial difficulty. From 2009 clubs require a licence to participate in the competition. Licences are issued for a three-year period and clubs will need to re-apply for a licence in 2011. The criteria applied for issuing a licence includes consideration of the financial stability of the club and its business performance. The licensing regime, therefore, provides a means of 'preventing clubs entering into damaging and unsustainable financial arrangements' which has a less restrictive effect on the market for playing services than the salary cap. A Super League club that gets into financial trouble is likely to face difficulty obtaining a Super League licence.

To protect the welfare and interests of all players participating in the Super League competition and of all those aspiring to participate in the Super League competition

A salary cap by its very nature can not achieve this objective. The salary cap restrains some player's earning potential and thus does not protect the welfare and interests of all players. A player's interests are served by receiving the market value for his playing services. A salary cap may through its restraining influence on club expenditure provide job security for players. However, the licensing regime also provides a level of job security for players without limiting a player's earning potential.

Conclusion

For the reasons set out above, the Super League salary cap is an agreement between horizontal competitors which restricts, distorts and prevents competition in the market for playing services. It does not satisfy the *Meca-Medina* test as a proportionate means of achieving a legitimate aim; and accordingly, breaches Article 81. The effects on the market are more than minimal and also place the salary cap outside the scope of application of Article 81(3). Any challenge to the legality of the salary cap under Article 81(1) would likely succeed.

The International Sports Law Journal

⁸⁴ Supra (n White paper reference) 68.



On Friday, October 24, 2008 the National Sports Law Institute of Marquette University Law School will host a conference on **Professional Sports: Current Issues and Their Future Implications**. The day long event will be held at the Alumni Memorial Union on the Marquette campus. Conference sponsors include the Sports & Entertainment Law Section of the State Bar of Wisconsin, Foley & Lardner LLP, and Greenberg & Hoeschen, LLC.

Four conference panels composed of leading sports lawyers, sports law professors, and industry professionals will address cutting edge legal and business issues related to the acquisition, sale, and valuation of sports franchises, sports broadcasting, playing facility issues, and a potpourri of hot topics in professional sports. Speakers include Mary K. Braza, Partner and Chair, Sports Industry Team, Foley & Lardner, LLP; Eryn Doherty, Senior Counsel, Labor Relations, Fox Entertainment Group, Inc.; Martin Greenberg, Member, Southeast Wisconsin Professional Baseball Park District; Greg Heller, Senior Vice President & General Counsel, Atlanta Braves; and Jim McKeown, Partner, Chair, Antitrust Practice Group, and Member, Sports Industry Team, Foley & Lardner, LLP.

The conference is from 9 am to 5 pm on Friday, October 24th. Complete details of the conference, including conference panels and participants, registration costs and forms, and conference sponsors, are available on the web at <http://law.marquette.edu/jw/2008conf>.

Fighting Sport Corruption: Polish Experience of a Global Dilemma

by Hubert Radke*

The legendary Polish sport commentator and journalist, observer of the greatest sport spectacles of the previous and present century, a huge sport fan and sport expert Bohdan Tomaszewski remarked: “*In the past sport was considered as an island of a good moral that emanated with its honesty to the world. Today is quite opposite. Undesirable, global phenomena and circumstances heighten the moral decline in sport.*”¹ These bitter words, describing present sport’s reality, become still important when we realize that in today’s society there are very few phenomena that are as multi-dimensional and have the same profoundly fascinating impact on people’s lives as sport.² Every kind of decay that we observe at the sport fields devastates all the positive values that sport generates. Unquestionably corruption has become the main accelerator of a sport rot. Therefore finding a good way to contain it seems to be the essential challenge that the world of sport has to tackle.

Dominating in modern world liberal democracy and free-market economy create the widest development opportunities in human history. The rivalry and strive for success that present political and economical system promotes, are the lifeblood of the human action. This situation brings certainly a lot of benefits and leads towards civilization’s progress. However on the same time we witness the changes in key motivations and following it professed values. In the modern society unlimited drive for economical benefits and material success aspiration become a leading force of intensive business ventures.³ Professional and commercial processes affect consecutive life areas. Human actions are more and more often shaped by the power of money. Philip Bobbitt remarked that we participate in the transition process from the nation-state to market-state, where economical relations replace traditional political bonds.⁴ This kind of environment causes that the possibility of misusing entrusted power for private gain becomes extremely attractive. That is why at the certain moment each area of life has to face the problem of corruption.

On the other hand the essential feature of democracy and free-market economy is the rule of law. On the current stage of civilization, each area of human activity has to be based on the specific normative regime.⁵ The fundamental function of law is the control of human’s behavior, its proper direction, so the human beings act in the way accepted by the rule maker and refrain from undesirable activities.⁶ In the developed countries law texts are the foundation of socio-economical and political order, “the visible hand of law” is the key warrantor of liberal democracy and an indispensable instrument of reforms.⁷ The absence of good law institutions and procedures and the existence of improper legal solutions favor and heighten the phenomenon of corruption.

The newest history of Poland has shown that corruption had conduced terms to spread. It would be hard to deny that political and economical transformation that this country went through was possible to accomplish without any warps and in an ideal way. The process of exposing the economy to “the invisible hand of the market” and simultaneous lack of complex institutional changes in some life areas that could adapt them to the new situation, have opened the gates for corruption. Moreover the political structures responsible for setting a new order have never been definitely cleared of people who served to the previous, communist regime. Friedrich Hayek remarked that persons that actively participate in building totalitarian system believe in the values that are in drastic conflict with the western culture values.⁸ Corruption is one of the governing methods that communistic cliques has infected the new structures with. Therefore building the system based on the rule of law was many times seriously questioned while

the Polish transformation process. Although the main stage of economical and political transition has been carried through and the legal frames for the new order were set up successfully, there are plenty of institutions that still do not guarantee the preservation of this order. Sport may be the best example of how much it still needs to be changed.

The rule of law in sport is as essential for civilization as the rule of law in society generally. Without it generally anarchy reigns. Without it in sport, chaos exists.⁹ The above statement is of a great importance especially for the modern sport that works under business rules and is directly connected to other life areas with a network of common interests. It is generally believed that the greater the role of economic factors in sport, the greater the impact of law in sport.¹⁰ The corruption that exploits institutional weaknesses, the lack of transparency of the law rules and procedures, hits the sport with double power though. On the one hand it undermines the credibility of sport as an area of life where society has always searched for missing in everyday life principles. On the other hand causes that sport as a market product can become not only unattractive but even an underworld in the legal point of view. The challenge of today’s normative regulations is to reverse the above course of things into desirable direction. The outstanding Polish fencer, Olympic champion Wojciech Zablocki said: “*Our duty is to create such rules of conduct and social motivations that positives values generated through sport could fight down all the dissonances in sport family.*”¹¹ Unquestionably law has a legitimate role to play in sport. However the key question is what kind of law rules should be engaged in fighting sport corruption. It needs to be remembered that not every law form may be the savior and the most effective form of regulation.¹²

In the world of Polish sport, corruption achieved a mythical status while the transformation period. It was the main subject of informal public discussion, but nobody ever attempted to prove its actual existence. Single corruption cases that once in a while came to light were treated as incidents and nobody tried to analyze them seriously. The situation that took place in Polish football league in 1993 could be set as a good example of the above policy. At that time two top teams-Legia Warsaw and LKS Łódź that competed for championship title were charged of bribery on the last day of football league. Polish Football Association (PZPN) cancelled the results and took away

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1 “Gazeta Wyborcza”, 21st of October 2004.
2 L. Halgreen, *European Sports Law*, Copenhagen 2004, p. 19.
3 P. Sztompka, *Sociology*, Warsaw 2002, p. 561.
4 P. Bobbitt, *Hegemony and Market. The Birth of New World Order*, Dziennik, 17-18th of May 2008.
5 M. Filar, *Heroes of instituted aggression. Problems of Criminal Liability of Professional Sportsmen for Accidents in*

Sport, Przegląd Prawa Karnego 14/1997, p. 28.

6 L. Morawski, *Introduction to jurisprudence*, Torun 2006, p. 29.
7 L. Morawski, *The Main Problems of Today’s Philosophy of Law*, Warsaw 2005, p. 144-145.
8 F. Hayek, *The Road to Serfdom*, Chicago 1994.
9 S. Gardiner, M. James, J. O’Leary, R. Welch, I. Blackshaw, S. Boyes, A. Caiger, *Sports Law*, New York 2006, p. 3.
10 M. Kedzior, *Effects of the EU Anti-Doping Laws and Politics for the International and Domestic Sports Law in Member States*, International Sports Law Journal 1-2/2007, p. 111.
11 W. Zablocki, *Sport Changeable or Not-changeable*, [in:] T. Jendryczko (ed.) *The Beauty and Bitterness of Sport*, Warsaw 2004, p. 6.
12 S. Gardiner, *op. Cit.*, p. 35.

points for won games from both this teams, although the fraud had never been formally proved. This verdict still remains controversial and in the common legal opinion is considered to be baseless. The bodies responsible for bringing the clubs to disciplinary responsibility adjudicated arbitrary without any respect for the fair trial rule. The club of Legia Warsaw till these days demands the return of the lost championship title. Also the prosecutor's office decided to discontinue investigation in this case, due to lack of features of criminal offence.¹³

The real concern about the corruption stage in Polish sport was caused by so-called "playoff affair" that took place in Polish football in May, 2003. The result of it was the life disqualification for six players of Lukullus Swit Nowy Dwór Mazowiecki that had been charged of bribery. The seventh player- a goalkeeper who brought corruption facts to light had been sentenced to one year disqualification. The club responsible for corrupting the players- Szczakowianka Jaworzno was relegated to lower division and deprived of ten points at the start of the following season. However in this case disciplinary committee of PZPN also did not rise to the challenge. Effectively appeal against the decision caused the reversal of the verdict by Sport Arbitration Court- the last instance in sport disciplinary justice and whole procedure had to be repeated. The tribunal bench formulated in the sentence a series of formal objections concerning the disciplinary proceedings. While the rearguing of the case disciplinary bodies of the football association upheld their previous verdicts and the tribunal reversed a decision again in 2005 due to prescription of disciplinary offences. Finally the whole process was examined by Polish Supreme Court in 2006 that rejected the cassation lodged by PZPN. Again penal prosecution agency turned out to be helpless because of the absence of specific criminal law countermeasures and insufficiency of evidence.

Nowadays Polish football struggles with a huge corruption affair that came out in August, 2005. The president of one of the Polish football clubs, a son of the former head of Polish Football Association, revealed in the press interview for the largest Polish daily newspaper- "Gazeta Wyborcza" the real picture of Polish football in the last years. Thereby he became the first person that broke the blanket of silence ruling in football environment in Poland. The scale of corruption presented by Piotr Dziurawicz has frightened not only the fans and sponsors investing their money in clubs, but in generally public opinion and state authorities. Thenceforth fighting the corruption has become officially the concern number one in Polish sport and has enforced serious actions of institutions responsible for preserving the legitimacy of sport and guaranteeing legal order generally. The change in anti-corruption policy has enabled the detection of a few minor corrupt affairs in other sport areas. However the football affair stays a spotlight of the public attention. The best summary of present situation in Polish football are the words of Leo Beenhakker, Polish national football team manager, who said: "*In your country I have not met a single person interested in the development of Polish football, its catching up with the rest of the world, regaining former splendor. Instead of that I have a continuous feeling that only personal interests count here.*"¹⁴ Unfortunately these upsetting words could be used to describe the general ethos dominating also in some other areas of Polish sport.

Even the rough analysis of the corruption problem in Polish sport leads to a conclusion that the key weaknesses in fighting this kind of abuse underlie on the level where sport institutions possess the self-governance rights. The autonomy rule has always been a characteristic feature of sport and the symbol of the high quality of its normative system. Moreover the processes of decentralization that we are able to observe in today's world have forced states to accept the increasing independence of the institutions and organizations that function within their territories. Therefore the autonomy rule has become one of the key principles of liberal democracy, the fundamental of the state of law. Consequently the autonomous legislation is currently one of the most dynamic kinds of lawmaking.¹⁵ The state institutions do promote this kind of legislation by withdrawing part of their competence from certain life areas and by passing it to independent bodies. Moreover states refer to autonomous law regulations in public statutes. The above sit-

uation legitimizes the opinion concerning the existence of pluralism of normative orders, set by different institutions, that creates the interactive rather than hierarchical model of relations between them.¹⁶ However it needs to be remembered that the undeniable prerequisite for proper functioning of autonomous organizations is complying not only with their own norms but with public law as well. Although the above statement seems to be obvious, it has turned out to be a missing one in the case of Polish sport. The example of football has shown that sport institutions do not get along with self-governing and especially with solving its internal problems.

Undoubtedly the biggest disappointment has been the mentality of people responsible for governing the Polish sport. Those who were competent in the previous political and economical system usually do not possess necessary leadership qualifications to govern effectively in modern democracy and under market rules. The negative symbol of the Polish sport environment has become so-called "sport activist" - a person that is able to sacrifice the good of Polish sport in the name of personal interests. Therefore the absolute respect to the rule of law has never reached its rightful status. Instead of that the processes of law making and law execution has been many times abused for certain private and connected with it pseudo-organizational purposes. The lack of institutional transparency has become the tool to keep the beneficial for the "sport elites" *status quo*. Unfortunately the attitude of disrespecting the law rules and principles has become attractive also for sportsmen. In the sport environment the law has lost its most important strength- the ability to prevent from dangerous phenomena and has become meaningless.

Prima facie the arsenal of disciplinary sanctions proposed by the Polish sport associations seems to be very impressive. On the one hand it is the expression of institutional subordination to the international sport associations and their disciplinary rules. On the other hand it is supposed to be the way to guarantee the discipline in the sport environment and the symbol of being legally capable to deal with sport abuses. However the closer analysis of the rules of disciplinary responsibility in sport reveals its faults.

First of all the functioning of disciplinary justice system within the sport associations leaves much to be desired. The example of football seems to be the most relevant again. The institutions responsible for autonomous sports law enforcement in the corruption cases have not been able to do it effectively. Also the governing board of football association has not tried to solve the problem of corruption definitely. This situation caused the suspension of football association government by the Polish Sport Minister and the act of curatory in January, 2007. However International Football Association (FIFA) questioned the article No. 23 of the Act of Qualified Sport of 25th of July 2005¹⁷ that became the base of minister's decision, having objections concerning the legality of such a wide-ranging intervention of Polish government into sport area and threatening with the expel from international football competition. Consequently after forty six days of legal controversies, Polish state and FIFA solved the problem concerning Polish Football Association. It would be hard to say though that it was a compromise. Polish government had to accept all the consequences of the autonomy rule and the governing board of football association was restituted in its rights. The controversial rule of Act of qualified sport has been changed (since then only the Sport Arbitration Court has been able to suspend the sport association authorities in certain circumstances). However the continuation of the above conflict has still been able to observe till these days. The disciplinary division of football association appointed by the curator that consisted of independent from PZPN lawyers has stayed in the permanent dispute with the rest of association authorities and questioned their commitment in fighting sport corruption. Thereupon most of the non-conformist lawyers have been removed from the disciplinary bodies of football association. The current decisions of the new body have become the

13 R. Stec, *The Beaten Football*, Cracow 2007, p. 16- 17.

14 R. Stec, *op. Cit.*, p. 5.

15 L. Morawski, *op. Cit.*, p. 249.

16 *Ibidem*, p. 31; N. MacCormick, *Institutions of Law*, Oxford 2008.

17 Dz. U. 2005, No. 155, item 1298.

symbol of their lack of competence and the object of ridicule of public opinion. Moreover the disciplinary procedure rules do not guarantee the quality of the process of law enforcement and are the subject of unconstitutionality exception. The adequate comment to the above situation should be a fact that while the last months most of the disciplinary verdicts of PZPN bodies were questioned and changed by the Sport Arbitration Court. Moreover the football federation authorities try to implement the idea of corruption faults abolition, because the further consequent fight with it could undoubtedly bare their incompetence and undermine the governing ability.

On the other hand the sport substantive law set up by the sport associations does not fulfill one of the keys of the rule of law- the assumption of stability. The autonomy acts that set up the sanctions and the structure of bodies responsible for implementing them are the subject of numerous changes. The process of rebuilding and extending the corpus of sanctions and the establishment of consecutive disciplinary institutions not only fudge the issue of fighting sport corruption, but pragmatically make it impossible to complete. The disciplinary statute of Polish football Association has been changed fourteen times since the start of current corruption affair.¹⁸ This situation does not favor the development of law culture, creating the positive picture of legislation in the eyes of society. The cognizability and understanding of law are the key conditions of law order acceptance.¹⁹ Therefore the public law has been burdened with fighting the sport corruption in Poland.

The constitution and statutory laws often establish a protection for autonomous rule making.²⁰ Thereby states *de iure* recognize autonomous normative orders and the self-determination rights of various organizations. The most important task of common statutory laws is the establishment of the legal framework for the activity of autonomous institutions. However the regulations of public law cannot pass a certain borderline that decides about the rights guaranteed by the autonomy rule. Thereby the public law scope is in many aspects restricted. Nowadays the challenge of public law acts concerning sport seems to be the formation of frames for professional sport activity. Undoubtedly the legal organization of the high level sports, where the economical benefits became a goal number one, should be based on the institutions of commercial and contract law.²¹ Nowadays in Poland two different law acts determine the public law foundations of sport- the Physical Culture Act²² of 18TH of January 1996 and already mentioned Act of Qualified Sport. Neither of them fully regulates the problems of institutionalized sport and both of them contain norms that deviate from the indispensable in today's high level sport professional rules. This situation not only does not prevent the corruption, but may provoke it as well. Where the business relations take place, should the adequate norms be involved.

The importance of proper legal solutions in professional sport has been articulated in the law of European Union. Although the member states have the exclusive competence in the area of sport and EU only has the competence to carry out actions to support, coordinate and supplement the actions of member states in the area of sport, the institutions of EU directly intervene in sport as far as it is an economic activity. Especially the jurisdiction of Court of Justice of European Communities has contributed to the development of professional sport institutions.

Last but not least is the role of criminal law in sport. The institutions of the criminal law have become the key instrument in fighting sport corruption in Poland. In spite of all the destructions different kind of abuses cause in sport, an opinion in the subject of applicability of criminal responsibility in sport is still questioned. The majority of critical voices is based on the subsidiarity rule. Undoubtedly it needs to be remembered that criminal law takes a special place in the general normative order. Neither it creates nor determines the fundamental principles of conduct of legal transactions, but plays a subsidiary role. The norms of criminal law are applicable only when the norms of other law areas that create the principles of conduct of legal transactions are not able to protect them effectively.²³ The rule of law assumes using the criminal law ultimately when the other remedies of social policy are inadequate.²⁴ On the other hand the criminal law has

been designed especially to protect the common goods and values of the greatest importance. The nature and specific character of criminal norms guarantees the highest level of protection of human rights and freedoms.²⁵ Naturally the criminal responsibility can be excluded in certain cases; however the universal character of criminal law does not allow to exclude it *a limine* and comprehensively.²⁶ Unquestionably sport influences the rest of the world in such an intensive way that the intervention of criminal law on the sport fields seems to be justified. Moreover the progressive criminalization is the response of the normative system to more and more sophisticated, modern methods of crime. The crime looks for new, so far unpenetrated areas of life and strives to exploit the lacks in the protection system. The sport abuses and especially sport corruption could be involved in the above category. However it needs to be remembered that the appropriate proportions in criminal law regulations have to be upheld.

The crime of sport corruption has been in force in Polish penal law since 13TH of June 2003. So-called "anti-corruption amendment" to the Polish Penal Code changed and broadened the scope of criminal responsibility in corruption cases. The provision of article 296b of Polish Penal Code concerning professional sport corruption has become one of the most recognizable reforms of the Polish criminal law.

The general reason for the above amendment was the adjustment of Polish law to the law of EU, one of the accession conditions. Although the criminal law regulations are the exclusive competence of member states, the cooperation in the fight against corruption between EU and its members has been established in so-called "third pillar" of EU. However the criminalization of sport corruption should not be treated as an EU idea, but as an internal initiative, a symptom of penal law modernization.²⁷ The legislator stated in the amendment reasons that "the lack of criminal law reaction to the pathological phenomena in professional sport is commonly recognized as a criminal law inadequacy to new symptoms of social pathology".²⁸ Placing the discussed rule in the special part of Polish Penal Code involving the economic crimes indicates that the main reason for criminal law protection is the integrity of commercial relations generated in the world of sport. However it is also believed that the regulation should be also recognized as an offence against public order.²⁹ Unquestionably the uniqueness and special role that sports plays in society justifies both above points of view.

Nowadays the article 296b of Polish Penal Code is the subject of intensive and serious trails. One major and few minor corruption cases were brought in the courts in Poland. This course of things will undoubtedly verify the quality of commented regulation. Moreover eventual conviction of persons responsible for corruption offences will also make the organizational responsibility of sport organizations possible. It is also worth adding that the bodies responsible for execution of disciplinary order in PZPN are going to coordinate their anti-corruption policy with the activities of penal prosecution agencies. This situation is certainly desirable; however it could be submitted as a next proof of institutional weaknesses in the area of sport autonomous regulations. Nowadays the penal law tools seem to be irreplaceable in fighting the problem of corruption in Polish sport.

The corruption in sport has become a global dilemma. Therefore the establishing of law institutions effective in fighting this kind of

18 <http://www.pzpn.pl>

19 S. Lewandowski, *The Legislation Technique and the Principles of Legislation Technique*, Edukacja Prawnicza 10/2003, s. 25.

20 L. Halgreen, *op. Cit.*, p. 26.

21 A. Baczewski, *The Elements of Commercial Law in the Act of Qualified Sport*, Sport Wyczynowy 9-10/2005, p. 21.

22 Dz. U. 1996, No. 25, item 113.

23 A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Girdwoyn, *The Criminal Law and Criminal Justice System of European Union Countries*, Torun 2007, p. 18.

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29 R. Zawlocki [in:] A. Wasek (ed.), *Penal Code. The Special Part. Commentary*, Warsaw 2004, p. 1050.

sport abuse seems to be a global problem. Although each country works out its specific legal relations with the world of sport, the general problem recurs. The question is: to what extent the rules of autonomous sport organizations are legitimate in fighting corruption

and how far should the public and especially criminal law intervene in the independent world of sport? I hope that the Polish experiences of sport corruption may be helpful in formulating proper policies.

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Football Supporters' Rights: A Lost Cause?

by Anastassia Tsoukala*

The introduction of numerous national and EU liberty-restricting counter-terrorism policies in the aftermath of the terrorist attacks of 2001, led to a broad upsurge in defence of human rights across Europe. Far from being surprising, this reaction constitutes a key feature of the evolution of the political class and the civil society in all post-war liberal democracies. Resistance against anything that can be seen as an attack on civil liberties and human rights is a core element of contemporary liberal political life, and many different social groups, varying from juvenile offenders and drug users to immigrants, Muslims and Roma people, have enjoyed the support of numerous political and social groups and institutions. In the late 20TH century this sensitivity to protecting the rights of others extended to the so-called third-generation human rights. An increasing number of people are thus actively involved in defending the right to a healthy environment, natural resources and the like.

But this rather reassuring image of a growing movement in defence of civil liberties and human rights reaches its limits when one considers not who or what is included, but rather who or what is excluded from this 'protecting umbrella'. When the issue is addressed at a European level, it becomes clear that football supporters are the broader, if not the sole, social group which has never enjoyed such mass support. As will be shown briefly below, though they have been the target of an expanding web of surveillance and control mechanisms in the course of the past four decades, one which ended up establishing vast control over deviant behaviour, this long-standing focusing of the social control apparatus on them has only raised some scarce and scattered criticisms, usually expressed by scholars and occasionally by some NGOs¹.

To shed some light on this startling general indifference to football supporters' rights, this paper will first summarise the main relevant surveillance and control mechanisms, and will then briefly address some of the reasons that arguably lie beneath this broadly-shared social stance.

A long-standing control of deviance

Notwithstanding several political groups and organisations, football supporters are one of the first social groups in liberal post-war European countries to be put under systematic surveillance. Justified in the name of the fight against football hooliganism, surveillance took the form of both electronic devices and undercover policing. In the former, CCTV cameras, first installed in the UK in the 1970s, have been introduced subsequently and eventually became compulsory in all European football stadia used for international matches². For high-risk matches, the permanent television surveillance system is reinforced by mobile cameras held by police officers or installed on police vehicles, thus creating a thick web of control that covers both the area inside and around stadia and a huge variety of specific 'high-risk' places, such as airports, railway and underground stations and downtown venues. Electronic surveillance has been completed since the mid-1980s by extensive undercover policing, while information on

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1 Tsoukala, A. (1995) *Sport et violence*, Athens/Brussels: Sakkoulas/Bruylant; Pearson, G. (1999) 'Legitimate Targets? The Civil Liberties of Football Fans', *Journal of Civil Liberties* 4(1): 28-47; Liberty (July 2000) *Briefing on the draft Football (Disorder) Bill* www.liberty-human-rights.org.uk; Tsoukala, A. (2001) 'La gestion policière du hooliganisme: Angleterre, Italie, Pays-Bas', in J.-C. Basson (ed.) *Sport et ordre public*, Paris: IHESI/La Documentation française: 159-74; Tsoukala, A. (2003) 'Les nouvelles politiques de contrôle du hooliganisme en Europe: de la fusion sécuritaire au multilatéralisme de la menace', *Cultures & Conflits* n° 51: 83-

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2 UEFA (2004), *Binding Safety and Security Instructions*, 3.21 (see also previous editions).

known and potential troublemakers thus gathered has been stored by specific intelligence agencies that became compulsory and interconnected at the EU level in 2002³.

In full compliance with the prevailing proactive principle of the risk-focused crime control model⁴, the introduction and further expansion of these surveillance practices was imposed rapidly as a self-evident way of dealing with the issue. Yet on closer inspection, these practices that ended up determining an increasing part of counter-hooliganism policies in Europe, are far from being unquestionable. In seeking to identify not only the perpetrators of punishable acts but also, and above all, the potential offenders, who have not and may even never commit any offence, the social control apparatus grounds its action on hypotheses rather than facts, that is, on suspicion rather than evidence. As I have shown elsewhere⁵, this radical departure from the principles of the so-called rehabilitation-oriented crime control model prevailing in Europe from the 19th century until roughly the 1980s, has produced numerous noxious effects on the rule of law and the protection of civil liberties.

Given the limited space of this paper, I will address just one of the effects of this crime management policy, that is, the direct punishment of deviant behaviour. In actual fact, the existence of a close link between putting a specific social group under surveillance and enhancing the chances of the people thus targeted of being spotted by the law enforcers, is now a commonplace among criminologists. The interplay between the rise in offences thus recorded, the *a posteriori* justification of the initial suspicion, and the legitimisation of maintaining and even expanding surveillance has been studied thoroughly since the 1960s. In the case of football hooliganism, many scholars have also shown that the rise in arrests provoked in part by such surveillance mechanisms, often went together with a standard judicial practice of punishing people accused for football-related offences more harshly than those accused of similar offences committed in a non-sports-related context⁶. Yet notwithstanding its importance, this punishment of deviant behaviour remains indirect. While it is undeniable that the attention of the social control apparatus is drawn to football stadia to a large extent because of the deviant behaviour of football supporters, people are arrested and eventually punished because they have committed one or more offences. Here football supporters can be considered as similar to other deviant social groups who may be targeted by social control agents on a temporary or more permanent basis.

But this similarity has now ceased to exist because of the increasing introduction of administrative football bans in several European countries, based on police officers' reports. Used increasingly frequently by the law enforcers, these football bans tend to become an important tool in crowd control policies, at the expense of recourse to judicial football bans. In actual fact, apart from Italy where administrative football bans were provided in law as early as 1989⁷, from the mid-1980s⁸ until the late 1990s football bans were only imposed by the courts as an additional penalty on conviction, and in principle they were national in scope. But in the late 1990s the use of administrative football bans started to spread slowly across Europe⁹, as a much faster to apply, though shorter in duration, alternative dissuasive measure. Of variable length, such bans were initially only applicable nationally. A second turning point came in Germany where,

with Euro 2000 imminent, the authorities amended the law on passports and banned around 60 known football hooligans from leaving the country. In the same year, the Football (Disorder) Act 2000 amended football banning orders in the UK substantially by broadening their scope and their legal basis. Applicable both nationally and abroad, they now entail a series of constraints: at the national level, these range from requiring the person concerned to report to a police station for the duration of a match, to banning them from using public transport on match days and/or from visiting town centres, pubs and bars during risk periods; as far as attending matches abroad is concerned, they involve preventing people from leaving the country by forcing them to surrender their passports for a specific period. These restraints¹⁰ may be now imposed by a magistrates' court, in accordance with the civil procedure rules, following submission of a complaint by the police or the Crown Prosecution Service. The complaint may be brought if the claimant can satisfy the court that the individual concerned has caused or contributed to any violence or disorder in the UK or elsewhere at any time.

In France, Law 2006-64 of 23 January 2006 on the fight against terrorism enabled the authorities to prohibit entry into stadia for a maximum of three months, to anyone whose behaviour has been deemed to threaten public order during a sporting event. In August 2007, Circular INT/D/07/00089/C on the implementation of administrative football banning orders specified that the conduct being penalized by such orders did not have to constitute a criminal offence; it was sufficient for it to amount to 'behaviour that is generally threatening to public order'. As the original length of such banning orders is now deemed to be too short, a Parliamentary Report is recommending it be increased to six months¹¹ while the authors of a Senate Report want it increased to a whole year¹².

The rapid upsurge in the use of administrative football bans marks a turning point in the repression of football hooliganism. Football supporters can now be deprived of their freedom of movement, within their own country or abroad, and subjected to other types of constraints on the basis of suspicion alone, without having been convicted of any offence. This turning point not only implies the introduction of a direct punishment of deviant behaviour, but also the imposition of a double penalty. In addition to the initial penalty, namely, limiting the freedom of movement within a given area for a specific period of time, there is a 'hidden' penalty that is likely to be applied for much longer within a potentially much broader arena. This 'hidden' penalty actually stems from the way intelligence agencies operate. To be more specific, the fact that they usually store their data for at least five years, means that the initial penalty is subject to a virtual prolongation which, based on the suspicion thus established, can have real consequences well after the period of duration of the initial penalty has ended. For example, Belgian football supporters subjected to three-month administrative banning orders in the early 2000s were turned away at the German border or deported from German territory during the 2006 World Cup. It is worth remembering here that the national authorities have no room for manoeuvre in this instance because, according to the Council Resolution of 17 November 2003¹³, information on football bans issued domestically has to be transmitted to countries staging international football matches.

3 Council of the EU, Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension, OJEC L 121, 8 May 2002.

4 Feeley, M. and Simon, J. (1992) 'The new penology: notes on the emerging strategy of corrections and its implications', *Criminology*, 30(4): 449-74; Simon, J. (1997) 'Governing through crime', in L.M. Friedman and G. Fisher (eds.) *The Crime connection*, Boulder: Westview Press: 171-89; Shearing, C. (2001) 'Punishment and the changing face of the governance', *Punishment & Society*, 3(2): 203-20; Johnston, L. and Shearing, C.

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7 Law N° 401 of 13 December 1989 (Art. 6), *Gazzetta Ufficiale* N° 294, 18 December 1989.

8 That is, when they were introduced for the first time.

9 In Belgium, for example, they were introduced in 1998 by the Law on security at football matches, *Moniteur belge*, 3 February 1999 (as amended by the Law of 10 March 2003, *Moniteur belge*, 31 March 2003, and the Law of 25 April 2007, *Moniteur belge*, 8 May 2007).

10 For a period of three to five years.
11 Assemblée Nationale, Rapport No 396 sur la mise en application de la loi n° 2006-784 du 5 juillet 2006 relative à la prévention des violences lors des manifestations sportives, 7 November 2007.

12 Sénat, *Faut-il avoir peur des supporters?* Rapport n° 467, 26 September 2007, p. 36.

A broadly shared indifference

This rapidly expanding establishment of a form of direct punishment of deviant behaviour is all the more worrying because it did not raise any significant criticisms. Though it is not possible here to analyse the reasons that may lie beneath this broadly shared indifference to the protection of football supporters' rights, I will attempt to present some of them briefly in the remainder of the paper.

The first to be mentioned is the absence of an overarching academic definition of football hooliganism. Despite the fact that since the early 1970s the analysis of football-related violence has given rise to explanatory theories espoused by more than 70 scholars in Europe, this broad academic interest has not led to a generally accepted idea about the main constituents of the phenomenon due, among other things, to serious conflicts among academics that in turn greatly impeded the conduct of multidisciplinary and comparative studies likely to grasp both the diverse and rapidly changing aspects and the local specificities of football hooliganism.

The inability of academia to play an important role in the ongoing struggles for the imposition of a definition of football hooliganism has been matched by the absence of a proper legal definition of the phenomenon. In actual fact, despite the many different national laws and EU regulatory texts, football hooliganism has only been defined in an indirect way to date, that is, in being broken down into a set of punishable behaviours. While the adoption of this type of analytical approach, calling to mind the difficulties encountered by jurists in the course of their many attempts to define organised crime¹³, suggests that football hooliganism is a commonsensical notion that can only be used as a generic term, its effect on policing football supporters has been tremendous. Not only did it allow the law enforcers to become the sole definers of the boundaries of the phenomenon, but also it placed them among the key definers of the 'threat' to a given society thus posed, and of the ways to counter this threat. Inevitably then, their decisions became influenced by a series of extra-legal parameters, varying from the way security professionals and politicians perceived security threats and prioritised the values to be protected, to the way these threats and values have been broadcast or not by the media professionals.

In other words, in the absence of an overarching academic definition and of a proper legal framing of the issue, in practice the defin-

ing process of football hooliganism was left to law enforcers and journalists. Social control of the phenomenon then developed against a background marked by the Heysel tragedy, the emergence of a crime control model based on actuarial risk management, rapidly accelerating Europeanisation, a growing politicisation of security issues, the evolution of domestic and EU political and security fields, and the professional routines of police officers and journalists. In this highly fluctuating context, the key definers of the phenomenon converged around the idea of its dangerousness.

Football-related violence has thus been regarded constantly since the early 1970s as a particularly dangerous and increasingly expanding phenomenon, thus justifying the introduction of any measure likely to counter the threat it allegedly posed to a given society. More often than not the image of dangerousness rested upon the idea that this form of violence was the result of people with a vague social and economic background, who were either acting in an irrational if not animal-like way, or being heavily orchestrated for purposes usually related to far-right political groups and organisations. Following the usual process of the social construction of 'otherness', known and potential troublemakers, that is, football hooligans and football supporters, were therefore being represented either as firmly divorced from any rational frame likely to give sense to their acts, or as being embedded in marginal, politically disavowed environments.

Arguably then, the long-standing and widely expanded broadcasting of this standard image of the 'threatening other' in Europe has established the idea of both the threat to be countered and the 'unworthiness' of the threatening people so well, that civil society reactions have been practically neutralised. In this respect, what seems to be one of the most successful cases of social construction of threat also questions our ability to go beyond such schemes when we define the values we wish to defend.

The International Sports Law Journal

- ¹³ Council of the EU, Resolution of 17 November 2003 on the use by Member States of bans on access to venues of football matches with an international dimension, OJEC C 281, 22 November 2003, art. 5.
- ¹⁴ Blakesley, C. (1998) 'Les systèmes de justice criminelle face au défi du crime

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REUTERS

Guus Hiddink, coach of the South Korean national football team which came fourth in the 2002 World Cup, holds a speech of thanks on the occasion of the honorary doctorate in physical education (physiology) which was then bestowed upon him at Sejon University in Seoul. One day later, Konkuk University granted him an honorary doctorate in business administration.

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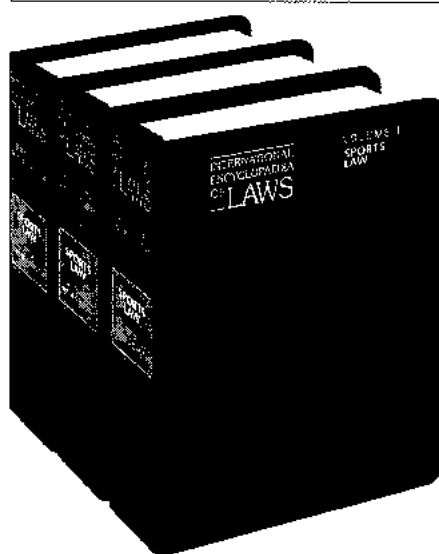




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Safeguarding Confidentiality in Mediation

by Ian Blackshaw*

Introductory: Sport and Mediation

More and more sports disputes are being settled extra-judicially by mediation: an increasingly popular form of alternative dispute resolution (ADR), which has been defined by the Centre for Effective Dispute Resolution, a leading ADR provider, based in London and generally known by its acronym as CEDR, as follows:

“A flexible process conducted confidentially in which a neutral person assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.”

One of the hallmarks of the mediation process, as noted in this definition, is its confidentiality. And this is particularly of interest to the sports world, which, generally speaking, prefers not “to wash their dirty sports linen in public.” And, furthermore, as Bernard Foucher, President of the French Institute of Mediators and a Member of the Court of Arbitration for Sport (CAS), which is based in Lausanne, Switzerland, has said: “within the family of sport.”¹ Despite this incontrovertible fact, the take up of the CAS Mediation Service, introduced in 1999, has been rather slow to date! But it is expected to grow in the foreseeable future.

And, it may be noted, *en passant*, that sports bodies are not the only ones encouraging ADR, especially mediation, but so also are the Courts, as evidenced by a speech given by the Lord Chief Justice of England and Wales, Lord Phillips of Maltravers, in New Delhi, India, on the occasion of the opening of the Indian Mediation Centre earlier this year.²

Apart from confidentiality, which is the subject of this article, mediation offers flexibility, speed, inexpensiveness, and the all-important ‘without prejudice’ feature and advantage. This means that, if the mediation is not successful - and most mediation providers claim an 80% success rate! - whatever is said, admitted or conceded during the course of the mediation, cannot be used and held against the party concerned in any subsequent arbitration or court proceedings.

Of course, the veil of confidentiality can be lifted if both parties to the mediation agree to do so. But what is the position if one party wishes to waive such ‘privilege’, but the party refuses? This was the issue raised in the recent English Queens Bench Division of the High Court case of *Cumbria Waste Management*.³

The Cumbria Waste Management Case

To put this case into context, mention needs to be made of the earlier case of *Earl of Malmesbury v Strutt & Parker*.⁴ In that case, the Earl agreed, together with his opponents, in subsequent Court proceedings, that the Judge should hear the offers that each had made to the other during the mediation. As a result of these disclosures, Mr Justice Jack, who heard the case, found that the Earl’s position at the media-

tion had been wholly unreasonable, and, therefore, based part of his adverse costs ruling on that fact, following the landmark decision of the Court of Appeal on costs in *Dunnett v Railtrack*,⁵ in which Railtrack unreasonably refused the Judge’s suggestion in that case to mediate, and were, accordingly, condemned in costs, even though they won the case and contrary to the normal rule that the successful party is, generally speaking, awarded their legal costs! Incidentally, it may be added that Court-sponsored mediation raises the question of whether a reluctant party, who agrees to it, has - as is their right - received a fair hearing under article 6 of the European Convention on Human Rights of 1950, but that is a complex subject in its own right for a separate article on another occasion! Returning to the present article, in *Malmesbury*, it should be noted that it was not the Judge who peered, as it were, uninvited behind the veil normally drawn over ‘without prejudice’ offers made in the course of mediations, but both parties who invited him to do so by expressly waiving their privilege on this matter.

However, in *Cumbria Waste Management*, one party to the mediation refused to waive this privilege. So, what was the legal position in such a situation? This was the novel legal issue for Judge Kirkham, sitting as an English High Court Judge, to decide in the *Cumbria Waste Management* case. In that case, there were, in fact, two mediations with different mediators, both claims for compensation being defended by DEFRA (the UK Department for Environment, Food and Rural Affairs) and arising out of the 2001 foot and mouth disease outbreak. *Cumbria* sued DEFRA for £4.5 million, but settled through mediation for £3.9 million. *Lakeland* sued DEFRA for £1.72 million, but also settled through mediation for £1.4 million. Both mediations were based on the standard CEDR Model Agreements.⁶

Both *Cumbria* and *Lakeland* had instructed the solicitors Baines Wilson (BW) to advise and negotiate on the service agreements between DEFRA and themselves. They now brought Court proceedings against BW, in which they alleged professional negligence on the part of these solicitors, causing the parties to lose the difference between their invoiced claims and the settlements ‘agreed’ at the mediations, asserting that it had been reasonable to settle, but that the discounts they had been forced to concede resulted from the negligent advice of BW.

In turn, BW sought disclosure of a wide range of documents relating to the mediation, and this was the subject Judge Kirkham’s ruling.

The main issues before the Judge were:

- whether disclosure could be ordered contrary to one party’s wishes by virtue of an exception to the “without prejudice” privilege; and
- whether the confidentiality provisions of the mediation agreement and generally precluded disclosure at the request of one of the parties to the mediation.

Cumbria and *Lakeland* were not fussed either way over disclosure, but DEFRA declined to waive its privilege and right to confidentiality, arguing that disclosure might reveal generally their attitude to claims of this kind, at a time when there were a number of them pending against DEFRA. The mediation agreements were shown to the Judge, but no documents claimed to be privileged.

Both of the mediators took the view that the privilege belonged to the parties and not to them, although the second mediator said that she would normally counsel against the parties agreeing to share such matters with the Court. She also drew attention to the fact that the disclosure sought was so broad as to extend to any notes made by the mediator or by parties in private mediation sessions.

On the other hand, BW argued that it was unfair on them not to

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1 See Paper on ‘Conciliation as a way of resolving sports related disputes in France’ given at the CAS Symposium on Mediation held in Lausanne, Switzerland, on 4 November, 2000. This article, which is in French, is reproduced at p. 71 *et seq* in a forthcoming Book, entitled, ‘Sport Mediation and Arbitration’ by Ian Blackshaw, to be published by the TMC Asser Press later this year.

2 ‘Alternative Dispute Resolution: An English Viewpoint’ a speech given in India on 29 March, 2008 by Lord Phillips of Maltravers and quoted in Blackshaw, *op cit*, at p. 261 *et seq*.

3 *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson* [2008] EWHC 786 (QB), heard in the Birmingham Mercantile Court.

4 [2008] EWHC (TCC).

5 [2002] 2 All ER 850.

6 See the official CEDR website at www.cedr.co.uk for details of these documents.

have access to documents relating to the terms on which the claims by *Cumbria* and *Lakeland* were settled with DEFRA, when those parties were actually claiming to hold BW liable for the shortfall as a result of their negligence. As far as the confidentiality clause in the CEDR model form of Mediation Agreement was concerned, BW argued that it was both novel and wrong to assert that 'A' and 'B' can validly contract for confidentiality so as to exclude 'C' from seeing documents, when C has a proper interest in seeing them. As to the 'without prejudice' privilege, BW argued that this had been waived when it was asserted by *Cumbria* and *Lakeland* that it had been reasonable for them to settle on discounted terms.

Judge Kirkham reviewed the main previous Court decisions on these points, looking particularly at *Muller v Linsley & Mortimer*⁷, which on the face of it was decided on very similar facts. She held, however, that in *Cumbria*, it was the defendant (DEFRA), which was seeking protection from disclosure and not the claimants; a situation not discussed in *Muller*. She, therefore, refused to hold that DEFRA had lost its 'without prejudice privilege' status regarding what happened at the mediation.

Interestingly, she went on to consider the extent and force of the confidentiality provision in the mediation agreement, not a topic covered by direct authority in relation to mediation confidentiality. The main source material for the debate on this was *Toulson & Phipps*' Textbook on Confidentiality (with some passing references to *Rush & Tomkins v Granada Television* [[1989] AC 1280). She relied on a passage which stated:

"Mediation and other forms of dispute resolution have assumed unprecedented importance within the court system since the Woolf reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and "without prejudice" nature of the process. However, even in the absence of such an express agreement, the process will be protected by the "without prejudice" rule set out above".

Judge Kirkham found that on both grounds of 'without prejudice' privilege and contracted confidentiality between the parties, it would be wrong to order disclosure of the mediation documents.⁸ In particular, she wanted mediators to be free to conduct mediations without fear that their notes might be disclosed to others. She saw this as an exception to the general rule that confidentiality is not a bar to disclosure of material to a Court.⁹

This is another example of judicial support and encouragement of mediation "on the grounds of public policy" (the words of Judge Kirkham) as opposed to litigation in the Courts. And added, for good measure, that "[t]he court should be slow to find exceptions to the without prejudice rule."¹⁰

Comments on the *Cumbria Waste Management Case*

In a recent article, entitled, 'Mediation: protection by privilege and confidentiality? A review of *Cumbria Waste Management and another v Baines Wilson*',¹¹ Tony Allen¹² had the following pertinent comments to make on the nature and scope of the decision in this case:

*"This is a bold decision and reinforces the security of what goes on at mediations which has apparently been under investigation in several recent decisions such as *Brown and Rice v Patel* [[2007] EWHC 625 (Ch), *Chantry Vellacott v Convergence Group* [[2007] EWHC 1774 and the *Malmesbury case*. So far as I am aware, all previous cases where mediation content has been reported to a judge have involved specific waiver of privilege by the parties, for better or worse. What *Cumbria* suggests is that courts might indeed be prepared to find that there is a special mediation privilege worthy of judicial protection because the parties (and the mediator) formally contract in writing to keep the mediation process confidential. The judge in *Brown v Rice and Patel* doubted whether such a privilege yet exists, but *Cumbria* suggests that it might. *Muller* may still act as something of a brake on that, though this concerned informal "without prejudice" correspondence rather than a formal mediation.*

One related but unresolved point relates to the fact that "without prejudice" protection almost certainly belongs only to the parties and not to the mediator. But the mediator also signs up to the confidentiality clause in the mediation agreement. Might therefore a mediator have to be consulted

*before any disclosure is made of what transpired at a mediation? In *SITA v Watson Wyatt* [[2002] EWHC 2025 and 2401 (Ch), the parties purportedly waived privilege to report to the judge (for different manifestations of self-interest) what a mediator was alleged to have said at a mediation, a decision that I criticised at the time. Does *Cumbria* suggest that this should never happen in future? I am sure that confidentiality will and should never be used to conceal wrongdoing by a mediator, but short of this it is hard to see why a mediator should not receive the benefit of acting confidentially in that sensitive role as much as the parties, remembering that there are two levels of confidentiality operating at a mediation offered for the benefit of the parties - overall confidentiality of the process, and confidentiality of private meetings with each party during the process."*

And he added the following remarks as a final comment:

"This is going to be a continuing debate before judges at first instance, with doubtless a future opportunity for the Court of Appeal to give further guidance. Judicial instincts on the whole rightly seem to be that the mediation process is deserving of protection from undue scrutiny."

Conclusion

I would entirely agree with Tony Allen's final comment; and would add that judicial protection of the confidentiality and 'without prejudice' nature of mediations is absolutely essential for this form of alternative dispute resolution mechanism to work effectively, in practice, not only for the parties to the mediation, but also for the benefit of the mediator - not least in relation to the conduct of sport-related disputes. Indeed, confidentiality and the 'without prejudice' principle have been - and will continue to be - the main reasons for the success of mediation generally.

In view of the importance of the decision in the *Cumbria Waste Management Case*, the full text of the Judgement of Judge Kirkham is reproduced in the Appendix to this article and, in the opinion of the author of this article, its careful study will repay dividends for all those involved in mediation of all kinds and whatever their capacity.

The International Sports Law Journal

⁷ [1996] 1 PNLR 74.

⁸ See para. 30 of Judge Kirkham's Judgement, which is reproduced in full in the Appendix to this article.

⁹ *Ibid.*, para. 31.

¹⁰ *Ibid.*, para. 26.

¹¹ *New Law Journal*, 15 May, 2008.

¹² Solicitor and Director of CEDR.

APPENDIX

Neutral Citation Number: [2008] EWHC 786 (QB)

IN THE HIGH COURT OF JUSTICE
BIRMINGHAM DISTRICT REGISTRY
MERCANTILE COURT

BIRMINGHAM CIVIL JUSTICE CENTRE
33 BULL STREET
BIRMINGHAM B4 6DS
Dates of hearing: 17 March 2008
Date of draft judgment: 9 April 2008

Date Of Judgment: 16 April 2008

B e f o r e:
Her Honour Judge Frances Kirkham sitting as a High Court Judge

CUMBRIA WASTE MANAGEMENT LIMITED (1)

LAKELAND WASTE MANAGEMENT LIMITED (2)
Claimants

and

BAINES WILSON (A FIRM)
Defendant

Mr Cobill of Wragge & Co for the Claimants
Mr Mark Cannon of Counsel (instructed by Mayer Brown International LLP) for the Defendant
Mr Jonathan Acton Davis QC of Counsel (instructed by Eversheds LLP) for The Department for Environment, Food and Rural Affairs (DEFRA)

HTML VERSION OF JUDGMENT

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1. In issue is whether the defendant is entitled to disclosure of documents arising out of or in connection with two mediations between the claimants and the Department for Environment, Food and Rural Affairs (“DEFRA”) and which are not subject to legal professional privilege. DEFRA are not a party to these proceedings but have been invited to make representations pursuant to CPR 31.19(6)(b). They resist the making of an order for disclosure. The claimants do not resist the application. They take a neutral stance.

Background

2. The defendant acted as solicitors to the claimants in connection with the drafting and negotiation of an agreement between the claimants and DEFRA for the provision of waste management services during the foot and mouth epidemic in 2001. The claimants and DEFRA were in dispute as to the sums to be paid for the claimants’ services. The first claimant claimed £4.54m and the second claimant £1.72m in respect of unpaid invoices and both claimed interest and costs. On 28 February 2005 that dispute was settled on payment by DEFRA of £3.9m to the first claimant and £1.4m to the second claimant.

3. The settlements between the claimants and DEFRA followed a

series of without prejudice communications between the claimants’ solicitors (Messrs Wragge & Co) and those for DEFRA (Messrs Eversheds) and two mediations. The first mediation took place in July 2004 and the second in February 2005.

4. The first and second claimants are now claiming from the defendant in the current proceedings the sums of £3.65m and £0.76m, being the alleged balance between the settlement monies paid by DEFRA and the claimants’ total claims against DEFRA. The claimants allege that the dispute with DEFRA occurred entirely as a result of the defendant’s negligence in relation to the negotiating, drafting and advising upon the terms of the agreement between the claimants and DEFRA. They contend that DEFRA’s case in the dispute with the claimants was based upon ambiguities and inconsistencies in the drafting of the contract for which the defendant was responsible. The claimants say that, if the defendant had performed its obligations and ensured that the contract was clear and unambiguous and that it reflected what had been agreed between the parties and/or the claimants’ instructions, the position taken by DEFRA on the construction of the contract would not have been possible.

5. The claimants allege that the settlement of the proceedings following the February 2005 mediation was in their best interests and reflected a reasonable and sensible compromise of the claims given, in particular, the ambiguity and lack of clarity in the contract.
6. The defendant's position is that it is for the claimants to prove that the settlement with DEFRA was reasonable and to prove what was the true cause of the settlement. The defendant's case is that the true construction of the contract was clear and that there was no reasonable basis for the contention advanced by DEFRA in the dispute with the claimants. If the claimants settled with DEFRA on the basis that there was a risk that the unmeritorious construction advanced by DEFRA would be upheld by the court, then that was an unreasonable basis for the claimants to settle. Further, if the claimants settled with DEFRA on the basis of concerns (whether legal or commercial) other than the construction of the contract, then the defendant cannot be held responsible for any shortfall between the settlement monies and the amounts invoiced by the claimants.
7. The parties have exchanged lists of documents. Pursuant to the guidance of the Court of Appeal in *Muller v Lindsay & Mortimer* [1996] 1 P.N.L.R. 74, the claimants waived privilege in and disclosed without prejudice communications between Wragge & Co and Eversheds. They disclosed the existence of documents created in connection with the two mediations but did not show these to the defendant. They enquired of the mediators and DEFRA whether the documents could be shown to the defendant. DEFRA has refused its consent.

Mediation agreements

8. At the hearing of this application, expressly reserving its right to confidentiality and without waiving its claim to privilege, DEFRA produced copies of the agreements entered into by the claimants, DEFRA and the mediator in relation to each of the two mediations. Each agreement contains a confidentiality provision. The agreement for the first mediation, in July 2004, was on a CEDR form. Clause 6 provided:

"6. Each Party to the Mediation and all persons attending the Mediation will be bound by the confidentiality provisions of the Model Procedure (paragraphs 16 - 20)."

9. Relevant provisions within the Model Procedure were:

"16. Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Mediation, including the fact of any settlement and its terms, save for the fact that the mediation is to take place or has taken place.

17. All information (whether oral, in writing or otherwise) arising out of, or in connection with, at the Mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information which would in any event have been admissible or disclosable in any such proceedings."

10. Similarly, the mediation agreement entered into by the claimants, DEFRA and the mediator for the February 2005 mediation contains the following confidentiality clause:

"6. Each Party in signing this Agreement is deemed to be agreeing to the confidentiality provisions of the Mediation Procedure on behalf of itself and all of its directors, officers, servants, agents and/or Representatives and all other persons present on behalf of that Party at the Mediation."

11. When asked to consent to the release of all the documents arising out of or in connection with the mediation, Mr Willis, the mediator in the first mediation, took a neutral stance: it was a matter for the parties. On 7 February 2008, Miss Andrewartha, the mediator for the second mediation, wrote as follows:

"The Mediation Agreement of course subjects all matters associated with the mediation to confidentiality. I would be extremely reluctant to allow any inquiry into the proceedings that took place during the mediation. I would normally counsel against

the parties agreeing to share such matters. However I view the privilege, ultimately, as being that of the parties and if you decided to waive privilege that may well be a matter for you. I would comment, though, that the request relates to '*all of the documents arising out of or in connection with the mediation*'. That is a very wide category of documents indeed. It could include privileged material on your respective files. I do not believe that I have retained any notes but if I had it could be wide enough to encompass those. It could also cover your own notes of private meetings held during the course of the mediation."

DEFRA's evidence

12. Mr Rabej is Director of Purchasing and Supply of DEFRA. He made a witness statement in relation to the defendant's application for disclosure. His evidence is that DEFRA are in dispute with other parties in relation to the 2001 foot and mouth epidemic or other disease outbreaks. If the documents are disclosed and if they become public during the course of hearings within these proceedings, that may provide information as to DEFRA's approach to disputes and resolution of these. That might lead to prejudice to DEFRA in such cases as may arise.

Issues

13. The defendant is facing a substantial claim. As the claimants have pleaded that the settlement was reasonable, particularly given the alleged ambiguity in the defendant's drafting, it would be unfair and unjust to the defendant if a confidentiality agreement between the claimants and DEFRA precluded inspection by the defendant of material documents. The claimants have chosen to bring these proceedings against the defendant and should not be entitled to hide behind a confidentiality agreement which they entered into voluntarily with a third-party (DEFRA) to preclude inspection of disclosable documents.

14. The defendant's case is that there is no principle of English law by which documents are protected from disclosure on inspection by reason of confidentiality alone. Without prejudice communications are confidential. The defendant does not challenge the proposition that the documents are prima facie protected from disclosure on the ground of privilege but contends that the claimants waived that privilege when they pleaded the reasonableness of the settlement with DEFRA. The defendant submits that the position here as to relevance is indistinguishable from that in *Muller*. In order to assess the reasonableness of the claimants' conduct, the defendant needs to know what that conduct was, including their conduct at the two mediations. Justice requires that the defendant be able to inspect the documents which are vital to understand the relevant conduct.

15. DEFRA's objection is based on four grounds, namely privilege, confidentiality, contract and relevance.

Privilege:

16. The starting point for consideration of the modern law is the decision of the House of Lords in *Rush & Tomkins Ltd the Greater London Council* [1989] AC 1280. Lord Griffiths summarised the general rule as follows:

"The without prejudice rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v Head* [1984] Ch.290:

"that the rule rests, at least in part, upon public policy is clear from many authorities, and a convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v Drayton Paperworks Ltd* (1927) 44 RPC 151,156 be encouraged fully and frankly to put

their cards on the table ... the public policy justification in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial and submissions on the question of liability.”

The rule applies to exclude all negotiations genuinely aimed at settlement whether all or in writing from being given in evidence.”

17. In *Unilever PLC v Proctor and Gamble* [2000] 1 WLR 2346, Robert Walker LJ referred to that passage in Lord Griffiths’ judgment and said:

“This well-known passage recognises the rule as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues.”

18. Robert Walker LJ went on to summarise the exceptions to that rule, and identified the authority relevant to each exception. The only exception of relevance here is that identified in *Muller*, namely where a former client sues his former solicitors for negligence and an issue arises as to whether he acted reasonably to mitigate his loss in his conduct and conclusion of negotiations with a compromise of proceedings brought against him. Robert Walker LJ said:

“Whatever difficulties there are in a complete reconciliation of those cases [ie the exceptions to the rule] they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties in the words of Lord Griffiths in the *Rush v Tomkins* case: ‘to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a base of compromise, admitting certain facts.’”

19. In his judgment in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, Dyson LJ said:

“We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the Court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the Court should not note, and therefore should not investigate, why the process did not result in agreement.”

20. In *Savings and Investment Bank Ltd v Fincken* [2004] 1 WLR 667 Rix LJ reviewed the authorities, and said, at paragraph 53:

“All four authorities in this court, while allowing the existence of an exceptional rule to cover cases of unambiguous impropriety, have stressed the importance of the public interest which has created the general rule of privilege and have cautioned against the too ready application of the exception.”

At paragraph 62, he said:

“In the tension between two powerful public interests, it seems to me that in favour of the protection of the privilege of without prejudice discussions holds sway - unless the privilege is itself abused on the occasion of its exercise.”

21. In *Muller* the plaintiffs were in dispute with shareholders of a company. Settlement was agreed. They then claimed damages for negligence from their former solicitors. The plaintiffs asserted that the settlement had been a reasonable attempt to mitigate their loss. The defendant solicitors asserted that it was not and applied for discovery of the documents relating to it. The Court of Appeal ordered disclosure. Hoffmann LJ referred to the two justifications for the without prejudice rule, namely public policy to encourage

parties to settle disputes and implied agreement about what are commonly understood to be the consequences of negotiating on a without prejudice basis. He said:

“If one analyses the relationship between the without prejudice rule and the other rules of evidence, it seems to me that the privilege operates as an exception to the general rules on admissions (which can itself be regarded as an exception to the rule against hearsay) that the statement or conduct of the party is always admissible against him to prove any fact which is thereby expressly or impliedly asserted or admitted. The public policy aspect of the rule is not in my judgment concerned with the admissibility of statements which are relevant otherwise than as admissions ie independently of the truth of the facts alleged to have been admitted.”

He went on to outline some of the exceptions to the without prejudice rule, noting: “Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made.”

22. Hoffmann LJ concluded:

“But the public policy rationale is, in my judgment, directed solely to admissions. In a case such as this, in which the defendants were not parties to the negotiations, there can be no other basis for the privilege.”

If this is a correct analysis of the rule, then it seems to me that the without prejudice correspondence in this case falls outside its scope. The issue raised by paragraph 17 of the statement of claim is whether the conduct of the Mullers in settling the claim was reasonable mitigation of damage. That conduct consisted in the prosecution and settlement of the earlier action.

The without prejudice correspondence forms part of that conduct and its relevance lies in the light it may throw on whether the Mullers acted reasonably in concluding the ultimate settlement and not in its admissibility to establish the truth of any express or implied admissions it may contain. On the contrary, any use which the defendants may wish to make of such admissions is likely to take the form of asserting that they were not true and that it was therefore unreasonable to make them.

I do not think that interpreting the rule in this way infringes the policy of encouraging settlements. It may of course be said that a party may be inhibited from reaching a settlement by the thought that his negotiations will be exposed to examination in order to decide whether he acted reasonably. But this is a consequence of the rule that a party entitled to an indemnity must act reasonably to mitigate his loss. It would in my judgment be inconsistent to give the indemnifier the benefit of this rule but to deny him the material necessary to make it effective.”

23. In the same case, Swinton Thomas LJ noted that the plaintiffs had alleged that they had acted reasonably in settling the proceedings, and said:

“... that allegation made by the plaintiffs would in reality not be justiciable without the court having sight of the without prejudice negotiations and correspondence. By bringing their conduct into the arena, and putting it in issue, the plaintiffs have, in my judgment, waived any privilege attached to the without prejudice negotiations and correspondence.”

Conclusion

24. I am not persuaded that disclosure of documents within the mediation falls within the exception to the without prejudice rule enunciated in *Muller*. The circumstances in *Muller* are different from those which obtain here. In that case, it was the plaintiffs who sought to deny disclosure of without prejudice material. Here, the question is whether a third party’s without prejudice material should be disclosed. The Court of Appeal in *Muller* gave no consideration to the position of a third party. In this case the privilege

- belongs not only to the claimants but also to DEFRA. There are public policy reasons why DEFRA should be entitled to assert that privilege: DEFRA are entitled to protect from disclosure material which may embarrass them in other disputes. Further, in this case there was express (not just implied) agreement between the claimants and DEFRA that the without prejudice rule apply.
25. The rationale of Hoffmann LJ in Muller was that the issue was unconnected with the truth or falsity of anything stated in the negotiation and as therefore falling outside the principle of public policy protecting without prejudice communications. It would appear that that will not apply in this case, because, here, the truth or falsity of what was argued in the mediation will or may (subject to relevance) be an issue in the litigation.
26. The long line of authorities, and the CPR, encourage parties to attempt to settle disputes through without prejudice communications and mediation. There is clear public policy to encourage mediation in place of litigation. The court should be slow to find exceptions to the without prejudice rule.
27. In my judgment, the defendant cannot bring itself within the Muller exception to the without prejudice rule. For that reason alone, the defendant's application must fail. I nevertheless deal with the question of confidentiality.
- Confidentiality**
28. Mr Acton Davis QC refers to extracts in Confidentiality, Toulson and Phipps, 2006:
- 17.001: "Generally speaking, confidentiality is not a bar to disclosure of documents... but the court will only compel such disclosure if it considers it necessary for the fair disposal of the case: see... British Steel Corporation v Granada Television Ltd [1981] AC1096.
- 17.005: "The principle that information necessary for the fair disposal of disputes should be disclosed, even if it is confidential, is subject to statutory and common-law exceptions".
- 17.007: "The general principle does not apply in cases of:
(i) 'without prejudice' communications and communications to mediators and conciliators ... the rationale being that the public interest in maintaining secrecy in such cases outweighs the general principle in favour of disclosure."
- 17.015 : "In Unilever PLC v The Proctor and Gamble Co Robert Walker LJ categorised a number of circumstances in which - and purposes for which - 'without prejudice' communications may be admissible in evidence. A private law duty of confidence arising from the 'without prejudice' nature of communications will not usually prevent a party from adducing such communications in those circumstances and for those purposes. However, if no duty of confidentiality were owed at all, a party to without prejudice negotiations would be at liberty to publicise them at large. This would be inimical to the object of such negotiations and contrary to the assumption on which they are ordinarily conducted."
- 17.016: "Mediation and other forms of alternative dispute resolution have assumed unprecedented importance within the court system since the Woolf reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and 'without prejudice' nature of the process. However, even in the absence of such an express agreement, the process will be protected by the 'without prejudice' rule set out above."
29. There is an overlap between DEFRA's objection to disclosure based on the ground of confidentiality and its resistance based on the protection it seeks pursuant to the 'without prejudice' rule, as many of the applicable principles are common to both. Had I not concluded that the defendant's application failed for the reasons given above - that is, as not falling within one of the exceptions to the without prejudice rule - I should have concluded that DEFRA would be entitled to rely on an exception to the general rule that confidentiality is not a bar to disclosure. DEFRA was a party to the confidentiality agreement and wishes its provisions to be honoured. In any event, I am persuaded that, for the reasons identified in 17-016 above, documents within a mediation should be protected from disclosure.
30. In my judgment, whether on the basis of the without prejudice rule or as an exception to the general rule that confidentiality is not a bar to disclosure, the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation.
31. I note that the disclosure sought by the defendant is of such wide scope that it would include documents held by the mediator. In my judgement, the court should be very slow to order such disclosure. Mediators should be able to conduct mediations confident that, in normal circumstances, their papers could not be seen by the parties or others.
32. Mr Cannon submits that the court could offer DEFRA the protection it seeks by setting in place safeguards such as restricting those entitled to see material or hearing evidence with respect to material within the mediations in closed court. In my judgement, the court should not follow that route. First, justice should normally be conducted in the open and the court should be slow to choose to do otherwise. Secondly, DEFRA has legitimate interests to protect. DEFRA would, understandably, wish to have an observer present to ensure that its position was protected; in my judgment, the court should not impose on DEFRA a regime which would cause them to such incur expense and suffer that inconvenience.
33. Given my conclusions with respect to these matters, it is not necessary to deal with Mr Acton Davis' submissions in relation to contract or relevance.
- Frances Kirkham

16 April 2008



SETTLING SPORTS DISPUTES THROUGH WIPO

See for information on WIPO Arbitration and Mediation Center, Geneva, Switzerland:

<http://www.wipo.int/amc/en/center/index.html>

See for information on relevant precedents on "sport":

<http://www.wipo.int/amc/en/domains/search/>

(Full text search on WIPO Panel Decisions: sport (search))

A Comparison of the European and North American Models of Sports Organisation

by James A.R. Nafziger*

I. Introduction

Comparative legal commentary on the organisational structure of sports, particularly of professional sports, is substantial and growing. One of the main themes in Europe has been the relationship between a rather pristine European Sports Model, as it has been called, and the growing commercialization of sport. This theme has been expressed variously in analyzing the regulatory power of the European Union over sporting activity and in contrasting the European Sports Model with a so-called North American Sports Model. Both models are largely policy constructs, and the North American Sports Model may simply be that which the European Model is not. Even so, the models help each of us see our own sports culture as others see it. Although the European Sports Model has been the subject of many writings, in-depth comparisons between it and the North American model are infrequent.¹ Comparing the models highlights core values, sharpens analysis, and yields new insights.

A few preliminary observations may be useful in defining the models. First, they are just that: models, that is general representations of reality rather than precise descriptions of organisational structures. We should not overlook significant variations. For example, the European Sports Model is based largely on just one sport that dominates attention in Europe, namely, football/soccer. Other sports have their own distinctive structures. For example, contrary to the monopolistic national structures of football/soccer in Europe, several competing organisations stage championship boxing matches there as well as elsewhere. Also, several European rugby leagues, contrary to the European mold, maintain caps on salaries expendable by member teams. There are also important variations among the structures of national football/soccer organisations within Europe. Moreover, although the European Sports Model has been replicated around the world, it is by no means universal. Some Asian and Caribbean organisational structures, for example, are distinctive.

The North American model is likewise diversified. For example, there are important variations among the several major professional leagues within North America, between Canadian and U.S. structures, and between those structures and others elsewhere in North America, such as in Mexico, Central America, and the Caribbean.²

Second, a functional analysis and evaluation of the European Sports Model inevitably must take account of the legal constraints, particularly European Union law. Of particular prominence are the tensions between European Union law and the so-called specificity of sport, according to which the special nature of sport, the “sporting

exception,”³ with its own complex structure of regulation and dispute resolution, constitutes a reserved domain of authority largely insulated from EU intervention.

Finally, the actual structure of professional sports in Europe continues to evolve. Consequently, the European model may no longer reflect the realities of football/soccer in an era of global marketing.

II. The European Sports Model

What, then, do we mean exactly by the European Sports Model? In 1997 the Treaty of Amsterdam, which amended the Treaty Establishing the European Economic Community, attached several single-paragraph declarations, including Declaration 29 on Sport.⁴ It was the first to acknowledge the economic and social roles of sport in the process of European integration. Later, in preparation for a 1999 Conference on Sport in Olympia, Greece, the European Commission expanded on this declaration by publishing a detailed consultation document entitled “The European Sports Model.”⁵ The same year, the Commission published the Helsinki Report on Sport⁶ in response to which the European Council published a definitive statement, the 2000 Nice Declaration on Sport.⁷ Neither of these latter two documents specifically reiterates the features of the European Sports Model although they both confirm values closely associated with the model. Then, in 2007, the Commission issued a White Paper on Sport⁸ that puts several features of the model in the larger context of sport as an economic and social phenomenon of fundamental importance to human welfare.

The European Commission’s Consultation Document identified six specific features that continue to form the core of the European Sports Model:

A. Pyramid Structure

In each country, a single, comprehensive structure for each sport includes four integrated, interdependent levels of professional and nonprofessional organisations. This structure is described as a pyramid. At its base are the largely autonomous and nonprofessional *clubs* that are said to be fundamental institutions in European society from the smallest communities on up. For example, it is estimated that 39% of the population in Austria belongs to a sports club.⁹ At the next higher level are *regional federations* within each country. They are responsible for organising competition among the constituent clubs in a particular sport. At the third level up are *national federations*. They are responsible for overseeing the work of the regional federa-

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1 A major exception is Lars Halgreen, *European Sports Law: A Comparative Analysis of the European and American Models of Sport* (2004). See also Stephen Weatherill, *Resisting the Pressures of “Americanization”: The Influence of European Community Law on the “European Sports Model,”* 8 *Willamette J. Int’l L. & Disp. Res.* 37 (2002). If the instant commentary offers any new perspective at all to European readers, it is that of a North American.

2 Throughout this study, discussion of the North American Model will be limited to the features of sport in the United States and Canada, drawing heavily on examples from the United States. The Canadian structure is similar to that of the United States, though not identical with it, and a few Canadian teams and players in binational professional leagues are thereby subject to the same rules as United States teams and players.

3 For a thorough, highly informative exploration of this topic, see Richard Parrish & Samuli Miettinen, *The Sporting Exception in European Union Law* (2008). In his Foreword to the book, Stephen Weatherill, *id.* at vii, observes as follows: 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.

On the “specificity of sport,” see also Ian Blackshaw, *The ‘Specificity of Sport’ and the EU White Paper on Sport: Some Comments,* *Int’l Sports L.J.* 2007/3-4, at 87.

4 Declaration 29, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C340) 1 [hereinafter Declaration 29 on

Sport]. The entire Declaration 29 appears in this text at *infra* note 18. See also Treaty of Nice, Feb. 6, 2001, O.J. (C80)

1. Both of these treaties amended the Treaty of the European Economic Community [hereinafter EC Treaty].
5 European Commission, Directorate-General X, *The European Model of Sport* (1999) [hereinafter Consultation Document]; Richard Parrish, *Sports Law and Policy in the European Union* (2003); Weatherill, *supra* note 1. For a cogent analysis of current problems and possible solutions related to the model, see Thomas M. Schiera, *Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance That it Helped Destroy?*, 32 *Brook. J. Int’l L.* 709 (2007). Gritt Osmann, *Das Europäische*

tions, organising competition among clubs from different regions, staging national championships, and regulating sports activity. For each sport, there is a separate national federation, each of which therefore enjoys both a monopolistic position in a particular sport and the competence to regulate itself, subject to national legislation. At the top of the pyramid are the *European federations*, again, one for each sport, such as the Union of European Football Associations (UEFA), with one member from each country. They organise European championships in each sport, based on the rules of international sports federations (IFs), such as the Fédération Internationale de Football Associations (FIFA) in football/soccer. A primary function of this pyramid structure is to facilitate an equitable distribution of revenue among the constituent sports clubs so as to encourage mass participation and competitive balance among clubs.

B. Promotion and Relegation

In Europe's open system of promotion and relegation, clubs may move up or down from year to year depending largely on their win-loss records. The purposes of this system are primarily to give small- or medium-sized clubs a better chance to reward merit and generally to enhance competition.¹⁰ A dynamic, hierarchical system therefore operates at all levels of the pyramid. The English Football Association (FA) hierarchy, for example, consists of seven tiers. Each year, the best performing teams on any of the bottom six tiers may advance to a higher tier and, if they are consistently successful, end up in the national league system, the highest tier of competition. The FA itself is the exclusive, recognized national federation in English football and is therefore a member of UEFA.

The specific rules and criteria for the process of promotion and relegation are defined by the national federations, such as the FA in England, but they all seek to reward merit and promote equality of opportunity and balance competition among teams. In addition, the promotion-and-relegation system performs an ethical function by mandating relegation to a lower tier of any team that has engaged in specified questionable practices.

Thus, for example, English football clubs finishing in the last four places of the National Football Conference at the top are relegated to either of two second-tier leagues for the following season. Two clubs are therefore relegated to the North League and two clubs to the South League. Conversely, the top team in each of these second-tier leagues is promoted to the geographically undifferentiated National Football Conference. Its remaining two spots for promoted clubs, one from each league, are filled after a series of playoff games among clubs finishing second through fifth in each of the leagues. These playoffs not only add to the excitement of competition each year but also offer an equitable second chance to some clubs, particularly late bloomers

and non-champions. Promotion and relegation of teams in the lower tiers is also merit-driven, but clubs must affirmatively request promotion upward if they qualify.¹¹

Overall, the European Commission "has taken the position that the pyramid structure of sport, along with promotion and relegation, are important aspects of the culture of sport in Europe, and that preservation of [such cultural] institutions (and presumably after such cultural aspects of sports) is an important interest that should be considered in determining whether the rules and policies of leagues and governing bodies are lawful under EU law, including competition law".¹² As we shall see, this is the crux of an ongoing legal tournament in Europe, involving substantial litigation.

C. Grassroots Involvement.

Another feature of the European Sports Model is a strong commitment to voluntary, grassroots leadership. Some 700,000 clubs at the local level are expected to be actively involved in training athletes and organising competition in their communities, usually by enlisting volunteers (an estimated 10 million) rather than paid professionals.¹³ Such grassroots involvement is a foundation of European sports. For example, Portuguese football/soccer clubs rely on approximately 70,000 unpaid coaches.¹⁴ While there may be some funding and other involvement at the grassroots from the regional and national federations, the clubs bear most of the responsibility for developing players and putting together teams.

The role of sports is idealized in Europe as a vital means for communities to bind their citizens together, from the grassroots to the top professional level. Indeed, throughout the world, "[s]port is central enough to the experience of the vast majority of people to be a useful tool to break down the barriers which divide citizens."¹⁵ It is unclear, however, how to define a genuine sports community above the level of highly localized, essentially neighborhood competition. Consequently, it is unclear whether the vaunted grassroots involvement ever comes close to achieving the ideal of communitarianism championed by the European Sports Model. Even if that identification is generally valid, the community is not always coterminous with a particular municipality. Sports can divide municipalities and separate them from other municipalities.¹⁶ For example, football/soccer loyalties in Liverpool, an English bastion of the sport, have historically been divided between a Protestant-oriented and a Catholic-oriented club. That kind of division certainly does not bespeak an optimal outgrowth of grassroots in an important community.

D. National Identity

The European Commission has described sport in Europe as "one of the last national passions. The commitment to national identity,

can be good or bad, but sports is definitely a powerful medium. It may sound trite, but it is nevertheless true, that a sporting contest has metaphorical qualities which lends itself to shared observation, evaluation, and discussion. It also has romantic qualities which frame idealistic thoughts and memories...A sports franchise is a powerful tool that a city can use to improve the quality of life of its citizens.
Id. at 25.

¹⁶ [It] must be strongly noted that a professional sports team does not automatically have a unifying effect by virtue of being a professional sports team. In fact, the same power a sports team has to unify, it has to divide, if it is perceived as only for a particular race, economic class, or culture...Professional sports can also bring to the fore pettiness, greed, divisiveness, and an exaggerated emphasis on athletic victories.
Id. at 24, 25.

Sportmodell, Spurt, 6/1999, at 228; 2/2000, at 58. Pertinent documents may be found in *The European Union and Sport: Legal and Policy Documents* (Robert Siekmann & Jan Willem Soek, eds. 2005).

⁶ Report from the Commission to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport Within the Community Framework, *The Helsinki Report on Sport*, COM (1999) 644 final.

⁷ Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of Which Account Should be Taken in Implementing Common Policies No. 13948/00 of Dec. 2000 (EC).

⁸ Commission of the European Communities, *White Paper on Sport*, COM (2007) 391 final (hereinafter *White Paper*). Parrish & Miettinen, *supra* note 3, at 43, observe as follows: The *White Paper* was not designed to act

as the basis for legislative proposals but to state the Commission's current policy position on sport. In doing so the *White Paper* acts as another communication with sports organisations and also as an orientation document sensitizing the other Commission DG's and EU institutions to the current debates within sport. The *White Paper* is structured around three themes: the societal role of sport, its economic dimension and its organisation in Europe.

With respect to the European Sports Model, the *White Paper* adopts the concept of the specificity of sport, *id.* at 13, but advances the rather unhelpful, non-committal view that a definition of a unified model generally defies adequate definition. *Id.* at 12.

⁹ *Sport for All*, Sports Info. Bull. 19 (1997).

¹⁰ On the benefits of this system, generally see Parrish & Miettinen, *supra* note 3, at 207.

¹¹ Football Association, *National League System Regulations* (2006); see also Roger

G. Noll, *The Economics of Promotion and Relegation in Sports Leagues: The Case of English Football*, 3 J. Sports & Econ. 169 (2002).

¹² Gary Roberts, *The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 Va. Sports & Ent. L.J. 52 (2001).

¹³ See *Commission of the European Communities, Commission Staff Working Document, The EU and Sport: Background and Context*, Accompanying Document to the *White Paper on Sport* 14, SEC (2007) 935.

¹⁴ See Consultation Document, *supra* note 5, at 2.

¹⁵ John Wunderli, *Squeeze Play: The Game of Owners, Cities, Leagues and Congress*, in *Sports Law & Regulation* 13, 24 (1999).

Thus, a professional sports team should be a tool to be used to improve the quality of life of the members of the community. A sports team can be a very effective educational and communicative tool. The intangibles of a sports franchise

therefore, is one of the features of sport in Europe.¹⁷ Declaration 29 on Sport, annexed to the Treaty of Amsterdam, articulated this principle as follows:

The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.¹⁸

The Commission's 2007 White Paper amplifies this appeal by noting reciprocal roles of patriotic emotions and solidarity, on one hand, and personal commitments to physical exercise and healthy social relationships, on the other.

E. International Competitions

The European Commission, acknowledging a psychological need for people to confront one another, promotes sports competition as an alternative to conflict, if not bloodshed, and as a safeguard of cultural diversity.¹⁹ International competitions therefore are seen as a means of harnessing national identity in the production of regional peace and integration.

F. Negative Aspects

The last of the six features of the European Sports Model candidly acknowledges the negative aspects of competition, particularly as a byproduct of efforts to forge national identities. Specifically, the European Commission's Consultative Document recognized that the formation of national identities often inspires ultra-nationalism, racism, intolerance, and hooliganism related to sports events.²⁰

III. The North American Sports Model

In general, the European Sports Model reflects an *open* system of national competitions in which individual clubs, organised comprehensively from the grassroots to the top professional tier in a pyramid structure, move up or down in status generally based on merit at the end of a season. The North American Sports Model is less easily defined because there is little agreement on what exactly it is other than what, to some extent, the European Sports Model is not. For the most part, it largely restates what is seen to be a creeping Americanization of sport, a view that is sometimes inspired by European nativism, antagonism toward American culture, or misunderstanding of it.²¹

This so-called creeping Americanization is closely identified with commercialism, but has other distinctive characteristics. For example, the European Commission's consultation document noted that sport in the United States is not a pastime and way of contributing to society, as it is said to be in Europe, but only a business "operated mainly by professionals."²² On the other hand, the same document concluded that the negative features of the European Sports Model - ultra-nationalism, racism, intolerance, and hooliganism - "are unknown in the U.S."²³ Despite the questionability of such generalizations about the sports culture in North America, the model merits consideration as a creditable representation of reality. As sketched out in the literature,²⁴ it has, like the European Sports Model, six principal characteristics:

A. A Sharp Distinction Between Amateur and Professional Sports

The pyramid structure of European sports organisations merges professional and non-professional sports into a hierarchy governed for the common good by vertically integrated associations and federations. On the other hand, the North American Sports Model is said to distinguish sharply between "amateur" and "professional" sports, each with its own unintegrated structures. Amateur sports - essentially competitions involving unpaid athletes - are governed by several layers of authority: community leagues, school athletic associations, state and national regulatory boards, the National Collegiate Athletic Association (NCAA) and other supervisory organisations at the non-professional level, the Amateur Sports Act, and the rules and processes of the Olympic Movement. Professional sports are governed primarily by their own league rules and the process of collective bargaining. The precise definition of an amateur varies, from the NCAA's strict prohibitions on professional contracts to the inclusive eligibility rules of the Amateur Sports Act and the Olympic Movement that have little to do with compensation of athletes.

The important point is that the distinction between amateur and professional sports which Europeans attribute to North American sports is fundamental in highlighting their commitment to an open, integrated structure of competition. Once the distinction is made, however, it tends to be exaggerated so as to obscure the strong role of non-professional competition in North American sports culture. In the words of a leading expert, the core of the North American Model is "synonymous with the way professional sports has been organised in the four Major League Sports."²⁵

B. The Role of Schools and Colleges

The fundamental role of schools and colleges in the organisation of sport, and the characteristic combination of sport with academic education, is another fundamental feature of the North American Sports Model,²⁶ indeed, an essential building block of both non-professional and professional sports.²⁷ It is therefore surprising how little attention the comparative legal commentary has given to this feature of North American sports culture. Without understanding the role of the schools and colleges as building blocks, however, the division between "amateur" and "professional" sports appears to be more pronounced than it really is.

C. A Closed System of Competition

The structure of sports organisation in North America involves a *closed* system of competition. In contrast to the European Sports Model's pyramid structure and its system of promotion and relegation, the major sports leagues in the United States are generally closed and autonomous, each with an average of 30-32 teams. Within the framework of governmental regulation, the teams in each league co-opt their own membership. They define which teams are to be included within a league, and once teams are so included, they may remain in the league with little fear of expulsion.²⁸ Indeed, membership in a league is an essential and definitive requirement for a team. Member teams thus have only derivative rights from a league and must satisfy distinct obligations²⁹ to other members to protect mutual market opportunities as well as the league itself. It has been said, quite aptly, that although in Europe there are no leagues without teams, in the United States there are no teams without leagues.

17 Consultation Document, *supra* note 5, at 4, 5.

18 Declaration 29 on Sport, *supra* note 4.

19 Consultation Document, *supra* note 5, at 5.

20 *Id.*

21 The perception of creeping Americanization has been described as follows: Indeed, it seems as if the British find every aspect of the sporting world's Americanization fearful. Thus, for example, *The Guardian* reported complaints in

1995 that British stadiums have increasingly come to resemble those in America and are now equipped with good seats, restaurants, and even dance floors: Abolishing those infamous standing-room sections, or "terraces," where nearly 100 people lost their lives in riots at Hillsborough in Sheffield, has made the sport too "nice." In 1998 *The Independent* intoned: "The creeping Americanisation of British sports, in terms of ubiquitous coverage and potential for earning, means that niceness is at

a higher premium than ever before."

Americanization has also been blamed for taming fans, who previously cared passionately about whatever game they were watching; now they allegedly attend events primarily to see and be seen. Andrei S. Markovits, *Western Europe's America Problem*, Chron. Higher Ed., Jan. 19, 2007, at B6, B8. See also Weatherill, *supra* note 1, *passim*.

22 Consultation Document, *supra* note 5, at 4.

23 *Id.* at 5.

24 See especially Halgreen, *supra* note 1, at 7.

25 *Id.*

26 "This direct interrelationship between the education system and professional sports leagues is quite unique for the U.S. in comparison to Europe." *Id.* at 73.

27 But see Halgreen, *id.* at 72 ("The very strong sports tradition among U.S. high schools and colleges is also a very significant feature in the American Model of sport compared to the situation in Europe").

[It] is the league, not the teams, that generates the fundamental market opportunity to produce professional sports games within the league territories. The league transfers derivative rights in the naked market opportunity, a property interest, to enable the member clubs to gain economic rewards by enhancing the inherent value of the business opportunity through team marketing and other operations.³⁰

The North American Sports Model implies that membership in the league is essentially a gift from other members of the league, although membership normally entails the payment of a substantial fee. Expansion and contraction of teams is controlled solely by cooptation. Unlike the generally open system within the pyramid of the European Sports Model, the lowest levels of organised *professional* sports in North America - farm teams and minor leagues in such sports as baseball and hockey - are fundamentally recruitment mechanisms to help train and provide the major leagues with seasoned players.

Thus, the professional leagues operate as joint ventures among the constituent teams. While competing with each other on the field, teams work together off the field in order to promote their mutual economic interests. The teams are horizontally integrated, whereas the European hierarchy of clubs, associations, and federations is vertically integrated.

The North American Sports Model, generally as constructed in European documents and professional commentary, emphasizes that its constituent leagues operate as cartels of team owners. This point can be exaggerated, however, particularly because the players' unions place a substantial restraint on the hegemony of the owners. The issue of synthetic basketballs is a case in point. When players complained about the NBA replacement of leather-covered basketballs, their union promptly filed a grievance with the National Labor Relations Board, claiming that the NBA had violated agreements by failing to consult the players. The union's initiative prompted David Stern, the NBA Commissioner, to acknowledge the players' complaints.³¹

D. Commercialization of Sport

The composition of the closed leagues that comprise the North American Sports Model is based not on promotion and relegation of teams, but rather on a combination of owner preferences, usually for commercial reasons, and approval by the joint ventures of established teams. Major league teams are called franchises, a commercial term, and investment in them is protected by the closed, horizontally integrated system. The product is sometimes described as little more than packaged entertainment. This is the heart of the argument by Europeans that the North American Sports Model is the product not of grassroots social activity, as the European Sports Model with its pyramidal structure purports to be, but of commerce, purely and simply.³²

E. An Extensive System of Team and Player Restraints

The European Sports Model has not relied on team and player restraints to enhance competitive balance among clubs. Indeed, several decisions of the European Court of Justice, to be discussed later,³³ have struck down restraints on conditions for a club's employment and transfer of players that had been imposed by sports associations and federations. In North America, however, restraints on teams and players are important, especially contractual restraints, the draft sys-

tem for player recruitment, salary caps, luxury and payroll taxes, and revenue sharing.³⁴

Contractual restraints are best understood against a background of free agency by which players may be released or otherwise freed of contractual obligations. Free agency has been qualified, however, by reserve clauses in particular. A player declining to sign with a team may be restricted from playing on other teams for a period of time. Free agency restrictions vary from league to league and often change with new collective bargaining agreements. Generally, though, they impose conditions on a player's freedom to transfer, based on the length and terms of service the player has provided a team.

Also, teams have had the right to prolong the player's contract indefinitely, under a reserve clause, or, temporarily, under an option clause. The former "Rozelle Rule" of the National Football League (NFL), for example, represented the use of reserve clauses as a basis for imposing transfer fees on teams acquiring players from other teams, often with the intent and effect of locking players into service with single teams for their entire careers. The "right of first refusal" was later developed, which enabled a free agent's former team to match any offer made to him by another team in order to retain his services. Ordinarily, if they elected not to exercise the right of first refusal, the Rozelle Rule still applied and the NFL Commissioner could himself impose a transfer fee on the former team.

A second type of player restraint in North America is the draft system. Although procedures vary from one professional league to another, an annual draft generally serves as the primary mechanism for recruiting players. The Commissioners of each professional league assign priority numbers to teams to determine the order in which they may select from the rosters of available new players. In the interest of balancing among teams, the poorest performers from the previous season have the first right to pick rookies, thereby helping allocate new talent in the league in reverse proportion to performance. These drafts largely define the access of teams to the pool of new players and exclusive contracting of them.

The third type of player restraint is the salary cap, which sets a limit on the maximum amount a team can pay its players. The purpose, again, is to encourage balance among teams by limiting the ability of the wealthiest teams to pick off the choicest cherries in the league. A luxury tax has a similar purpose but operates differently so as to impose a penalty on payments above a set limit.

F. Collective Bargaining System

In North America, team and player restraints, and formal relationships between them, are largely premised in labour agreements. Indeed, the collective bargaining system has been described as a "very essential difference compared with Europe, where the 'sports industry' concept is not yet as developed and player unions have been relatively weaker and not equipped with the necessary bargaining powers".³⁵ Although restraints on a market such as that of the sports industry may violate U.S. anti-trust law, two exemptions remove restraints on labour from this general policy. The "statutory exemption" is an express statement in the Clayton Act³⁶ that labour is not a commodity or article of commerce, thereby removing labour agreements from the reach of anti-trust law. The "non-statutory exemption" establishes that the Wagner Act and later labour-relations legislation preempt applications of the anti-trust laws. These exemptions, however, have not always been applied consistently.

28 A further distinction has been drawn between "closed" and "hermetic" structures, as follows:
The structure and organisation of sporting leagues in the US also differs on other essential points. The major leagues are generally considered to be "hermetic," meaning that new teams are seldom admitted to a league and there is no annual promotion or relegation between junior leagues and senior leagues.

Expansion franchises are admitted only on agreement between existing league members, and there is a substantial entry fee for new franchisers, which is divided among existing league members. The league structure is not just hermetic, it is also "closed" in the sense that member teams do not compete simultaneously in different competitions. And apart from occasional exceptions, such as the consecutive NBA-dominated "dream teams" at

the Olympic Games, nor do teams release players to compete in national team competitions. This means that especially the World Cup in ice hockey is often deprived of the best players, who have to play championship games at the same time in the NHL.
Halgreen, *id.* at 77.
29 *See, e.g.,* Hollywood Baseball Ass'n v Commissioner, 42 T.C. 234 (1964).
30 Ray Yasser, James R. McCurdy, C. Peter

Goplerud, & Maureen A. Weston, *Sports Law: Cases and Materials* 231 (2006).
31 WR News, Edition 3, Jan. 26, 2007.
32 *See generally* Weatherill, *supra* note 1.
33 *See text at infra* notes 54-58.
34 *See* Stephen F. Ross, *Player Restraints and Competition Law Throughout the World*, 15 Marq. Sports L. Rev. 49 (2004).
35 Halgreen, *supra* note 1, at 79.
36 15 U.S.C. § 12 *et seq.* (2000).

IV. Comparison: Continuing Divergence or Gradual Convergence?

A. Commonalities

1. Ends

In practice, are the two sports models descriptive? If so, are the current organisational structures on the two sides of the Atlantic continuing to diverge or are they converging? Let us begin to answer this question by noting some commonalities between the two models as means to accomplish certain ends, not as ends in themselves. We shall see that because the ends help shape the means and are largely the same on both sides of the Atlantic, the models are gradually converging.

The first of the common ends is to encourage competition at the highest level for the public benefit, whether we define that level as one of pure entertainment or as some sort of unsullied social activity. Consequently, for example, both Europe and North America employ "anti-siphoning" regulations to restrict the media in their ability to control public access to broadcasted competition. In other words, the ability of the media to "siphon off" events by blackouts or pay-for-view requirements is limited on both sides of the Atlantic. Second, both systems seek to find the right balance between the necessary values of cooperation and competition. Striking this balance between competition and cooperation in a social enterprise with "no analogous models in other industries," however, can be difficult.³⁷ Third, the two models both seek competitive balance among clubs or teams based on two principles of competition: equality of teams and uncertainty of outcome.³⁸ Opposing teams should be roughly equal on a given day. Dominance by a single team, in the opinion of the Seventh Circuit Court of Appeals, "would be like one hand clapping,"³⁹ and the sound of even two or three hands clapping would also be disappointing to the spectator public. Perhaps a better metaphor, however, involves the sound of music: "Sport without uncertainty of result would be like opera. You would know who is going to die in the end. It might be entertaining, but it would not be sport."⁴⁰

One might think that the closed system in North America, in which the same teams compete against each other year after year, would not encourage the adjustments in the composition of leagues upon which competitive balance relies. It might seem that the rich, flush with success, would tend to get richer and the poor, poorer. To some extent, this is true, but mostly in the short-run. Generally, the professional leagues maintain competitive balance. Even the well-endowed New York Yankees in Major League Baseball lose games and pennant races. A variety of factors, such as robust players' unions, the annual players' drafts, salary caps (both hard and soft⁴¹), and revenue sharing of broadcast revenue, seek to promote equality.

In European football/soccer, however, a traditional reluctance to adopt such restraints has led to competitive imbalances. Well-established, large-market clubs dominate the sport,⁴² and newly formed consortia of elite clubs, especially the G-14,⁴³ reinforce the imbalances. In part, this may be attributable to decisions of the European Court of Justice and other applications of EC law,⁴⁴ but, overall, increased economic regulation of the clubs should have the effect of minimizing commercial disparities among the clubs. Quite likely, however, the EC regulatory machinery has been unable to keep up with the steady commercialization of European football/soccer.

In both Europe and North America, it is to be candidly acknowledged that many fans prefer dominant teams. For such fans, having

some assurance of a championship may be more important than watching exciting matches.⁴⁵ Thus, the principles of equality and uncertainty of outcome⁴⁶ not only may be frustrated but may actually run contrary to the preferences of sports fans. In sum, although competitive balance remains a shared goal of both sports models, there are clearly limitations on its achievement and questions about its importance.

Finally, the two models seek to insulate sport as much as possible from political and harmful economic manipulation. For example, the European Commission secured an agreement limiting the role of the IF governing Formula One Racing after complaints that the federation had been using its regulatory power to favor its own economic interests.⁴⁷

2. Means: The Models Themselves

To what extent do the basic features of the two models, respectively, conform to reality in this era of globalization and commercialization? To what extent are the models similar despite the apparent differences between their respective features? In seeking answers to these questions, it will be helpful to note several characteristics of sport as it actually operates on both sides of the Atlantic, in terms of the six basic features of the European Sports Model.

a. Pyramid Structure

In the closed, horizontally integrated system of the North American Sports Model, a kind of pyramid structure, though not the same or as formally organized as that of the European Sports Model, is nevertheless apparent. That is due to several factors: the profound role of the schools and colleges in training and recruiting professional players, the annual drafts for recruiting new players, and the importance of semi-professional teams and leagues in thousands of communities. Moreover, the closed system generates lasting long-term loyalties to particular teams as well as close cultural identifications with them. These community-based loyalties help ensure what amounts to an informal, semi-integrated pyramid of sports organization. Also, the establishment of open competition in sports, involving non-professionals and professionals alike, has further blurred the distinction between amateur and professional sports in North America.

b. Promotion and Relegation

In the North American Model, team success also serves to a limited extent as a basis for reconstitution of league membership. To be sure, the process of recomposition or reconstitution of team membership in leagues is not established by formal rules, as in the European Sports Model, nor is it routine, and the process is very gradual. But there is a kind of slow, *de facto* promotion and relegation, in which a team's competitive standing, by influencing ticket sales and other commercial revenue, helps determine the long-term sustainability of a particular franchise. In recent years, the relocation to Washington, D.C. of the less-than-successful Montreal Expos in the MLB is one example of this phenomenon; another involves the plan for the relocation within the NBA of the underperforming Seattle Sonics to Oklahoma City. This plan is of particular interest because the team would thereby move from a large population center and media market to a much smaller one. Perhaps only a community-owned team such as the

37 Matthew J. Mitten, Timothy Davis, Rodney K. Smith, Robert C. Berry, *Sports Law and Regulation: Cases, Materials, and Problems* 399 (2005).

38 See White Paper, *supra* note 8, at 4.1 For further discussion of the unique balancing required, see Stephen Weatherill, *Fairplay Please!: Recent Developments in the Application of EC Law to Sport*, 40 *Common Mkt. L. Rev.* 51, 52-57 (2003).

39 Chicago Professional Sports LP v. N.B.A., 95 F.3d 593, 598 (7th Cir. 1996).

40 Weatherill, *supra* note 38, at 76.

41 The hard cap, employed by the National Football League (NFL), specifically and

absolutely limits the total amount that a team may pay its players, whereas a soft cap, as employed by the National Basketball Association (NBA), likewise sets a limit on compensation but allows exceptions, for example, to enable a team to resign its own veteran free agent without a salary cap limitation. Players anticipating a transfer to another team may negotiate a salary with their current team cap-free. Thus, soft caps encourage players to remain with their teams. See Alan M. Levine, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6

Fordham Intell. Prop. Media & Ent. L.J. 243 (1995).

42 Stratis Camatsos, *European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance?*, 12 *Sports L.J.* 155, 178 (2005).

43 For a description of this consortium, see text at 2(b), *infra*.

44 See *infra* notes 54-58. For a discussion of the decision's effect in shifting power from clubs to players and thereby triggering a dramatic increase in players' salaries so as to favor dominant teams, see Schiera, *supra* note 5, at 718.

45 See James D. Whitney, *Winning Games*

Versus Winning Championships: The Economics of Fan Interest and Team Performance, 26 *Econ. Inquiry* 703 (1988).

46 For an influential articulation of these principles, see Simon Rottenberg, *The Baseball Players' Labor Market*, 64 *J. Pol. Econ.* 242 (1956).

47 In the United States, by contrast, the National Association for Stock Car Auto Racing (NASCAR), which sets standards and organizes competition for the most popular form of automobile racing, is a family-controlled, for-profit enterprise that is independent of IF regulation.

Green Bay Packers in the NFL is secure from the limited process of *de facto* promotion and relegation.

More significantly, however, Europe's promotion-and-relegation system, particularly in football/soccer may no longer be absolute. It is under attack by institutional reforms and commercialism. The UEFA's new system for comprehensive licensing of teams, following a French practice, challenges the merit-based system of promotion and relegation. The result of relying on a licensing system to certify teams is apt to be a semi-closed tournament system akin to the North American Model. Also, the decision of the Court of Arbitration for Sport (CAS) in the Granada 74 case, which upheld the purchase, renaming, and relocation of a team, opens up a major crack in the system. In addition, the elite European clubs have formed their own revenue-generating dream league. This "G-14" group (so-called, although the group has grown beyond the original 14 clubs) has launched what amounts to an attack on the vertically integrated structure by launching their own championship competition. The G-14 arrangement, though still unauthorized, has so far succeeded in puncturing the promotion-and-relegation-driven hierarchy of the European pyramid structure.

c. Grassroots Involvement

Grassroots involvement is also alive and well, not only in Europe but in North America. Such hallowed traditions as Little League Baseball, competition among schools for colleges, and community leagues in many sports bear witness to the vitality of voluntary, grassroots organization of sports in North America. As we have seen, this grassroots foundation is essential in the training and recruitment of professional players. To be sure, as one moves up the sports pyramid, it is apparent that community playing fields abruptly change to commercial ventures, but that is true in both Europe and North America.

In Europe, "much professional sport is rapidly distancing itself from the social and educational context of recreational sport".⁴⁸ In no small measure, this has resulted from foreign acquisition of elite clubs. The discourse of such investment ventures does not smack of communitarianism but rather of commerce. For example, in describing the Hicks Sports Group's acquisition of Liverpool F.C., its Chief Operating Officer spoke of a "gold rush to English soccer" by investors who sought "low-hanging fruit," "brand exploitation," and "synergies in cross-fertilizing opportunities".⁴⁹ The commercial marketing of sports now permeates European football/soccer. In North America, however, a robust system of non-professional competition among schools and colleges remains an alternative fixture of the sports culture.

d. National Identities, International Competitions, and Negative Aspects

In terms of professional sports, the remaining three features of the European Sports Model are considerably less important in North America, primarily because the North American Sports Model encompasses only two countries, the United States and Canada. Indeed, only three of the four major leagues in North America - MLB, NBA, and NHL - have any teams at all in Canada; and only one, the NHL, has substantial Canadian membership.

The feature of national identity in the European Sports Model is itself problematic. Indeed, "the traditional structures of European sports will most likely continue to create problems simply because they are by nature based on the importance of nationality and thus contain an inherent element of potential discrimination".⁵⁰ Moreover, new pressures to relocate clubs and establish feeder clubs in other countries challenge the aspiration of national identity.

Another big question concerns the nature of the international competition that is said to build upon national identity as a feature of the European Sports Model. Because of this relationship, based on national rivalries, international competition unfortunately involves the "inherent element of potential discrimination" that too often takes the form of spectator violence and hooliganism, all of which constitute the "negative aspects" of the European Sports Model. Ironically, the controversial G-14 competition among elite clubs, as a structure *not* based on national rivalries, may better avoid the negative

aspects of the European Sports Model despite its general threat to the promotion of national identities. It is not at all clear whether the European Sports Model has helped the region advance competition beyond such rivalries, with all the bitterness and spectator violence such rivalries entail, to a higher level of transnational integration.

Nor is it clear that the fifty years of European integration has led to any continent-wide identifications in sport. Indeed, many English football fans often cheer for Brazilian and Argentinian teams in their World Cup matches with French and Italian teams rather than for their fellow Europeans. This is particularly puzzling in a region committed to integration. Why, indeed, are there so few European-wide teams? If European integration is important enough to trump the autonomy of sports as something "special," why is the impulse of integration missing in the actual composition of teams? The Ryder Cup team in golf stands out as a major example of a European-wide team.⁵¹

B. The Great Legal Tournament in Europe

Despite the commonalities shared in varying degrees by the two models, important institutional differences between them are also profound. We have already seen that their general organisational structures diverge, in theory if not in practice. Of increasing significance, however, has been the framework of external regulation. Although both European and North American systems are subject to similar legal constraints, particularly anti-trust/competition law, some constraints are more distinctive of one system than the other, for example labour and collective bargaining law as a fundamental element in North American professional sports. Moreover, the framing of related issues has been quite different.

The distinctive framework within which several important issues have been addressed within the European Community involves a dichotomy between pure sporting activity and sporting-related activity subject to economic regulation. The extent to which EC regulatory law extends to sports has profound implications for the integrity of European sports law. Whenever, in the interest of European economic and social integration, EC law overrules the governance of sport by associations and federations, it must be acknowledged that the pyramid of sports organisations is at least potentially challenged. Indeed, what we might call a great legal tournament in Europe concerning EC regulatory authority in the sports arena, as opposed to the autonomy of clubs and associations, has been described as the "crux of sports law"⁵² in Europe.

This development has been fueled, on one side, by rampant commercialization, for example the sale of English football/soccer clubs to foreign investors.⁵³ On the other side is an abiding recognition that sport is "special" and therefore worthy of an exemption from regulation when it does not engage the process of economic integration in Europe. The state of play in the European legal tournament is reflected in four cases, three that have been decided by the European Court of Justice and one by the Court of Arbitration for Sport.

1. *Bosman*. The first of these cases, *Union Royale Belge des Sociétés de Football Ass'n v. Bosman*,⁵⁴ remains *the* cause célèbre. A Belgian player, Bosman, sought a transfer from his former team to a French team. When his new team failed to pay a required transfer fee to the former team, thereby preventing the transfer, Bosman brought legal action

48 Weatherill, *supra* note 38, at 92.

49 Casey Shilts, Remarks at the Conference on the Increasing Globalization of Sports: Olympic, International and Comparative Law and Business Issues, National Sports Law Institute, Marquette University (Sept. 28, 2007).

50 Halgreen, *supra* note 1, at 64.

51 See Mark Rice-Oxley, *Common Currency? New Flag? Nope. Try Golf to Unify Europe*, *Christ. Sci. Mon.*, Sept. 17, 2004, at 1.

52 Halgreen, *supra* note 1, at 396.

53 See, e.g., Ola Olatawura, *The "Theatre of Dreams"?-Manchester United, FC*

Globalization, and International Sports Law, 16 *Marq. Sports L.J.* 287, 289 (2006) (corporate raider Malcolm Glazer's purchase of Manchester United); John Cassidy, *The Red Devil*, *New Yorker*, Feb. 6, 2004, at 47 (Russian billionaire Roman Ambromovich's takeover of Chelsea).

54 Case C-415/93, 1995 E.C.R. 97. For a thorough analysis of pertinent European Union law, see Stefan Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (2005).

against the team and the Belgian football association. The transfer-fee requirement, long a fixture in European sports, had been justified as a means of ensuring balanced competition and uncertainty of results, as well as an equitable means of compensating a team for the cost of training a player. Ultimately, however, the European Court of Justice (ECJ) struck down the player transfer system under Article 39 of the EC Treaty, which provides for freedom of movement among Member States. On the same basis, the ECJ also struck down a provision that, in the interest of national identity, had strictly limited the number of players from other EC Member States who could become members of a team. The *Bosman* decision was later extended to benefit players from non-EC states having special agreements with the EC, that is the so-called “Europe agreements” states that are in the process of applying for membership in the EC.⁵⁵

In response to serious issues that emerged from the *Bosman* decision, FIFA and the UEFA reached an agreement with the European Commission in 2001 that provides for a revenue-redistribution mechanism between teams in compliance with EC law. The new mechanism involves two elements. The first is a provision for training compensation whereby, if a player under age 23 who has trained with one club transfers to another club, training compensation is due from the transferee to the transferor club. The ECJ suggested the rationale for this system in *Bosman* by noting that a system of compensation to teams for expenses incurred in training players might not run afoul of Article 39, even, as in the FIFA regulations, after the expiration of a player’s contract. The second element in the agreement is a so-called “solidarity mechanism,” which requires that if a player is transferred during the course of his contract, a small portion of any fees paid by the transferee to the transferor team is redistributed to other teams for which a player has played previously. The agreement applies only to transfers during the course of a player’s contract.

2. *Meca-Medina*. In *Meca-Medina & Majcen v Comm’n of the Eur. Communities*,⁵⁶ two swimmers claimed that the anti-doping rules of the Olympic Movement, as specified by the international swimming federation (FINA), violated provisions of the EC Treaty that protect freedom of movement and void collusive arrangements among organizations. The ECJ determined that EC law generally applies to sports-related issues, just as it would to other issues with economic implications. Thus, to avoid the prohibitions of the EC Treaty, contested sporting rules must be limited to sporting necessities. In the dispute itself, however, the ECJ ruled that EC law did not apply. Instead, the swimmers’ claim was “at odds with the Court’s case law,” and their argument that anti-doping rules were imposed not only for health considerations but also to safeguard the economic potential of international competition was “not sufficient to alter the purely sporting nature of the legislation.” What may be most significant (and disappointing) about the ECJ’s decision is that it failed to further clarify what is economic and what is not in defining the contours of sports organisational autonomy within the European Community.

3. *Oulmers*. In *Charleroi v FIFA*,⁵⁷ a Belgian football/soccer club, the Royal Charleroi Sporting F.C., joined by the G-14 group of elite clubs, challenged rules of the FIFA. These rules require clubs to release players for so-called “international duty” on national teams and insure them against the risk of injury in FIFA-sponsored or recognized international matches without compensation from FIFA, even when players are injured in the course of such “mandatory release” competition.⁵⁸ A Moroccan national, Abdel Majid Oulmers, was badly injured in the course of a mandatory release competition to play on the Moroccan national team. The injury resulted in demonstrable losses to the club during Oulmer’s prolonged period of recovery from his injury. The Charleroi club therefore requested damages for these losses. More ambitiously, the G-14 elite group requested 860 million Euros in damages as compensation for costs incurred by elite clubs over a period of ten years to implement the FIFA mandatory release requirements to their detriment. FIFA responded, first, that there was no connection between the injury of Oulmers and Charleroi’s eventual

league standing; second, that it is the national associations, not FIFA or UEFA, that should reimburse clubs for the cost to them of player injuries; and third, that 75% of the profits from major tournaments are returned to national associations for use in their discretion, such as to compensate them for player injuries as in the case itself.

The case was initially brought before a Belgian commercial tribunal, the Tribunal de Commerce de Charleroi. It rejected the G-14 demand for damages but decided to refer two questions to the ECJ: (1) whether the club’s obligation to release players without compensation, as FIFA mandated, violated freedom-of-movement and anti-trust competition provisions of the EC treaty; and (2) whether FIFA’s binding determinations of a coordinated match calendar, which is an essential foundation of the pyramid construction of European sports, complied with those provisions. What is important about that case is, once again, the question of where to draw the line between the autonomy of sporting activity and regulation of it by the EC in the interest of economic integration. If the petitioning club and the G-14 win, the pyramid and its vertical integration of European clubs, under the supervision of FIFA and UEFA, will crumble further. It is also feared that a decision in favor of the petitioners will all but end the coordination of professional, non-professional, and national team competition in European sports. If that happens, not only will the pyramid be quite hollow as a formal consideration, but it will be especially difficult, if not impossible, for national teams from poorer countries to compete internationally if they cannot count on a coordinated calendar of matches that ensures the availability of star players employed by high-paying European clubs.

4. *Granada 74 SAD*. In 2007 FIFA and UEFA asked the Court of Arbitration for Sport to enjoin the Spanish Football Federation from allowing a new club, Granada 74 SAD, to compete in the second division football/soccer club, Ciudad Murcia, renaming it Granada 74 SAD and relocating its headquarters to a coastal town, Motril, south of Granada and west of Murcia. FIFA and UEFA claimed that the club’s registration by Spain’s Football League (LFP) violated the normal promotion-and-relegation system for gaining membership in the second division, based on sporting results on the field of play rather than a commercial transaction.

The sole CAS arbitrator, however, endorsed the club owner’s view that Granada 74 SAD was not a new legal entity that had replaced Ciudad Murcia. Instead, it was the same entity with a different owner, name, and location. He also found that Granada 74 SAD had been duly recognized by the LFP. Thus, the new ownership, the name change from Ciudad Murcia to Granada 74 SAD, and the club’s relocation did not breach any applicable rules. Insofar as the Ciudad Murcia team had obtained the right to play in the Second Division on sporting merit, its mere sale and conversion into Granada 74 SAD did not breach FIFA and UEFA regulations that are designed to prevent a different range of practices, namely all methods or practices that jeopardize the integrity of matches or competitions. The CAS arbitrator therefore concluded that the owners of the upstart club had engaged in a perfectly legal business transaction by purchasing 100% of the shares of a registered sports company whose renaming and change of registered address was protected by Spanish law. Finally, the

55 See *Deutscher Handballbund eV v Kolpak*, Case C-438/00, 2003 E.C.R. I-04135. For a discussion of judicial and other developments in the EU regulation of sports after *Bosman*, see Roberto Branco Martins, *The Kolpak Case: Bosman Times 10?*, 2004-1/2 Int’l Sports L.J. 26.

56 Case C-519/04P, July 18, 2006.

57 Case C-243-96 (withdrawn; *Eds*).

58 The ECJ’s precise framing of the question presented is as follows:
Do the obligations on clubs and football players having employment contracts with those clubs imposed by the provi-

sions of FIFA’s statutes and regulations providing for the obligatory release of players to national federations without compensation and the unilateral and binding determination of the coordinated international match calendar constitute unlawful restrictions of competition or abuses of a dominant position or obstacles to the exercise of the fundamental freedoms conferred by the EC Treaty and are they therefore contrary to Articles 81 and 82 of the Treaty or to any other provision of Community law, particularly Articles 39 and 49 of the Treaty?

CAS arbitrator ruled that the similarity of the newly formed club's name, Granada 74 SAD, with that of another club, Granada 74 CP, was immaterial insofar as the LFP had duly registered the name of Granada 74 SAD.⁵⁹

C. Specific Legal Issues

So far, we have seen that despite the contrasting features of the European and North American Sports Models, they converge in sharing fundamental commonalities and structural characteristics in practice, but they continue to be divergent institutionally and in certain specific practices. In particular, the EC framework is materially different insofar as it understandably puts overwhelming emphasis on issues of economic import. Thus, inspired by the objective of regional integration, a unique effort continues in Europe to distinguish pure sporting activity from sporting-related activity subject to economic regulation.

Specific legal issues of professional sports highlight both the continuing divergence and emerging convergence between the two models. For example, the following comparative summary of anti-trust (competition) regulations, with specific reference to broadcasting rights, is instructive.⁶⁰

i. Regulation Under Anti-Trust/Competition Laws

a. United States

The structure of professional sports leagues in the United States is defined primarily through a combination of labour law and anti-trust law: "The common ground for attack is found in application of the antitrust law."⁶¹ Most claims arising in this area suggest violations of the Sherman Act,⁶² stemming from collusion between owners of separate teams. What, then, are the main anti-trust ramifications of the organisational structure for professional sports in North America?

i) Joint Venture/Horizontal Integration Structure

Whenever a professional league is classified as a joint venture of separate and independent teams, such collusion is open to attack under the Sherman Act. However, in defense, the leagues have asserted that they do not constitute cartels but rather a *single entity*.⁶³ Thus the collusion is "internal" and beyond the reach of the Sherman Act. Under the single-entity approach, teams can no more illegally collude with one another than could members of the board of a corporation. Unfortunately for the league, however, United States courts have not been very receptive to classifying professional sports leagues as single entities.

The Supreme Court decision of 1984 in *Copperweld v Independence Tube Corp.*⁶⁴ adopted a "unity of interest" test to differentiate between strictly "internal" agreements to manage the affairs of the league and illegal anti-competitive agreements that established relationships between teams. While this test suggested new hope for the single-entity defense, courts have been reluctant to accept it so as to relieve the leagues of anti-trust regulation.

Recently, Major League Soccer (MLS), the newest professional sports league in North America, was deliberately structured so that it would resemble a single entity. All teams are owned by the league, with investors/operators having very limited control over the actual decision making. Many predicted that this would be a new model for successful U.S. sports leagues. While the MLS approach initially seemed to suggest great hope for success, these expectations did not materialize. In *Frazer v Major League Soccer*,⁶⁵ the court did not rule, as had been hoped, that the MLS structure passed the "unity of interest" test of *Copperweld*, but rather decided the case on other grounds. In any event, even if a single-entity approach were found to be tenable for a professional league, its disadvantages of inhibiting the autonomy of teams may outweigh its benefits.

Historically, the anti-trust law has applied comprehensively to all sports organisations except Major League Baseball (MLB). In *Federal Baseball Club of Baltimore Inc. v National League of Professional Baseball Clubs*,⁶⁶ the Supreme Court famously ruled that organised baseball did not fall within the scope of anti-trust law. Despite criticism by later courts and invitations for Congress

to modify the statute to change this rule, the exemption remained absolute until 1998 when Congress, in response to an incident involving a pitcher, Curt Flood, nearly 30 years earlier, extended the anti-trust law partially to baseball. Most importantly, the Court decided that the law applies to employment issues involving MLB (but not minor league) baseball players, thereby giving those players rights comparable to those of other professional athletes.

ii) Broadcasting Rights

Television and media rights engage a complex of collective league rights and individual club rights. The essential question for analysis of legal issues surrounding sale and distribution of television and other media rights for professional sports is: Who owns the rights in the first instance? If the rights are viewed as belonging to the teams, then the collective selling of them is subject to review under anti-trust or competition laws. If, however, the rights actually belong to the league, such laws do not apply. "Under the common law, the home team has a fundamental right to telecast its own game. Thus, any rights sales by a club-run league constitutes an agreement among competing clubs to jointly sell valuable rights, which is subject under anti-trust law to the rule of reason analysis. Any sale that demonstrably raises prices, reduces viewership, or renders output unresponsive to consumer demand would be unlawful."⁶⁷

The Sports Broadcasting Act of 1961,⁶⁸ however, created an exemption from anti-trust regulation for the collective selling by professional leagues of the rights to broadcast professional baseball, hockey, basketball, and football games. This exception has been justified by the necessity of a collective sale and corresponding distribution of revenues in order to maintain equality and competitiveness between small-market and large-market franchises. Only the NFL, however, sells the collective exclusive rights to every game. The other major leagues sell exclusive television rights for some games, but games not sold by the league may be sold by the teams playing in the games.

b. Europe

In the European system, competition law and regulations also remain paramount.⁶⁹ Articles 81 and 82 of the EC Treaty, much like Articles 1 and 2 of the Sherman Act upon which the European provisions were based, prohibit anti-competitive agreements and market dominance. These provisions therefore constitute the main vehicles for challenges to arrangements that set up exclusive broadcast and distribution rights. Article 81(3), however, gives the Commission the power to allow exemptions from anti-trust challenges if doing so could be expected to improve production or distribution in the interest of regional economic integration while benefiting consumers, so long as otherwise prohibited arrangements include only restrictions that are indispensable to the attainment of acceptable objectives and do not afford the possibility of substantially eliminating competition. Article 81(3) therefore confirmed that the collective sale of television rights is generally consistent with EC competition law. In practice, however, the arrangements for collective sales have encountered problems:

59 Case Granada 74, The Claim, C.A.S. Press Release, Sept. 7, 2007.

60 Another important set of issues, involving the licensing of sports merchandise, lies beyond the scope of this study but merits mention. (In North America almost all licensing is collective, unlike the European practice. See Roberts, *supra* note 12.)

61 Yasser et al., *supra* note 30. 62 15 U.S.C. § 1 *et seq.* (2000).

63 See Nathaniel Grow, *There's No "I" in "League": Professional Leagues and the Single Entity Defense*, 105 Mich. L. Rev. 183 (2006); L. Kaiser, *The Flight from Single-Entity Structured Sports Leagues*, 2 DePaul J. Sports L. & Contemp. Probs. 1 (2004); Karen Jordan, *Forming a Single Entity: A Recipe for Success for New*

Professional Sports Leagues, 3 Vand. J. Ent. L. & Prac. 235 (2001); Brad McChesney, *Professional Sports Leagues and the Single-Entity Defense*, 6 Sports L.J. 125 (1999).

64 104 S. Ct. 2731 (1984).

65 284 F.3d 47 (1st Cir. 2002).

66 259 U.S. 200 (1922).

67 Stephen F. Ross & Stefan Szymanski, *Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations*, 16 Marq. Sports L. Rev. 213, 229 (2006).

68 15 U.S.C. §§ 1291-1294 (2000).

69 See generally Eleanor M. Fox, *The Competition Law of the European Union* (2002).

[In Europe, transaction costs inhibit] club-run leagues from maximizing profits from the sale of broadcast and internet rights. Owners have passed up profitable opportunities because, unable to agree among themselves on how to divide the proceeds, a requisite super-majority cannot agree to proceed with a valuable rights sale. In the English Premier League in football/soccer, for example, rights have traditionally been sold collectively. In reviewing a government challenge to an agreement to sell television rights for only sixty of the league's 380 possible games, a tribunal found that the league's limitation on television sales actually reduced revenues. However, the clubs could not agree on how to share revenue gained from additional sales, whether negotiated individually or collectively. Unlike English soccer, television rights to NBA games not collectively sold by the league may be sold by each club within a team's assigned territory.⁷⁰

Starting in 1999, therefore, UEFA sought clearance from the Commission for its pooled sale of broadcast rights to Champions League games. The result was a revised selling arrangement approved by the Commission in 2003 with several essential elements. First, a bidding process establishes broadcast rights. Rights to broadcast matches that have not been so acquired by a certain deadline revert to the clubs, giving them the ability to exploit the residual rights within their respective media markets and thereby increase the likelihood of events being televised to their fan base. Second, contracts for broadcast rights may not exceed a period of three years, at which time a new bid process is to be initiated. Third, opportunities for exploitation of new media, such as internet broadcasts, are to be marketed separately in response to the Commission's concern that the so-called "bundling" of those rights with the television broadcast rights would inhibit the development of the new media.

V. Conclusion

"Globalization and commercialism are not just American inventions."⁷¹ These trends continue on both sides of the Atlantic,⁷² accel-

erating a convergence of the European and North American Sports Models in many respects and on all levels of competition. In sharper focus, the formation of the G-14 group of elite European football/soccer clubs, the licensing of teams, and opportunities for investors in clubs to bypass the promotion-and-relegation system are among the developments that threaten the pyramid system in Europe. The variations in practices among the several North American professional leagues as well as the much-neglected similarities between features of the European Sports Model and the actual characteristics of sports organisation in North America further call into question both the reality of a North American Sports Model and the extent to which its features actually differ materially from those of its European sibling.

Traditionalists may lament the changes that are occurring rapidly in the organisation of European sports, such as the creeping Americanization, as it has been dubbed, of English football. But the current developments are often positive. For example, the perennial issue among NCAA schools in North America of allocating funds between money-making and money-spending sports is becoming significant in Europe as the more monolithic, single-sport structure of its organisational pyramid falls apart. Also, European sports will likely continue moving toward a collective bargaining system and an exemption from EC competition law for labour agreements. These developments should certainly accrue to the benefit of players even as they threaten to undermine the carefully crafted vertical integration of the European sports pyramid. The more the models stay the same, the more they change.

The International Sports Law Journal

⁷⁰ Ross & Szymanski, *supra* note 67, at 239.
⁷¹ *Id.* at 81.

⁷² See, e.g., Stephen Weatherill, *Is the Pyramid Compatible with EC Law?*, *Int'l Sports L.J.* 2005/3-4, at 3.



International Comparative Sports Law

The US and EU Systems of Sport Governance: Commercialized v. Socio-Cultural Model – Competition and Labor Law

by Anastasios Kaburakis*

The contributions of Foster¹ and Halgreen² are the latest in a series of debates, discussions, conferences, and academic scholarship on the subject of United States (US) and (or versus) European Union (EU) sport policy. In the context of international relations and foreign policy, these two main players in the formation of international law frequently conflict due to differences in philosophy and culture.

This research examines the particular differences between US and EU competition and labor law application in sport, investigates the connection between the two, and attempts to entertain the thought of a "balanced approach" in the legal handling of sport matters, bringing the two "worlds" closer together. In the process of bridging certain traditional gaps in culture and philosophy under a legal and policy analysis lens, the reader may become aware that, indeed, the two "worlds" may not be so far apart, as some critics may argue. Instead, considering contemporary sport situations and increased commercialism in the sport industry, they may be growing progressively closer.

The starting point of this analysis involves the examination of specific

characteristics featured in the US and EU systems of sport governance. Differences in the philosophies and cultures of the two systems are evident and directly impact policy-making and the legal handling of sports-related cases. In particular, the intricacies of the European "socio-cultural" federalized club-based model differentiate certain policy initiatives in Europe and cases decided by the European Court of Justice (ECJ) from respective issues surrounding commercial sport organizations in the US. In the latter case, both on the professional and the "amateur" level, there have been important decisions –and sometimes Congressional intervention– that have handled sport in a variety of legal ways (either as a commercial enterprise or allowing for autonomy of sport organizations). Thus, examples of such legal handling by courts and policy-making by governmental entities display particular differences between the two often conflicting systems of sport governance, and may even forecast toward resolution of potential disputes in 21st century sport.

This investigation presents cases that were instrumental in the development of the present approaches in US and EU sport policy. These cases

will be juxtaposed with key policy changes affecting sport in the two systems. The main objective of this contribution is to pursue a balance between the cultural and philosophical differences of the two "worlds", promoting pluralism and alleviating some of the problems recently documented in EU and US administrations², as well as sport governance bodies' relations. In this process, ideas for future research may be generated. Contrary to popular belief of recent past, this research finds that sport needs politics. Political intervention is a "conditio sine-qua-non" in contemporary world sport policy evolution.

A. The US and EU systems of sport governance

A summary of theory and international sport relations between the US and the EU can be found elsewhere.³ In sum, scholars argue there is an ideological clash between the two "sides of the pond".⁴ Although sport commercialization is not directly attributed to American influences, "American ways are resented as... hostile to many of the sporting values and institutions which have been held dear elsewhere".⁵

Foster⁶ offers a description of the two models of sport governance. The characteristics of the European model, frequently termed as "socio-cultural", entail:

- Sporting competition as the major organizational motive
- Open pyramids with promotion and relegation as the league structure
- Vertical solidarity as the governing body's role
- National leagues, local teams, opposition to relocation of teams and transnational leagues as cultural identity
- International competitions as instrumental for national identity, and
- The feature of a single representative federal body as governance structure.

In contrast, the US commercial sports model entails:

- Profit as the major organizational motive
- Closed, ring-fenced league as the league structure
- Profit maximization and promotion of elite stars as the governing body's role
- Transnational or global (clubs according to Houlihan leagues with footloose franchises as cultural identity
- Non-existent or minimal interest for international (national teams per Houlihan) competition, and
- The feature of a league or commissioner as governing structure.

Problems faced by both "worlds" entail the conflict between sport autonomy and state intervention in sport matters. In terms of global sports policy and the legal handling of world sport, these problems become instrumental, as a traditional form of private governance succumbs to the commercial influences of global capital elites. In contrast, heretofore courts both in the EU and the US have viewed International Sport Federations (ISFs) and Sporting International Non-Governmental Organizations (SINGOs) as private clubs, out-

side legal scrutiny⁷. Practices that aimed to prevent litigation from occurring include: compulsory dispute resolution via binding arbitration [e.g. the international Court of Arbitration for Sport (CAS), the FIFA Dispute Resolution Chamber (DRC), and the FIBA Arbitral Tribunal (FAT)]; exclusion and indemnification clauses as prerequisites for athletic participation, so the organizing body would not be held legally liable to the participant; where allowed by national labor law, liquidated damages clauses, etc. Thus, the creation of a unique area of private law, "Lex Sportiva", assimilates "Lex Mercatoria", governing commercial relationships. In a remarkable twist, however, the two meet considering 21st Century sport circumstances.

Research also points out to an interesting paradox in EU sport: on one hand, a formidable political consensus to protect the socio-cultural model and the existing organizational structure in Europe. European policy-makers combat the fear that rampant commercialization of sport in a global economy will lead to a deterioration of fundamental values, such as a long-standing tradition of democracy, self-regulation, and solidarity between sport clubs. At the same time, there is an attempt to uphold the highly beneficial effects of sport on European youth, health, and social inclusion. Halgreen identifies that, as far as EU policy is concerned, there is a firm "No" to an outright commercial model according to American standards, characterized as "the root of all evil...destructive commercialism".⁸ On the other hand both Allison and Halgreen find that EU sport features much commercialized force of its own. The authors go a step further commenting that EU sport is actually driving many globalization tendencies.

In a nutshell, this cornucopia of theory and scholarship on the matter of international sport policy and the two main models of modern sport governance, commercialized and socio-cultural, may be summarized by a picture of commercial sport as an accepted practice in the US, whereas the situation is markedly different in the EU. Although, according to Allison and Halgreen, "American ways" are not to blame for mass commercialization of EU sport, bearing in mind that the latter itself plays a central role in sport globalization - even commercialization, in the case of the Champions' League and the Premier League in soccer - tendencies, there still appears to be intense conflict between the supporters of the two schools of thought, or global sport models, the commercialized and the socio-cultural one. Proponents of the former may be characterized as "realists" or "practical", and of the latter as "romantics" or "idealists". Regardless of the terminology used, the latter have established a strong constituency in political circles (e.g. the Committee on Culture and Education of the European Parliament) and decision-making entities such as the European Commission (EC). The socio-cultural model emphasizing traditional values and the educational character of sport still appears to be the major defining factor in EU sport policy, delineating between EU and US sport. Thus, it appears logical to assume that sport entities in the US will be treated similarly to commercial ones, all things considered, by policy-makers and courts. On the other hand EU sport may be defined by limited autonomy of its sport entities, and significant legal and policy intervention in the case of e.g. a commercial practice or a regulation that would compromise the socio-cultural character of sport promoted in its totality by the EC. Hence, the quest for answers that may forecast future sport policy and litigation is on. Such a quest necessarily follows the path of past cases and policy initiatives from the US and the EU, with the two most frequently politically challenged and litigated sectors; Competition and Labor Law.

B. US Competition Law application in sport

I. Antitrust Law theory

The most important piece of federal legislation in terms of competition came in 1890 in the form of the Sherman Antitrust Act⁹. The Sherman Antitrust Act (SAA) attempted to promote competition and prevent monopolies, putting an end to unfair monopoly practices and promoting free and open market competition. SAA §1 states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...is declared to be illegal". SAA §2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons...shall

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1 Foster, K., Alternative models for the regulation of global sport. In L. Allison, (Ed.), *The global politics of sport* (pp. 63-86). London, England: Routledge. (Foster 2005).

2 Halgreen, L., *European Sports Law - A Comparative Analysis of the European and American Models of Sport*. Copenhagen, Denmark: Forlaget Thomson. (Halgreen 2004)

3 Kaburakis, A., *International Comparative Sport Law - "War of the worlds" or the path to a more balanced future? US and EU competition and labor law examination in relation to*

sport policy. *Managing Policy and Politics in Sport* [Special Issue]. *International Journal of Sport Management and Marketing* (manuscript submitted for publication). (Kaburakis, A. 2005a).

4 L. Allison (Ed.), *The global politics of sport* (pp. 5-25). London, England: Routledge. (Allison, 2005); Foster, 2005; Halgreen, 2004.

5 Allison, 2005, p. 117.

6 Foster 2005, pp 73-77.

7 Examples in: R v. Disciplinary Committee of the Jockey Club ex p Aga Khan (1993) 2 All E R 853, Martin v. IOC, 740 F.2d 670 (9th Cir. 1984), Defrantz v. USOC, 492 F. Supp 1181 (1980), and San Francisco Arts & Athletics Inc. v USOC, 483 U.S. 522 (1987).

8 Halgreen, 2004, p. 64.

9 15 U.S.C. §§1-7.

be deemed guilty of a felony". The basic elements a plaintiff needs to establish for a SAA §1 claim are: 1) an agreement of two or more in the form of contract, trust, or conspiracy that; 2) unreasonably restrains trade and; 3) affects interstate commerce. For a SAA § 2 claim the respective elements are: 1) possession of monopoly power in a relevant market and 2) the use of unacceptable means to acquire, entrench, or maintain it. Specifically for a SAA §1 claim, courts have created various analyses a plaintiff needs to satisfy, in order to prove a particular restrictive business practice is a violation of the SAA. Hence, one encounters such methods as "per se", defined as an inherently anticompetitive practice (e.g. price-fixing or group boycott), "rule of reason", entailing the elements of an agreement that adversely affects competition in which the anti-competitive outweigh any pro-competitive effects (where the defense can legitimize the reason for the anti-competitive practice), or "quick look", a hybrid bridging the per se and rule of reason analyses, according to which a per se condemnation of a practice is inappropriate, but where no elaborate industry analysis is necessary to reveal the anti-competitive character of an inherently suspect restraint (in this way the burden shifts to the defendant to prove justifications). In 1914, a new piece of legislation, the Clayton Act (15 U.S.C. §§ 12-27 & 29 USC § 52), strengthened the application of the SAA, additionally trebling the damages a successful plaintiff suffered and may recover. More in-depth analyses can be found in texts such as Weiler and Roberts¹⁰ and Wong¹¹.

II. Antitrust Law application in amateur sport

What is important to clarify is the peculiar nature of US sport, attempting to clearly "demarcate between intercollegiate and professional sports" (NCAA Constitution, Article I, Bylaw 1.3.1, Fundamental policy - Basic Purpose). In this way, one might expect that professional sports entities in the US would be treated as commercial ventures, faced with antitrust law scrutiny; the situation assumes a unique twist, though, in the antitrust analysis of the National Collegiate Athletic Association (NCAA). The effort of NCAA member institutions to abide by a strict policy of amateurism bears several problems and involves much litigation Kaburakis¹². Sherman¹³ supports the notion that the NCAA enjoys a "quasi-judicial" antitrust exemption. In a nutshell, Sherman¹⁴ argues that the NCAA may be faced with antitrust scrutiny only when litigation involves a business practice, and only in very rare occasions when such cases challenge its internal bylaws. Respective examples are found in the 1984 United States Supreme Court decision in *NCAA v. Board of Regents of the University of Oklahoma*¹⁵ and the 1998 US Court of Appeals for the 10th Circuit decision in *Law v. NCAA*¹⁶. In the former case, the NCAA TV football package limiting the freedom of member institutions to broadcast their games was found to be in violation of the SAA §1 per restraint of trade. Nevertheless, the United States Supreme Court acknowledged that "in such an industry...horizontal restraints are essential". In the latter case, "Restricted Earnings Coaches" class members sued successfully (under SAA §1), challenging the limitations on earnings particular coaches might receive by NCAA member institutions. Every other case brought against the Association did not establish a SAA violation¹⁷, while in a recent case, *MIBA v. NCAA*¹⁸, the parties settled out of court, with the NCAA purchasing the rights to organize the once prestigious and competing NIT tournament]. Wishing to avoid similar challenges, the NCAA proceeded to settle another important case, the most recent antitrust challenge of its policies in regard to setting financial aid limits, in *White v. National Collegiate Athletic Association*¹⁹.

III. Antitrust Law application in professional sport

Answering the proverbial question whether sport entities should be handled as commercial enterprises, one should study the lessons from precedent case law. Unlike the majority of cases that involved the NCAA, in most cases dealing with the top professional sports leagues in the US there was SAA scrutiny applied. Many of these SAA challenges paved the way for modern labor relations in US sport. After a summary of related litigation of various SAA claims against professional sports teams and leagues, this research will examine the partic-

ular problems in sport labor relations and the way they have been handled by US courts and Congress.

1. Antitrust scrutiny of broadcasting restrictions

a. Collective selling of broadcasting rights.

Congressional intervention frequently proved to be the crucial resolution to problematic matters, in which the United States Supreme Court declined to provide a remedy. In the early days of US professional sport development, the matter of property rights and their use by joint entities such as professional leagues came to the fore. The Department of Justice sued the National Football League (NFL) because of the restriction the NFL imposed on members for any games being broadcast in the home territory of another member (the NFL could restrict other telecasts when there was a home game, but not when the team was away or was not playing). In this way it was argued that pooling of broadcasting rights constituted a horizontal restraint violating antitrust law²⁰. Even though in the initial stages the practice was found to be indeed a SAA violation, Congress did respond to the challenge in 1961 by enacting the Sports Broadcasting Act²¹. Thus, the four major sport leagues were able to sign agreements pooling broadcasting rights ("sponsored telecasting"), being exempt from antitrust scrutiny. The Sports Broadcasting Act (SBA) was a fine example of how policy intervention may provide remedy for commercial realities developing in contemporary sport. Practices that would otherwise be considered as violations of competition laws are allowed due to the unique nature of the sport industry, in order to preserve its character, and more importantly for investors in sport businesses, its feasibility and practicability.

b. "Black-out" provisions.

The "Black-out" provision in Section 1291 (2) of the SBA (1961) gave leagues the power to prohibit the televising of games "in the home territory of a member club of the league on a day when such a club is playing a game at home". In *Blaich v. NFL*²², New York Giants' fans sought a preliminary injunction against the "blacking out" of the 1962 NFL championship game between the Giants and the Chicago Bears. They argued that the Section (2) "black-out" provision of the SBA applied only to regular season games. It is interesting to read the plaintiffs' assertion that a *basic human right* was violated.²³ Their arguments, however, were unconvincing for the District Court. President Nixon appealed with the NFL to reconsider the "black-out" position. Eventually, in 1973 the NFL lifted the local black out of the Super Bowl, in an effort to accommodate an infuriated Congress, which wanted to eliminate "black-outs" especially in sold-out games.²⁴ In September 1973 Congress enacted legislation requiring the leagues to lift local black-outs of any pooled telecast if all tickets available for purchase before the game were sold 72 hours or more in advance. This legislation expired by the end of 1975, but the NFL continued voluntarily to adhere to its provisions.

*NFL v. McBee & Bruno*²⁵, ended the practice of commercial establishments televising blackout games. *NFL v. McBee & Bruno* was a case in which St. Louis restaurants and bars used satellite equipment to televise three blackout St. Louis Cardinals football games during the 1984-1985 season. The NFL contended that they violated copyright law and had infringed upon their telecast copyright. The US

10 Weiler and Roberts 2004.

11 Wong 2002.

12 Kaburakis, 2005b.

13 Sherman 2005.

14 Sherman 2005.

15 468 U.S. 85.

16 134 F.3d 1010.

17 I.e. Justice v. NCAA, 577 F. Supp. 356

(D. Ariz. 1983), *AIAW v. NCAA*, 236

U.S. App. D.C. 311 (D.C. Cir. 1984),

Smith v. NCAA, F.3d 180 (3rd Cir. 1998),

Adidas America, Inc. v. NCAA, 40 F.

Supp. 2d 1275 (D. Kan. 1999), *Pocono*

Invit. Sports Camp, Inc. v. NCAA, 317 F.

Supp. 2d 569 (E.D. Pa. 2000),

Worldwide Basketball & Sports Tours v.

NCAA, 388 F.3d 955 (S.D. Oh.

Columbus Division 2000).

18 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

19 CV 06-0999 VBF (C. D. Cal. Western

Division, settlement filed January 29,

2008).

20 *United States v. NFL*, 116 F. Supp. 319

(E.D. Pa. 1953), 196 F. Supp. 445 (E.D.

Pa. 1961).

21 15 U.S.C. Section 1291.

22 212 F. Supp. 319 (S.D.N.Y. 1962)

23 *Blaich v. NFL*, 322.

24 Halgreen, 2004, p. 108.

25 621 F. Supp. 880 (E.D. Mo. 1985).

Court of Appeals for the 8th Circuit agreed. This case sparked a legal debate as to whether a compulsory license for the public performance of blacked-out professional teams sporting events telecasts should be introduced, to “balance the public demand to watch popular sports programs with the economic interests of the copyright owners”.²⁶ So far no such legislative efforts have been fruitful.

c. Contracts with competing broadcasting networks.

In *USFL v. NFL*²⁷ the USFL alleged that the NFL had prevented the competing league from obtaining a profitable TV contract, as the NFL had non-exclusive contracts with all of the networks (ABC, CBS, NBC), giving them the right of first refusal. The appellate court ruled that Congress’ specific antitrust exemption of the SBA included contracts with more than one network, unless the contract constituted illegal monopolization or unreasonable restraint of trade in terms of competing leagues.

Similarly, in *Chicago Professional Sports Limited v. NBA*²⁸, the Chicago Bulls’ contract with superstation WGN gave the superstation the exclusive broadcast right to televise 25 games. The National Basketball Association (NBA) had decided that each team could televise 20 games per season on a superstation (commercial over-the-air-TV station, whose broadcast signal can be received outside the local area by more than 5% of the total number of cable subscribers in the US). The NBA rule had been amended in order for the teams to share profits, whereas before the team could televise up to 25 games and retain all of the revenues generated. The District Court ruled that the NBA’s adoption of this new rule limiting the number of games by 20% was a significant restraint of trade, which could not be remedied under a rule of reason test (pro- vs. anti- competitive effects). The 7th Circuit affirmed that decision, stressing the SBA’s antitrust exemption would not apply, since the Bulls according to NBA’s own regulations possessed the rights to superstation games. Thus the WGN-Bulls agreement was upheld. As a result of this case, the NBA teams -with a narrow vote- decided to transfer all the rights to the NBA. The NBA repealed the 25 game-limit, but demanded that teams pay a substantial fee to the NBA for superstation telecasts. Once again the Bulls sued, seeking the rights to televise 40 games through WGN. The Bulls lost this case on appeal, as the Court found that the Bulls being a member of the NBA had to respect the limitation imposed by the NBA, in regard to the maximum number of games televised on superstations. One notes in such cases that certain limitations upheld under a SAA analysis should be reasonable and within limits acknowledged by the courts or Congress.

d. “Anti-siphoning” provisions.

In further examples of such restrictive practices challenged in court, there have been cases and policy intervention per “anti-siphoning” regulations. In 1968 the Federal Communications Commission (FCC) issued rules prohibiting “specific events” from being sold to anyone other than broadcast TV (e.g. NCAA Final Four, Super Bowl). These rules were challenged in *HBO v. FCC*²⁹. The Court of Appeals vacated the FCC regulations on the grounds they exceeded the FCC’s jurisdiction in regard to cable; they were not found to be necessary to prevent siphoning; and they were found in violation of the First Amendment as being overbroad. After the HBO decision, the FCC remained silent until the passage of the 1992 Cable Act. In *HBO v. FCC* the US Court of Appeals for the District of Columbia provided a working definition of the “siphoning” phenomenon:

Siphoning is said to occur when an event or program currently shown on conventional free TV is purchased by a cable operator for the showing on a subscription cable channel. If such a transfer occurs, the Commission believes the program or event will become unavailable for showing on free TV or its showing on free TV will be delayed... A segment of the American people -those in areas not served by cable or those too poor to afford subscription cable service- could receive delayed access to the program or could be denied access altogether. The ability of half a million cable subscribers thus to preempt the other 70 million TV homes is said to arise from the fact that subscribers are willing to pay more to see certain types of features than

are advertisers to spread their messages by attaching them to the same features.

The FCC rules could not pass scrutiny under the four-part test set out by the United States Supreme Court in *US v. O’Brian*³⁰. Under the *O’Brian* test the regulations must: (1) fall within the constitutional power of the Government, (2) further an “important or substantial governmental interest”, (3) be “unrelated to the suppression of free expression”, and (4) impose no greater restriction on First Amendment freedoms “than is essential to the furtherance of government interests”. The Court’s opinion suggests that the anti-siphoning rules could have been upheld, had the FCC adequately demonstrated siphoning to be both likely to happen and harmful.³¹

For now the combination of protests from fans and most importantly the fear of Congressional intervention seems to have kept pay-per-view and subscription TV at bay when it comes to the largest sports events such as the Super Bowl or the World Series. So far, neither the SBA nor the Communications Act hold a “broadcast guarantee”, i.e. legislation in the form of a rule that would ensure a national broadcast TV outlet for play-off/championship events designated as “nationally shared events”, but there seems to be little doubt that anti-siphoning legislation in sports-loving America to this effect would be so politically popular that such a limitation in major league anti-trust exemption could (if the situation changed) be easily introduced.³² On the other hand, it would be interesting to research the potential financial impact of major sports championship events offered on cable or pay-per-view TV, in contrast to the public criticism such practices would create. Should sport programming in the US continue to migrate from free broadcast TV to subscription TV for both regular and post-season competitions, the need for such future research would be emphasized.

An amendment specifically aimed at protecting the availability on non-subscription TV of a handful of “nationally shared” sports events would mean compliance with the *O’Brian* test, and its most difficult prong, the last one, requiring that any incidental restriction of any First Amendment freedom “be no greater than is essential to the furtherance of the government interest”. It is useful at this point to juxtapose the “European twist”: The Television-Sans-Frontier Directive, Article 3A, forecasting “National Lists of events of major importance for society”. These policy matters are further explored in the respective section of this analysis, dealing with EU policy.

2. Antitrust scrutiny of ownership restrictions

Other restrictive practices that have been challenged involve “cross-ownership”. In *NASL v. NFL*³³, the NFL had changed its bylaws to prevent NFL team owners from having an interest in other professional leagues. The Court ruled that these cross-ownership restriction rules were anti-competitive and a violation of Section 1 of the Sherman Act. These rules prevented the North American Soccer League (NASL) from attracting new team owners, unjustifiably under a rule of reason test. The NFL is the only professional league to maintain a ban on cross- and corporate sponsorship. At the same time it is a much disputed practice in US sports to deter public ownership and initial public offerings for shares in professional sports teams. Reasons include an effort to control salaries paid to free agents, and the fact that public ownership would deprive the league of its ability to regulate the sport effectively, as it would be much harder to reach a consensus through thousands of stakeholders.

These matters recently came into discussion after the successful bid by Malcolm Glazer, owner of the NFL Tampa Bay Buccaneers, taking over a controlling share in Manchester United for \$1.47 billion. Although the bid and takeover does not compromise NFL’s cross-ownership restrictions under the *NASL v. NFL* decision, there were

26 Halgreen, 2004, p. 109, footnote 64.

27 842 F. 2d. 1335 (2nd Cir. 1988).

28 754 F. Supp. 1336 (N.D. Ill. 1991), 961 F. 2d. 667 (7th Cir. 1992), 113 S. Ct. 409, 121 L.Ed. 2d 234 (1992).

29 567 F. 2d 9 (D.C. Cir. 1977), 434 US 829 (1977).

30 391 US 367 (1968).

31 Cox quoted in Halgreen, 2004, p. 127, footnote 104.

32 Halgreen, 2004, p. 128.

33 670 F 2d 1249 (2nd Cir. 1982).

concerns surrounding Manchester's stakes in casinos both in Europe and in the US. For the European reader, sports gambling in the US is only allowed in Nevada, Oregon, Delaware, and Montana, but only the first two states offer it. Nevada has full-service sports books, while Oregon has a state-run professional football pool during the season. Atlantic City, NJ officials have consistently lobbied for sports betting in New Jersey, to no avail at present (currently only horse racing bets are allowed). New Jersey may have had its best opportunity in 1994, but the federal government's "glove" was not picked up at that time³⁴. Nonetheless, by means of the internet, creative gambling entrepreneurs have instituted online sports betting agencies via off-shore web-based ventures. In addition, the NFL policies prevent owners and staff from having any ties to sports gambling activities. Hence, Manchester United had to abandon any gambling interests in order to comply by the regulations enforced on its owner by the NFL (Associated Press, 2005). This creates a very interesting ground for future research, especially in light of sports betting restrictions by EU members recently investigated by the EC³⁵.

Furthermore, in *Sullivan v. NFL*³⁶, 115 S. Ct. 1252 (1995), former owner of the New England Patriots William Sullivan challenged NFL policy on antitrust grounds. He was prevented from selling 49% interest in his team in a public tender. He was ultimately forced to sell the team at a much lower price. The key issue usually being "the relevant market", the latter was defined as "sports team ownership" and by restricting a form of ownership the NFL was restricting a form of product - a share in an NFL team- to the public. Under a rule of reason analysis the Court held that the NFL could have achieved its purposes by choosing a much less restrictive alternative, such as a proposal to allow the sale of minority non-voting shares of stock to the public or restricting the size of holdings by any one individual. Eventually the parties settled in 1996 and Sullivan reportedly received \$11.5 million over four years.

Similarly, in *Levin v. NBA*³⁷, Levin and Lipton were prevented from buying the Boston Celtics, because of their alleged connections to certain individuals deemed undesirable by the NBA, due to illegal gambling activities. The Court upheld the NBA's decision, made on valid non anti-competitive reasons. "The plaintiffs wanted to join, not compete with those not willing to accept them..."³⁸.

3. Antitrust scrutiny of players' allocation and teams' relocation restrictions

a. Players' allocation.

Frequently, what defendants in antitrust cases find as a useful defense is the claim of "single entity". For example, in *Fraser v. Major League Soccer*³⁹ it was found that professional sports leagues may contract players centrally, instead of contracts with individual franchises. The argument by the defendants was -as usual- that such a practice promotes competitive balance and equity. When there is no collusion, or conspiracy, or trust, or agreement by two parties that leads to anti-competitive effects, essentially one observes no competition. There is only one entity, the professional league, with various branches, its franchises⁴⁰.

b. Teams' relocation.

The single entity defense was also used successfully in a relocation restriction decision. In *The San Francisco Seals v. NHL*⁴¹, the National Hockey League (NHL) Seals attempted a move from San Francisco to Vancouver. The Court upheld NHL's decision preventing the move, without prior unanimous league approval. The Court applied the "single entity" doctrine, implying that anti-trust measures cannot be taken against activities carried out by a single entity, in this case the NHL. The decision to prohibit such moves was not anti-competitive as NHL teams were not "competitors in the economic sense" but rather "acting together as one single business enterprise".⁴²

Relocation matters were also the subject of *Mid-South Grizzlies v. NFL*⁴³. The Grizzlies' was a football team from the World Football League (WFL), which was a competitor of the NFL before folding. Their application to join the NFL was rejected and the franchise argued that this came as punishment for playing for the competing league. The NFL cited reasons such as scheduling conflicts and Collective

Bargaining Agreement (CBA) disputes. The Court ruled that this exclusion was actually pro-competitive, opening up a Southern market for other leagues wishing to expand and relocate teams.

However, on the opposite side of the argument, several practices and restrictive leagues' rules or decisions may be found in violation of the SAA. A well-documented and often cited case was *LA Memorial Coliseum Commission v. NFL*⁴⁴. In this case (*Raiders*), the NFL had blocked an attempt by the Oakland Raiders to move to Los Angeles in order to avoid competition with the other NFL franchise already there, the Los Angeles Rams. Applying the rule of reason, the Court held that the ban was anti-competitive in helping to sustain local monopolies. The Raiders' move to Los Angeles would create, not eliminate, competition. "Ruinous competition" was not a valid defense (*Raiders*, 1395). At a later point a settlement was reached, with the NFL paying the Raiders \$18 million. Under the same light, in *NBA v. SDC*⁴⁵, the San Diego Clippers wanted to "pull a 'Raiders'" and move to Los Angeles. The NBA actually allowed the move but nevertheless filed a suit seeking judicial confirmation for its rule requiring league approval before a league could relocate home games. The Court limited the previous "Raiders" scope, not laying an absolute ban on rules limiting franchise movements. The Court noted that leagues had property rights in league franchise sites, and that rules requiring league approval in relocation cases were lawful, unless applied unreasonably. As a result of "Raiders" and "Clippers", the NFL and other leagues amended their rules including certain types of objective standards to be applied when deciding upon a relocation proposal.

In *Piazza v. MLB*⁴⁶, the plaintiffs wanted to purchase the San Francisco Giants and move the team to Tampa, Florida. Major League Baseball (MLB) did not approve and they filed suit. The Court noted baseball's antitrust exemption on the reserve clause matter of the past (analyzed in the ensuing section), but made a very fine distinction between acquiring an existing team and creating a new one. Thus, the product market was the market for existing baseball teams rather than the professional sport generally. Subsequently, the Court ruled that the rejection to relocate was a restraint of trade and competition in the relevant market. The judge ordered further proceedings to explore the scope of the antitrust exemption, but a new trial never occurred, as Piazza settled for \$6 million. MLB sold the franchise to Peter Magowan, who kept the Giants in San Francisco, for \$15 million less than what Piazza originally had offered.

4. Antitrust scrutiny of transfer "windows" and acquisition deadlines

In a case much similar to the "Lehtonen" case analyzed in the EU section, transfer windows and acquisition deadlines were challenged under an antitrust lens in *Bowman v. NFL*⁴⁷. Former WFL players were seeking employment in the NFL, which decided that a player or coach from a competing league could not sign with an NFL team after a set deadline. The NFL argued that the deadline was imposed in an effort to avoid upsetting the competitive balance among the NFL clubs as they entered the crucial period where divisional leaders were determined. The Court disagreed. It held that in the context of the WFL's recent demise, the deadline constituted a conspiracy to restrain competition for the plaintiffs' services. The Court had to show that public policy would support the issuance of the preliminary injunction; hence, in support thereof, it stated that "pro sports and the public are better served by open, unfettered competition for playing positions".⁴⁸ The league's rationale was further undermined by the

34 Bell, T. Lawmakers hear testimony on Atlantic City sports betting bill. (Bell, 2004).

35 EurActiv.com (2006, April 5).

Commission investigates national restrictions on sports betting. (EurActiv, 2006).

36 34 F.3d 1091 (1st Cir. 1994).

37 385 F. Supp. 149 (S.D.N.Y. 1974).

38 Levin v. NBA, 152.

39 97 F. Supp. 2d 130 (2000), 284 F.3d 47 (1st Cir. 2002).

40 Fraser v. MLS, 31.

41 379 F. Supp. 966 (C.D. Cal. 1974).

42 S.F. Seals v. NHL, 969-970.

43 467 US 1225 (1984)

44 469 US 990 (1984).

45 815 F. 2d 562 (9th Cir. 1987), 484 US 960 (1987).

46 831 F. Supp. 421 (E.D. Pa. 1993).

47 402 F. Supp. (D. Minn. 1975).

fact the rules were not applicable to free-agents, thus discriminating against WFL's players.

5. Antitrust scrutiny of monopolization attempts and misuse of a dominant position

Closing this section of antitrust litigation, monopolization attempts and the misuse of a dominant position were brought forth in *AFL v. NFL*⁴⁹. The American Football League (AFL) alleged the NFL had a monopoly and misused it by seeking to locate new franchises in Dallas and Minneapolis, where the AFL had strong interests. The Court ruled the NFL did not have a monopoly power in the "relevant market", defined as "Metropolitan areas having a population in excess of 750,000 (31 cities)"⁵⁰, in which only 11 had NFL franchises. Furthermore, the Court rejected the charge the NFL had attempted to monopolize the industry and found that the NFL expansion simply implemented earlier plans to set up new franchises in other cities. Importantly, in the mid-1960s the NFL and AFL agreed to merge, primarily because the leagues' rivalry had led to a dramatic and economically damaging increase in players' salaries.⁵¹ As the merger prima facie would eliminate all competition in the football industry, Congress amended the 1961 SBA granting the merger antitrust immunity. The merger took place in 1970.

In *Philadelphia World Hockey v. Philadelphia Hockey Club*⁵², the reserve clause of the NHL was challenged not by the players but by the rival league, World Hockey League (WHL). Due to the fact the NHL lacked baseball's antitrust exemption, it was found to violate antitrust law and several teams from the WHL were admitted into the NHL. The WHL argued that NHL's reserve clause excluded other leagues from the professional hockey market by effectively cutting off the supply of proficient players.

In an interesting twist of the NFL-AFL merger, the American Basketball Association (ABA) and the NBA merged in 1976, even though a Court in *Robertson v. NBA*⁵³, held that the proposed merger would result in elimination of any competition within professional basketball, violating the Sherman Act. After lengthy Senate hearings and contingent upon a settlement with the players, the NBA and ABA were allowed to merge as planned. Oscar Robertson, John Havlicek, Bill Bradley, Wes Unseld, and nine other players received a \$4.3 million settlement on April 29th 1976, as requested by Judge Carter. But that date was more important because it signified the NBA's acknowledgment of the players' union (NBPA). Thus, collective bargaining revisited the reserve clause, insurance and wage practices, and led the way to contemporary labor negotiations.

C. US Labor Law application in sport - The impact of antitrust challenges

I. Overview of sport labor evolution

It is intriguing to observe the litigation and Congressional intervention that led to the sport labor reality of the 21st Century in the US. Litigation moved by professional athletes was initiated from the early days of the 20th Century. In what was the most decisive case for years to come, baseball was ruled exempt from antitrust scrutiny in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*.⁵⁴ Justice Holmes delivered the opinion of the United States Supreme Court, pontificating that "the business of baseball... should not be held as interstate commerce... as a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State". Hence, because of the nature of sporting exhibitions, in this case the character of baseball games, antitrust law cannot be applied as it would in normal commercial business practices. The United States Supreme Court was called to affirm its 1922 position in *Toolson v. New York Yankees*⁵⁵, and *Flood v. Kuhn*⁵⁶. Although it consistently upheld baseball's antitrust exemption, in *Radovich v. NFL*⁵⁷ and *International Boxing Club v. US*⁵⁸ the United States Supreme Court ruled that the antitrust exemption enjoyed by professional baseball did not include other US professional sports, even though the characteristics of other team sports such as basketball, football, and hockey were almost identical.

Even after US courts had established that all other professional sports were subject to the antitrust laws, it was not until the early 1970s that antitrust suits against professional sports leagues were filed by disgruntled players or their unions in an attempt to remove various types of player restraints embedded in the leagues' own bylaws or uniform standard players' contracts. Through the 1970s, 1980s, and 1990s players and players' unions used the antitrust weapon in the court system with a substantial amount of success in order to gain leverage in negotiations with team owners for better working conditions. In fact, antitrust lawsuits have unquestionably been the primary reason why leagues were eventually willing to enter into CBAs.⁵⁹ Historically, the primary impediments to the free movement of US athletes that have been challenged are the "reserve" and option clauses combined with the "tampering rule", the right of first refusal, and the draft system. Recently, the most highly debated restraints are forms of wage-fixing such as "salary caps", or a "luxury tax".

1. The reserve system

Originally, the reserve system had been developed in the 1880s in professional baseball as a preventive measure against clubs from competing leagues from "stealing" players. A typical reserve clause would give the club the exclusive right to "reserve" a player, i.e. prolong unilaterally his contract upon expiry. The player could not oppose the clause, even if he wanted to sign for another club. In reality, the club could hold on to a valuable player his entire career by making use of the reserve clause time and time again whenever the contract was at its end. The reserve clause proved to be the most effective way to prevent players from becoming "free-agents", who can unrestrictedly negotiate and sign a new contract. In earlier types of reserve clauses, the clubs could exercise the right of renewal and even at their own discretion cut the player's salary by 10-25% of that provided for in the original agreement.⁶⁰

In 1971, at the outset of Senate hearings on the merger of the two professional basketball leagues, Senator Sam Irvin of North Carolina made this thought-provoking comparison:

Many years ago the term "chattel" was used to denote the legal status of slaves. That is, they were considered a type of chattel, which was owned as a piece of furniture, as livestock was owned. This use of the term "chattel" applied to human beings and the condition it stands for is so abhorrent that we don't even like to acknowledge it ever existed. Yet, in a real sense that is what these hearings are about today - modern peonage and the giant sports trusts.⁶¹

2. Option clauses, the "Rozelle" and "tampering" rules

Unlike the reserve clause, the option clause would give the club the right to renew the contract for one additional year. After the player played out his option year he would theoretically be considered an unrestricted free agent. However, this free mobility was seldom realized. Typically, the option system would be combined with an inter-league rule informally known as the "Rozelle Rule", named after former NFL Commissioner Pete Rozelle, who was elected to set the compensation to the former club for a free agent in *Mackey v. NFL*⁶². The Rozelle Rule would require a club signing a free agent to compensate the original employer. This compensation might consist of the transfer of future draft rights, the assignment of the new employer's contract rights in other players, or money. This in fact lessened the willingness of other teams to deal with a free agent and increased the likelihood the free agent would stay with the original employer.⁶³ The reserve and option clauses could be combined with another rule, the "tampering rule", according to which other teams were prohibited

48 *Bowman v. NFL*, 756.

49 323 F.2d 124 (4th Cir. 1963).

50 *AFL v. NFL*, 130-131.

51 Halgreen, 2004, p. 154, footnote 167.

52 351 F. Supp. 462 (E.D.P.A. 1972).

53 389 F. Supp. 867 (S.D.N.Y. 1975).

54 259 US 200 (1922).

55 346 US 356 (1953).

56 407 US 258 (1972).

57 352 US 445 (1957).

58 358 US 242 (1959).

59 Weistart & Lowell quoted in Halgreen, 2004, p. 169.

60 Halgreen, 2004, p. 171.

61 Halgreen, 2004, p. 171, footnote 7.

62 407 F. Supp. (D. Minn 1975).

from negotiating or making an offer to a player whose rights were held by another club, or risk the League's Commissioner's sanctions.

3. *The Right of First Refusal and Compensation system*

The Right of First Refusal (ROFR) modified the option clause in some professional leagues by the late 1980s, usually termed as ROFR/Compensation (ROFR/Comp). The prior team could "match" any offers made to a free agent and retain the rights to the player. If the prior team chose not to "match" the offer, the player could sign with the new team, but the prior team would still have to be compensated, pursuant to the Rozelle Rule. Procedurally, the difference between the ROFR and the Rozelle Rule was that the compensation was determined by a formula instead and not by the Commissioner's discretion. As the compensation for virtually all players was computed to be two first-round college draft choices, only two players subject to the ROFR/Comp system changed teams in over a decade between 1977 and 1988, and only one free agent player from 1982 to 1987 even received an offer from another team.⁶⁴

4. *The Draft system*

The Draft system was designed to promote and maintain competitive balance among teams. Once a club has drafted a player, it has the exclusive right to contract with him/her. The duration of this right varies among leagues; in few leagues it lasts until the next draft is held, but in most leagues the clubs reserve the perpetual right to negotiate with the drafted player.⁶⁵ In these situations, the drafting club continues to enjoy exclusivity even though no contract was entered into, even if the player spends several years in another league or some other endeavor.

5. *Salary caps and luxury tax*

The single most controversial issue in US professional sports in the last 10 years involves fixed restrictions on player salaries via "salary caps", or a "luxury tax" penalizing a team spending more than the amount allowed for salaries. The NBA and the NFL have extremely comprehensive salary caps. Recently the NHL followed suit, with the ratification of the new NHL CBA on July 22, 2005. Challenging such restrictions, there have been extensive labor strikes in the NHL and the MLB. The latter's current CBA contains a luxury tax. The whole idea is to reduce the salaries of the superstars and/or diminish the ability of clubs to overbid one another. Salary caps feature a number of general concepts such as definition of gross revenues, the league calculation of the cap, calculation of a cap per team, league-wide minimum salary (hard v. soft caps), and a number of exceptions and possibilities (such as the NBA's "Larry Bird" exception, re-signing one's own player exceeding cap space, and severe penalties for teams that wish to circumvent caps). Case law on such matters includes: *Robertson v. NBA*⁶⁶, *White v. NFL*.⁶⁷

II. The baseball anomaly

So that this investigation contributes to the realization of sport labor peculiarities and the unique handling of matters by the courts, further analysis of the cases that shaped the world of sport is necessary. Developing an understanding of how US labor relations in sport developed through litigation and policy intervention offers useful lessons, which may be juxtaposed with similar progress in the EU the past thirteen years. In this process a modernization of sport policies and labor practices can be pursued, and contemporary realities may be served. To that end, an examination of the "baseball anomaly"⁶⁸ is the first important stop.

In 1876 the National League of Professional Baseball Clubs was formed. "Federal Baseball" (as the landmark United States Supreme Court decision in 1922 is often termed) arose out of a conflict between the two then competing baseball leagues, the Federal League and the American/National Leagues (AL/NL). The plaintiffs alleged that the AL and NL, enforcing their reserve clauses, prevented the Federal League from obtaining quality ball players and becoming a financial success. The United States Supreme Court did not find it necessary to consider the merits of the case, based on the rather feeble assump-

tion⁶⁹ that the activities of organized baseball did not even fall within the scope of the Sherman Antitrust Act. Quoting Justice Holmes: "Baseball exhibitions constitute 'business', which is not the same as 'commerce' in the context of the Sherman Act... Personal effort not related to production is not a subject of commerce... The Leagues must induce free persons to cross state lines, but this transportation is a mere incident, not the essential theme..." Therefore the United States Supreme Court rejected that baseball engaged in inter-state commerce or trade.

In the late 1940s baseball's antitrust exemption had also been challenged in *Gardella v. Chandler*⁷⁰. As a result of signing with a rival baseball league in Mexico, Commissioner Chandler had suspended 18 players including Gardella and had refused to reinstate them as eligible players in the league. At the trial, Gardella alleged that the reserve system and the blacklisting of him and other players violated the antitrust laws. He lost in the District Court due to baseball's exemption in "Federal Baseball", but the Appellate Court reversed and remanded the matter back for trial on the allegation raised by Gardella. However, for economic reasons on the part of Gardella, and for fear of jeopardizing the antitrust exemption on the part of the baseball league, the parties settled out of court.⁷¹

In *Toolson v. New York Yankees*⁷², after reviewing the evidence, the United States Supreme Court affirmed its earlier ruling in "Federal Baseball", based on two -different- arguments. First, Congress had the "Federal Baseball" ruling under consideration and had not considered it fit to bring the business of baseball under the antitrust laws (somewhat ironic, as the United States Supreme Court, abiding by the principle of "stare decisis", applied precedent expecting legislative action by Congress, and the latter waited for a reconsideration by an updated United States Supreme Court decision). Secondly, the Court relied heavily on the fact that due to the ruling in "Federal Baseball" the baseball industry had 30 years to develop on the understanding that it was not subject to existing antitrust legislation...

Despite the open invitation for Congress to intervene after "Toolson", no bills were passed by Congress to rectify the apparent anomaly in professional baseball. The next major attack upon the baseball exemption was brought in 1970 by Curt Flood. After the end of the 1969 season, Curt Flood, who in an excellent career had been recognized as the best centerfielder in the National League seven seasons in a row, was traded from the St. Louis Cardinals to the Philadelphia Phillies without any prior consultation and against his expressed wishes. Flood objected to the trade -and the additional pay cut- but Commissioner Kuhn rejected his plea, after which Flood filed suit alleging that the reserve clause violated the Sherman Act. For the second time the United States Supreme Court affirmed the antitrust exemption in "Federal Baseball", but was fully aware of the inconsistency compared with other team sports. The Court noted on that respect⁷³:

If there is any inconsistency and illogic in all of this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this court... If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in "Toolson" and from the concerns as to retrospectively therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.⁷⁴

In the mid-1990s the United States Congress held a number of hearings regarding the anti-trust exemption of professional baseball. In late 1998 (76 years after "Federal Baseball") both houses of Congress unanimously passed the Curt Flood Act of 1998 and forwarded the bill for presidential signature. Both the MLBPA (players' union) and the MLB encouraged Congress to seek removal of the

63 Halgreen, 2004, p.172.

64 Halgreen, 2004, p. 173.

65 Halgreen, 2004, p. 175.

66 No. 70 Civ. 1526 (S.D.N.Y. 1982).

67 41 F 3d 402 (8th Cir. 1994).

68 Halgreen, 2004, p. 178.

69 Halgreen, 2004, p. 178.

70 79 F.Supp. 260 (S.D.N.Y. 1948).

71 Halgreen, 2004, p.179, footnote 26.

72 346 US 356 (1953).

73 Flood v. Kuhn, 312 F. Supp. 404 (S.D.N.Y. 1970), 407 US 258 (1972).

74 Flood v. Kuhn, 284.

exemption in this particular context, relating to labor matters. Thus, MLB players would enjoy the same rights as other professional athletes. The labor relationship in professional baseball at the Major League level (only) would follow the enactment of the Curt Flood Act (CFA) and be subject to collective bargaining.

It is important to note that the CFA only provided for extension of the antitrust laws to the narrow area of activity "directly relating to or affecting employment of Major League baseball players at the Major League level"⁷⁵. Hence the Act does not extend antitrust law coverage to baseball matters such as the amateur draft and Minor Leagues' reserve clauses.

Despite the CFA of 1998, "old habits die hard".⁷⁶ In *MLB v. Crist*⁷⁷, in regard to the legitimacy of MLB's decision to reduce the total number of its clubs from 30 to 28 for the 2002 season, the Court concluded the following in terms of baseball's special status:

The death of the business-baseball exemption would likely be met with considerable fanfare, save for the club owners who benefit from the rule. The exemption was founded upon a dubious premise, and it has been upheld in subsequent cases because of an equally dubious premise. Moreover, the welfare losses stemming from the potentially anti-competitive agreements among pro clubs have been well documented... Even so, we believe that a good faith reading of Supreme Court precedent leaves us no choice but to conclude that ... contraction is a matter that falls within the "business of baseball" and therefore cannot be the subject of a prosecution based on federal antitrust law⁷⁸.

Hence, for this particular matter the Court applied prior United States Supreme Court precedent and not the CFA of 1998. On the subject of free agency, the MLBPA won a surprising victory in the Seitz arbitration ruling of 1976. The 1973 MLB CBA had witnessed the birth of neutral salary arbitration and a mechanism under which a 10-year veteran could veto suggested trades. Players Andy Messersmith and Dave McNally brought a case before arbitrator Seitz, who -surprisingly after 50 years of antitrust litigation to the contrary-ruled that the reserve clause from a contractual point of view had never been agreed upon, making the players free agents upon expiry of their contracts. Having agreed to binding arbitration, MLB was not able to reverse Seitz's ruling.⁷⁹

III. Labor developments in other sports

The situation in other US sports and entertainment businesses was different, i.e. *U.S. v. Schubert*⁸⁰, *U.S. v. International Boxing Club*⁸¹. Both in "Schubert", concerning the legitimacy of theatrical producers' booking and production activities, and "IBC", concerning promoters of professional boxing bouts, the United States Supreme Court rejected the argument that "Federal Baseball" immunized all public exhibitions, observing that "Toolson" did "not necessarily reaffirm all that was said in Federal Baseball". So, in 1955, the United States Supreme Court made it clear that the baseball exemption was special, and not a general standard for the entertainment and sports industry.

In "Radovich"⁸², the plaintiff, who had played with the Detroit Lions, moved to a rival league and played there for two years. When he later sought a player/coach position with an NFL club, he found himself blacklisted for breach of contract with his previous club and filed an antitrust claim. The United States Supreme Court was well aware of the practically non-existing distinction between baseball and football; nevertheless, the Court quoted the language used in "Schubert" and "IBC", and stressed the fact that no other team sport but baseball could legitimately have relied on the antitrust exemption in "Federal Baseball" and "Toolson". Since "Radovich" the courts have consistently applied the Sherman Act to all other types of US sports and entertainment activities: [Basketball] *Haywood v. NBA*⁸³, *Robertson v. NBA*⁸⁴; [Hockey] *Philadelphia World Hockey Club v. Philadelphia Hockey Club*⁸⁵; [Tennis] *Heldman v. USLTA*⁸⁶, *Drysdale v. Florida Team Tennis*⁸⁷, *Gunter Harz Sports v. USTA*⁸⁸; [Golf] *Dessen v. PGA*⁸⁹, *Blalock v. LPGA*⁹⁰; [Soccer] *NASL v. NFL*⁹¹.

IV. The Antitrust Law labor exemptions

1. Statutory labor exemptions

Finally, the antitrust exemptions encountered through labor law are of instrumental importance for such litigation and policy. The first source of exemption from the antitrust laws for certain labor-related activities was the Clayton Act of 1914⁹². The United States Congress added a section in order to restrict the ability of the courts to apply the Sherman Act anti-competition prescription against union organizing activities. Thus, Section 6 of the Clayton Act expressly declares that the labor of humans is beyond the reach of antitrust law. Therefore, since "the labor of a human being is not a commodity or article of commerce"⁹³, player rules that restrain the sale or employment of the labor of athletes, are prima facie not a restraint of trade in interstate commerce.

The Norris-La Guardia Act⁹⁴, which was passed in 1932, precluded federal courts from issuing injunctions in labor disputes, except in cases involving unlawful destruction of property, or where authorities were unwilling or unable to protect the property. Players or unions seeking to enjoin or declare player restraints illegal, such as the draft or the reserve clause, could argue that the Norris-La Guardia Act, like Section 6 of the Clayton Act, protects union activity, but not employer activity.

The National Labor Relations Act (NLRA)⁹⁵ extracts a duty on both employers and unions to bargain in good faith over certain mandatory subjects of bargaining, rather than resorting to government interference to settle the dispute. In contrast to the Clayton Act, no strong reference of expressed antitrust exemption was included in the NLRA. However, cases where a CBA itself may be an alleged violation of antitrust law are not covered by the express statutory exemptions. In order to resolve this apparent conflict between antitrust and labor law, the United States Supreme Court developed what is now commonly referred to as the "non-statutory labor exemption".

2. Non-statutory labor exemption

The United States Supreme Court reached this important legal fiction in two cases decided on the same day in 1965, the "Jewel Tea" and the "Pennington" cases⁹⁶. Both involved antitrust challenges by third parties to CBAs made by unions and employer groups. The application of the non-statutory labor exemption led to two different results. In "Pennington" the Court held that although a union had an implied non-statutory labor exemption from the antitrust laws to enter into labor agreements with a multi-employer bargaining group, the union had forfeited its protection by agreeing to pursue anti-competitive interests of the employer group (the content of the CBA was deemed to have a ruining effect on other smaller mining companies). By contrast, however, the United States Supreme Court in "Jewel Tea" applied the non-statutory labor exemption to a CBA that was designed to protect the interest of employees by limiting late night hours. In "Pennington" the agreement required the union to force certain terms on other employers outside the multi-employer bargaining unit who, thus, had no input into the bargaining process. In "Jewel Tea", the plaintiff was simply a dissident member of the multi-employer bargaining group that forced the union to impose the same hourly restrictions on other grocers.

The factual context in which the non-statutory exemption has been applied other than in sports cases is limited to where a product market competitor of an employer, who is in the same bargaining unit as the employer, challenges a CBA between the employer and its union

75 15 USC Sec. 27 (a).

76 Halgreen, 2004, p.180.

77 331 F 3d 1177 (11th Cir. 2003).

78 *MLB v. Crist*, 1188.

79 *Kansas City Royals v. MLBPA*, 532 F. 2d 615 (8th Cir. 1976).

80 348 US 222 (1955).

81 348 US 236 (1955).

82 *Radovich v. NFL*, 358 US 445 (1957).

83 401 US 1204 (1971).

84 389 F. Supp. 867 (S.D.N.Y. 1975).

85 351 F. Supp. 462 (E.D.P.A. 1972).

86 354 F. Supp. 1241 (S.D. N.Y. 1973).

87 410 F. Supp. 843 (W.D.P.A. 1976).

88 665 F. 2d 222 (8th Cir. 1981).

89 358 F. 2d 165 (9th Cir. 1966).

90 359 F. Supp. 260 (N.D.G.A. 1973).

91 465 F. Supp. 665 (S.E.N.Y. 1979).

92 15 U.S.C. §§ 12-27 & 29 USC § 52.

93 15 USC Sec. 17.

94 29 USC Sec. 101-115.

95 29 USC Sec. 141-187.

96 *Local Union # 189, Amalgamated Meatcutters & Butchers Workmen of North America, AFL-CIO v. Jewel Tea Company*, 381 US 676 (1965); *United Mineworkers of America v. Pennington*, 381 US 657 (1965).

as a section 1 antitrust conspiracy to restraint the product market in which both employers compete. This factual context has never been presented in a sports case, yet mysteriously it is to Jewel Tea and not Clayton and Norris-La Guardia that the courts have looked for guidance in the key sports cases.⁹⁷

3. Labor exemptions application in sport

a. Impact of CBA - The "Mackey test".

The labor exemptions found application in the sport context of *Mackey v. NFL*⁹⁸, when eight union sponsored players challenged the "Rozelle Rule". In this case, the "Mackey test" developed and is applied since in relevant sports cases. Under the test, the antitrust exemption could be invoked by a league only when:

1. Restraint of trade primarily affected the CBA parties
2. Agreement fought to be exempted concerned a mandatory subject of bargaining, and
3. Agreement was the product of arms length bargaining

In the particular case, the Court found that the third element was lacking, hence no league protection via the labor exemption. Before "Mackey", the courts had ruled in several cases that the labor exemption could not be used by the employer side, i.e. the teams, with reference to the CBA, as no evidence had been presented to substantiate that the challenged regulations and restrictions had been the subject of serious arms length collective bargaining.⁹⁹

The alleged restraint of trade was solely on the labor market in which the clubs employed the players. The NFL argued that besides being stated in each NFL player's standard contract, the Rozelle Rule had also been authorized by the Players' Union (the NFLPA) in the 1970 CBA, thus exempt from antitrust attacks. The Court ruled the statutory exemption applied only to protect union activity. However, the non-statutory labor exemption could be used to protect employer conduct, only if that conduct was authorized in a union-employer agreement. The Rozelle Rule had not been "bargained over". The NFLPA was in weak position and the rule simply continued provisions that had been unilaterally imposed by the owners.

Also, in *Smith v. Pro Football*¹⁰⁰, the plaintiff challenged the NFL draft, which had not been incorporated into a CBA. The Court held that even if it could be established that the draft had been included in the CBA, a trial would be necessary on the issues of whether the restriction was thrust upon a weak players' union.

In contrast to "Mackey" and "Smith", the courts concluded that the player restraints in "McCourt" (the league's reserve system) and in "Zimmermann" (the NFL supplemental draft) had been the result of good faith arms length bargaining.¹⁰¹ In "Wood" [*Wood v. NBA, 809 F. 2d 954 (2nd Cir. 1987)*], a rookie player claimed that the salary cap and the college draft were violations of the antitrust laws and that he was not an employee at the time the CBA was made. Thus Wood claimed that the non-statutory labor exemption should not apply to him. The Court refused the argument and held he was bound by the previous decisions made by his older player-colleagues. The same conclusion was reached by the 2nd Circuit in "Clarett" recently, where a former Ohio State football player challenged the NFL policy not allowing college athletes to declare for the NFL draft unless they were three years at least separated from the graduation of their senior year in high school.¹⁰²

b. Post-CBA expiration and post-impasse labor exemption application.

What was not answered per se in the Mackey decision, however, was whether the antitrust labor exemption survives the expiration of a CBA, thus allowing employers to unilaterally impose restrictive practices upon a union. In footnote 18 of the "Mackey" decision the Court left the issue open to interpretation, something that dominated antitrust sports law cases in the late 1980s and the 1990s. Would the exemption survive the expiration of CBAs, if so for how long, did it cover just the exact same terms that had been previously bargained or would it cover unilaterally implemented new terms by the league after

impasse (dead end in negotiations after both parties bargained in good faith as described by the NLRA)?

In "Bridgeman"¹⁰³ the Court held that the exemption would not survive the expiration of the CBA, but it would protect the terms that were in place until the time that team owners could not "reasonably believe that the practice or a close variant of it would be incorporated in the next CBA". Hence, with a somewhat unfortunate decision, the Court assumed "the reasonable employer test", featuring numerous logical and practical flaws. Why should the antitrust rights of the plaintiff depend upon the beliefs of the antitrust defendant? No other court since adopted the reasonable employer test.¹⁰⁴

One year after "Bridgeman" the District Court in "Powell" reconsidered this issue.¹⁰⁵ In 1989 the NFL CBA expired. The NFL maintained the status quo on all mandatory subjects of bargaining. After fruitless negotiations the players filed suit. The District Court agreed with the NFL that the exemption would survive the CBA, however the non-statutory labor exemption had expired at the time the owners and players reached the point of impasse, after bona fide bargaining toward a new CBA. On appeal the 8th Circuit overruled the District Court opinion. As long as the player-team relationship was governed by the NLRA it would survive even the point of impasse, as long as players were represented by a union, unless the owners committed serious unfair labor practices.

So instead of going on strike, or filing an unfair labor practice complaint with the National Labor Relations Board (NLRB), the NFLPA selected the decertification of their union, in a priceless and timeless lesson of legal strategy.¹⁰⁶ The "new" NFLPA was reconstituted as a trade association with the stated goal of supporting players' effort to gain free agency through all means other than collective agency. Eight players thus filed suit against the NFL, in *McNeal v. NFL*¹⁰⁷, claiming that the league's ROFR/Comp system was in violation of the antitrust laws. Even though the NFLPA looked exactly like it did a day before decertification, the Court concluded that the union was no longer part of an ongoing collective bargaining relationship, and therefore the NFL was not allowed to invoke the non-statutory labor exemption as a defense.

To avoid similar surprises, other leagues filed suits, as "pre-emptive strikes". Before the expiration of the CBA, the NBA filed suit in *NBA v. Williams*¹⁰⁸ seeking a declaration that the salary cap, the ROFR, and the college draft would continue to be immune from antitrust scrutiny. Both the District Court and the 2nd Circuit extended the protection reached in "Powell". The Appellate Court even adopted a new, broad, and pro-employer approach, suggesting that the exemption would protect not only terms from the old agreement that the owners maintained post-expiration, but also new terms unilaterally implemented after bargaining impasse, as employers were permitted to do under labor law provisions, provided they had engaged in bona fide bargaining under the NLRA.

In the mid-1990s the United States Supreme Court ruled in favor of the employers in *Brown v. Pro Football*¹⁰⁹. A number of players had filed suit after impasse, claiming that the NFL's \$1,000 per week wage rate for young players who failed to secure a position on the regular team roster violated federal antitrust law. In an 8-1 decision, the United States Supreme Court affirmed the decision of the Appellate Court, agreeing that the exemption continues for as long as the par-

97 Gary Roberts in *Halgreen*, 2004, p. 184, footnote 49.

98 543 F. 2d 606 (8th Cir. 1976).

99 Philadelphia World Hockey Club v.

Philadelphia Hockey Club, 351 F. Supp.

462 (E.D.PA. 1972); *Kapp v. NFL*, 390

F. Supp. 73 (1974), 583 F. 2d 644 (9th

Cir. 1978); *Robertson v NBA*, 389 F.

Supp. 867 (S.D.N.Y. 1975).

100 593 F. 2d 1173 (D.C. Cir. 1978).

101 *McCourt v. California Sports*, 600 F. 2d

1193 (6th Cir. 1979); *Zimmermann v.*

NFL, 632 F. Supp. 398 (D.D.C. 1986).

102 *Clarett v. NFL*, 369 F.3d 124; 2004 U.S.

App. LEXIS 10171, 2nd Cir. 2004.

103 *Bridgeman v. NBA*, 675 F. Supp. 960

(D.N.J. 1987).

104 *Halgreen*, 2004, p. 187.

105 *Powell v. NFL*, 678 F. Supp. 777 (D.

Minn. 1988), 930 F. 2d 1293 (8th Cir.

1989).

106 *Halgreen*, 2004, p. 187.

107 764 F. Supp. 1351 (D. Minn. 1991).

108 857 F. Supp. 1069 (S.D.N.Y. 1994), 45 F.

3d 684 (2nd. Cir. 1995), 116 S. Ct. 2546

(1996).

109 116 S. Ct. 2116 (1996).

ties have a bargaining relationship, even for terms unilaterally implemented by team owners post-impasse.

D. US Competition and Labor Law applications in sport summary

Recapitulating the section devoted to US Competition and Labor Law applications in sport, one may reach several conclusions that are useful before an analysis of the contemporary situation evolving in EU sport:

- In the “amateur” section of US sport, the NCAA has enjoyed relief from antitrust scrutiny, with the exceptions in “Board of Regents” and “Law”. In this way the observer of law and policy may reach the conclusion that restrictive practices such a voluntary association adopts are reasonable and even necessary for the association to pursue its purposes. Any policies, however, that entail business practices affecting third parties and not the regulatory framework which members institutions have to abide by, may come under antitrust scrutiny, rendering the association a commercial business venture.
- Frequently Congress has intervened attempting to resolve situations in sport that courts declined or were unable to provide remedy for (or in certain cases deciding to bypass or alter court decisions, satisfying either public demand or succumbing to major corporate interests), i.e. the SBA of 1961 allowing sports leagues to pool broadcasting rights and sign exclusive contracts, or the CFA of 1998, providing relief for a situation that evolved the 76 years following the “Federal Baseball” case that granted baseball its infamous —according to aforementioned legal scholars— antitrust exemption. Such intervention arguably protected the interests of individual sport laborers, to that point treated unfairly and not enjoying privileges other employees in other business sectors normally enjoy. At the same time, such policy initiatives also allowed for the continuation of sports leagues development, rendering the operation of sports franchises feasible for investors.
- Promoting competitive equity and balance among participating teams and athletes is a major purpose of all sports organizations. In such a manner, practices that would otherwise be declared inherently anti-competitive find a sporting rationale and pass antitrust muster (e.g. broadcasting restrictions, draft systems, salary caps, luxury tax).
- Several major sports leagues’ practices have been declared violations of antitrust law (cross-ownership restrictions, relocation restrictions, transfer windows, and acquisitions deadlines) under SAA §1. SAA § 2 claims in regard to monopolization and the misuse of a dominant position have been harder to prove. It is difficult to establish a monopoly claim in sport settings.
- Even though on strict business law terms restrictive practices such as the “reserve” or “option” clauses, the “tampering” or “Rozelle” rules, or the ROFR/Comp system appear to make no legal sense, they did pass legal scrutiny in the early days of professional sports development in the US.
- Players unions that wish to uphold players’ rights can only bargain for them in good faith with employers in CBA negotiations. After a series of court decisions in “Powell” and “Williams”, the employers’ side received the benefit of the doubt in relation to antitrust protection of rules unilaterally implemented for the survival of the league and the game.
- Under the “Mackey test” and considering the obligations employers have under the NLRA, unions may still pursue the negation of a restrictive practice; as a last resort they always have the “nuclear option” of union decertification.

E. EU Competition Law application in sport

I. Competition Law theory

The competition rules in the EC Treaty¹¹⁰ aim at promoting a competitive market economy and preventing barriers to integration of the single European market. Article 3 (g) ensures a system that does not distort competition. Article 81 (1) creates and sustains that system:

The following will be prohibited as incompatible with the Common Market: All agreements between undertakings, decisions by

associations of undertakings, and concerted practices which may affect trade between member states, and which have as their object or effect the prevention, restriction, or distortion of competition within the Common Market.

Hence, the EC Treaty provides for no cartel agreements leading to anti-competitive effects. Article 81 (2) renders all agreements or decisions under (1) void.

Article 81 (3) provides:

...[E]xceptions for practices which contribute to improving the production or distribution of goods or promoting technical or economic progress while allowing consumers at a fair price access to the resulting benefit and which (a) do not impose restrictions on the undertakings indispensable to the attainment of the objectives; (b) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In this way the EU assumes a “sui generis” community rule-of-reason.¹¹¹ Article 82 declares:

Any abuse of one or more undertakings of a dominant position within the common market or in substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States. Such abuses include:

- a) Price-fixing or unfair trade conditions
- b) Limiting production or technical development
- c) Applying dissimilar conditions to equivalent transactions with other trading parties, placing them at competitive disadvantage
- d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

There are no exemptions, provided the three elements to breach Article 82 are met:

- a) a dominant position
- b) abuse of that position, and
- c) effect on inter-member trade caused by the abuse.

Examples of monopolization in terms of business practices are found in *Hoffman-LaRoche v. Commission*¹¹². Hoffman - La Roche controlled 80% of the relevant vitamin market, which was found to be an exploitive and anti-competitive abuse. On the other hand, *United Brands v. Commission*¹¹³ established the meaning of dominance in a relevant market. United Brands (UB), marketing Chiquita bananas, handled 40% of EU bananas trade. The Commission defined the market as bananas, whereas UB argued for the broader “fresh fruit” category, in which there would be no monopoly. The ECJ sided with the Commission, leaning toward a unique market “due to particular consumption by young, old, and sick”.

There is no per se exemption at Article 81 (3) of the EC Treaty for economic activities in sport. In a February 1999 EC policy statement¹¹⁴, purely sporting activities were distinguished from commercial ones to which EC competition law would apply. This policy entailed general principles applying EU competition law to sports:

- Safeguarding the general interest in relation to the protection of private interest
- Restricting competition action to cases of Community interest
- Applying the so called “de minimis” rule, according to which agreements of minor importance do not significantly affect trade between member states
- Applying the four authorization criteria laid down in Article 81 (3) of the EC Treaty, but also refusing an exemption to any agreement which infringes other provisions of the EC Treaty and in particular freedom of movement for sportsmen
- Defining relevant markets pursuant to the applicable general rules
- Adapting to the features specific to each sport.

¹¹⁰ The Treaty establishing the European Community (as amended by the Treaty of Amsterdam), C 325/35, 12-24-02.

¹¹¹ Halgreen, 2004, p. 100, footnote 38.

¹¹² C-85/76 [1979] ECR 461.

¹¹³ C-27/76 [1978] ECR 207, [1978] 1 CMLR 429.

¹¹⁴ Halgreen, 2004, p. 101.

Deputy Director General of Competition Directorate of EU Commission JF Pons, on October 14, 1999, clarified the rationale and in a way defined the application of the “socio-cultural” model of sport in the new era of commercialization. Pons emphasized the following points:

- There should be no premature drop out of teams, promoting solidarity and equality, as well as the uncertainty of results
- The social activity by millions of amateurs involves the expectation of top-bottom distribution of revenue
- ISFs regulate and may involve economic activities
- Commission distinguishes between compliance with Competition policy and requirements of sports policy
- Commission attempts to prevent restrictive practices of sports organizations with significant economic impact that are unjustified in the light of the goal of improving the competition and distribution of sports events, or in reference to the specific objectives of a sport. It will, however, accept practices that do not give rise to problems of competition, as being inherent in the nature of sport, necessary in the organization of it, or justified
- Bearing in mind the difficulty of pinpointing the character of sporting activity, gradually and on a case-by-case basis the Commission and/or the ECJ will clarify rules inherent in sport or necessary for competition.

Pons (1999) mentions he would not be surprised if in the future the following fall outside the scope of article 81 (1) of the Treaty:

- Rules of the Game
- Nationality clauses in competitions between teams representing nations
- National quotas governing the number of teams or individuals per country participating in European and international competition
- Rules for selection of individuals on the basis of objective and non-discriminatory criteria
- Rules setting fixed transfer periods for the transfer of players, provided they achieve some balance in the general structure, or
- Rules needed to ensure uncertainty as to results, where less restrictive methods are not available.

Articles 86, 87 et seq. of the EC Treaty govern state aid administered to sports clubs. This becomes very important, introducing policy in the EU member states that allows governmental debt relief via a socio-cultural approach. Recently clubs in France (Paris, Bordeaux), Spain, and Greece (AEK, Aris, PAOK, et al.) fell within such “special liquidation” policies¹¹⁵, as a “measure designed to assist education and initial training, and as such constituting an educational or comparable scheme”.¹¹⁶ Thus, it becomes apparent that the “socio-cultural” approach differentiates the handling of certain sport activities from pure commercial enterprises. Especially in times of dire financial straits for historic European sporting clubs, the states have been able to intervene and provide special resolution.¹¹⁷ This special resolution oftentimes is argued to be contradictory to state constitutions, state common and civil laws, even EU community mores and business laws.¹¹⁸ But the socio-cultural norm as expressed by EC policy at this point appears to allow for such special legal and financial management of relevant cases. Needless to say, in a purely commercialized sporting world such as the one in the US professional leagues, no justification would be possible. When sporting organizations in the US have had financial hardship, there was no way to establish governmental intervention to save the struggling clubs or leagues. Unless there was an issue such as the ones rectified by the SBA of 1961 and the CFA of 1998, essentially providing remedy for both team owners and players to operate in a healthy and feasible business environment, Congressional intervention would not step in and save e.g. the Women’s United Soccer Association (WUSA) or professional leagues’ competitors from economic extinction. One may argue that the threat of professional sport franchises departing from their host cities in the US creates a burden for financial subsidy of new facilities via public monies. This assumption, however, would need further exploration.

II. Competition Law application in sport

1. Competition Law scrutiny of broadcasting restrictions

a. Collective selling of broadcasting rights.

It is useful to investigate particular Competition Law issues as they are found in EU sport to juxtapose their legal resolution and handling with respective US cases. For example, in regard to sports broadcasting, the collective selling of sport broadcasting rights is considered restricting competition based on the following reasons¹¹⁹:

- 1) Price-fixing
- 2) Limited availability to rights
- 3) Market position of stronger broadcasters is strengthened, being the only operators able to bid for all the rights in one package.

However, there have been cases of a pro-collective sale of rights stance to protect the financially weaker clubs, such as the one decided by the Restrictive Practice Court (UK, Premier League, July 28, 1999). The Court’s handling was also possible under a rule-of-reason test. Through a pragmatic-public interest approach, the Office of Fair Trading lost to the Premier League, pooling TV rights, owning a unique product by all its clubs, unlike a cartel of producers of a homogenous product, where cooperation removes incentives to innovate or compete on price and quality.¹²⁰

On the same matter, in 1999 UEFA notified the EC of regulations regarding the bundle of exclusive rights to the Champions’ League, for up to four years to a single national broadcaster (usually free TV), normally sub-licensing to a pay TV channel. On July 19, 2001, the EC sent objections to UEFA, using the reasoning that huge prices drive competition away, and deter new technology. In 2003, UEFA assumed a new plan and on July 24, 2003 the EC reconsidered, pursuant to the following justifications:

- * Gold and Silver rights packages options
- * Exclusive right to sell remaining games (Bronze package) by cut-off date or individual clubs may use the right to negotiate themselves
- * UEFA and clubs can exploit internet or cell phone avenues [Universal Mobile Telecommunications System (UMTS) technology], and
- * Maximum period of pool is three years via public tender procedure in open bidding.

In a recent development on the issue, on December 16, 2003, the EC reached an agreement with the Premier League in the United Kingdom. The latter was advised to amend its practices allowing more transparent bidding for the Premiership soccer games, instead of renewing the exclusive contract with Rupert Murdoch’s Sky TV (B-Sky-B). In early September 2005, the Premiership was given three weeks to respond to the EC on ways to implement new broadcasting contracts¹²¹. In a more representative bidding process, B-Sky-B was expected to receive most games’ rights. The Irish pay-TV operator, Setanta, however, secured two of the six available packages (Harris, 2006).

Some background on exclusive licensing involves 1991 and 1993 ECJ decisions on the European Broadcasting Union (EBU) organizing the popular European Song Contest, which was deemed too restrictive, not allowing others to bid.¹²² Improvements to the EBU plan were granted until 2005. In close relation, one observes the British Monopolies and Merchants Commission’s (MMC) decision refusing Rupert Murdoch’s £623 million bid for Manchester United as B-Sky-B owned the Premiership’s broadcasting rights and would have the other end of the table in broadcasting negotiations as well. The MMC was not assured that the deal would not influence present and future broadcasting agreements.¹²³

115 Dedes, 2005.

116 Halgreen, 2004, p. 103, footnote 47.

117 Dedes, 2005.

118 Dedes, 2005

119 Halgreen, 2004, p. 113.

120 Halgreen, 2004, p. 114.

121 EurActiv, 2005a.

122 Halgreen, 2004, p. 122.

123 Halgreen, 2004, p. 123.

b. Anti-siphoning provisions.

In regard to anti-siphoning regulations in the 1980s and 1990s there was increased privatization and involvement of commercial media partners. Recently Prisma (FIFA's media partner) paid for World Cup games (as a member of BRD Kirch Group) \$1.8 billion for 2002 and 2006. Approximately \$450 million were paid for each cup final game. Hence, EC policy forecasting potential developments assumed the "Television-Without-Frontiers" initiative. In its article 3A, there is the mention of "important events for society" that should remain available on free TV. As of September 2005, only Austria, Germany, Italy, and the UK had submitted lists of nationally important events.¹²⁴

2. Competition Law scrutiny of monopolization attempts and misuse of a dominant position

In terms of monopolization attempts and the misuse of a dominant position, the Formula One case provides useful insight, especially in regard to SINGOs/ISFs separation of regulation and promotion functions. In the International Automobile Federation (FIA) case the EC suggested that a governing body of sport needs to separate its regulation of the sport from its commercial activities in promoting events and in maximizing their commercial value; a governing body must not use its regulatory functions improperly to exclude its commercial rivals from the sport¹²⁵. The history of the matter was that FIA prevented rival promoters from setting up events. It refused to license rival promoters, competitors, and events. It would ban drivers who competed in rival events. FIA insisted that circuit owners grant exclusive use of their tracks. It would penalize broadcasters if they showed rival events. The Commission convinced FIA to separate the regulatory from the commercial function, preventing conflicts of interest. As scholars note, there is a very different handling of motor sports (commercialized global sport) when compared to soccer (internationalized sport).¹²⁶

What is important to note at this point (self-regulation of sporting organizations) is that the Commission "does not care about sporting rules",¹²⁷ "Rules without which sport could not exist should not -in principle- be subject to EU Law application. Sporting rules applied in an objective, transparent, and non-discriminatory manner do not constitute restrictions of competition".¹²⁸ The elements emphasized by Commissioner Monti -objective, transparent, and non-discriminatory-are the main areas where EC intervention and ECJ decision-making may promote a "socio-cultural" approach. Promoting these elements may entail preempting certain acceptable business practices. At the same time, the operators of sport organizations attempt to find ways under which restrictive practices may be upheld, considering the unique nature of the sport industry. On this matter, the ECJ rejected that sporting bodies have a clear immunity even over the rules of the game, and they have to satisfy basic legal safeguards, such as non-discrimination and rational decision-making criteria. These issues have been deciding factors in sport labor related cases, with the seminal one, shaping the world of modern EU sport, being "Bosman".

F. EU Labor Law application in sport - Bosman et al.

I. Sport labor evolution

1. Pre-Bosman

Before examining the impact of *Union Royale Belge des Societes de Football Association, Royal Club Liegeois, UEFA v. Bosman*¹²⁹, in short "Bosman", frequently termed as the "bombshell" in European sports law and policy, it is necessary to investigate the legislative history behind it. In *C-36/74 Walrave & Koch v. Union Cycliste Internationale et al*¹³⁰ ("Walrave"), Dutch motorcycle pacemakers wanted to work for other than Dutch teams. The ECJ pontificated:

Having regard to the objectives of the Community, the practice of sport is subject to Community Law, only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty... The prohibition on discrimination based on nationality contained in Articles 7, 48, and 59 of the Treaty does not affect the composition of sports teams, in particular national teams, the formation of which is

a question of purely sporting interest and as such has nothing to do with economic activity.

Article 39 (48) extended to collective regulations of gainful employment services, supported by Article 7 (4) of Council Regulation 1612/68, prohibiting nationality discrimination in agreements and collective regulations concerning employment. The abolition of obstacles to freedom of movement¹³¹ would be meaningless if such barriers were replaced by obstacles imposed by Associations not subject to public law. The latter brought private sports organizations within the realm of community law.¹³²

In *Dona v. Mantero*¹³³ ("Dona") an agent wishing to recruit players abroad targeted restrictive nationality clauses. The Court ruled that:

Rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the state in question, are incompatible with Article 7, and as the case may be, with Article 48 to 51 or 59 to 66 of the Treaty, unless such rules or practice exclude foreign players from participation in certain matches for reasons which are not of an economic nature and context of such matters are thus of sporting interest only.

The imprecise language in regard to EC Treaty provisions' application in sport in "Walrave" and "Dona" may very well have been one of the reasons why very little was done to prevent continued discriminatory practices in European sport after 1976.¹³⁴ Thirteen years after "Dona", attempting to rectify such ambiguity and uncertainty governing the sport industry, and especially European soccer, the Commission and UEFA reached a "gentleman's agreement", introducing the "3+2 rule" (club teams could use three non-nationals and two assimilated players who had played in that country for five years without interruption, including three years in junior teams).

*UNECTEF v. Heylens*¹³⁵ ("Heylens") dealt with discrimination of a Belgian football trainer, holding a Belgian diploma, employed by Lille, in France. In order to practice the occupation of football trainer in France, a person must be the holder of a French license, or a foreign one which has been recognized by the state. Heylens' application was rejected without cause. The ECJ recognized that in the absence of harmonization of the conditions of access to a particular occupation, the member states were entitled to lay down the knowledge and qualifications needed in order to pursue it and to require the production of a diploma certifying that the holder had the relevant knowledge and qualifications. However, in order for the national state to exercise the right of rejection, the person concerned had to be given the opportunity to ascertain the reasons for the decision, which was not the Heylens case. Similar cases include: *Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris*¹³⁶; *Ordre des Avocats au Barreau de Paris v. Klopp*¹³⁷; *Ramrath v. Ministre de la Justice*¹³⁸; *Kraus v. Land Baden-Wurtemberg*¹³⁹.

2. Bosman

In "Bosman", the ECJ decided on December 15, 1995:

1. Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one member state may not, on the expiry of his contract with a club, be employed by a club of another member state unless the latter club has paid the former club a transfer, training or development fee.
2. Article 48 of the EEC precludes the application of rules laid down by sporting associations under which, in matches, in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other member states.

124 Halgreen, 2004, p. 125.

125 COMP/35.163; COMP/36.638;

COMP/36.776. GTR/FIA et al. Official Journal June 13, 2001.

126 Foster, 2005; Halgreen, 2004.

127 Monti, 2001.

128 Monti, 2001.

129 C-415/93 [1996] ECR 5040.

130 [1974] ECR 1405.

131 EC Treaty Article 3 (c)

132 Halgreen, 2004, p. 191.

133 C-13/76 [1976] ECR 1333.

134 Halgreen, 2004, p. 51.

135 C-222/86 [1987] ECR 4112.

136 C-71/76 [1977] ECR 765.

137 C-107/83 [1984] ECR 2971.

138 C-106/91 [1992] ECR I-3351.

139 C-19/92 [1993] ECR I-1663.

Thus, “Bosman” killed two European “sacred cows”¹⁴⁰: the transfer system and nationality clauses. Professional players were considered workers governed by EC Treaty, upholding their fundamental employment rights. In regard to transfer rules the ECJ concluded that the old transfer system and nationality clauses violated Article 39 (then 48); it refrained from taking a stand on the competition law aspects of the case.

Weatherill (1999) supports that the use of free movement law under Article 39 was a blip. He goes further saying that Competition Law is most applicable for sport. Thus, the ECJ elegantly passed the baton to the Commission. The ECJ reaffirmed “Walrave” and “Dona” in reference to sport application of EC Law insofar as it constituted an economic activity. As an extension, the Court did not preclude rules or practices justified for non-economic reasons (e.g. particular sport-specific regulations, in specific nature and context). These would have limited basis per proper objective, not excluding the whole of sporting activity from the scope of the Treaty.

Transfer rules were considered an obstruction of workers’ free movement, as

“...such rules could only be justified if they pursued a legitimate aim compatible with the Treaty due to pressing reasons of public interest. Even so, application of such rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose.” Further, the ECJ concluded in “Bosman” (par. 106-110):

106. Due to social importance of sport... the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty per results and encouraging the recruitment and training of young players must be accepted as legitimate.
107. The application of transfer rules... is not an adequate means of maintaining financial and competitive balance in the world of football...
108. It must be accepted that the prospect of receiving transfer, development, or training fees is indeed likely to encourage clubs to seek new talent and train young players.
109. It is by nature difficult to predict the future of young players... fees are contingent and uncertain, and are in any event unrelated to the actual cost borne by clubs of training both future pro players and those who will not play pro. The prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.
110. As the Advocate General pointed out in 226 et seq. of his Opinion, the same aims can be achieved at least as effectively by other means, which do not impede freedom of movement for workers.

For example, other means would be a salary cap via a collective wage agreement, redistribution of income from ticket sales, radio and TV contracts, and other sources to achieve a balance. The ECJ dismissed claims that transfer fees were necessary for the continuation of the world of football or that clubs should be compensated because of the expenses they had incurred recruiting their players.

On nationality clauses, the ECJ considered such practices discriminatory under Article 39 (48). The Court disregarded arguments that rules were not per se restrictions on employment, but restrictions on participation, as participation was the essential purpose of a professional player’s activity. Advocate General Lenz’s interpretations - as important for the world of sport in Europe as were the opinions by Justice Holmes in “Federal Baseball” for US baseball- supported that limitations of the sort would render freedom of movement inapplicable. The ECJ also did not accept that they were pro-competitive rules. Nothing prevented the richest clubs securing the best national players.

Advocate General Lenz and his interpretation of Article 81 and 82 (then 85 and 86) in the sports context was the best and most authoritative reading of the EC Treaty for ten years, until the ECJ decision in *Meca-Medina*. In *Bosman*, the ECJ did not deem appropriate to

examine Competition Law application under Articles 81 and 82 once it found that rules were violations of Article 39... Lenz, however, did extend his analysis into the EU Competition Law application aspects in sport.¹⁴¹ There should be, he argues, no exemptions on “sporting grounds”. Nationality rules prevented free competition of clubs on recruiting players, thus constituting an agreement sharing sources of supply within the meaning of Article 81 (i) c. On transfers, the substitution of supply and demand by the traditional transfer system essentially was a deprivation of competitive opportunities. On the prospect of a labor exemption, UEFA argued that it was a concealed labor/wage dispute. Employer-employee relations should not come under scrutiny of Competition Law (in the spirit of US antitrust labor exemptions). However, in Lenz’s opinion, there was no rule for employment relationships to fall outside the scope of Competition Law. He stated that restrictions of such sort might indeed exist under the scope of Article 81, but would be “limited in character”. Lenz went beyond that theoretical problem observing that there were no collective bargaining agreements in place but simple horizontal agreements between clubs. Hence, UEFA’s argument fell to the ground. Such agreements are within the scope of Article 81, though no abuse of a dominant position under Article 82 was established.

3. Post-Bosman

In the post-“Bosman” world of European sport, there was a consensus for new transfer rules. Sport migration patterns developed in Europe. Talented athletes would mainly swarm to the more lucrative sports markets. Participation by national athletes would deteriorate, and salaries would be controlled. Arguably the decision strengthened national leagues, and promoted competition in the lower level ones. The decision assumed a broader scope after the Copenhagen Summit in December 2002, when ten member-states were added to the EU. Furthermore, there were European trade agreements extending the coverage and application of *Bosman*¹⁴².

Important and decisive cases in determining the world of European sport after *Bosman* include: *Malaja v. FFBB*¹⁴³; *Deutscher Handballbund v. Maros Kolpak*¹⁴⁴; *Igor Simutenkov v. Abogado del Estado et al.*¹⁴⁵.

In *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale Des Sociétés De Basketball ASBL*¹⁴⁶ (“Lehtonen”), a Finnish basketball player challenged acquisitions’ deadlines as violations of fundamental rights according to Article 39 of the EC Treaty. The Court established that transfer windows were discriminatory, as for Belgian clubs they were April 15, 1995-May 15, 1995, for EU imports they extended to February 18, 1996, and for players from outside the EU zone (e.g. NBA players) they extended to March 31, 1996.

In *Christelle Deliege v. Ligue francophone de judo et disciplines associées ASBL, et al.*¹⁴⁷ (“Deliege”), the issue challenged was the freedom of sporting federations to select individual athletes to participate on national teams for international competitions. Belgian judoka Deliege had not been selected by her federation, as the International Judo Federation (IJF) imposed nationality-based quotas on participation. She was not a “professional” athlete, but lived off grants, was engaged full time in her sport, and had no other job. The Court stated that the EC Treaty applied to her as she was engaged in commercial activities. The ECJ recognized that some selection criteria were inevitable for ISFs; totally unrestricted open entry was deemed unworkable.

II. The scope of sport labor law

An important distinction that needs to be made after an investigation of the aforementioned cases refers to ECJ’s interpretation on the scope of the principle of non-discrimination of the trade agreements between EU member states and non-members. This scope extends to workers that are *already* employed in a member state, not referring to *access* to employment. Hence, e.g. if *Simutenkov* (Russian national)

¹⁴⁰ Halgreen, 2004, p. 167.

¹⁴¹ Halgreen, 2004, p.194.

¹⁴² Halgreen, 2004; Martins, R. B. (2004).

The Kolpak Case: *Bosman Times* 10?

International Sport Law Journal, 1-2, 26-33.(Martins, 2004).

¹⁴³ CE 30-12-2002, 219646.

¹⁴⁴ C-438/00, ECJ 8-5-2003.

¹⁴⁵ C-265/03, ECJ 12-4-2005.

¹⁴⁶ C-176/96 [2000] ECR 2681.

¹⁴⁷ C-51/96 and C-191/97 [2000] ECR 2549.

was not already a professional soccer player employed by a professional club team in Spain, he would not have been successful in his case claiming he was discriminated by horizontal restrictive practices by the local league and federation.

The examination of Martins is very informative on the subject of classification of players. According to Martins, there is qualification to three groups:

- "Europe Agreement" (EA, gradual integration to the EU) involves 23 countries, provided the player was lawfully employed already. EC Treaty covers these players; however, there is no extension of EC Treaty coverage to access to employment
- Other association agreements with other countries not presupposing integration to the EU will not have direct effect. Such agreements entail 77 African, Caribbean, and Pacific (ACP) Countries with agreements (*Cotonou* pact) on the same working conditions as EU nationals including limitations of working conditions, such as federation rules limiting the numbers of non-EU players
- Other players, without protection under the EC Treaty, including US players, whose legal position is to be dependant upon national laws.

It is argued by Martins that national legislation could grant free access to employment from EA countries, until they fully join the EU. It is useful to quote Martins on the subject of European football (soccer) in the 21st Century, as he was instrumentally involved in the "social dialogue" between ISFs, FIFA, UEFA, and the EC. One observes the clear impact of the socio-cultural approach on his positions:

European football may expect to be flooded by cheap labor from all over the world, placed on the market by clever brokers. Clubs will see their investments into youth training dwindle and fade, players will face reduced salaries, unemployment among national footballers will rise, fans will no longer be able to identify with their team and eventually stadiums will empty. As a result of these cheap workers every aspect of the game, from youth training to national teams, will be affected.

III. The "Homegrown Rule"

In her recent critique of UEFA's "Homegrown Rule", which as of 2008-2009 requires at least four players on each team (in a 25-member roster) to be trained in the youth development program of the respective club, and up to four more trained in other clubs of the same UEFA member association as "locally trained" players, defined as players who have been registered for three seasons/years with the club(s) between the ages of 15 and 21, Briggs shares Professor Parrish's comments¹⁴⁸ that such a rule may find its way before the ECJ. The authors argue that such an admittedly shrewd legal strategy on the part of UEFA may still not pass ECJ and EC muster, as in effect it would create nationality-based discriminatory criteria for sport participation in both European and national leagues.

Although the rule does not explicitly impose nationality requirements on club teams, the effect of the requirement will be to decrease the number of foreign youths being trained by each club development program and thereby increase the number of local players on any given team... UEFA can thus create de facto nationality quotas without ever using the word "nationality"¹⁴⁹.

According to Parrish¹⁵⁰, "even though UEFA claims the quota is neutral in terms of nationality, it is clear the intention and effect of the rule is to indirectly discriminate on the grounds of nationality." These authors agree that as long as there is no clear exception of sport in the EC Treaty in reference to employment, freedom of movement, and competition, such rules will not be valid under ECJ scrutiny. Briggs concludes:

With the Homegrown Rule, UEFA is making an effort to comply with the letter of EU antidiscrimination law while still preserving the important local character of European league soccer. It recognizes the validity of antidiscrimination policy and imposes only minimal restrictions on free movement, but reaffirms private league soccer as more than purely economic activity.

Her comment that "sport is not a business like any other busi-

ness"¹⁵¹ clearly embodies the aforementioned impact of a socio-cultural approach to sport policy. More analysis and discussion on the homegrown rule ensues in the recent developments' section. The author optimistically forecasts:

The Homegrown Rule is an attempt to evade current law, and if the rule is challenged, the challenge may provide a key opportunity for carving out a soccer exception to EU economic policy. Such an exception would be appropriate given the unique nature of the business of soccer. This is especially true where, as under the Homegrown Rule, the exception would have only minor affects on free movement of workers. A reexamination of application of antidiscrimination laws to soccer would be the EC's best option in resolving the current conflict¹⁵².

IV. Efforts for conflict resolution

In a nutshell, one may conclude that there is a legal conflict between federation rules (transfer system and licensing systems) and EU labor and competition law. EU law principles are overarching. There are requirements which have to be fulfilled for the conclusion of an employment contract, such as the issue of a valid work permit-authorization by member state. On the matter, realities that have formed in policy entail a Northern "autonomy of sport" vs. a Southern "public intervention"¹⁵³. With the latter segmentation, Martins supports the notion that Southern European countries (i.e. Spain, Italy, Greece) attempt to intervene in the regulation of sport by means of Acts of Parliament affecting sport policy (e.g. capping work permit numbers). On the other hand Northern and Central European countries (i.e. The Netherlands and Germany in Martins' examination) attempt to allow for some sport federations' autonomy in drafting sport policy, although that becomes more difficult considering EC and ECJ scrutiny and contemporary EU Law application in sport. Martins argues that such "autonomy of sport" policies have to feature some member state regulations (and definitely "social dialogue" between sport federations, the EC, and various constituents) to control for the "Kolpak" phenomenon, extending the scope of "Bosman" to EA and trade associations countries' citizens.

In an effort to control a maelstrom of sport labor, Martins suggests several practices that would both make sense considering the "socio-cultural" aspect of EU sport, and would abide by EC policy and ECJ case law in terms of restrictions. Overall there is easier access to pro-sport employment. Federation rules may be passed into Acts of Parliament, a practice that would be too time-sensitive. EU minimum rules (statutory law), quotas for work licenses, and uniform EU laws are already passed by state legislatures. Transfer fees would be poured into the youth development fund. A "wild-card" system promoting participation at the top level would involve fees also invested into the youth fund. Works permits' ceilings may further provide the opportunity for smaller clubs to capitulate them, in certain cases selling them to bigger clubs that have reached their quota¹⁵⁴.

After "Bosman" and the cases mentioned above, in March 2001 an agreement was framed between EC and FIFA/UEFA, withdrawing complaints against a transfer system. Sadly, there was no FIFPro (FIFA players' union) participation in the negotiations¹⁵⁵. FIFA and the EC adopted a new, very elaborate and complex transfer system on July 5, 2001, in Buenos Aires, effective from September 1, 2001, most recently updated in 2005, with an anticipated new update following the settlement in *Oulmers* and the historic 2008 agreement between the G-14, UEFA, and FIFA. There were four categories of club segmentation, along with protection of youth training and clubs which invest in it. Lenz (above) disagreed with the legality of such regulations. Nonetheless, fees include a solidarity mechanism, as well as an

¹⁴⁸ EurActiv.com (2006, April 5).

Commission investigates national restrictions on sports.

¹⁴⁹ Briggs, L. (2005). *UEFA v The European Community: Attempts of the Governing Body of European soccer to circumvent EU freedom of movement and antidiscrimination labour law.*

Chicago Journal of International Law, 6, 439

¹⁵⁰ Quoted in EurActiv, 2005b.

¹⁵¹ Briggs, 2005.

¹⁵² Briggs, 2005.

¹⁵³ Martins, 2004, p. 28.

¹⁵⁴ Martins, 2004.

¹⁵⁵ Martins, 2004.

alternative dispute resolution mechanism, usually referring matters to the CAS. On this matter, a recent case *CAS 2005/A/899 FC Aris Thessaloniki v. FIFA & New Panionios N.F.C.* (“Aris”) exposed FIFA and UEFA’s enforcement mechanisms. Aris Thessaloniki F.C. argued that a prior decision sanctioning Panionios N. F. C. by FIFA (due to participation of ineligible players) was not enforced by the member federation (the Greek soccer federation), thus costing the plaintiffs relegation. It is noteworthy to mention that FIFA acknowledged before the CAS its inability to unilaterally enforce its sanctions. It only recommends them to its member federations¹⁵⁶.

V. Recent developments

Between 2006 and 2008 there have been remarkable developments in ECJ case law, application of EU competition law in sport, jurisprudence and alternative dispute resolution in regard to sport labor, sport policy initiatives, and generally a flurry of legal activity in European sport, shaping a new reality. Herein, a few samples will merely be posed for further research.

In *David Meca-Medina and Igor Majcen v. Commission*¹⁵⁷, and *Piau v. Commission*¹⁵⁸, the ECJ proceeded to apply and interpret competition rules’ application in sport. In the latter case, UEFA was found not to be in competition for player agency services. In what probably constitutes a controversial conclusion, the Court of First Instance (CFI) considered in its judgment that football clubs hold a collective dominant position on the relevant market¹⁵⁹. When examining the nature of the regulations on players’ agents, the Fourth Chamber of the CFI first asserted that national football associations that are members of FIFA may be considered as undertakings as well as associations of undertakings within the meaning of Article 81 EC. As a consequence, FIFA is classified as an association of undertakings. Regarding the services provided by players’ agents, the CFI considers in paragraph 73 that this activity is of an economic nature “involving the provision of services” - something that does not “fall within the scope of the specific nature of sport”. As to the regulations adopted by FIFA, the CFI holds in paragraph 74 that they do not “fall within the scope of the freedom of internal organisation enjoyed by sports associations”.

What the ECJ accomplished in *Meca-Medina*, was more than an original application of competition rules to sport, their interpretation, and the formation of a legal test as precedent for future cases in the sport sector. It further segmented theorists, scholars, policy-drafting entities, and politicians in two major constituencies; the ones that vehemently disagreed with the decision fearing a “case-by-case analysis” by the ECJ, dreading the legal uncertainty they claim to exist, not allowing sport governing bodies to operate in a prudent and secure environment for the better of sport; and the proponents of this decision as a fine display not of judicial activism, rather a much anticipated clarification, to achieve consistency in decision-making, alerting sport governing bodies that they are not above EU Law, and they need to ensure their policies will abide by the spirit and the letter of the EC Treaty. In a nutshell, in *Meca-Medina* swimmers challenged anti-doping and drug-testing regulations of their governing federation, arguing that they were incompatible with Arts. 81 and 82 EC Treaty. The ECJ took an important detour from established theory in “Walrave” and “Donat”, in reference to rules of “purely sporting interest”. The adoption of a new methodological approach (case-by-case analysis) can be summed as follows:

- Step 1: Is the Association an “undertaking or Association of undertakings”
 - o It is if it carries an economic activity itself
 - o It is an Association of undertakings if its members (clubs - athletes) exercise economic activity
- Step 2: Does the rule restrict competition (81§1) or abuse a dominant position (82)
 - o Overall context and objective pursued
 - o Restrictions inherent to objectives
 - o Proportionate in light of objectives
- Step 3: Does it affect MS trade
- Step 4: Does it fulfill conditions of 81§3 (*sui generis Rule of Reason analysis*)

Contrary to critics’ contentions, this application of competition law in sport does allow for reasonable restrictions and regulatory evolution to abide by EU Law. As in *Piau* and *Meca-Medina*, restraints and regulatory criteria can be found within reason, not violating Arts. 81 and 82. Still, they should be tested. This is precisely where the “traditionalists”, the ones who would love to see a sport exemption from EU competition law, revolt, arguing that sport governing bodies’ rules, the “top-down” policy-making method in the classic pyramid model, should be protected, with the best interests of sport in mind. Whether the latter has been the case is definitely arguable.

*SA Sporting du Pays de Charleroi, G-14 Groupment des clubs de football européens v Fédération internationale de football association (FIFA)*¹⁶⁰, the *Oulmers* case for short, resulted from Charleroi losing the services of Moroccan national Oulmers, due to injuries he sustained during national team play. The G14, in support of Charleroi and championing European clubs’ cause(s), claimed €860mil. in various damages from FIFA, a claim rejected by the Belgian Court, the Tribunal de commerce de Charleroi, which referred matters to the ECJ¹⁶¹. The Q posed:

- *Do obligations of clubs to release players without compensation and the*
- *Unilateral and binding determination of international matches calendar*
- *Constitute unlawful restrictions of competition (EC Treaty Art. 81)*
- *Abuses of a dominant position (EC Treaty Art. 82) or*
- *Obstacles to the exercise of fundamental freedoms (per EC Treaty Art. 39, 49, 81, and 82)?*

In September 2006, FIFA’s lead counsel, Heinz Tännler, observed that FIFA might consider establishing an insurance and compensation fund for international players. That was criticized due to time constraints and the unilateral level of action by FIFA, as opposed to including clubs in the decision-making process. The matches’ calendar issue was not addressed. UEFA’s strategy in the interim did involve FIFPro and the EPFL.

The sixteen months that followed were absolutely bursting with energetic academic discussions, legal and policy analyses, and the obvious stakeholders’ negotiations, which led to the historic agreement that was struck on January 15th 2008, to the detriment of scholars eagerly anticipating ECJ Jurisprudence on the issue, and perhaps another *Meca-Medina*-type competition law application test. The settlement’s main highlights:

- o *Oulmers* settled (pending approval); G14 disbanded; European Club Association (ECA) formed after UEFA/FIFA signed Memorandum of Understanding with G14; ECA (already one of the crucial stakeholders in the first Social Dialogue venture in sport launched by the EC, as explained in the ensuing summary and policy sections) shall consist of 103 clubs representing 53 Member Associations, based on sporting achievement, i.e. UEFA’s biennial ranking (<http://www.uefa.com/newsfiles/648367.pdf>)
- o FIFA/UEFA will make available \$252mil. (110 and 142 respectively) for clubs’ (with national team players’ representation) compensation and insurance
- o Euro2008 sums split three ways (approximately \$6,000/day) to: current club, previous season’s club, club with player’s license up to two years prior to international competition (could be the same club receiving the total sum)
- o Assurances by FIFA/UEFA reducing numbers of preliminary games for national teams’ competitions.

*Webster (& Wigan) v Hearts*¹⁶², is the most recent (CAS award: 30.1.2008) precedent in regard to consequences of contract termination by a player without cause (post-protection period). This is an important interpretation of FIFA rules on status and transfers of players Art. 17.

¹⁵⁶ “Aris”, par. 45.

¹⁵⁷ Case C-519/04.

¹⁵⁸ Case C-171/05.

¹⁵⁹ *Piau*, 107-121.

¹⁶⁰ Case C-243/06.

¹⁶¹ OJ C 212 of 02.09.2006, p.11.

¹⁶² CAS 2007/A/1298-1299-1300.

FIFA Protected Period in a nutshell:

- * First three contract years pre 28th birthday
- * First two contract years post 28th birthday
- * Unilateral termination by player without cause whilst in Protected Period results in sporting sanctions and financial compensation to club.

Webster breached without cause post-Protected Period. What is the compensation owed to the club? The FIFA Dispute Resolution Chamber (DRC) set damages at £625,000 (inexcusably according to CAS), whilst Hearts claimed £4.9 million (estimated market value at £4mil). According to the CAS award, the compensation owed to Hearts was set at the remaining value of the contract, £150,000 plus interest.

Selected highlights from the award:

- *Panel finds there is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit*
- *Possible entitlement to the transfer or market value is entirely absent [in FIFA rules and player's contract] ...to imply it into the contract would contradict both the principle of fairness and the principle of certainty*
- *Compensation... should not be punitive or lead to enrichment ... put clubs and players on equal footing*
- *...no reason to believe that a player's value owes more to training by a club than to a player's own efforts, discipline and natural talent... a talented and hardworking player tends to fare well, stand out and succeed independently from the exact type of training he receives, whereas an untalented and/or lazy player will be less successful no matter what the environment... market value could stem in part from charisma and personal marketing*
- *...it would be difficult to assume a club could be deemed the source of appreciation in market value of a player while never be deemed responsible for the depreciation in value... if the approach relied on by Hearts were followed, players should be entitled to compensation for their decrease in market value caused by being kept on the bench for too long or having an incompetent trainer, etc... such a system would be unworkable...*
- *...giving clubs a regulatory right to the market value of players and allowing lost profits to be claimed ...would in effect bring the system partially back to the pre-Bosman days when players' freedom of movement was unduly hindered by transfer fees ...becoming pawns in the hands of their clubs and a vector through which clubs could reap considerable benefits without sharing the profit or taking corresponding risks... [It would] be anachronistic and legally unsound.*

The first half of 2008 has most certainly provided Law and Policy scholars with ample opportunities for significant research and meaningful contributions. The historic football agreement and settlement in the *Oulmers* case, the CAS award in *Webster*, the various positions and arguments after ECJ's *Meca-Medina* test, and the EC White Paper (discussed below) approaches in political, legal, and administrative circles, have opened the path for the European Parliament's initiatives in regard to sport and its place in the new European reality, in view of the Reform Treaty.

In March 2008, under the auspices of the Slovenian Presidency, another intriguing venture featured the 27 Member States' Ministers responsible for sport, the Presidents of the National Olympic Committees, members of the Executive Committee of the European Olympic Committees, and the European Commissioner for Sport, Jan Figel, reaching a declaration essentially summarising recent European positions on the social significance of sport, emphasising the need for an urgent, structured, large-scale stakeholder dialogue. In April 2008, the first official position on sport post-EC White Paper was adopted (31-1-1) by the Committee on Culture and Education of the European Parliament and moved for a plenary session vote in May 2008. The latter, on May 8TH 2008, adopted the report by a wide margin (518-49-9).

The rapporteur, Greek MEP Manolis Mavrommatis, commented that the inclusion of sport in the Reform Treaty is a big step toward a European Policy on sport, and underscored the White Paper's various

targets. One can characterise the report as descriptive, prescriptive, and restrictive. It initially describes and revisits many of the topics posed and analysed in the White Paper. It proceeds with offering a set of recommendations, guidelines, directives, suggestions for action items, some more elaborate than others, and simultaneously deviates from some main areas of the White Paper and findings of the Commission and the European Court of Justice, at times assuming a much friendlier approach to the traditional sport governing bodies, which were the first to express disappointment at the controlled and balanced approach found in the White Paper. Selected highlights from the report, short commentary, and useful links follow. The report:

- Declares that the White Paper failed to take a clear position on how to uphold the principle of the specificity of sport and assumes a pro-traditional sport governing bodies approach, i.e. purports that a case-by-case analysis as posed in *Meca-Medina* by the ECJ would be unsatisfactory and characterised by legal uncertainty [for the record, the author sides with the Wathélet position (http://www.sportslaw.nl/documents/cms_sports_id100_1_Doc%20Wathelet%20EN%20oversie%20II.doc) and other colleagues who question such concerns]
- Promotes action re: sports-specificity, European sport policy, and clarification of EU Law application to sport in light of Article 149 of the Lisbon Reform Treaty [stopping short of advocating an outright exemption for sport as an economic activity from EU competition law (Draft Report on the White Paper on Sport, Motion, p. 70, Amendment 227, para. 14a)]
- Reiterates the findings of the Austrian Presidency re: financial impact of sport on European economy (€407 billion in 2004, 3.7 % of EU GDP, employing approximately 15 million or 5.4% of the labor force)
- Emphasises the need for Commission action in regard to digital piracy (in particular live and re-transmission of sport events) threatening the sport sector significantly
- Finds that in addition to the application of competition law insofar sport is considered an economic activity, there are other European Law areas that need to be respected by the sport sector, namely prohibiting discrimination in employment based on gender, race, national origin, religion, disability, age, or sexual orientation (Art. 13 EC Treaty)
- Promotes participatory democracy in decision-making in re: sport governance mechanisms, at the same time declaring that sport cannot be compared with ordinary economic activity, especially due to (a) the specific nature of sporting rules and activities and (b) the specific framework of sport (the pyramid, i.e. one federation per sport model, the independence of sport organisations, etc.)
- Through means that are elaborately expanded in the report, the Commission and member states are called to assume a unified, organised, multi-faceted plan to combat doping
- Calls on the Commission to recognise the legality of "home-grown" rules assisting in the national and local development of young players; further declares UEFA's "home-grown" rule scheme a model that could be emulated by other federations [here it is important to note that the Commission, via its Employment Commissioner Vladimir Spidla on May 28, 2008, chastised a directly discriminatory policy on the grounds of nationality proposed by FIFA to its member federations, the "6+5" rule, according to which at least six players on the field at the beginning of each match would have to come from the country of the club they are playing for. On the other hand, the present studies the Commission has conducted in regard to the "home-grown" rule concluded that the UEFA rule does not lead to direct discrimination on the basis of nationality, but that a risk of indirect discrimination on the basis of nationality exists as access to clubs' training centers is easier for the young national players rather than players from the other member states. According to the above release, Spidla, MEP Belet (EPP-ED), and Commissioner Figel all agreed that, although not perfect, the "home-grown" rule appears reasonable and modest, encouraging the investment of clubs in (local) youth development, thus deserving

the support of the Commission, Parliament, and broader European political constituencies. Nonetheless, the Commission reportedly will “closely monitor” the implementation of the UEFA rule and undertake “a further analysis of its consequences by 2012” in order to assess its implications in terms of the principle of free movement of workers]

- Proposes a special budget line in 2009 for sport pilot programmes
- Includes a form of a “soft exemption” for sport under which the Commission and member states are called to recognise sport officially as a complementary competence in the new Reform Treaty, giving practical effect to the principle of the specificity of sport in EU-Law making, respecting its autonomy, establishing a consistent future European Policy in the sector, enabling the Commission to promote and complement - but not regulate - the actions of member states and sport organisations¹⁶³
- Strongly supports existing gambling monopolies, which are considered based on “imperative requirements in the general interest”, including control of a “fundamentally undesirable activity”, prevention of compulsive gambling and maintenance of public order, pursuing such objectives in compliance with European Law as established in the case law of the European Court of Justice
- Voices its concern at the possible deregulation of the market in gambling and lotteries, since state-run or state-licensed gambling or lottery services will be harmed by competition and will restrict their support and social mission mainly to amateur sport [note that such argumentation was not convincing for the ECJ in *Gambelli* and *Placanica*, cases elaborated elsewhere¹⁶⁴]
- Sides with the Commission in a need to provide tax exemptions in view of the social role sport performs, and its close links to local communities benefitting from sport
- Supports the creation of an independent financial monitoring entity overseeing the finances of professional sport clubs, a European clubs’ standardised management control strategy, as well as a European independent certification body clearing transfers and the pertinent financial transactions, ensuring fairness in competition and the proliferation of the European sport model
- Challenges sport governing bodies and federations to reform their decision-making mechanisms in order to become more transparent and democratic, calling the Commission to ensure this will take place appropriately
- Calls the Commission to assist sport governing bodies in regulating sport agents by means of a directive; also recommends the creation of a European certification system, and strongly encourages an expedited investigation into the need for European legislation on agents’ licensing
- Calls the Commission to expeditiously tackle the problem of human trafficking and young athletes’ migration by: subscribing to a European charter for sports solidarity, creating a solidarity fund for education and prevention in the countries most affected by sport human trafficking, and reviewing FIFA Art. 19 on Status and Transfers of Players, protecting minors
- Recommends as a condition for licensure, the mandatory health insurance of players
- Notes that media rights are owned by sports organisations and due to the many differences (including market conditions), the principle of subsidiarity is to be respected, ensuring nonetheless that redistribution of fees from collective pooling broadcasting rights will be equitable for the weaker clubs; further, a block exemption from competition rules is proposed, if so required on a European level, for the legal certainty of such collective selling practices of media rights
- Due to the time required for ratification of the Reform Treaty and the eventual budgetary decisions for sport allocations, the Commission is requested to adopt an implementation plan for the White Paper action items
- Invites the comprehensive participation of many entities outlined in the report.

In sum, there are important issues raised in the report. Considering the plenary session reception of its somewhat controversial action

items and depending on the European Council’s acceptance that is expected to follow suit, as well as the Commission’s approach of the Parliament’s and Council’s recommendations, one may wish to brace oneself for a dynamic environment for sport policy development in the process of the much anticipated ratification of the Reform Treaty and its direct ramifications for the sport sector. Undoubtedly, the report and its adoption present fertile ground for future Law and Policy research in this dynamic era.

G. EU Competition and Labor Law applications in sport summary

In sum, EU competition and labor law applications in sport offer the following conclusions:

- EC Treaty Articles 3, 81, and 82 are applied in sport settings, insofar as sport is treated as a commercial activity in the particular case. Otherwise, there are no sport-specific exemptions from EU Competition laws (as opposed to several sport-related practices in the US being exempt from antitrust scrutiny, e.g. pooling of broadcasting rights under the SBA of 1961, the CBA labor exemptions under the NLRA, etc).
- Buttress for the “social, educational, and cultural character and contribution of sport”, EC Treaty Arts. 86, 87 et seq. allow for states assuming the burden of clubs in financial hardship (no such direct policy sample may be encountered in the US, but for stadia and arenas built via municipality and state funds, receiving special tax treatment, etc).
- Horizontal restraints in sport are attempted to be controlled, promoting the socio-cultural model, by means of EC policy, ECJ, or national courts or commissions’ decisions, i.e. against exclusive licensing -unless it protects the weaker financially clubs- separating the regulatory from the commercial activity of sports organizations, yet allowing for considerable regulatory autonomy, provided sport purposes are served in an objective, transparent, and non-discriminatory manner, according to Commissioner Monti.
- “Bosman” and the cases that followed brought forth a free sport market and free movement for sport labor, forestalling transfer and nationality rules in the EU, including laborers originating from trade associations’ countries.
- Considering there are no collective bargaining exemptions in EU sport, SINGOs cannot argue that sport labor should be treated differently.
- Access to sport employment and international competition participation opportunities may be controlled by reasonable rules according to Lenz, Monti, and “Deliege” (2000).
- The inherent conflict between EU law and SINGOs is usually resolved by dialogue between the EC and the SINGO, as in the case of the new FIFA transfer system, the *Oulmers* settlement, and the most recent development featuring the EC-sponsored social dialogue in sport (see ensuing section on contemporary European sport policy). Otherwise, as long as SINGOs rules meet the criteria set by the EC, complying by EU law, the EC will not intervene.

H. Contemporary European sport policy

Recent developments have featured post-Bosman efforts to introduce a “Sports Exemption” or “Special Sports Article” in the EC Treaty, in order to:

1. Keep sports organizations’ autonomy intact
2. Ensure EU institutions would consult with the sports sector when sporting issues were discussed, and
3. Incorporate sport into the framing of other EU policies.

Such initiatives aim at protecting sport from EU law’s “insensitive application”¹⁶⁵, at the same time protecting traditional and autonomous structures. Such an effort is geared toward not merely protecting social, cultural, and educational values of sport, but also commercial interests of the sporting community in Europe from

163 (Draft Report on the White Paper on Sport, Motion, pp. 54-55, Amendment 179, para. 10.

164 Kaburakis, 2008.

165 Halgreen, 2004, p. 57.

Brussels intervention. After “Bosman”, European Non-Government Sport Organizations (ENGSOs) (36 state federations), the European Olympic Committee (EOC), and UEFA submitted a joint proposal featuring certain important elements: 1) sport would be treated by EU as subsidiary, 2) EU would respect autonomy, democratic structures, and national distinctive features of sport, 3) problems and viewpoints of sport would be taken into careful consideration in connection with future legislation, and 4) NSFs and ISFs would be given a voice when new EU proposals affecting sport are promoted. This policy initiative was unrealized in the Amsterdam Treaty of 1996, as environmental matters and the expansion were higher on the agenda, as well as due to a fear from the Commission that it would set a dangerous precedent for other industries. A compromise was reached by the “Non-binding Declaration of Sport in the Amsterdam Treaty”:

The Conference emphasizes the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.

By 1998 the Commission had received 55 complaints relating to sport.¹⁶⁶ The Council of Ministers promoted the socio-cultural qualities of sport through political priorities. Suddenly sports were a high-profile matter in EU policy.¹⁶⁷ The ensuing policy progress involves:

- “The Pack Report”
- “Report on the role of the European Union in the field of sport”, *Document A4-01 97/97 (May 28, 1997)*
- “Television-without-frontiers directive”

Directive 97/36/EEC of the European Parliament and of the Council of June 30, 1997 amending Council Directive 89/552/EEC; Article 3A - Popular sporting events are to be made available to the public on free TV

- *Commission of the European Communities: “Development and Prospect for Community action in the field of Sport”, Directorate General X (Brussels) 1998.*
- *Commission of the European Communities: “The European Model of Sport” (1998), Consultation document, Directorate General X, (Brussels), which attached questionnaires per European sport philosophy and structure. Findings were presented in Olympia, May 1999, in the First European Conference on Sport*
- The Vienna European Council Presidency Conclusions, the Paderborn Conclusions, and the Sports Conference in Olympia, which led to the publication of the “Helsinki Report on Sport”, presented in Helsinki, December 1999. According to the “Helsinki Report”, there was a new approach to EU sports policy, strongly advocating the conservation and reinforcement of social and educational functions of sport and the preservation of the existing sports structure in Europe
- *Lisbon, May 10, 2000, Declaration of Social Dimension of Sport, featuring recommendations for establishment of an informal working group with the aim of proposing forms of participation with the World Anti-Doping Agency (WADA)*
- *Nice European Council meeting, December 7-9, 2000. The Nice Conclusions, on specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies:*

Even though the Community does not have direct power, it must take into account the social, educational, and cultural functions inherent in sport that make it special, in order that the code of ethics and the solidarity essential to the preservation of its social value may be expected and nurtured.

The EC stresses its support for the independence of sports organizations and their right to organize through appropriate associative structures. It recognizes that, with due regard for national and community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organizations to organize and promote their particular sport, particularly as regards the spe-

cial sporting rules applicable and the makeup of national teams, in the way which they think best reflects their objectives.

It notes that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice from recreational to top-level sport, which co-exist; they provide the possibility of access to sports for the public at large, human and financial support for amateur sports, promotion of equal access to every level of sporting activity for men and women alike, youth training, health protection, and measures to combat doping, acts of violence, and racist or xenophobic occurrences. These social functions entail special responsibilities for federations and provide the basis for the recognition of their competence in organising competitions. While taking account of developments in the world of sport, federations must continue to be the key feature of a form of organization providing a guarantee of sporting cohesion and participatory democracy.

In the process of the proposed EU Constitution, there were amendments as constitutional proposals referring to sport:

The Union shall contribute to the promotion of European sporting issues, given the social and educational function of sport (Article 16).

Union action shall be aimed at developing the European dimension in sport, by promoting fairness in competitions and cooperation between sporting bodies and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen (Article 182).

The ECJ is likely to be the one entity to decide the scope of non-intervention policy toward professional sports sectors in absence of “hard” EC sports law.¹⁶⁸ On October 29, 2004, the Treaty of Rome promoted the EU Constitution, with state legislatures and referendums to follow. Articles I-17 and III-282 were proposed coordinating, supplementing, and supporting action. Sport fell under the category of education, training, and youth. Emphasis was drawn on its social and educational function. Once more, it is recognized that “European construction based only on economic aspects is condemned to failure”.¹⁶⁹

Finally, the highly anticipated first official position on sport by the EC was published in the summer of 2007, and the “White Paper” was received with controlled optimism by many, and with substantial disappointment by the traditional governing entities of sport, expecting more favorable action and possibly legislative exemptions to re-affirm their regulatory autonomy. The “White Paper” featured three main sections, the societal, the economic, and the organization of sport (selected highlights below):

- The societal role of sport, considering which the EC shall:
 - Develop and support guidelines and research for PE
 - Collaborate with Law enforcement to fight doping
 - Support network of Member States’ (MS) agencies
 - Fund education-based sport programs
 - Nurture young sport talent training
- NOTE: “Locally trained players’ rules” could be deemed compatible with EC Treaty Law if they do not lead to direct nationality discrimination 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
 - Organize fight against violence and racism via new instruments
 - Promote girls’ and women’s access to sport (including administrative and management posts)
 - Create policy attending to international transfers, doping, exploitation of underage players, money-laundering, and security during major events

¹⁶⁶Halgreen, 2004, p. 58.

¹⁶⁷Halgreen, 2004, p. 58.

¹⁶⁸Mestrtre, 2005; Halgreen, 2004.

¹⁶⁹Robert Schuman quoted in Mestrtre, 2005.

- The economic dimension of sport, according to which the EC undertakes to:
 - Fund research and develop financial impact instruments (utilized by MS - EU)
 - Fund non-economic quantitative and qualitative research (Eurobarometer polls, participations rates, volunteerism data, etc.)
 - Fund study to assess sport's direct (GDP, growth and employment) and indirect (education, regional development, EU attractiveness) impact
 - Organize exchanges between ISFs and MS in reference to major events best practices promoting sustainable economic growth, competitiveness, and employment
 - Fund independent study on grassroots and sport for all financing
 - Defend reduced tax rates for sport
- The organization of sport, which challenges the EC to:
 - Investigate and pursue the crucial balance between self regulation and respect for EU Law, without exemptions, considering
 - Specificity of sport prisms
 - Sport-specific rules, limits on numbers, competitive equity and uncertainty of results
 - The pyramid, autonomy, structure of sport organizations and grassroots solidarity mechanisms, keep one governing body per sport
 - Combat nationality-based discrimination
 - Fund non-EU nationals individual competitions study
 - Explore the problematic area of player transfers further (though no clear plan or action items are posed in the respective section)
 - FIFA Rules are appreciated as prudent practice
 - Guarantee access to national courts, protect minors' education, etc.
 - Seeds for a verification system by ISF or MS
 - Fund impact assessment in respect to players' agents to determine EU action
 - Research the "Player trafficking" problem; EC study on child labor and Communication between MS
 - Support public-private anti-corruption partnerships
 - Investigate licensing best practices models
 - Monitor and affirm collective and individual clubs selling media rights
 - Engage in social dialogue promotion and continuously follow-up.

Precisely on these social dialogue efforts, on July 1, 2008, in Paris, France, the EC commenced what may prove to be an instrumental venture in the sport sector. Although not directly embracing efforts toward per se CBAs in the European sport sector, the seeds for a more democratic and representative nature of decision-making are certainly there. Especially since "footballers are some of the most mobile professionals in Europe", according to Commissioner Spidla, who alongside Commissioner Figel launched the effort as a necessary sequence to EC's White Paper, it comes as fairly rational to engage in a social dialogue with all pertinent constituents. These are currently the ECA as mentioned above, along with the Association of European Professional Football Leagues (EPFL), representing clubs/employers, FIFPro, representing players/employees, and still preserving the traditional governance model and encouraged by pro-specificity of sport socio-cultural caucuses in the EC, UEFA, chairing the social dialogue efforts.

I. Conclusion

Summarizing the main points of this research, the reader may wish to keep the fact that the two often conflicting worlds of sport governance have more in common than one may initially presuppose. Recent efforts e.g. by policy makers in Europe and the US Congress to battle the phenomenon of extensive drug use in sport attest to the fact. Moreover, EU sport features more commercialized influences than what a pure "socio-cultural" model may initially accept. As Allison,

Foster, and Halgreen agree, EU sport has a lot of commercial force of its own, so European observers have to be careful when chastising US commercial sport influences.

Having acknowledged that fact, the aforementioned analysis still leads to several conclusions that distinguish between US and EU law and policy applications in sport:

- The US sport model (amateur and professional) allows for more specific exemptions from competition laws for sport. This finding appears ironic when one considers that the EU socio-cultural model attempts to promote exclusionary tactics (separate territories theory, segment commercial and regulatory functions of ENGSOs, distinguishing between the commercial activity and sport per se) and incorporate the social, educational, and cultural character and contribution of sport in EU policy. EC Treaty Articles 81 and 82 have no explicit exemptions from competition law scrutiny for sport entities.
- On the other hand, Arts 86, 87 et seq. allow for state intervention and European governments' practices follow a method that may salvage sport clubs threatened with economic extinction. These practices have been briefly analyzed¹⁷⁰ and more elaborately criticized (Dedes, 2005) by European legal scholars. Such "special liquidation" salvation practices arguably would not have a place in US sport policy.

Both the US Congress and the European Commission will not hesitate to intervene in sport matters. Idealists and devotees of the "socio-cultural" model in sport would reconsider past positions¹⁷¹, and accept that political intervention is crucial for the perseverance of important principles in sport. Political support has a place in sport; the latter needs politics when dealing with contemporary problems. Adhering to the preservation of the multi-faceted service sport can offer to society, constituents from both the US and the EU can play a major role in shaping 21st Century sport policy. Considering the problems, inconsistencies, and conflicts examined above, the challenge remains. Whether a balance between commercial activity and the "traditional" aspect of sport can be reached is for future legal and policy historians to note. For what it is worth, this research argues that, contrary to popular belief, the two worlds of sport governance are closer than what a "quick look" analysis may conclude. Policy-makers and judicial decision-makers are arguably closer than they have ever been, due to the commercialized character sport ventures assume. The investigation above demonstrates the problems both sectors of the world "sport order" face, and challenges key stakeholders to cooperate and bring the worlds of sport closer together, for the benefit of the fan, the owner in the long-term, and sport.

¹⁷⁰Halgreen, 2004, p. 103.

¹⁷¹Vassilakopoulos, G. (2005). Transcript

from FIBA Europe General Assembly in Portorose, Slovenia, May 20-22, 2005.

Comparison of US and EU Sport Policy		
	US	EU
Competition Laws	Sherman Anti-Trust Act (1890)- prohibits agreements restraining trade and attempts to monopolize Clayton Act (1914)- supplements SAA, trebles damages, prohibits exclusive sales, contracts, and unfair price cutting, also states "labor of human beings is not a commodity or article of commerce"	EC Treaty (Amended by Treaty of Amsterdam 2002), Article 81 (1)- prohibits practices that restrict/distort competition within common market, Article 82- prohibits abuse of a dominant position within common market
Exemptions to Competition Laws	<i>Federal Baseball</i> (1922) US Supreme Court decision Sports Broadcasting Act (1961) AFL and NFL merger (1970) <i>Robertson v. NBA</i> (1975) - ABA and NBA merge Curt Flood Act (1998) repealing <i>Federal Baseball</i> re: MLB labor only; <i>MLB v. Crist</i> (2003) abides by stare decisis and declares league contraction is still exempt	Only exempt if there is no economic activity, for "sporting interest" rules only Article 81 (3): Article 81 (1) inapplicable if the practice contributes to economic/technological progress while the consumer benefits, and without elimination of competition (<i>Sui generis Rule of Reason analysis</i>) See application of Arts. 81 & 82 in <i>Meca-Medina</i> (2006) Arts. 86, 87 et seq. state funds for teams in need - Special liquidation practices
Labor Laws	National Labor Relations Act, Sec. 7 (1935) - gives employees the right to organize and bargain collectively with employer - Duty to bargain bona fide for a CBA	EC Treaty Articles 39 & 49- freedom of movement for workers within the community (EU) & freedom to provide services Article 7- prohibits nationality discrimination in employment agreements
Labor Law Exemptions	Clayton Act (1914)- excludes labor unions from laws against restraint of trade and legalizes peaceful strikes Norris-La Guardia Act (1932)- prohibits courts from issuing injunctions against labor <i>Jewel Tea & Pennington</i> (1965) non-statutory	Exemptions for "sporting interest" only See UEFA's "home-grown" rule discussion
Anti-Siphoning Provisions	1968- FCC prohibits selling of rights of certain events to anyone but broadcast TV (Final Four, Super Bowl) Challenged in 1977- <i>HBO v. FCC</i>	"Television Without Frontiers" Initiative (Article 3A)- important events for society that should remain on free TV
Transfer of Players with Expired Contracts - Drafts - Salary and rookie caps	Seitz Arbitration ruling- <i>Kansas City Royals v. MLBPA</i> (1976)- arbitrator finds reserve clause was not agreed upon (in contractual sense), making players free agents upon contract expiration "Rozelle Rule" (1963)- new team must compensate former team after signing a free agent <i>Mackey v. NFL</i> (1976) - Court finds Rozelle rule a violation of anti-trust laws <i>Powell</i> (1989) - <i>McNeal</i> (1991)/NFLPA decertification - No union, no CBA, no exemption <i>NBA v. Williams</i> (1995) & <i>Brown v. Pro Football</i> (1996) - Pro-employer approach, exemption survives impasse, after bona fide bargaining	Article 48 prohibits sport rules that require a new club to reimburse former club for a player whose contract has expired <i>ASBL v. Bosman</i> (1995) CAS interpretation of monetary compensation owed to club for breach by player post-protection period in <i>Webster</i> (2008): Only amount remaining in the contract, not market value
Players allocations - Trades - Team Relocations Restrictions	<i>Radovich v. NFL</i> (1957) - Court finds NFL in violation of anti-trust laws for not allowing former NFL player to sign as a coach after signing with rival league <i>Flood v. Kuhn</i> (1970)- Flood claims trade violates SAA, loses due to stare decisis (<i>Federal Baseball & Toolson</i>), SCOTUS recognizes that 1922 decision contradicts SAA application in sport, but only Congress has power to amend <i>Raiders</i> (1984) - Team relocation = pro-competition (also see <i>Seals</i> , <i>Grizzlies</i> , <i>Clippers</i> + prior league approval)	<i>Walrave & Koch v. Union Cycliste International</i> (1974)- Dutch motorcycle pacemakers want to work for non-Dutch, ECJ rules restriction discriminatory
Acquisition Deadlines	<i>Bowman v. NFL</i> (1995) - Court finds deadlines restrain competition	<i>Lehtonen</i> (2000) - Court finds transfer windows discriminatory according to Article 39
League Entity Status	<i>Fraser v. MLS</i> (2000) - Sports league as a single entity with branches (franchises) having no competition (only one league) and therefore not violating Sherman Anti-Trust Act	Advocate General Lenz comments in <i>Bosman</i> (1995) that clubs do not have CBAs, but rather horizontal relationships <i>Oulmers</i> settlement - ECA creation



T · M · C · A S S E R P R E S S

Players' Agents Worldwide: Legal Aspects

**Robert Sickmann, 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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T · M · C · A S S E R P R E S S

European Sports Law: Collected Papers

Stephen Weatherill

With a Foreword by Maitre Jean-Louis Dupont, Avocat, Belgium.

Researching the field of sport and European law tells us something about sport, of course. But it tells us something about European law too. Examination of the special character of sport when placed under European law's microscope reveals the scope of European trade law's adaptability to the particular context in which it is applied. And the story of European sports law told through the case law illuminates the way in which European law is exploited by actors as a lever to prise open sometimes long-established organizational patterns. Sport has in recent years become more commercialized and more juridified too. The challenges to its self-regulatory preferences have strengthened and European law plays a significant part in this narrative. It is testimony to the pragmatic and creative approach of the European Commission and the European Court of Justice to the regulation of sport within the Single Market of the European Union, even though there is no specific provision in the EC Treaty giving the EU competence in the field of sport.

European Sports Law is a *vademecum* for all those involved in a variety of ways and functions, as administrators, managers, researchers, academics, marketers, broadcasters, advisers and practitioners, in the exciting field of international sport and the ever unfolding challenges that the interface between European law and sport provide in daily life.

The book contains the collected works (1989-2006) of Stephen Weatherill, Jacques Delors Professor of European Community Law, Somerville College, University of Oxford, United Kingdom, for which he provided an up-to-date introduction.

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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Fundamental Doctrines of International Sport Law*

by Ola O. Olatawura**

Introduction

Sport, at the elite level, is an organized global phenomenon that combines physical competition with professional management, commerce, and investment relations across borders. The activities are systematically regulated by conventions, statutes, customs, rules, and principles of "sport law". International sport law (ISL) is the specialized branch of transnational law that globally regulates private and public participants conduct and claims in sport. As sport law remains largely non-codified, doctrines emanating from private and public juridical sources and legislative institutions for sport are important. Four doctrines, namely: 'access', 'fair play', 'olympism', and 'commerce' doctrines, are fundamental, largely uncontested, but need exposition. Each doctrine's existence, functions, scope, judicial application and formulation is respectively espoused in parts I to IV. The final part presents the current and future status of the doctrines in the international and domestic theory and practice of sport law.

Part I - The Access Doctrine

1.1. History

Sport evolved from "play" undertaken voluntarily by masses of people. Its core activities involve a cadre of persons and organizations from domestic and foreign territories. The exclusion from sport provokes several problems at personal, psychological, and social levels. Apart from recreational and health benefits to individual participants, involvement in "sport" in the widest sense provides huge cultural, social, civic, and economic benefits to society at large. The access doc-

trine promotes participation and disavows exclusion. The doctrine practicalises and extends the ideas that 'no child should be excluded from the play ground' and that 'all should play together' to all members of society and to all modern sport related activities. Accordingly, it promotes in the widest sense "sport for all".¹

1.2. Nature, Functions, and Features

The ability and right of individuals, corporations, and governments to participate in sport is validated by the access doctrine. The access doctrine promotes public and private interests and participation in various components of sport. The doctrine reifies the cultural origins and importance of certain sport, the generally unifying role of sport across societies, the health impact, and the benefits of domestic and foreign private investment in sport development. The doctrine is expressed in various international and national instruments that promote "sport for all",² ban discrimination on the basis of race or gender,³ admit sport as a human right,⁴ and as a constitutional right.⁵ The doctrine primarily upholds the characterisation of sport as a mass activity with protectable roles and interests by the 'sports family' or 'sport movement'. Governments, sport federations, and other stakeholders, notably supporters, but also increasingly, private investors, may rely on the doctrine to regulate, participate in, and manage sport.⁶

The access doctrine obliges governments and their agencies to invest in sport development.⁷ Accordingly, governments have prerogative powers to support or subsidize infrastructure, teams and compe-

Dedicated to by Prof. Fionna Macmillan, School of Law, and Vice-Master of Research, Birkbeck College, University of London, an able supervisor for my doctorate thesis on the existence and nature of property rights in international sport law. Special thanks to Ruth Beck-Perrenoud and the staff of the Olympic Museum and Studies Centre, Lausanne, Switzerland for access to some requested materials; Stian Motensen for research translation on Norwegian cases, Zoe Garret, Carla Bull, and Trevor Pearce, of Birkbeck College, for facilitating admission and graduation, Victoria Rohricht for sourcing relevant judgment from Germany, Orla Fee of British Institute of Comparative Law (BICL), for supplying two new books used in the article, Katherine Read of IALS Library University of London, ever helpful in sourcing misplaced books or wrong citations, and staff of the Swiss Institute of Comparative Law, for allowing me to use their facilities during the period of research.

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** Previously published articles on international sport law by the writer include: "The 'Theatre of Dream'? Manchester United FC, Globalization and International Sport Law"; 16 Marq. Sports L. Rev. 287-315 (2006) and "Why There May Not be Extraterritorial Sport Right to On-Line Gambling"; 27 Loyola of Los Angeles International & Comparative Law Review, no. 3, pp. 371-

399 (2005). Others are to appear in *Causa Sport and International Sport Law Review-Pandektis*. His articles appear in *American Review of International Arbitration*, *Uniform Law Review*, and *Recht in Africa*. The writer has been among others a Max Planck Research Fellow in Hamburg, Germany, UNIDROIT Research Scholar in Rome, Italy, and a Nuffield Commonwealth Fellow at the Institute of Advanced Legal Studies, England. He has been tutor at Birkbeck College, University of London. The writer is also a consultant on sport law and management.

- 1 See Nigel Wiggleworth, *The Story of Sport In England* (Routledge, Abingdon, 2007) See generally, IOC "Sport For All".
- 2 See Art. 6 (1), European Sport Charter 2001 (Council of Europe).
- 3 See generally, *Fundamental Principles of Olympism 4 & 5*, Olympic Charter 2007; Art. 4, European Sports Charter 2001, *International Declaration against Apartheid in Sports* (UNGA/res/ 32/105 - M) 14 December 1977); and UN *International Convention against Apartheid in Sports* 1985 (Not in force) On this basis, apartheid South Africa and Afghanistan were excluded from international sport competitions by the sport movement. See also, C. Martin-Jenkins, "Racism inquiry denies England escape clause", *The Times*, Sport, Monday October 18, 2004, 1. (On ICC investigation of racist complaint against Zimbabwe's cricket authority policies.) See also, *Resolution of the European*

Parliament on the Non-Participation by Women from Certain Countries At The Olympic Games, 4 July 1996, OJ C 211, 22-27-1996, 36.

- 4 See K. Mbaye, "Sport and Human Rights", [1998-1999] *Olympic Review* 8, and T.A. Bhuvanendra, "Human Rights in the Realm of Sport", [1998-1999] *Olympic Review*, 15.
 - 5 For European states that expressly guarantee and insert sport in the constitution, see, Andre-Noel Chaker, *Study of National Sport Legislation in Europe* (Strasbourg, Council of Europe, 1999) 14-32. For others see, Laurence Chalip, et al (eds) *National Sport Policies*, (Westport, Greenwood, 1996).
 - 6 For action by fans see - "Fans stage walkout", *The Times* (UK), Wednesday, October 16, 1996, 48 (Protests against chairman method of running football club) Cf. *MacDonlad v FIFA & Anor*, [1999] *Times L Rep.* 17. For action by members of a federation to enforce access rights see, *Finnigan v New Zealand Rugby Football Union Inc.* (No 1), [1985] 2 NZLR 159 and *Finnigan v New Zealand Rugby Football Union Inc.* (No 2), [1985] 2 NZLR 181 (Order made to restrain the tour of apartheid South Africa by the All Blacks national rugby side.).
 - 7 See Arts. 1, 6 (1) and 12, *European Sports Charter 2001*. (Recognises right to sport and imposes an obligation on governments to promote the right) See also, Arts. 2, 7, 8, 10-16, and 41, *Sports Law Act 1995* (China) and Art. 1 (para.3), *Loi du 3 Aout 2005 Concernant le Sport et*
- Portent, No 131 2005. (Luxembourg).
- 8 See now, - "Ministers to decide Trump plans", Tuesday, 4 December 2007 news.bbc.co.uk/1/hi/scotland/north_east (visited 4/11/07) (Following local council's rejection of £1billion golf investment, national ministers convey decision to meet to decide on invoking national authority) and A. Culf & C. Higgins, "Arts leaders turn on Jowell over Olympics", *The Guardian* (UK), Monday 23 April 2007, 1 (Culture minister admits forthcoming cuts, but justifies the decision as necessary and the eventual outcome equitable) See also, supra, Note 7 (China and Luxembourg).
 - 9 See *Fundamental Principles of Olympism- 4*, (Sport is a human right.) See also, Arts. 1 & 2, *Resolution of the European Parliament on the Broadcasting Of Major Sports Events*, 22. See OJ C166, 10-6 1996, at 109. See also, James A.R Nafziger, *International Sport Law* (NY, Transnational Law Publishers, 2004) 220-221 (Efforts by IOC and FIFA to promote solidarity with less developed states in meeting sport programs) - "Free tickets for locals at 2010 WC", Saturday 24 November 2007.
 - 10 The high cost of broadcasting right fees and the transfer of free to air broadcasting of major international events to pay per view poses serious access problems to sport followers in the developing world. Historically, financial claims for broadcasting rights were not demanded from developing jurisdictions of Africa, Asia and South America. This is changing. High fees can be resisted, if it will lead to

titions.⁸ This obligation to grant and develop access and support is also directed to Olympic movement international sport federations (ISFs). The obligation pertains to their programs and tournaments.⁹ As a result, they cannot deny access to economically disadvantaged states and communities.¹⁰ Only as a matter of last resort may they expel or suspend participation of sporting associations, teams, and clubs from states.¹¹ They must deny rights and privileges to third-party activities that unjustifiably limit access.¹² Conversely, the doctrine limits public or private arrangements, in form of laws, policies, claims and strategies that may impede or exclude others from being participants, investors, or managers in sport.¹³ This feature of the doctrine counter-balances monopolist or privatization initiatives.¹⁴

Thirdly, the doctrine protects sport persons, supporters, and other stakeholders' *right to participate* and *right to invest* in sport. With regard to the right to participate, generally, the act of physical performance in sport is freely available to any person.¹⁵ With limited exceptions, no person can ordinarily be excluded from a sport.¹⁶ In most jurisdictions, this right has been activated to protect practice rights for sport persons, managers, and other professionals.¹⁷ The competence to participate in organised sport in foreign territories manifests the right.¹⁸ One of the clearest examples of international law's recognition of the participation right in international sport is the IOC Olympic Truce.¹⁹ The Truce has the support of the UN and

regional bodies.²⁰ It affirms that all participants in the Olympic Games must be granted safe passage through all territories. A breach of the Truce would create liabilities under international law regimes on peace, war, and armed conflicts.²¹ Similarly, with regard to the *right of investment*, professional or other commercial investments in sport is a protected right under the access doctrine.²² There is, in principle, no power to forbid others from professionalising and commercialising their rights of participation.²³ Exceptions under the doctrine arise where exercising the right of access is not good for the sport,²⁴ the process of seeking access is morally objectionable,²⁵ the person seeking to invest may not be desirable,²⁶ or the investment relationship in a club or its assets might jeopardise a league or competition's future or be disruptive to other stakeholders.²⁷ In limiting investments, an objective test is to be applied.²⁸

Fourthly, the subject matter and scope for applying the doctrine are wide. The range covers most sport related activity. It is applicable in relation to events,²⁹ information,³⁰ physical participation,³¹ investment,³² and markets.³³ The scope for application of the doctrine can be found in judicial applications in various states.³⁴

1.3. National Judicial Treatments and Formulation

This section examines the reality and importance of the roles attached to the access doctrine with decisions by national courts of Australia

less people following a national sport or global tournament.

11 On the expulsion of racist teams by ISFs from competitions, see James A.R Nafziger, *supra*, Note 8, 224-228. See C. Martin-Jenkins, *supra*, Note 2. On the legality of expelling clubs for safety associated reason, see A. Evans, "Freedom of Trade under the Common Law and European Community Law: The Case of the Football Bans", [1986] 102 LQR 510. On the problems associated with China - Taiwan problem and prevention of expulsion, see Reel v Holder, [1981] 3 ALL ER 321.

12 See M. Oloja, "Multichoice looses monopoly rights to English Premier League", *The Guardian* (Nig.) Tuesday November 14 2006, 7. (Nigerian government rejects the grant of exclusive right to a South African broadcasting channel to English FA Premier League broadcast in the Nigerian market) Cf. C. Martin-Jenkins, *supra*, Note 2. See also, A. Evans, *ibid* and Reel v Holder, *ibid*.

13 The leading example is the World Series case involving billionaire sport enthusiast, Mr. Kerry Packer and the cricket authorities of England, Australia, and India. See generally, Wikipedia, World Series Cricket. See also, Robin Jacob, Note 11, *supra*. Cf. Sport Business, "Appeal extends Australia's C7 court case".

14 See Sport Business, *ibid*. See also, Linsemann v WHA, *infra*, Note 52 and Heldmann v US LTA, *infra*, Note 17. Cf. R v Jockey Ex Parte RAM Racecourses Ltd, [1993] 2 All ER 225.

15 See generally, IOC, Fundamental Principles of Olympism, 2, 6, & 7, Olympic Charter 2007. See also Arts. 1.1, 1.2, and 3.3, UNESCO International Charter of Physical Education And Sport ("ICPES") 1978. (Adopted November 21 1978) Cf. Rule 45 (2), Olympic Charter 2007. ("... Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled to any right of any kind to participate in the Olympic Games.") But see, *infra*, Note 301.

16 Exclusion could be justified by infringement of sporting principles, reprehensible or unsporting conduct, and violence. For lifetime ban on athlete for repeated drug taking, see Johnson v Athletics Canada, 41 OTC 95 [1997]. See, for example, the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches, 1985. See also, R. Moriarity, "Fans taunt Langham", *thelondonpaper*, 27 November 2007, 8 (Arsenal FC fans taunting and threatening supporter convicted for downloading child porn site) Cf. A. Evans, *supra*, Note 11.

17 In Australia, see, Hughes v Western Australia Cricket Ass. Inc., (1987) 69 ALR 660. In England, see Eastham v Newcastle United FC, [1963] 3 ALL ER 139 and Greig v Insole, [1978] 1 WLR 302. Cf. McInnes v Onslow Faine, [1978] 3 ALL ER 211. In the European Union see; Dona v Mantero, [1976] ECR 134; and ASBL Union Royale Belges des Societies de Football Association v Bosman, [1996] 1 CMLR 645. In US, see Heldmann v US Lawn Tennis Ass., 354 F Supp. 1241, 1252 (1973); Linsemann v WHA, *infra*, Note 52; and Reynolds v IAAF, & Ors, 505 US 1301 (1992).

18 This is sometimes met with resistance. See S. Wallace, "Foreign influx is 'a big danger' for England, warns Gerrard", *The Independent* (UK), 15 November 2007, 64. See also, S. Wallace, "Gerrard gives welcome voice to an endangered species", *ibid*, 62. Cf. A. Evans, *supra*, Note 11. See also, Blackler v NZRFL, *infra*, Note 23.

19 Issued on 21 July 1992. See UN, Respect for the Olympic Truce, UNGA/ Res. A RES/48/11 (25 October 1993) See generally, Fekrou Kidane (Ed.) Dossier - Treve Olympique (Lausanne, IOC) 52 and F. Kidane, "Olympic Truce", [1998] Olympic Review 5.

20 See UN, Respect for the Olympic Truce, UNGA/ Res. A RES/48/11 (25 October 1993) See generally, Fekrou Kidane, *ibid* and F. Kidane, *ibid*.

21 See generally, Art. 2 (3) and (4) UN Charter; Art. 1, Declaration on Principles

of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970 (UNGA Res. 2625); Art. 1 (b) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents 1973 (UNTS 107); and Art. 8 (1) and (2) (b), Rome Statute of the International Criminal Court 1998. See also ILC Articles on Responsibility of States for International Wrongful Acts 2001. Cf. - "Olympic Truce", [1998] Olympic Review 25 (Contains messages exhorting respect for the Olympic Truce issued by the UN Secretary-General, Mr. Kofi Annan and President of the United Nations General Assembly, Headly Udovenko).

22 *Ibid*. See Puma catsuit case, *infra*, Note 47 and Bob Gilder & Ors v PGA Tour Inc, *infra*, Note 54. See also, parts 3.2 and 4.2, *infra*.

23 *Ibid*. See Blackler v New Zealand Rugby Football League, [1968] NZLR 547, 554-555, 556. Cf. "Americans are buying up chunks of the Premiership football clubs and not because of their love of football but because see an opportunity to make money. They know absolutely sweet FA about our football and we don't want these type of people involved." See M. Butler, "Hill-Wood blast: We don't want his sort here", *The londonpaper*, Friday 20 April 2007, 38 (Tirade against Americans coming to buy English clubs by chairman of leading Premiership club who wishes to keep the Premiership English).

24 See Art 2.3.1, FIFA Statutes 2001 (FIFA has the duty to prevent the introduction of improper methods or practices in the game and to protect it from abuses.).

25 *Ibid*. See generally, *infra*, The Olympism Doctrine, part 3.

26 See Sportbusiness.com - "UK Sports Minister to hold talks on Premier League foreign ownership", ("Fit and proper person test" to be applied before foreign investors allowed to own controlling

shares in English Premier League) (visited 27/06/07) Cf. J. Rosenblum, "High Noon Aisle Five", *INC. Magazine*, Jan 2004, 88-95 (Reviewing aggressive organizational and competitive culture of News Corp., a significant player in the US' sport media industry).

27 For example see, AEK & Anor v UEFA, [2001] Int. SLR 122. Cf. N. Pratley, "Glazer bid for United this week," *The Guardian* (UK), April 13 2005, 34 and K. Roberts, "Glazer back with New United Offer", *Sportbusiness.com*, April 15, 2005.

28 Cf. Flaherty v National Greyhound Racing Club Ltd., [2004] EWHC 2838.

29 Cf. P. Polden, "A Day at the Races: Wood v Leadbitter in Context", (1993) 14 *Journal of Legal History* 28. See also, Cf. M. Bose, "ICC would back England in vote", *The Daily Telegraph* (UK), November 25, 2004, S.4 and M. Bose, "Deported before I had a chance to write a word", *ibid*.

30 See, Art II-71 (1) and (2), Treaty Establishing a Constitution for Europe. ("European Constitution") See also, Rule XIII, Charte du Sport de Haut Niveau (France) On supporting case law, see Victoria Park Racing v Taylor, *infra*, Note 35; NBA v Motorola, 105 F.3d 841 (2D. Cir. 1997); and British Horse Racing Board Ltd. v William Hill Organisation Ltd.; [2005] RPC 260 [ECJ Judgment]. Cf. Radio Station Hamburg v Hamburger SV and FC St. Pauli, LG Ham docket No 308 O 415/01, OLG Hamburg docket No 5 U 67/02 (No right to free broadcasting for radio station.) See also, P. Waldmeir, "Baseball takes a swing at the fantasists", *Financial Times* (UK), 14 April 2005, 14. Cf. M. Bose, *ibid* and M. Bose, *ibid*.

31 *Supra*, Note 3.

32 See generally, NFL v Gov of Delaware, 435 F. Supp 1372; 192 USPQ 803 (D. Del 1977) and USGA v St. Andrews Systems, Data Max Inc., 749 F.2d. 1028; 224 USPQ 646. Cf. *infra*, The Commerce Doctrine, part 4.

33 *Ibid*.

34 See part 1.2, *infra*.

and New Zealand, England, Germany, and United States. It then offers a composite judicial approach to the doctrine.

1.3.1. Australia & New Zealand

In *Victoria Park Racing and Recreation Grounds Ltd v Taylor*,³⁵ a split majority in the High Court of Australia held that there was no property right in a sporting spectacle to debar defendants from using neighbouring land to broadcast live sporting events, including particular information about the participant horses. While the defendant's conduct affected the claimant's power to exclusively monopolise the product, there had been no direct interference to constitute infringement of property right.

In New Zealand, the majority in *Blackler v NZFLR*,³⁶ decided that sporting federations rules that prevented a rugby player from leaving his country for professional services abroad without the permission of the national sport federation was disastrous, obnoxious, unreasonable, and void. Such a rule prevented citizens from gaining wider experience, developing and exploiting their skills.³⁷

1.3.2. England

Apart from classical restraint of trade claims,³⁸ a wide access doctrine has been applied to deal with claims involving other stakeholders. The courts have rejected claims that prevent access to sport information,³⁹ and women.⁴⁰ Notable decisions promote participants access to venture into sport business, reject attempts to privatize sport, and encourage other sport investors to compete with the standard bearer. In *Greig v Insole*,⁴¹ it was held that rules of the controlling cricket sport federations that prevented players from taking part in matches organized by a rival body were invalid.

In *Trebor Bassett v The Football Association*,⁴² the trial court refused to grant a trademark injunction against a sport cards entrepreneur who independently marketed photographs of players in jerseys with IPR protected logos owned by the claimant. It found that there was only 'incidental use'. In *RFU & Nike v Cotton Traders*,⁴³ the court invalidated claimant's registered trademark and refused to confer an exclusive right to a logo on the ground that it represented English national identity and allegiance. It is instructive that both claimants in these two cases were national sport authorities seeking monopoly rights. It is uncertain whether the fact that both sport are national sport operated in the minds of the judges to prevent denial of free access by others. In *Adidas-Salomon AG v ITF*,⁴⁴ the trial judge in an interlocutory ruling restrained the defendant sport federation from banning apparel that did not conform with the federation's specifications for its sanctioned tennis tournaments. The claimant pointed out that the defendant's conduct amounted to a restraint of trade.⁴⁵ The ruling apparently upholds an investment right in tennis. In *Arsenal FC v Reed*,⁴⁶ the trial judge held that the famous football club could not deprive a merchant who independently sold merchandise bearing the club's names and logos as a badge of loyalty of fans. The defendant made it plain that the items were not official merchandise or authorized by the club. The decision was rejected by the European Court of Justice on the basis of EU trademark regime.⁴⁷

1.3.3. Germany

The doctrine has been widely applied in the recent *Puma v FIFA cat-suit* case.⁴⁸ The case involved FIFA's ban of a radical kit commissioned, designed and manufactured by Puma for the *Indomitable Lions*, Cameroon's national football team. The design of the kit enhanced the quality of the sport. By avoiding fouls, cheating, time wasting techniques, and disputes about grabbing jerseys, the cat suit promotes the physical flow of the game. Accordingly, players, fans, and supporters directly benefited from fair play and full sporting action.⁴⁹ In pecuniary terms, the major direct beneficiary was Puma. Indirect beneficiaries were the team sponsors, and tournament organisers. FIFA penalized the *Indomitable Lions* for the use. The trial judge, Ingrid Kefer, ruled that the ban was arbitrary and illegitimate because nothing in FIFA RULES forbade such designs. It was Judge Kefer's personal opinion that as the design would successfully halt the 'indecent' tradition of male chest baring following goal celebrations or shirt exchanges after matches, it was functionally proper. Applying this reasoning, Puma - as well as other investors- have the right to freely design sport apparel for FIFA - as well as other ISF- tournaments. Similarly, the *Indomitable Lions* - or other sport teams- could wear what they wished.

1.3.4. United States

Apart from numerous cases striking down race and gender discrimination in physical performances and management relations,⁵⁰ the access doctrine could be seen when it was applied to allow a physically challenged golf player to utilize a golf cart to move from point to point rather than walk as other golfers in a professional tournament. The Supreme Court held that the Professional Golfers Association (PGA) rules conflicted with the disability law.⁵¹ The court has rejected a rule absolutely banning persons under 20 years from undertaking professional sport, irrespective of talent.⁵² In the controversial *Reynolds v IAAF case*, Mr. Justice Stevens ruled that it was improper for the defendant federation to foreclose the opportunity to the athlete to participate in the Olympic trials that could lead him to realise the incomparable importance of winning a gold medal in the Olympic Games.⁵³

Court decisions also confirm that there is a narrow scope for commercial exclusivity. In *National Football League v Governor of Delaware*,⁵⁴ the defendant's right to provide a service derived from the goodwill of sport was approved notwithstanding the organizer's lack of consent. The court held that the right could not be stifled by the popularity or organization of the claimant, since the defendant was engaged in collateral services. Holding that the defendant could not be liable for the use of schedules and scores, the court rejected the claim for misappropriation of goodwill as exclusively that of the claimant. In an important passage, the court declared that:

We live in an age of economic and social interdependence. The NFL would undoubtedly not be in the position it is in today if college football and the fan interest that it generated had not preceded the NFL's organization. The same can be said of course for the media networks which the labour of others have developed.

35 (1937) 58 CLR 479. Cf. The Fair Play Doctrine, *infra*, part 2.3.1.

36 *Supra*, Note 23.

37 *Ibid*, 554-556, 570-572. See also, *Kemp v NZRFL*, [1998] 3 NZLR 463 (Rule prohibiting international transfer void being in restraint of trade)

38 See *supra*, Note 19. See also, *Warren v Mendy*, [1989] 1 WLR 853.

39 See *BBC v BskyB*, [1992] Ch. 141; *British Horse Racing Board Ltd. v. William Hill Organisation Ltd.*, *supra*, Note 30 and *British Horse Racing Board Ltd. v. William Hill Organisation Ltd.* [2005] EWCA (Civ) 863. Cf. *The British Horse Racing Board Ltd. v. William Hill Organisation Ltd.*; *Case No HC 2000 1335* (9 February 2001)

40 *Nagle v Fielden*, [1966] 2 QB 693

41 *Supra*, Note 17. See also, *Wikipedia*, *supra*, Note 19. See also, *Hughes v Western Australia Cricket Ass. Inc.*, *supra*, Note 17 and *Heldman v US Lawn Tennis Ass.*, *supra*, Note 17.

42 [1997] FSR 211. Cf. *FA Premier League & Ors v Panini UK Ltd*, [2003] EWCA Civ. 995.

43 [2002] EWHC 467

44 [2006] EWHC 1318.

45 The reliance on a common law restraint of trade doctrine is anomalous. It is not obvious how the claimant falls within the general exceptions. See *Andrew Phang, Illegality and Public Policy*, 950-952. See *Michael Furmston (Ed.)*, *The Law of Contract*, (London, Butterworths, 2003)

Cf. *Adam Taylor & Jonathan Taylor*, *Sport: Law and Practice* (London, Butterworths, 2003) 177-188.

46 [2001] 1 All ER [D] 67.

47 *Case No C-206/01* (Nov 12, 2002) [ECJ] See also, *Boston Professional Ass v Dallas Cap & Emblem*, 510 F. 2d. 1004. (1995) See further, *The Commerce Doctrine*, *infra*, part 4. Cf. *William Cornish*, *Intellectual Property - Omnipresent; Distracting, Irrelevant*, (Oxford, OUP, 2004) 92-95.

48 Decision of 14 April 2005, *Landgericht, Nurnberg*. See, - "Fifa suffers kit setback", news.bbc.co.uk/sport/hi/football/africa/4418031.stm (visited 12/4/05)

49 See also, - "Erster Punkt geht an Puma".
49 See generally, *A. Caile*, *infra*, Note 87.

50 See generally, *Charles E. Quirk (Ed.)*, *Sports and The Law - Major Legal Cases* (NY, Garland, 1996) 245-292 and *Paul Weiler*, *Leveling the Playing Field* (Camb., Harvard University Press, 2000) 17-30. Cf. *Selfridge v Carey*, 522 F. Supp. 693 (1981).

51 *PGA Tour Inc. v Casey Martin*, 532 US 661 (2001).

52 *Linesman v World Hockey Ass.* 439 F. Supp 1315, 1322-22 (1977)

53 *Supra*, Note 17. Cf. *DeFrantz & Ors. v USOC*, *infra*, Note 209, 1190-1192. See *J.A.R Nafziger*, "International Sports Law as a Process for Resolving Disputes", (1996) 45 ICLQ 130.

54 *Supra*, Note 32. See also, *NBA v Motorola*, *supra*, Note 30. Cf. *Boston*

In *Bob Gilder & Ors v PGA Tour Inc.*,⁵⁵ a wide access rule was applied. Karsten Manufacturing Corp. (KMC), long established in the golf equipment business, designed and enjoyed professional and commercial success with a radical golf club, the Ping Eyez(tm). The PGA, a body which controls the major professional golf tournaments decided to ban the Ping Eyez on the ground that it gave users more “backspin” advantage. KMC and certain professional and amateur players challenged the ban. Trial and appellate courts in interlocutory actions found that KMC had vested commercial and proprietary interests with customers and in the design. These were considered worth protecting pending the determination of the suit. On terms favourable to KMC, parties finally settled the action. It was agreed that an independent expert body would advise on the objectionability of new designs.

1.3.5. Formulation

Case law confirms a wide doctrine. The decisions illustrate that the existence of the participative and investments rights will be taken very seriously. They emphasize the commonality element of sport, and the historical and social contribution of other participants. Attempts to rely on general property rights for investment in sport related activities may founder under the access doctrine. Even IPR claims which are generally promoted by legislation for innovative and entrepreneurial investors may not be successful. Common or public property status may be preferred to give access for others against investors.⁵⁶ The judicial approach to the access doctrine may be formulated as follows:

There is a generally applicable right that allows parties to participate or invest in sport. In participating or investing in sport, any arrangement, rule or law made or utilised by parties and institutions, must not impede access to sport development. There can be no conglomerate proprietary private right to a sport. Authorities must provide access to all, save in exceptional cases, and for good reason. It would be illegitimate to prevent access to perform, create a monopoly on information, or prevent fair competition.

1.4. Private Interests, Investments and the Access Doctrine

Sport has business dimensions and these give rise to private investments.⁵⁷ The right of participants to freely invest is a cardinal expression of the access doctrine.⁵⁸ Private investment is justified by the fact that sport is a matter of personal preference. There is also limited public fund available for sport development.⁵⁹ Investment and capital from private sources are crucial to organizing sport events, developing new sport products and services, and increasing wider participation

from the society.⁶⁰ They have also increased the prestige of sport.⁶¹ Accordingly, private capital and investment is respected by the access doctrine.⁶² The principle therefore is that access must be granted to the private sector to invest in domestic and international sport.⁶³ Unreasonable artificial barriers should not be set up.⁶⁴

1.5. Public Power, Private Rights, and the Access Doctrine

Government has the duty to promote private and public sector initiatives that create and promote access to sport.⁶⁵ The recognition and growth of sport as an economic global service industry makes it worthwhile for states to promote and protect private business. It is recognized that private access and successful initiatives contribute to the development of the national economy, international prestige and influence, and foreign exchange. This raises the possibility of sport being considered within the ambit of sectors covered by the General Agreement on Trade in Services (GATS) 1994. At the same, governments bear uncompromising responsibility to restrain initiatives that conflict with the public interest.⁶⁶ Though ‘sport business involves selling things quaintly considered public, there are things that just cannot be owned’.⁶⁷ It is true for rugby, golf, polo, cricket, baseball, Aussie Rules, and all Olympic movement sport that there “is no such phenomenon as “property” in the game [...] or in the right to play [...]”.⁶⁸ Core sport related activities such as access to information and spectatorship have been treated as common rights.⁶⁹ On this basis, there can be no right to information in the public domain and by corollary, there is no proprietary right to control or prevent the exploitation of such information. Generally, exclusive property enclosure claims must be justified.⁷⁰ Proprietary investment may not on its own give rise to absolute exclusivity. It has been recognized that ‘insubstantial’ taking or use of the product will not found a complaint.⁷¹ In all situations, restriction of access must be reasonable and not abusive. Proprietary claims may not be available in sporting events, where the claim or object of the property is not made widely available.⁷² Further, it is generally illegitimate to prevent access by creating a monopoly or to preventing competition.⁷³

Technology and the Access Rule

The development or use of technology in a particular sport is not on its own a compelling factor for conferring exclusive rights.⁷⁴ Generally speaking, technology rights must be not be acquisitive of others’ interests. Technology associated claims may be refused where it confers unfair advantage,⁷⁵ grants access to a limited exclusive class,⁷⁶ endangers the health of sport persons⁷⁷ and deprives legitimate parties of

Professional Hockey Ass Inc. v Dallas Cap & Emblem Mfg. Inc, supra, Note 47. See also, The Commerce Doctrine, infra, part 4.
 55 936 F.2d 417 (9th Cir. 1991). John W Johnson, In the Groove? The Legal War over Golf Clubs, 97-110. See Charles E. Quirk (Ed.), supra, Note 50.
 56 Cf. Radio Station Hamburg v Hamburger SV and FC St. Pauli, supra, Note 30. See also, The Commerce Doctrine, infra, part 4
 57 Cf. The Commerce Doctrine, infra, part 4.
 58 See Nature, Functions, and Features, supra, part 1.2.
 59 Cf. A. Culf & C. Higgins, supra, Note 8. See also, J. Ashley, “The Olympics are a chance to transform the nations lifestyle”, The Guardian (UK), Monday April 23, 2007, 33.
 60 See Art. 24, Resolution of the European Parliament on The Helsinki Report, 7 September 2000 (Provisional Edition)
 61 See now, M. Butler, “Rich List Revealed-Becks is till top dog with money”, thelondonpaper, Wednesday 7 November 2007, 39 (Analysis of top ten players and investors in English football revealed

nouveau millionaire players and several foreign multi-millionaire investors.).
 62 See, Sports and General Press Agency Ltd v “Our Dogs” Publishing Co Ltd, [1917] 2 KB 125.
 63 See Arts. 3 (para 2) (State shall encourage enterprises to establish and support the cause of sports.), 42 (State shall encourage enterprises to raise by themselves for the promotion of the cause of sport and encourage organizations and individuals to help finance and sponsor the cause of sports’), and 48 (State shall encourage enterprises to conduct specialized sport academies in accordance with the law), SLA 1995 (China)
 64 Cf. M. Butler, supra, Note 61.
 65 On private sector support, see supra, part 1.3.
 66 See, for example, Art. 8, UNESCO International Convention against Doping In Sport 2005. See generally, Paul C. Weiler, supra, Note 50, ... See also O. Olatawura, infra, Note 251. (Illegality of gambling in sport) and State v AS P. Ltz Aas & Hansa Borg Bryggerier AS, infra, Note 248 (Norwegian ban on alcohol related advertising on jerseys).
 67 See P. Waldmeir, supra, Note 30, Cf. The

Commerce Doctrine, infra, part 3. See also, Toronto Cricket & Country Club v Cricket Club Townhouse, 27 CPR (4th) 417 (Div. Ct.)
 68 See K. Gray, “Property in Thin Air”, [1991] 50 Cam. L.J. 252, 298.
 69 Arts. 1 & 2, Resolution of the European Parliament on the Broadcasting of Major Sports Events, 22. See OJ C166, 10-6 1996, at 109. See also, Victoria Park Racing v Taylor, supra, Note 35. See also, NFL v Governor of Delaware, supra, Note 32, and International Order of Job’s Daughter v Linburgh Co. 633 F.2d. 912, 918 (9th Cir. 1986).
 70 Cf. Art. 7, Olympic Charter 2007 (Absolute property rights in the Olympic Games and symbols vested in the IOC to fund the Olympics.)
 71 See, British Horse Racing Board Ltd. v. William Hill Organisation Ltd. [ECJ], Note 30 supra. In copyright cases, this is well established under national fair use or equivalent provisions. See generally, Gillian Davies, Copyright and the Public Interest (London, Sweet & Maxwell, 2002) 56-63, and 105-115.
 72 See Technology and the Access Rule, infra.

73 See, Wikipedia, supra, Note 17. See also, M. Oloja, supra, Note 12.
 74 Victoria Park Racing v Taylor, supra, Note 35, 509 and NBA v Motorola, supra, Note 30. See also, P. Waldmeir, Note 30. Cf. BHB v William Hill [2001], supra, Note 39. (On the basis of substantial investment in obtaining, verifying, or presenting the contents of the database, database right in horse racing protected.)
 75 See supra, The Fair Play Doctrine, part 3.
 76 In national or Olympic movement sport where technology proprietors limit the ability of the general public to invest or participate in a sport, there may be infringements of access and human rights. See supra, Notes 4, 5, 7, and 9. Cf. AFP “Cloned horse born in Italy”. See also, AP, “Qatar to replace camel riders with robots”.
 77 This is settled in doping cases. See also, Art. 7.1 and 7.4, UNESCO International Charter of Physical Education and Sport 1978 and Para 16, UNESCO International Convention against Doping In Sport 2005. Another example would be that of dangerous sporting equipments.

their interests in sport.⁷⁸ A difficult question is whether an organizer or contractual proprietor can use technology to block others from access to sport contents? While parasitic parties may have no claim in law, parties with legitimate interests in a sport may demand the withdrawal of the technology.⁷⁹ Where the technology confers benefit to a sport, parasitic action may be legitimate. Such users must however be obliged to acknowledge the rights of the owner and share commercial returns with the technology owner on an equitable basis.⁸⁰ It therefore follows that though copyright and patent rights are granted or owned, there may be a proven overriding public interest claim that prevents private rights from being asserted within the sporting family.⁸¹ This point is understandable once the various needs of the audience is analysed.⁸²

Competition Law and the Access Doctrine

A method employed to challenge practices that limit access to commerce is by applying the competition law framework.⁸³ One authority has struck down agreements that prevented the distribution and sale of sporting goods within territorial borders.⁸⁴ Because the decisions do not purport to take the specificity of sport into account, it is debatable whether they are sport law regimes.⁸⁵ On two accounts the results would not change. First, the liberalization tends to encourage greater interest and practice in the sport concerned and therefore are applications of the access doctrine. Second, it is apparent that the decisions promote the commerce doctrine's commitment to sport development.⁸⁶

Part II - The Fair Play Doctrine

2.1. History

The earliest of recognized concepts to govern modern sporting relations is fair play. It was a British contribution embedded by educational and political elites to instill morality and civic education in the practice of sport. It also served to popularize and institutionalize sport and distinguish true sport from contentious or unethical practices, like gambling, cheating, and other vice related activities. Fair play promoted the acceptability of sport to private elites and mainstream public society.⁸⁷

78 Cf. Arts. 7 and 8, Trips Agreement 1994. See also, John Barton/Cipr, Integrating Intellectual Property Rights and Development Policy (London, CIPR, 2002) 109. (Restriction through technological means to defeat technological protection should not be regarded as illegal.)

79 See *NBA v Motorola*, supra, Note 30.

80 Cf. "Fair Play" and "Olympism" doctrines, supra, parts 2 and 3.

81 See F. Macmillan, "Commodification and Cultural Ownership", 48-50. See Jonathan Griffith & Uma Suthersanen (Eds.) *Copyright and Free Speech* (Oxford, OUP, 2005)

82 Cf. supra, Note 13.

83 This has been done within the framework of EU treaty. See Arts. 81 and 82, Treaty Establishing the European Economic Community 1958. See generally, N. Beale & G. Duhs, infra, Note 85. In the US, see John W Johnson, *When a Professional Sport Is Not a Business: Baseball's Infamous Antitrust Exemption*, 149-165. See Charles E. Quirk (Ed), supra, Note 50 and S.F. Ross, "Monopoly Sport Leagues", 73 Minn. L. Rev 643 (1989).

84 See *Windsurfing International*, 11 July 1983, OJ L 229, 20-8-1983, 1-21; *Newitt/Dunlop Slazenger International*, 18 March 1992, OJ L 131, 16-5-1992, 32-49; *Tretorn and Others*, 21 December 1994 OJ L 378, 31-12-1994, 45-53

85 Generally, the relevant EU agencies, the Commission and the European Court of Justice do not have ordinary competence in sport matters. Cf. N. Beale & G. Duhs, "Meca-Medina & Majcen:

Perspectives on How to Apply the EC Treaty to the Rules of Sporting Bodies", [2007] 7 I.S.L.R. 19. Cf. *Linesman v World Hockey Ass.*, supra, Note 52.

86 *Infra*, part 4.2.

87 See generally, A Caille, "The Concept of Fair Play", [1998] *Olympic Review XXVI* (No. 22) 27. For a historical insight into the use of fair play see, Nibert Elias, *The Genesis of Sport as A Sociological Problem*, 133-139. See Nibert Elias & Eric Dunning, *Quest for Excellence: Sport And Leisure in the Civilising Process* (Oxford, Blackwell, 1993), Nibert Elias, *An Essay on Sport and Violence*, *ibid*, 168; and, Neil Wiggleworth, supra, Note 1, 162.

88 *Ibid*.

89 Council Of Europe, Code of Sports Ethics - Fair Play - The Winning Way (Adopted in 1992 and revised on 16 September 2001).

90 See ICSPE/IOC/UNESECO, Declaration on Fair Play, [1995] *XXV-3 Olympic Review* 48-51 and J.A Samaranch, "Olympic Ethics", [1995] *XXV-1 Olympic Review* 1.

91 See, D. Powell, "Johnson to give back fifth gold medal", *The Times* (UK), Monday 20 July 2004, 58 (Reporting the decision to strip the Olympic gold medal won by the US' relay team during the Sydney Olympics four year after it was discovered that one of the team members who had taken part in the qualifying series but not the final ought to have been disqualified from participating in the Olympic games for failing a drugs test prior to the games.) Mr. David

2.2. Nature, Functions, and Features

Observers of sport would relate with fair play's role in sporting conduct or ethics. Sport's doctrinal conception of fair play promotes a high standard of morality, good conscience, sportsmanship, fairness, and natural justice.⁸⁸ According to the Council of Europe's CODE OF SPORTS ETHICS:⁸⁹

Fair play is defined as much more than playing within rules. It incorporates the concept of friendship, respect for others and always playing in the right spirit. Fair play is defined as a way of thinking, not just a way of behaving...

The Council summarised that:

"Fair play is an essential and central part of successful promotion, development and involvement in sport. Through fair play, the individual, the sports organisations and society as a whole all win. We all have a responsibility to promote FAIR PLAY - THE WINNING WAY. (Qui joue loyalement est toujours gagnant.)"

Due to their functional and psychological values, ethos, maxims, rules and principles that promote the fair play doctrine are fundamental to sport.⁹⁰ The doctrine is rigorously applied as an article of faith.⁹¹ The standard of conduct imposed by the doctrine is high. This is based on Olympism.⁹² The promotion of fair play encourages wider popular interest, support, and tolerance in sport *simpliciter*.⁹³ The doctrine is applicable in relations between clubs, as well as between sport persons, clubs, and the controlling sport authority.

The doctrine applies to the commencement,⁹⁴ performance,⁹⁵ extinction,⁹⁶ and enforcement⁹⁷ of sporting obligations. Based on enlightened self-interest, there is acceptance of fair play by sport persons. It creates expectation of equality of contest and merit. In competing to win, most participants want winning to be fair.⁹⁸ To be accused of being 'unfair' can lead to disciplinary sanctions or attract defamation action.⁹⁹ Sport associations refer directly or indirectly to fair play as a central characteristic for participation in their sport.¹⁰⁰ Breach of fair play attracts swift condemnation by controlling sports

Millar, champion cyclist returned the medal earned two years after it was discovered he had taken performance enhancing drugs. See A. Fotheringham, "Millar the confessor set to lose crowning glories", *Irish Independent* (Rep. of Ireland), Wednesday 21 July 2004, 23. See also, J. MacArthur, infra, Note 101 and C. Foley, "Scandal rocks Aussies", *Irish Independent* (Rep. of Ireland) Wednesday 27 July 2004, 24 (Australian Olympic team delayed names of Olympic Games bound athletes because the Australian Sports Commission refused to give details about an athlete being investigated for importing banned substances). See generally, James A.R. Nafziger, supra, Note 8, 111-116.

92 See generally, The Olympism Doctrine, Nature, Features, and Functions, infra, part 3.2. See also, Fulham FC v Tigana, infra, Note 109 (para. 43).

93 See A. Caille, supra, Note 87. See also J. Drew & Anor., "S... at centre of South African race - rigging row," *The Guardian* (UK), Friday September 22 1996, 24. (The director general of the Department of Sport and Recreation in the Republic of South Africa reacted to news of a draft race rigging contract involving Athletics South Africa (ASA), some sponsors, and at least one athlete as "a serious violation of the principle of fairness in sport.")

94 Examples are false disclosures in age-grade competitions, medical condition for contracts, and status of sport persons in international transfers. Others are obtaining sporting information of other

contestants through bribery of officials and spying, causing physical or mental damage to rivals, as in the Tonya Harding - Nancy Kerrigan scandal, working to get competitors disqualified through doping, etc.

95 Examples are shoddy performances in competitive sport and rigging of results. See generally, James A.R. Nafziger, supra, Note 9, 111-116.

96 Examples include, maligning an existing relationship, termination without due and proper notice, and termination without objective cause. See infra, Note 110.

97 Examples include implementation of rules of athletes selection and rules of the game. See M. Lewis-Francis, infra, Note 98 and D. Powell, supra, Note 91. Cf. *Raguz v Sullivan*, infra, Note 117.

98 For examples of the acceptance of fair play, see, O. Holt, "Courteous Villeneuve promises Hill a fair fight", *The Times* (UK), Friday October 11 1996, 45. (Mr. Jacques Villeneuve is quoted as stating: "... I don't think that is very fair, so that is not a route I will take.") See also, P. Deeley, "Intikhab: We have a moral duty to play fair", *Sport, The Sunday Telegraph* (UK), March 3 1996, 12; and M. Lewis-Francis, "Why I welcome Malachi Davis with open arms", *The Guardian* (UK), *Sport*, Saturday July 24 2004, 9. (Statement supporting the inclusion of recently naturalized sprinter into the Olympic team because the latter had not taken someone else's place and no other athlete made the qualifying time.) Earlier, Mr. Davis had positively responded to the 'fairness of his selection'. See -

organisations.¹⁰¹ The doctrine is also enforceable in relations involving sporting associations that belong to international sports associations that embrace “fair play”. For most of Europe, the role of fair play is contained in the *Code of Sports Ethics*.¹⁰² It provides that:¹⁰³

The basic principle of the Code of Sports Ethics is that ethical considerations leading to fair play are integral, and not optional, elements of all sports activity, sports policy and management and apply to all levels of ability and commitment, including recreational as well as competitive sport.”

It goes further to provide in the summary:¹⁰⁴

Fair play is an *essential* part of successful promotion, development, and *involvement in sport*.

Internationally, the Olympic Charter mandates participants to respect the spirit of fair play on the sport field.¹⁰⁵ Similarly, the United Nations Economic and Social Council (UNESCO) affirmed that:¹⁰⁶

There can be no true sport without fair play. All rules must be observed with this in mind.

The fair play doctrine applies to professional and commercial transactions.¹⁰⁷ It encourages participation by a wider number of persons and gives confidence to the wider public to support sport. The scope covers the commencement,¹⁰⁸ performance,¹⁰⁹ extinction,¹¹⁰ and enforcement¹¹¹ of obligations. Finally, the doctrine applies in dispute resolution.¹¹² This allows a party involved in a dispute to appeal for a solution on the basis of fair play.¹¹³ The flexibility ensures meritorious consideration, and the application of rules and principles of equity to the whole circumstances of a dispute.¹¹⁴ The demand for fair play can be enforced if there is a claim that it is breached.¹¹⁵

2.3. National Judicial Treatments and Formulation

This section examines how national courts independently respond to

cases presenting fair play claims or remedies. The jurisdictions considered are Australia, Austria, England, and the United States. It then offers a composite judicial approach to the doctrine.

2.3.1. Australia

In *Victoria Park Racing and Recreation Grounds Ltd v Taylor*,¹¹⁶ the defendants conduct of broadcasting of live races organized by the claimant without permission seriously affected the revenue derived by the organizer. While real property was not broken into, the intangible commercial value was certainly invaded. The decision would now be controversial in the light of the recognition of property in intangibles and the limitation of unfair use of modern technology.¹¹⁷ Mr. Justice Evatt rejected the claim that the defendants were in legitimate trade competition, as the product they were profiting from were not produced by them but by the claimant.¹¹⁸ He argued that the defendants interfered with the claimant's profitable use of its land and its conduct could not be regarded as honest.¹¹⁹ The conduct manifested ‘an insufficiently disciplined desire for business profit and reckless disregard of ordinary decencies and conventions’.¹²⁰ In *Raguz v Sullivan*,¹²¹ the court refused to disturb an appeal against an arbitration award, whereby the claimant was successful in contesting her non-selection to the Olympic Games bound judo team. The claimant led the criteria, but was not picked. The right of the athlete to be selected in accordance with ranking and performance was enforced. For procedural reasons, leave to appeal was denied. It is submitted that the appeal would have failed if allowed.

2.3.2. Austria

Austria's case law show a strong attachment to the fair play doctrine in commercial relations. In three cases, the Supreme Court adjudged conduct of defendants unfair and prejudicial to claimants economic interests.¹²² In *Gerhard Berger*,¹²³ the act of the defendant interfered with the sponsorship agreement between the claimant and the sport person-

“American’ makes GB team”, Irish Independent, Wednesday 21 July 2004, 23. See generally, James A.R. Nafziger, *supra*, Note 9, 111-116.
99 See R. Kitson, “Yates maintains his innocence”, *The Guardian* (UK), Wednesday January 14 1998, 24. (Rugby player accused of biting off opponent's ear instructed solicitors to demand withdrawal of allegations.) and L. Booth, “Hussain sparks ‘chucking cheat’ row”, *The Guardian*, Friday December 12 2003, 38. (Conduct of Mr. Nasser Hussain in an international cricket match subjected to inquiry, based on allegation of calling opponent, a cheat. He was reprimanded for behaviour that instigated animated reaction) Claims of cheating constituted a basis of the litigation in *Green v Blake*, [1948] IR 242 and *Ian Botham & Alan Lamb v Imran Khan*, [1996] Times LR 422. See also, *Grobelaar v News Group*, [2002] UKHL 40.

100 In the United Kingdom, ‘fair play’ or its variants is contained in several documents. See, Sports Council (UK), *Officiating In Sports - An Investment in Fair Play* (London, Sports Council, 1995) This booklet is based on the *Donnovan Report, Investing in Fair Play* (1991). See also, Sports Council (UK), *supra*, Note 107. On its British origins, see Neil Wiggleworth, *supra*, note 87. Cf. *Sachs LJ in Edwards v SOGAT*, [1970] 3 ALL ER 689, 701 (B): (“...Natural justice or fair play in action as it is often styled nowadays...”)

101 In taking action during the Valencia - Marseille scandal, French Football Federation (FFF) president, Jean Fouriet

- Fayard stated that: “We had to take sanctions in this affair which had harmed the morality of our sport.” See, *The Times* (UK), Thursday, September 23 1993, 44. The Sports Council (UK) Policy Statement On Doping states: “...Doping is cheating, and is contrary to the spirit of fair competition.” See also, M. Phillips & Anor, “Moorcroft attacks steroid ‘cheats’”, *The Guardian* (UK), Thursday October 23, 2003, 32. (UK Athletics chief executive condemned athletes who “cheat” by taking drugs. The president, Lynn Davies declared a zero tolerance policy towards claims of innocent culpability by athletes involved.) J. MacArthur, “Drugs row casts gloom on German Olympic chances”, *The Times* (UK), Monday 19 July 2004, 65. (When a leading horse failed a drug test, the secretary-general of the German Olympic Equestrian Committee (DOKR), Hanfried Haring reportedly declared: “It’s a disaster ..., a disaster for us and a disaster for the sport.”)

102 - *Fair Play - The Winning Way*, (“The Code”) *supra*, Note 89.

103 *Ibid*

104 *Ibid*.

105 See “Fundamental Principle 4” and Rule 41, Olympic Charter, 2007. In football, the Federation Internationale de Football Association (FIFA) launched ‘Fair Play awards’ and ‘Fair Play please!’ advertorials.

106 See, Edward Grayson, *Sport and the Law*, (London, Butterworths, 1994), p.xlviii.

107 Cf. *infra*, part 2.4.

108 Examples are: throwing matches or bribing referees to injure rival teams, pre-

venting a team or qualified sports person from competing or featuring in sanctioned matches, and giving false or practically incorrect information to engage services or obtain benefits. See generally, *Lewis v Bruno & Anor*, Unreported 3 November 1995 (High Court, England) and *Sunderland AFC v Uruguay Montevideo FC & Anor*, [2001] 2 ALL ER (Comm.) 828.

109 Examples are acting disloyally, breaches of contractual relationships without just sporting cause, opportunistic holding out by performance or team, and preventing the performance of a sporting duty. Cf. *Fulham FC Ltd v Tigana*, [2005] EWCA Civ. 895 and *Bournemouth AFC v Manchester United FC*, *infra*, Note 133.

110 Examples include maligning an existing relationship, termination without due and proper notice, and termination without objective cause. See, *Revie v FA*, [1979] Unreported (1979); *Don King Productions Inc v Warren & Others*, [1999] 2 All ER 218, and *Stransky v Bristol Rugby Ltd.*, [2003] ISLR-SLR 27. See also, *Clansmen Sporting Club Ltd v Robinson*, [1995] Times LR 295 and *MasterCard v FIFA*, *infra*, Note 142.

111 Examples include unconscionable enforcement of commercial or contractual power, See *AEK v NBA*, *infra*, Note 155.

112 Cf. *infra*, part 2.3.

113 For recent examples, see K. McCarra, “Estonia plead for clemency after fiasco”, *The Times* (UK), Friday 11 October 1996, 44. (Reacting to the action and circumstances of Estonia's refusal to play in the World Cup qualifying match against Scotland, UEFA President Lennart

Johannsen reportedly stated: “The most fair thing is to have a replay.”) See P. Shaw, “Scotland must play on Estonian Encore”, *The Independent* (UK), Friday 8 November 1996, 28. The official reaction attests to the role of fair play. In ordering replay, FIFA General - Secretary is reported to have said the decision was made in a “sporting spirit.” Cf. K. McCarra, “Scotland made to suffer for Estonia farce”, *The Times* (UK), Tuesday 10 November 1996, 48. The final report on the dispute provoked a similar appeal to fair play from the Estonian FA Secretary - General that: “the decision is more fair to the Scottish.” See -, “Scotland told to replay Estonia in Monaco”, *The Times* (UK), Thursday November 28 1996, 48. See also, J. Goodbody, “Brighton likely to escape heavy punishment”, *The Times* (UK), Thursday October 3 1996, 48.

114 Cf. *Victoria Park Racing v Taylor & Ors*, *supra*, Note 35 and *Adidas KG v O'Neil & Co. Ltd.*, [1983] FSR 76, 90-94. See also, *Stevenage Borough FC v Football League*, *infra*, Note 136 (Delay in bring application would be unfair to others)

115 See Arts. 1 (2) and 3 (5), European Sport Charter 2001. Cf. *infra*, part 2.3

116 *Supra*, Note 35.

117 See D.F. Libling, “The Concept of Property: Property in Intangibles”, [1978] 94 LQR 103.

118 *Ibid*, 514.

119 *Ibid*, 518-519.

120 *Ibid*, 522.

121 New South Wales Court of Appeal No. CA (Australia) 40650/00, Excerpted in II Digest of CAS Awards, 783

ality. It was held that deleting the claimant's trademark on a product and replacing it with that of another company was contrary to good morality. It did not matter that the companies had different products. In *Hormann*,¹²⁴ the court held that the defendant company deliberately used the name it shared with the claimant to encroach on claimant's goodwill as a respected professional footballer. In *Football Association*,¹²⁵ on the grounds of reputation the court granted a permanent injunction to restrain the defendant from using emblems belonging to the English national football team on its apparel. It held that the defendant was unfairly competing and benefiting from the goodwill attached to the emblem in Austria, which was based on a lot of investment of sporting labour and financial investment. The fact that the emblems were not registered trademarks was held immaterial.

2.3.3 England

English judicial pronouncements suggest the recognition of fair play doctrine in sport. In *McInnes v Onslow Fane & Ors*,¹²⁶ Megarry VC in refusing the claimant's application held *inter alia* that: (i) natural justice and fairness apply in relationships where there was a right to work.¹²⁷ (ii) The court could intervene to enforce the appropriate requirement of natural justice and fairness.¹²⁸ (iii) Where there was no duty to apply natural justice, there could still be a duty to be fair.¹²⁹ (iv) Where there was a statutory power and duty that would affect a party, there was a duty of fairness which included the duty to give the other party notice of facts which may adversely affect him.¹³⁰ (v) The duty to be fair is a duty to reach an honest conclusion and avoid any capricious policy.¹³¹ (vi) The court would as a matter of policy be slow in exercising jurisdiction over a claim of unfairness where sporting activities were concerned.¹³²

In *Bournemouth AFC v Manchester United FC*,¹³³ the majority of the court decided that the defendant was obliged to pay the claimant an agreed additional sum to the transfer fees of a player, even though the condition had not been met. It had been agreed that £27, 777 would be paid if the player netted 20 goals for the club. However, the player was sold shortly after by a new manager at a lesser price than the sum purchased. This deprived the claimant club, the League, and the player, potential fees. The defendant, it was held, denied these parties opportunities. The judgments suggested that there was no untoward conduct and the decision to sell was made in good faith. On this basis, the minority judgment took the view that no liability occurred. Four reasons account for why the minority judgment is preferable. Ordinarily, the claimant could have expressly inserted the obligation to pay if there was transfer, knowing as it would, that transfers are common and would have denied it further payment.¹³⁴ Secondly, that the transfer was done in good faith and without malice is also relevant. Thirdly, that defendant sold at a loss showed that they were not benefiting from the sale at claimant's expense. Finally, the clause was speculative and lacked mutuality. There was no guarantee that the player would meet the goals target. It carried no reciprocal obligation to return the same amount if player failed to score. The decision would have been well founded if the clause required only that the player feature in 20 matches. In *Clansmen Sporting Club Ltd v Robinson*,¹³⁵ the court gave a judgment for the claimants against the defendant boxer who sought to renege on a partially performed promotion contract on the basis that rules of the organisation ren-

dered an option term void. The court acknowledged the existence of the rule, but rejected its application because it had generally not been followed. The decision is supportable as a principled application of the fair play doctrine. The sport federation had not challenged the defendant's conduct and the contract did not jeopardise his career. In *Stevenage Borough FC v Football League*,¹³⁶ claimant was prevented from playing in the League on account that its stadium did not meet requirements. Though, it met this requirement before the start of the season, it was still refused. The court held that it would be unfair to relegate another team, Torquay United FC, which had spent money and entered into contracts with the hope of continuing in the division. The balance of fairness was against the claimant.¹³⁷ Perhaps the decision would have been fairer had claimant been asked to reimburse Torquay United FC for any expenses proved. There was good reason why claimant had to delay bringing an action, as it was not in the best position to challenge the rule that imposed the condition. Torquay United FC, could not have had a legitimate expectation that it would be asked to remain in the League on non-sporting grounds.

Nonetheless certain cases suggest that the courts may not consider it their business to apply fair play.¹³⁸ In *Carlton Communications v Football League*,¹³⁹ a trial judge ignored crucial evidence that formed the essential background to a sport broadcasting agreement. A negotiating third party's signature was not included in the final agreement, although it was clear that it sponsored, negotiated, and stood to benefit from the enterprise being set up. When the venture collapsed, it rejected joint liability, leaving the contracting party to bear the full consequences, even if unfairly.¹⁴⁰

2.3.4 United States

US cases suggest that as a rule of practice there is a liberal order for fair play in sport. In *Boston Professional Hockey Ass. v Dallas Cap & Emblem*,¹⁴¹ the court held that only a prohibition to desist from business was appropriate as the defendant business method was unfair to the claimants. It was insufficient for defendant to disclaim that its products were not officially approved by the claimant. In *MasterCard v FIFA*,¹⁴² after defendant surreptitiously negotiated with a rival company, VISA, the claimant, long-term sponsors of FIFA tournaments sued FIFA for breach of contract. It argued that the defendant did not act in good faith and fairly towards it and knowingly breached its right of first refusal. Indeed, the judge found levels of dishonesty and deceit in defendant's conduct.¹⁴³ Upon this finding, FIFA agreed to settle the case with a payment to the tune of \$90million. In *USOC v Intelicorp. SA*,¹⁴⁴ in the run up to the 1984 Los Angeles Olympic Games, the court prevented the IOC's agents, Intelicorp., from interfering or engaging in competition with the USOC in licensing and merchandising of Olympic symbols. Ordinarily, the IOC has global rights to Olympic symbols. The court held that as the USOC as the exclusive right holder under US law, Intelicorp. had no right to enter into the US market to compete or dilute USOC's ability to obtaining corporate sponsors. The decision would be supportable on the basis of the fact that the USOC was privately funding the Olympic Games, and relied on sponsors, merchandising and licensing revenue. ISL's profit seeking entry at this crucial time would have jeopardised the financial investments by USOC and was unfair.

122 See Gerhard Berger, 4 Ob 16/90 (Judgment of 18 September 1990), Football Association, 4 Ob 2206/96g, (Judgment of 17 September 1996) (Ecolex 1997, 107) and Hormann, 4 Ob 368/97i, OBI 1998, 298 and WBI 1998, 273, (Judgment of 24 February 1998). Cf. Thomas Muster, Ob 16/90, Judgment of 24 February 1998. OBI 1998, 298 and WBI 1998, 273. See Alexander Grohmann & Ingo Braun, Austria, 31 - 57. See Ian S. Blackshaw & Robert C.R. Siekmann (Eds.) Sport Image Rights In Europe (The Hague, TMC Asser, 2005).

123 Supra, Note 122.
124 Ibid.
125 Ibid.
126 Supra, Note 17. See also, Cowley v Heatley, The Times 24 July 1986, Cf. The Access Doctrine, supra, part 1.2.
127 Ibid, 217 (c) - (d).
128 Ibid, 218 (a).
129 Ibid, 219 (c) - (d).
130 Ibid, 220 (a) - (e).
131 Ibid, 219 (f) and 221(j).
132 Ibid, 223 (f) - (j). Cf. Flaherty v National Greyhound Racing Club Ltd., [2004] EWHC 2838.

133 The Times (UK), May 22 1980 (unreported).
134 Admittedly, the defendant could have expressly demanded that payment would not be due, if there was a bona fide transfer.
135 Supra, Note 110.
136 (1997) 9 Admin. LR 109.
137 Ibid, 118 (C), 121, (B), 122 (F).
138 See Bournemouth AFC v Manchester United FC, supra, Note 133 and Carlton Communications v Football League, infra, Note 139. See also, Lord Devlin, The Enforcement of Morals, (Oxford, OUP, 1989) 5. (A judge cannot decide

what is fair. This is an arbitrator's function.) Cf. Flaherty v National Greyhound Racing Club Ltd., [2004] EWHC 2838; and Don King Productions Inc v Warren & Others, [1999] 2 All ER 218.
139 [2002] EWHC 1650.
140 See C. Mitchell, "There's still life in the Classical Law", 62 Camb. LJ 26 (2003) Cf. Stransky v Bristol Rugby Ltd., supra, Note 109.
141 Supra, Note 46. See also, part 4.3, infra.
142 06 Civ 3036 US District Court (SDNY).
143 Ibid (At ...).
144 737 F.2d. 263 (1984).

2.3.4. Formulation

The cases confirm that generally, court will recognize the duty of fairness or fair play between parties in the sport context. The judicial approach to the fair play doctrine may be formulated as follows:

Relations and participation in sport is founded on "fair play". Participants must observe rules of fairness towards each other. There is a legitimate expectation of good faith conduct. Conduct that impose burdens or hardship will be rejected. The underlying moral etiquette in all activities related to sport will be enforced. It is proper to impose measures that enforce fair play.

2.4. Private Interests, Investments and the Fair Play Doctrine

As sport grows into a domestic, regional, and international investment business, with its own risks, the role of fair play becomes relevant.¹⁴⁵ Privatisation and commercialization objectives have to be practiced within existing parameters. In the absence of express recognition of fair play, the general doctrine of good faith seems poised to accommodate the "fair play" doctrine in commercial relationships.¹⁴⁶ In jurisdictions where emphasis is placed on the bargaining process, expressed contract terms, the assumption of risk, or reject a general doctrine of good faith, or limit the duty of fairness, the theory and practice of fair play poses juridical problems.¹⁴⁷

With new products, strategies and techniques, there is concern whether fair play has a valid role in creating and interpreting relations.¹⁴⁸ The classical obligations theory of common law jurisdictions promotes individual self maximization. This approach ignores morality and sentimental attachments.¹⁴⁹ Arguably, it may be justified by the high risks in national and inter-state operating environment. Nonetheless it creates tensions between parties. A relational-contextual approach, on the other hand, promotes mutual benefits and fair dealing.¹⁵⁰ The approach creates or supports medium-term and long-term sport development. It is more appropriate and favoured in construing sport business relations.¹⁵¹ The approach is consistent with the mandatory nature of fair play in business reflected in sport organisations staff and policy documents.¹⁵² Indeed, within Europe, the modern *Code of Sports Ethics* clearly refers to commercial transactions.¹⁵³ The Code provides that fair play is concerned with dealing with "exploitation, unequal opportunities, excessive commercialisation and corruption."¹⁵⁴ This establishes legal rights against: ambush marketers,¹⁵⁵ unfair contracts between sport persons and clubs,¹⁵⁶ and unequal treatment

between members.¹⁵⁷ Efforts to avoid fair play and disregard other stakeholders interests in commercial transactions would seem futile.¹⁵⁸

2.5. Public Power, Private Rights, and the Fair Play Doctrine

In sport relationships states have an obligation to entrench and enforce the fair play doctrine in the legal system.¹⁵⁹ The duty is influenced largely by the role fair play has in stimulating sport development, equity, popular interests, and civic socialisation. In the absence of specific statutes, state authorities may apply laws and principles of equity and unfair competition regimes to existing obligations.¹⁶⁰ Protecting fair play is also important in the emerging business context of sport rights. Decisions in support of fair play in business will be right under legal systems as part of "sport law".¹⁶¹

Part III - The Olympism Doctrine

3.1. History

The modern Olympism doctrine is based on the philosophy, principles, and ideals of ancient Olympism practiced in the Hellenic Olympic Games.¹⁶² It was reinvented by the International Olympic Committee (IOC) to apply to all Olympic Movement's activities.¹⁶³ Olympism is now universally accepted as the foundation for international sport relations.¹⁶⁴ Recognition is found in declarations by international organizations and conventions.¹⁶⁵ It has been recognized as a 'fundamental principle' in the Olympic Charter.¹⁶⁶ According to according to an advocate, Jorge P. Irigoyen, Olympism is concerned about the unity of human kind, equity, and fair play. The necessity for the doctrine is to promote and defend timeless values that support peace, harmony and progress.¹⁶⁷

3.2. Nature, Functions, and Features

According to the Olympic Charter, Olympism is an international philosophy that blends sport with culture and education and constitutes a human right.¹⁶⁸ It obliges *inter alia* respect for universal fundamental ethical principles.¹⁶⁹ The doctrine espouses regard for dignity, equity, co-operation, mutual respect, and fair competition.¹⁷⁰ The doctrine regards sport as a tool for emphasizing non-discrimination, mutual understanding, solidarity and fair play, to create *a way of life*.¹⁷¹ The main subject of the Olympism doctrine has been the sport person. From the individual athlete, and by extension, clubs and teams, Olympism demands excellent natural physical performance, technical

¹⁴⁵ Cf. Dimitrios Panagiotopoulos, *The Legal Aspects of Sport Ethics and the Protection of Fair Play*, 318, 322-324. (Fair play applies in Greece through IOC Olympic Charter and the European Code of Sport Ethics) See, IOA, Report on Ioa Special Sessions And Seminars 1997 (Athens, IOA, 1998)

¹⁴⁶ On good faith, see generally Peter D. V. Marsh, *Comparative Contract Law: England, France, Germany (Hampshire, Gower, 1994)* 38 - 39; A. Harmathy (Ed.), *Binding Force of Contract (Budapest, Hungarian Academy of Sciences, 1991)* 41-48 and 105-111. See also, Reinhard Zimmermann & Simon Whittaker (Eds.), Note 80 and Hugh Beale & Ors, *Contract Law: Cases, Materials & Texts* (Oxford, Hart Publishing, 2002) 238, 497-490.

¹⁴⁷ See, National Judicial Treatments and Formulation, supra, part. 2.3. Cf. Kampers Sanders, *Unfair Competition Law* (Oxford, Clarendon Press, 1997) 135. See also, Roger Brownsford & Ors. (Eds.), *Good Faith in Contract*, (Aldershot, Dartmouth, 1999), 1- 40 and 139-164.

¹⁴⁸ See, Richard Bagheot, *Sponsorship, Endorsement and Merchandising - A Practical Guide* (London, Waterlow, 1990) 15. (In motor racing 'primary sponsorship' contracts there is a purely

commercial deal with no room for sentiment.) See -, "Minnardi lose backer after tribute row", *Metro* (UK), Thursday July 20 2004, 51. Cf. S. McManaman, "Why I would have backed player strike", *The Times* (UK), Monday November 4 1996, 29.

¹⁴⁹ *Ibid.* See Carlton Communications v Football League, supra, Note 139. See generally, Simon M Whittaker & Reinhard Zimmerman, *Good Faith in European Contract Law: Survey of the Legal Landscape*, 1, 39-41. See Reinhard Zimmerman & Simon Whittaker (Eds.) supra, Note 80.

¹⁵⁰ Heinz Kotz, *Towards a European Civil Code*, 243. See Peter Cane & Jane Stapleton (Eds.), *The Law of Obligations* (Oxford, Clarendon Press, 1998)

¹⁵¹ See Arts. 1(ii), 3(5) and 8(2), *European Sports Charter* 2001.

¹⁵² *Ibid.* Cf. "Sport has been synonymous with fair play and courtesy." See Jean-Philippe Rochat, *The Court Of Arbitration for Sports*. See, IAF, *Sport And Law* (Supp.) (Monte Carlo, IAF, 1991.) 43.

¹⁵³ *Supra*, Note 89.

¹⁵⁴ *Ibid.* (para. 1) "Defining Fair Play" and (para 1.2) "Responsibility For Fair Play".

¹⁵⁵ Cf. Victoria Park Racing v Taylor, supra, Note 35.

¹⁵⁶ See *Athletic Union of Constantinople v NBA*, [2002] 1 *Lloyds Rep.* 304 (Contract of 9 years service by professional player held to be invalid and contrary to principles of fairness, morality and justice in Greek law) See generally, *Warren v Mendy*, [1989] 1 *WLR* 853 and *Watson v Prager*, [1991] 1 *WLR* 726.

¹⁵⁷ Cf. *Paul Edwards v British Athletics Federation*, [1978] *CMLR* 363.

¹⁵⁸ Cf. Art 1.103 (2) *Principles of European Contract Law* ("PECL") 1999. See also, Arts. 1.106; 1.201; 1.202; and 1.302, *PECL* 1999.

¹⁵⁹ Within Europe, see the *European Sport Charter* 2001 and the *European Code of Sport Ethics*, supra, Note 89. In the US, see, James A.R Nafziger, supra, Note 9, 99-100, 103-108 and Paul Weiler, Note 50, 95.

¹⁶⁰ See generally, Note 122. See also, *Reebok Int. Ltd v Marnatech Ent.*, infra, Note 279.

¹⁶¹ Cf. James A.R Nafziger, supra, Note 9, 65-100.

¹⁶² For a history of the ancient Olympic Games see, James A.R Nafziger, supra, Note 9, 179-193 and Nigel B Crowther, *Sport in Ancient Times* (Westport, Prager, 2007) 45 - 56. See also, Vassil Girginov & Jim Parry, *The Olympic Games Explained* (London, Routledge, 2005)

¹⁶³ See Pierre De Coubertain - Selected Writings - Olympism, (IOC, Lausanne, 2000) 580. See also, Jorge Padilla Irigoyen, *Olympic Doctrine* 46. See, IOC, *The Olympic Movement In Prospect -VOL 3* (Lausanne, IOC, 1982) 47 and M. Mzali, "Olympism and Culture- II", [1979] 143 *Olympic Review* 507, 572-575.

¹⁶⁴ Other philosophies on sport and leisure from England, Africa, Asia, and the Middle East have been subsumed into Olympism. See M. Mzali, *ibid.* Cf. Z. He, "Universal Olympic Values in a Multicultural World", [2002] *Olympic Review* 11

¹⁶⁵ See generally, Arts. 3.3 and 7.1, *ICPES* 1978 and General Preamble, Art 1 (3) *International Convention against Apartheid in Sport* 1985.

¹⁶⁶ IOC, "Fundamental Principles of Olympism: 1" *Olympic Charter* 2007.

¹⁶⁷ See Jorge Padilla Irigoyen, *Olympic Doctrine* 46. See, IOC, *The Olympic Movement in Prospect -Vol 3* (Lausanne, IOC, 1982) 47.

¹⁶⁸ See *Fundamental Principles of Olympism 1 & 4, Olympic Charter* 2007. Cf. Michael J. Beloff, et Al, *sports law* (Oxford, Hart, 1999), 257. (Olympic Charter falls well short of being a transnational constitution for sport).

ability, and self discipline.¹⁷² It recognizes sports persons, and by extension, clubs, as entertainers. Olympism promotes the status and rights of the athlete to privacy, personality, and dignity,¹⁷³ as well as to commercial reward.¹⁷⁴ It promotes the acquisition of multicultural values, supranational orientation, and positive spirituality. To protect sport and the athlete, it rejects commercial and political abuse of the athlete. The doctrine also focuses on roles and responsibilities of a wide group of subjects who participate in sport. It admonishes the sporting community to engage in mutual respect, solidarity, and co-operation. It seeks from society, humanism, ethics, and honour. Actions that denigrate cultures and images of others through sport are unacceptable.¹⁷⁵ From governments, it requests the use of sport as an instrument of national development and international friendly relations. From the international community, it seeks peace, friendship, and merit.¹⁷⁶ Holistically, Olympism promotes high standard practices, values and decision making. Olympism touches and impact on bi-party and multi-party relationships.

These demands manifest in legal principles and practices on: access,¹⁷⁷ boycotts,¹⁷⁸ participation in international sport,¹⁷⁹ cheating,¹⁸⁰ the ban on substances that desecrate the sanctity of the body and the spirit,¹⁸¹ practice of fair play,¹⁸² non-discrimination,¹⁸³ solidarity,¹⁸⁴ protection of the image of the sport,¹⁸⁵ respect and protection of the reputation of others,¹⁸⁶ respect for peace and the Olympic Truce.¹⁸⁷

Although previously doubted, the doctrine is applicable to contractual and economic relationships.¹⁸⁸ The involvement of professional sport persons, clubs, and teams in commercial ventures is an incentive and reward for their efforts. In demonstrating the spirit and triumph of Olympism, it is amply fitting that the sport person should be materially successful in or outside the sport.¹⁸⁹ The application commends legal rules and principles of relational contracting,¹⁹⁰ and good faith.¹⁹¹ It rejects classical individualist contract rules¹⁹² and abuse of rights.¹⁹³

3.3. National Judicial Treatments and Formulation

This section examines how the judiciary in various states appreciate, understand, and react to issues involving Olympism ideals. The jurisdictions considered are Australia and New Zealand, England, Italy, and the United States. It then offers a composite judicial approach to the doctrine.

3.3.1. Australia & New Zealand

In the Australian case of *Raguz v. Sullivan*,¹⁹⁴ the Olympism principle of merit was upheld so that the claimant, rather than a preferred candidate, was eventually selected for the Olympic Games.¹⁹⁵ One of the most important cases in respect of the Olympic ideals and Olympism was decided in the sport of rugby.¹⁹⁶ The decision applied Olympism goals of sport as an instrument for common humanity, friendship, and progress to support the principle of solidarity.¹⁹⁷ In *Finnigan v NZRFU Inc.*,¹⁹⁸ the court on the application of certain members restrained the New Zealand "All Blacks" national team from embarking on a rugby tour of apartheid South Africa. The case had been brought against the background of the Gleneagles Agreement (1977) by Commonwealth nations rejecting sporting relations with apartheid South Africa and unusual public protestations, including violence, in New Zealand.¹⁹⁹ The courts upheld arguments that the council's decision to send the *All Blacks* to apartheid South Africa was against the principled duty to promote, foster, and develop the game or its welfare, would reduce interest and support for the sport, was a burden to the international standing and trade of New Zealand, and was against New Zealand's national interest.²⁰⁰

3.3.2. England

In *Wheeler v Leicester Council*,²⁰¹ the House of Lords ruled that a local council that banned a club from its premises for 12 months for touring apartheid South Africa could not be sanctioned. It held that the Gleneagles Agreement did not have the force of law but was only a mat-

169 Ibid. See also, IOC, IOC Code of Ethics -2007

170 See generally, E. Guelfand, "The Olympic Games: Equality in Law and Inequality in Practice", [1983] Olympic Review 130 and Francesco Gneccchi-Ruscone, The Future of the Olympic Movement, 24. See, IOC, The Olympic Movement in Prospect (VOL 3) (IOC, Lausanne, 1982)

171 See Fundamental Principles of Olympism 1, 4 & 5, Olympic Charter 2007. This position must not be underestimated. It elevates Olympism as an inherent neutral philosophy with quasi-ideological and quasi-religious status. See also, Jim Parry & Ors, Sport and Spirituality, (London, Routledge, 2007) 2001 et seq.

172 Cf. - "Russian Nikolay Davydenko fined \$2,000 by ATP for lack of effort at St. Petersburg Open", Yahoo! Sport, October 26 2007, sports.yahoo.com (visited 26/10/07).

173 Respect for sport persons privacy and personality is generally protected in France, Germany, Monaco, and Switzerland.

174 On general right to become a professional, see *Blackler v NZRFL*, supra, Note 23; *Kemp v NZRFL*, supra, Note 37; and *Linesmann v WHA*, supra, Note 52. On disputes with employers about commercial property rights, see *Baltimore Orioles Inc. v MLB Players*, 805 F.2d 663 (1986)

175 See generally, Rosemary J. Coombes, *The Cultural Life of Intellectual Properties* (NC, Duke University Press, 1998) 193-212.

176 See *Finnigan v NZRFU Inc.* (No. 2), supra, Note 6.

177 On private rights of access see supra, Notes 1, 2, 3, 14 and 173. On state interest in access see generally, supra, Notes 2, 8, 18-20 ("The Olympic Truce") and infra, Note 177. Cf. T. Bridis, "U.S. bans sale of iPods to North Korea", www.breitbart.com/news/2006 (visited 29/11/06) (Under proposed UN sanctions, "sport equipment" included in US measures against North Korean regime) See also, US' Cuban Liberty and Democratic Solidarity (Libertad) Act, 1996 ("Helms-Burton Act"). It bans US companies from doing business in Cuba. There is no express sport-related exemption. Cf. James A.R. Nafziger, supra, Note 9, 249.

178 See generally, JAMES A.R. NAFZIGER, supra, Note 9, 243-276. A leading manifestation is the agreement between the NOCs of the US' and USSR. The fall-out of mutual boycotts of the Moscow and Los Angeles' Olympic Games prompted the NOCs to agree to work under the Olympic Charter, promote Olympism ("Olympic ideals"), undertake to ensure the participation of their teams in the Olympic Games, co-operate and exchange technical, scientific and organizational resources to further the Olympic Movement, and ensure the survival of the Games to foster international goodwill and mutual understanding among nations and youths. (Agreement made September 15 1985).

179 James A.R. Nafziger, *ibid.* Cf. *DeFrantz v USOC*, infra, Note 209.

180 See generally, James A.R. Nafziger, supra, Note 9, 111-116 and 148.

181 See generally, A. Benedetti & J.

Bunting, "There's A New Sheriff in Town: A Review of the United States Anti-Doping Agency", [2003] 2 ISLR 19; A. Rigozzi, & Ors, "Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code", [2003] 3 ISLR 39; R. McLaren, "CAS Doping Jurisprudence: What Can We Learn?", 6 [2006] ISLR 4; and G. Ioannidis, "Legal Regulation of Doping in Sport and the Application of Criminal Law on Doping Infractions: Can a Coercive Responsive be Justified?", [2006] 6 ISLR 29 See also, James A.R. Nafziger, supra, Note 9, 154.

182 See generally, The Fair Play Doctrine, supra, part 2. See also, James A.R. Nafziger, supra, Note 9, 111, 148, and 152. Cf. Advisory Opinion, CAS 2005/C/841/CONI (On culpability for use of performance enhancing drugs outside the banned list a tribunal erroneously ruled that no liability should attach.).

183 Cf. *Paul Edwards v British Athletic Federation*, [1998] 2 CMLR 363

184 See *Finnigan v NZRFU Inc.*, supra, Note 6.

185 *Ibid.*

186 *Ibid.*

187 See supra, Note 20.

188 See, Private Interests, Investments and the Olympism Doctrine, infra, part 3.4. For olympism in commerce, see infra, part 4.2. Cf. K.H. Shaddah, infra, Note 253. See generally, James A.R. Nafziger, supra, Note 9, 141-146.

189 Frontline examples will be Mr. Michael Jordan, Haile Gebrselassie, and David Kirk. See respectively, Mark Vancil (Ed.),

Driven from Within - Michael Jordan (NY, Atria Books, 2005); CNN, The Greatest Runner of Them All Haile Gebrselassie and NZPA, "Former All Black appointed CEO of Fairfax", New Zealand Times (London), Wednesday, 31 August 2005, 12. An opposite example would be Northern Ireland and Manchester United's FC player, late Mr. George Best's admitted lifestyle. It is noteworthy he was not an Olympian ("I spent a lot of money on booze, birds and fast cars. The rest I just squandered.")

190 See infra, Note 240. See *Don King v Warren*, supra, Note 109; and *MasterCard v FIFA*, supra, Note 142.

191 *Ibid.*

192 See generally, supra, Notes 150-152. The traditional common law approach is opposite. See *Carlton Communications v Football League*, supra, Note 139. See also, C. Mitchell, supra, Note 138.

193 See supra, Note 158. Classical common law systems tolerate the existence and application of abuse of rights. See generally *Mogul Steamship Cop v McGregor Gow & Co* [1892] AC 25; *Bradford v Pickles*, [1895] AC 587 and *Allen v Flood*, [1898] AC 1. See also, H.C. Gutteridge, "Abuse of Rights", (1933-5) 5 CLJ 22.

194 See supra, Note 117.

195 *Ibid.*, 787.

196 See, supra, Note 163. (On the assimilation of other values and philosophy by Olympism).

197 Cf. supra, parts 3.1- 3.2.

198 Supra, Note 6.

199 See James A.R. Nafziger, supra, Note 9, 251-253.

ter of independent morality. This decision suggests that Olympism may not be enforceable on that account. If that was the position, the council had a right to ban the club or players breaching sport law norms of access and non-discrimination that exist as part of Olympism. The decisions dismissing claims challenging decisions of tribunals suspending or banning athletes that test positively for performance drugs are in conformity with Olympism.²⁰² In *Gasser v Stinson*, the court held that strict liability for drug use was sensible.²⁰³ In *Wilander v Tobin*,²⁰⁴ it was held that rules designed against drugs in sport by international sport organizations were justified and should be protected from legal technicalities, if sensible and fair. In *Modahl v British Athletic Federation*,²⁰⁵ the claimant who tested positive for prohibited substances sued to recover damages for lost earnings in the period she had been suspended by the national authority, after a tribunal overturned the suspension. The court refused her claim. It was stated that draconian action by authorities was necessary in the evident interest of sport, even though it might sometime cause injustice in individual cases.²⁰⁶

3.3.3. Italy

The various responses to revelations of match fixing, doping and betting reveal the extent to which Olympism's ideals are applied in Italy. On the basis of the statute proscribing sporting fraud and fairness, the football authorities prosecuted 26 individuals and clubs involved in arranging matches.²⁰⁷ It imposed drastic penalties which included permanent or fixed term expulsion from sport, taking away championship medals, relegating teams to lower division, and deducting points from future matches.²⁰⁸

3.3.4. United States

In *DeFrantz & Ors. v USOC*,²⁰⁹ following heavy pressure from the federal government, a majority decision of the USOC's House of Delegates voted against sending US athletes to the Moscow Olympics. Claimants challenged the decision as invalid because it was based on "non-sporting reasons". They contended the decision breached their statutory right to compete in the Olympic Games. The court refused to mandate the USOC's participation in the games on the ground that it was within its right not to go.²¹⁰ Refusal it ruled, could be based for non-sporting reasons.²¹¹ It held that the statute gave no right to athletes to compete in the Olympics.²¹² The view that non-sporting reasons could be the basis of a decision to contest in the Olympics is with respect *per incuriam*. If such criteria availed, several persons would not risk venturing into Olympic sport as a profession. The ratio belittles the importance and value of Olympic competition to eligible athletes.²¹³ According to the court, the "state action" premise contended by the claimants was inappropriate. The crux of the decision is the view that claimants failed to establish the basis upon which the relief could be granted.²¹⁴ It is submitted that Olympism provides the basis of claim or relief. The fundamental issue is whether the USOC was right on Olympism ground to boycott the Moscow Olympics following the Soviet invasion. This does not admit an easy answer. If Soviet invasion was not consistent with Olympism, then boycott was illegal. If it was inconsistent, the boycott decision was legal. The pressure and role of the US government is then irrelevant.²¹⁵ Finally, if Soviet foreign policy independently affected the

Local Organising Committee's plans of hosting the Olympics, then a boycott decision must be exercised in good faith.

In *Selfridge v Carey*,²¹⁶ Chief Judge Munson of New York held that the defendant, the governor of New York, was obliged by the constitution to allow and protect apartheid South Africa's national rugby team's tour matches with the US claimant. The defendant's demand that no match take place jeopardised claimant's right of political expression. This decision conflicts with US general and sport laws which forbid discrimination and racism. Undoubtedly, the connection between political expression and right to sport is tenuous. The decision ignores the duty of the state to use sport, pursuant to Olympism, as an instrument of peace and solidarity as well as to protect sport values.

3.3.5. Formulation

The cases and analysis show that compliance with important ideals and values associated with Olympism are a source of legal obligations and rights for individuals, private bodies, and state authorities. Olympism promotes and protects core human values in sport related practices. The judicial approach to the Olympism doctrine may be formulated as follows:

International sport practice and relations is dictated by values and ideals associated with olympism. There is an obligation on public and private authorities to exercise power and discretion to support these ideals and conduct. Conversely, there is the power to restrain conduct that denigrates or destroys olympism. Participants have a right to enforce rules of merit and conduct that affect them.

3.4. Private Interests, Investments, and the Olympism Doctrine

The Olympism doctrine welcomes private interests and investment in sport. From benefit and empowerment perspectives, investors and commercial rights are instruments to amply value and empower athletes for achieving sporting glory. On this basis it is proper to grant private property rights and intellectual property rights to sport persons and teams in recognition of the artistic and cultural contributions.²¹⁷ Conversely, it is improper to reject the claims of rights.²¹⁸ From relational and pedagogical perspectives, the values and spirit of Olympism may be imbibed by participation in sport by investors, while athletes may be expected to carry the ethics into commercial society and practice. Otherwise, athletes and investors alike may engage in less desirable values and conduct in their profit goals.²¹⁹

3.5. Public Power, Private Rights, and the Olympism Doctrine

It can be taken as a *fiat accompli* that every state has the duty to adopt and implement Olympism as the basis and goal of its domestic and international sport development and relations.²²⁰ In Olympic movement sport, the state has a duty to ensure that the values and goals are implemented and applied by stakeholders.²²¹ It must therefore encourage, support, and enforce the Olympism doctrine within its borders.²²²

Part IV - The Commerce Doctrine

4.1. History

International sport associates with commerce.²²³ The diversity, nature and global spread of sport ensure it is capable of generating interna-

200Supra, Note 6.

201 [1985] 2 All ER 106. Cf. Finnigan v NZRFU Inc, supra, Note 6.

202 Cf. N. Cox, "Legalisation of Drug Use in Sport", [2002] ISLR 77.

203 June 15 1988 (Unreported)

204 [1997] 1 Lloyds Law Rep. 195, 198-199 and [1997] 2 Lloyds Law Rep. 293, 300.

205 House of Lords, 22 July 1999 (Available on www.....). See also, Modahl v BAF, [2002] 1 WLR 1192 (CA).

206Ibid. (per Lord Hoffman.) Cf. The Fair Play Doctrine, part 2.2, supra.

207See Legge 13 dicembre 1989, n. 401. Other jurisdictions with such statutes are France and South Africa. See Decret No. 2001 -35 du Janvier 2001 (France)

and secs. 15 and 16, Prevention and Combating of Corrupt Activities Act 2004 (South Africa).

208See F. Dunne, "The drug scandal that blackens the name of Juve's team of the Nineties- Club doctor sentenced to jail as doping controversy intensifies", The Independent, 1 December 2004 (www....); BBC Sport, "Italian trio relegated to Serie B", 24 July 2006; D. Warren, "Italian football's tangled web", 25 July 2006; BBC Sport, "Punishment cut for Italian clubs", 26 July 2006.

209 492 F. Supp 1181.

210 Ibid, 1188.

211 Ibid, 1188-1189.

212 Ibid, 1190-1191.

213 Cf. Reynolds v IAAF, supra, Note 17.

214 Ibid. 1182-1183.

215 Cf. James A.R Nafziger, supra, Note 9, 305-308.

216 522 F. Supp. 693 (1981).

217 See S. Wells, "Is sport art? Only when its convenient, pal", Guardian Unlimited (UK) Wednesday November 7, 2007. See also, Richard Arnold, Performers Rights (London, Sweet & Maxwell, 2005) 49-50 and 58.

218 Richard Arnold, *ibid*. See also, MLBP Ass. v Baltimore Orioles, supra, Note 173 and NBA v Motorola, supra, Note 45, (para 20-24).

219 See Headnotes 135 and 139. See also, Rosemary J.Coombes, supra, Note 175.

220 See Finnigan v NZRFU Inc. (No. 2), supra, Note 6. Cf. National Judicial Treatments and Formulation, part 3.3, supra.

221 See The State v AS P. Ltz Aas & Hansa Borg Bryggerier AS, Rt. 2000, 46. The Norwegian case involved a brewery's logo on the shirts of a sports club. The governmental directorate warned the football club that they could face fines if this continued. The brewery brought an unsuccessful action against the government contending that their brand covers non-alcoholic beverages, and not just alcoholic beverages. The logo had to be removed. See also, Public Power, Private Rights, and the Commerce Doctrine, part 4.5, *infra*.

tional business activities. According to Baron de Coubertain, the founder of the modern Olympic Games:²²⁴

“Let us export oarsmen, runners, fencers: there is the free trade of the future - and on the day it takes place ... the course of peace will have received a new and powerful support.”

He also admonished that:²²⁵

“In any case, Olympism has nothing to fear from corporate trends ... It is important that at every stage, ... men strive to spread the athletic spirit that consists of spontaneous loyalty and chivalrous selflessness.”

This intrinsic and beneficial relationship with commerce was negatively impacted upon by the political and ideological views of modern participants. Throughout much of the 19TH and 20TH centuries, communists, socialists, and so-called purists derided attempts to commercialise sport.²²⁶ However, this anti-commerce position became burdensome for sport development and relations. Indeed during the 1980 XXII Olympiad taking place in Moscow, the USSR entered into several international sponsorship, licensing and commercial arrangements. By 1983, it had been realized that:

“It is, nevertheless to the world of commerce and business that the Olympic movement must turn for additional source of revenue. And it must do so now.”²²⁷

By 1984, the entirely privately financed and hugely profitable Los Angeles Olympic Games conclusively established the role of commerce as a vital and efficient source of promoting sport.²²⁸ Thereafter, the recognition of the place of commerce in sport moved at a fast pace. This trend was aided by the fall of communism and the advent of modern globalisation.²²⁹ It has then become plausible to legitimize contractual, property and trading rights within international law sources that recognized commerce’s role in sport development.²³⁰

4.2. Nature, Functions, and Features

The commerce doctrine consecrates contractual and commercial transactions and relations in sport.²³¹ It recognizes general and specific *sport rights* and *sport contracts*.²³² The nature and legitimacy of trans-

actions is guided by normative principles and rules devised to cater for sport and regulate commercial conduct. The basic premises for promoting commerce is to independently fund the organization of sport, build teams and infrastructure, sponsor competitions, remunerate participant sport persons and officials, administer and promote activities associated with sport, and develop technology necessary to promote safety and competitive values.²³³

The commerce doctrine also promotes *quasi* and full property rights. Exclusive rights reward participants, stimulate private investments, and allows for easier contractual distribution and allocation of sport products. This reduces commercial risks. The doctrine recognizes property rights in the name, images, labour and dignity of sport persons and sport products. Generic rights, in the form of personal property rights (PPR), commercial property rights (CPRs), and intellectual property rights (IPRs), may be held by professional sport persons and managers, commercial merchants and service providers, as well as companies, creators, and innovators. It advances the view that commercial profit should accrue to those whose names and labour is exploited.²³⁴ In the earliest disputes about marketing practices in international sport, diplomatic and legal objections were successfully raised about the exploitation of marketable sporting names by non-proprietors or organizers,²³⁵ the use of sporting names considered inappropriate or incorrect,²³⁶ or names that involve misrepresentation of the status and character of a sport.²³⁷ As a result, the Olympic Movement and states’ categorise entrepreneurs actions as cheating on financial organizers and sponsors if they appropriate the labour of logo and symbols of others,²³⁸ or engage in ‘ambush marketing’ practices.²³⁹ Though the doctrine traditionally employed ethics,²⁴⁰ the more formal route is through specific legal regimes in national laws,²⁴¹ treaties,²⁴² or other general instruments providing for transnational good faith²⁴³ and unfair competition.²⁴⁴

Further, the doctrine emphasizes that sport is to be strictly aligned with beneficial products and parties that share the Olympism ethos.²⁴⁵ The premise for a restrained doctrinal approach is that commerce may be abused, lead to loss of independence by ISFs, and conflict with the best interests of the sport family as a whole.²⁴⁶ In this vein, the UNESCO International Charter of Physical Education and Sport 1978, provides that: “Even when it has spectacular features, competi-

222 Cf. - “Fifa v Greece: Your questions answered”, Thursday, 26 April 2001. See www.bbc.co.uk/ (Resistance by FIFA to a Greek law banning persons convicted for serious crime from running football) See also, N. Nissiotis, “Philosophy of Olympism”, [1979] Olympic Review 178, 181.

223 Marc J. Maes, *Ethics in Sport Management*, 153. See, Jean-Louis Chappellet, (Ed), *Sport Management: AN International Approach* (Lausanne, IOC, 1996) See also, James A.R Nafziger, *supra*, Note 8, 167-178.

224 November 25, 1892, at a meeting of the Union des Sports Athlétiques in Paris, France. See HM Abrahams & DC Young, “Olympic Games”, *Encyclopædia Britannica*, Inc 2007.

225 Pierre De Coubertain, *Selected Writings - Olympism*, (IOC, Lausanne, 2000) 604.

226 See James A.R Nafziger, *supra*, Note 9, 135-143. Cf. Manfred Ewald, *Commercialisation*, 90. See, IOC, 11th Olympic Congress - *The Future of the Olympic Games* (Vol. 1) (IOC, Lausanne, 1982).

227 International Sport and Leisure (“ISL”) S.A., Presentation to the IOC, (1983) (Untitled, Undated, IOC Archival document (Inspected August 2004)).

228 See generally, Peter Ueberroth, *Made in America*, (New York, William Morrow & Co, 1985)

229 See Toby Miller, et al, *Globalization and Sport* (London, SAGE, 2002).

230 See generally, Universal Declaration of Human Rights 1948; International Covenant on Economic, Social, and Cultural Rights 1966; UNESCO Declaration on the Principles of International Cultural Co-Operation 1966; UNESCO International Charter of Physical Education and Sport 1978; Nairobi Treaty on the Protection of the Olympic Symbol 1981; and The Olympic Charter 2007. Regional treaties on human and property rights are also important.

231 See generally, Luc Silance, *Legal Aspects of the Commercialisation of Sport*, 94-109. See N Robert Muller (Ed.) *International Olympic Academy-Collection of Lectures* (Mainz, IOA, 2004).

232 On express rights recognised for sporting groups, see for examples, Art. 11-2, Loi No. 84-610 du Juillet 1984 (France), and sec. 110, Amateur Sport Act 1978 (USA).

233 See Rule 2, (5), (8) - (11) Olympic Charter 2007. See also, Berthold Beitz, *Commercialisation in Sport*, 36. See IOC, 11th Olympic Congress - *International Co-Operation* (Vol. 2) (IOC, Lausanne, 1982) and H.R.H Prince Phillip, *Financial Aspects of Sport*, 39, *ibid*.

234 See for example, Bye-laws 1, 3.2, and

4.10.4 to Rules 7-14, Olympic Charter 2007. See Ian S. Blackshaw & Robert Cr Siekman (Eds.), *Sports Image Rights in Europe*, (The Hague, TMC Asser, 2005).

235 See Scott G. Martyn, *Selling The Five Rings: The International Olympic Committee and the Rise of Olympic Commercialism* (Utah, University of Utah Press, 2000)

236 For example, “Olympic” refers to quadruple games. It also refers exclusively to sport, sport products and not to any product.

237 Scott G. Martyn, *supra*, Note 233. See also, San Francisco Arts & Athletic Ass v USOC, 483 US 522; 107 S.Ct 2971 (1987).

238 Sport statutes of states with early positions include Luxembourg (1976); United States (1978) and France (1984). A recent statute is that of China (1995) See also *infra*, Note 241.

239 See also, J.A.R Nafziger, “Interlocking Rings of International Sport Law”, [1993] ISLR - Pandektis, 402, 404. See also, M. Sudzum & J. Rudkin-Binks, “The Countdown begins...”, [2007] 18 ENT LR 253 and A.M Blakely, “London Olympic Games and Paralympic Games Act 2006”, [2006] 17 ENT. LR 183-184.

240 The notion of “universal fundamental ethical principles” is enshrined as part of Olympism. See IOC, *Fundamental Principles of Olympism*: 1, Olympic

Charter 2007. See also, *Private Interests, Investments, and the Fair Play Doctrine*, *supra*, part 2.4.

241 States with laws designed against ambush marketing of international sport events include: Canada (1976), China (1995), Australia (1996 and 2006), South Africa (2003), Greece (2004), Portugal (2004), United Kingdom, (2006), and Switzerland (2008). These were passed to protect sponsors and organizers in host states.

242 The Nairobi Treaty on the Protection of the Olympic Symbol 1981 (Adopted 26 September 1981) is the most specific treaty applicable to sport, but is limited to the IOC Olympic symbols and has few developed states with economic or sporting potential as signatories.

243 See Arts. 1.7-1.8, UNIDROIT Principles of International Commercial Contracts (PICC) 2004, and Art. 1.201, Principles of European Contract Law (PECL) 1999.

244 Practices will not be honest that create confusion, are based on “false allegations”, or give “false indications”. Steps in this direction have been taken by Switzerland with the new Federal Act on Unlawful Competition. See Daniel Hufschmid, “New legislative steps against ambush marketing”, [2006] ISLR 77-78. See also, *supra*, Note 237.

tive sport must always be in accordance with the Olympic ideal to serve the purpose of educational sport, of which it represents the crowning epitome. It must in no way be influenced by profit seeking commercial interests.²⁴⁷ The IOC Code of Ethics 2007 provides that: "The Olympic parties must not be involved with firms or persons whose activity is inconsistent with the principles set out in the Olympic Charter and the present Code."²⁴⁸ These and other similar instruments ban associating sport with violence,²⁴⁹ tobacco,²⁵⁰ gambling,²⁵¹ and sexual activities.²⁵²

The commerce doctrine further ties sport business to particular ISL policies. It integrates educational²⁵³ and developmental²⁵⁴ approaches to commercial relations. Secondly, it reinforces the view that commerce should promote fair competitiveness, the image of sport, and not be excessive.²⁵⁵ Thirdly, it integrates Olympism into commercial and proprietary transactions.²⁵⁶ Olympism in commerce imports fair play,²⁵⁷ as well as integrity and ethics in sport management.²⁵⁸ Further, the Olympic Movement's rules and policies oppose the political or commercial abuse of sport and athletes.²⁵⁹

4.3. National Judicial Treatments and Formulation

This section examines how the judiciary in various states appreciate, understand, and react to issues involving Olympism ideals. The jurisdictions considered are England, Germany, Republic of Ireland, and the United States. It then offers a composite judicial approach to the doctrine.

4.3.1. England

In *Millar v Taylor*,²⁶⁰ Willes J. stated that: "He who engages in laborious work, which may employ his whole life will do it with more spirit, if, beside his own glory, he thinks it may be a provision for his family."²⁶¹ Aston J stated that: "Things of fancy, pleasure, or convenience are as much objects of property ... in short anything merchandisable and valuable."²⁶² In a trail blazing decision, the court in *Irvine v Talksport Ltd.* awarded damages to Mr. Eddie Irvine, a racing sport driver, whose photograph had been manipulated by defendant to market its corporate clients.²⁶³ The court accepted evidence that endorsement fees from businesses associating with sport generated income to the sport drivers.²⁶⁴ The judge took the view that the sport person's right was within the human right to property.²⁶⁵ The Court of Appeal in *FA*

Premier League & Ors v Panini UK Ltd.,²⁶⁶ held that the defendant acted unlawfully when without permission it commercially exploited emblems, badges, club strips to sell photographic images of the football employees of the claimants in the economically valuable collectible stickers business. Indeed, the defendant bid for an exclusive licensing contract with the defendant but lost to another company. Its claim that the use of emblems, club strips, etc. were incidental was rejected.

4.3.2. Germany

In *Radio Station Hamburg v Hamburger SV and FC St. Pauli*,²⁶⁷ the Hamburg court rejected a claim based on the German constitution to free broadcasting right for football matches organized or played by the defendants. The station suggested that this right was derived from the constitution and was not amenable to paying fees. The court held that the events and rights attached to it were assets to be protected under German law.²⁶⁸ Similarly, in *Oliver Khan v EA - Sports*,²⁶⁹ the court awarded damages to the claimant for the unlicensed use of his image in a computer football game. It rejected defendant's reliance on constitutional freedom of art defence.²⁷⁰ The court reasoned that the defendant's action in commercially designing the game with functions to suit the whims of the player, the claimant's personality right to economic self determination had been infringed.²⁷¹

4.3.3. Republic of Ireland

In *Adidas KG v Charles O'Neil & Co. Ltd.*,²⁷² the trial court and the Supreme Court ruled that claimant could not prevent the defendants from using three steps configuration on sport wear. However, Mr. Justice Henchy departed from the majority by recognizing that the claimant had a renowned particular distinctive design which had been well marketed, brought it custom, and earned it goodwill. Neither the defendant nor any other person were entitled to poach or benefit from acquired goodwill. There was in his opinion no reason why the traditional tort of passing off could not be extended to censure defendant's conduct or limited remedies granted to protect claimant's commercial goodwill in the sport market. In his view the defendant's action constituted unfair trading.²⁷³

4.3.4. United States

In *Pittsburgh Athletic Co v KQV Broadcasting Co.*,²⁷⁴ the claimant suc-

245 See also, John Macaloon, *infra*, Note 256, and Lamartine Dacosta, *The Central Problems Facing Olympism in the Face of Constraints of Commercialisation and Possible Solutions*, 77, IOA, Note 256. Cf. K.H Shaddah, *infra*, Note 256.

246 See Manfred Ewald, *supra*, Note 221, and K.H Shaddah, *infra*, Note 256. See also, Hon Mr. Justice Robin Jacob, "Trademarks and the Olympic Games", [2000] 21 EIPR 1, 5. David Conn, *The Football Business* (Edinburgh, Mainstream, 1997) Cf. B. Penton, "Fans' fury at move to take over Man Utd", *The Daily Telegraph* (UK), Tuesday October 5, 2004, 1; K. Griffiths, "He wouldn't kiss the badge but he'd bid for the club behind it. Glazermania comes to Man Utd", *The Business, The Independent on Sunday* (UK), 10 October 2004, 5-6; and M. Goodman & Anor, "United they stand in a bid to beat Glazer", *The Sunday Times* (UK), October 17, 2004, 15.

247 Art. 3.3, UNESCO ICPES 1978. This applies to taking performance enhancing drugs, but other forms of cheating.

248 Art. B6, IOC Code of Ethics 2007.

249 Following the appropriately condemned violence induced conduct of global football star, Mr. Zidane against his Italian opponent at FIFA Football World Cup in Germany 2006, it was reported that

an entrepreneur applied to register the headbutt as a trademark.

250 Although cigarette smoking is not an illegal item, it is contrary to the Olympic Movement's stance against the serious side effect of smoking. Cf. James A.R Nafziger, *supra*, Note 9, 174. (During the FIFA 2002 World Cup, the Korean state tobacco company was used to produce World Cup cigarettes.) See also, O. Slot, "After smoking past the competition, Olympic champion sells cigarettes", *The Times* (UK), Saturday October 23, 2004, 35 (Reporting that Mr. Liu Xiang, gold medal winner in the 110 meters hurdles at Athens Olympic Games agreed to endorse cigarettes.).

251 See Art. A5, IOC Code of Ethics 2007. Cf. O. Olatawura, "Why There May Not be an Extraterritorial Sport Right to Online Gambling," 27 *LOY. L.A. Int'l & Comp. L. Rev.* 371 (2005). See also, S. Mott, "We're still blind to the evil of gambling", *Sport, The Daily Telegraph* (UK), Tuesday, March 27, 2007, S.9 and L. Siddons, "Tennis Officials Focus on Match-Fixing Probe as Davis Cup Nears", 25 November 2007.

252 See G. Smith, *infra*, Note 259.

253 This involves role modeling by sports persons and organisations. See generally, Don Anthony, *The Propagation of Olympic Education as a Weapon against the Corruption and Commercialisation*

Of World-Wide Sport, 157. See, IOA, 32ND Session - Commercialisation of Sport and the Olympic Games (Athens, IOA, 1992).

254 Oleg Milshtein, *Commercialization in Sport and the Pedagogical Aims of the Olympic Movement*, 118. See, IOA, *ibid*.

255 Marc J. Maes, *supra*, Note 221. See also, Arts. 7.1 and 11, UNESCO ICPES 1978 and Preamble, Ottawa Declaration - ICPES - 1990.

256 See *supra*, Note 121. See also, John Macaloon, *Sponsorship Policy and Olympic Ideology: Towards a New Discourse*, 62. See IOA, *supra*, Note 253; Don Anthony, *supra*, Note 253, and Oleg Milshtein, *ibid*. Cf. K.H Shaddah, "Reflections on Olympism", [1979] *Olympic Review* 510, 511

257 See, IOC, "Olympism and Fair Play," *Factsheet*, 2 December 2002, 4. (Fair play involves "controlling commercial and political influences and those of privileged classes which can, for example affect fairness of opportunity.") See also, Francesco Gnecci- Ruscone, *supra*, Note 170 24.

258 Cf. IOC, IOC Code of Ethics 2007 (Adopted 26 April 2007 by IOC Executive Board) In general, unethical practices are contrary to ISL. These apply to management, marketing, and contracting techniques. See also, *Adidas KG v Charles O'Neil & Co. Ltd*, *infra*,

Note 269; and MasterCard v FIFA, *supra*, Note 125.

259 See Rule 2.10, Olympic Charter 2007. Cf. G. Smith, "Tennis flirts with an eye on total glamour", *The Times* (UK) Saturday October 23 2004, 35 (Report that the organizers of the Madrid Masters (2004) employed catwalk models as ball girls, which a legislator called 'an insult to women', in order to glamourise and market the tournament. Meanwhile, leading tennis player, Mr. Agassi was reported to have commented about the inefficiency of some ball girls.)

260 (1769) 4 Burr 230; 98 ER 201.

261 *Ibid*, 2335; *Ibid*, 218.

262 *Ibid*, 2340; *Ibid*, 221.

263 See [2002] EWHC 367.

264 *Ibid*, 426-427, and 433-434.

265 *Ibid*, 437.

266 *Supra*, Note 41. This decision impliedly overrules *Trebor Basset v FA*, *supra*, Note 41.

267 *Supra*, Note 30.

268 Cf. Art 11, Grungetsz ("GG"). See *infra*, Note 271.

269 Hamburg District Court. Judgment delivered 25 April 2003.

270 Art. 5 (3), GG.

271 Cf. Art. 5 (2), GG. For liability for appropriation of first names, see *Uwe Seeler, BGH NJW 1185 (1983)* and *Berti Vogts NJW - RR 748 (1988)*.

272 [1983] FSR 76.

cessfully restrained the defendant from continuing to broadcast play by play reports of its games. The claimant arranged for its employees to report events inside the stadium from strategic locations outside. The court rejected the view the defendant had done no wrong or had a right to do what it was doing.²⁷⁵ It held that investment solely made by the claimant justified an exclusive right to capitalize on the value and that the property rights in the events belonged to claimant. On the other hand, the defendant's conduct interfered and deprived the claimant of economic relations with others. It also unjustly enriched itself at claimant's expense, and was appropriating the goodwill, and engaging in unfair competition.

In *Zacchini v Scripps-Howard Broadcasting Co.*,²⁷⁶ while it was accepted that there was no property right in a spectacle, a right to monetary compensation was granted to an artiste who perfected a method whereby he was fired as a human cannon ball into a net. The defendant televised the moments despite his objection. According to the court, the defendant's broadcast threatened the economic value of the claimant's performance.²⁷⁷ It was irrelevant that the moment had been shown in the news only and no financial benefit derived.

In *San Francisco Arts & Athletic Ass v USOC*,²⁷⁸ the Supreme Court restrained the appellants from using the word "Olympic" in their games. The appellants organized and marketed goods for its "Gay Olympic Games" without the permission of the USOC, the statutory recognized organizer of Olympic movement activities in the US. The majority held that the USOC had the exclusive right to exploit the word "Olympic" in the United States. By using the word "Olympic Games" the appellants were appropriating the domestic and international commercial goodwill of the USOC and the IOC with regard to the "Olympic Games."

In *Reebok Int. Ltd v Marnatech Ent.*,²⁷⁹ at the request of a US based apparel claimant, the court restrained a Mexican based sport shoes counterfeit manufacturer with products that competed with original goods in the Mexican market and were also exported to the US market under the defendant's direction. The court relied on the principles of equity to issue orders protecting the claim.

In *Boston Professional Hockey Ass v Dallas Cap & Emblem*,²⁸⁰ the court of appeals deliberately expanded the tilt of the trademark law and unfair competition law to protect the emblems business of sport organisations, rather than the traditional consumer protection focus. It was persuaded by the fact that the efforts of the claimants produced a unique lucrative commercial global recognition and desire for the trademark emblems. The defendant's conduct on the other hand interfered with contractual rights granted to licences.

4.3.5. Formulation

The decisions show that courts will promote commerce and reward legitimate investors in sport. They have been impressed by labour and products of economic value created by parties which do not create a danger to lawful competition. They do not appreciate unfair competition. They have noticeably rejected reliance on claims of constitutional right to information or media, which may arguably fall within the access doctrine. This approach is consistent with national constitutions. The judicial approach to the commerce doctrine may be formulated as follows:

Sport creates products with economic value. In general, parties that invest organizational, professional, and financial resources to develop and maintain sport will be allowed to control and profit from their core investments. Activities detrimental to their investments would be limited. Unauthorised competitive commercial practices and unfair trading practices will be forbidden.

4.4. Private Interests, Investments, and the Commerce Doctrine

High risk of financial failure in sport hampers international sport business and development. To incentivise, reward, and protect investors, special *sport property rights* regimes need to be privately developed for transactions. The most radical of these rights and claims is the recognition and treatment of sport persons as 'property'.²⁸¹ In companies books they are treated as assets. Restrictions are imposed in their employment and relations with other clubs and companies. The need for income to promote sport development and sustain finance is a basis for recognition of character and merchandising rights to investors.²⁸² Similarly, international and national sport federations need merchandising protection for them to be autonomous, manage the challenges of globalisation of sport, and defend their goals and objectives from purely commercial entrepreneurs involved in sport.²⁸³ Finally, international private investors must be allowed to rely on transnational procedural and substantive norms based on or relevant to sport in matters of the applicable law.²⁸⁴ This means that the national law must be given a transnational law characterization.

4.5. Public Power, Private Rights, and the Commerce Doctrine

Relating commerce with sport, three strands of public power are decipherable. In the first situation, it is incompatible with the commerce doctrine for the state to monopolise or prevent commercial opportunities in sport.²⁸⁵ The state is under a duty to open up the channels of sport commerce for sport development and international relations.²⁸⁶ Accordingly, states that deny commercial rights and businesses in sport breach international sport law.²⁸⁷ It has been declared that states should not keep exclusive control of radio and television sport broadcasting stations or rights.²⁸⁸ Indeed contractual tie up between the public and private sectors in sport broadcasting has been prevented.²⁸⁹ This pro-commerce and investment position is to accomplish: promoting access,²⁹⁰ give consumers choice,²⁹¹ and enable minority or less popular sport to grow.²⁹² Other reasons are to reduce conflict of interests and bias between state agencies and private investors, concentrate state resources on grass roots sport development, and minimize the use of sport in political and public corruption.²⁹³ On this basis an important duty of the state includes enacting appropriate statutes for sport development and the promotion and protection of investment. A second strand of public power is to curtail abuse of right, monopolies, and prevent inequality in sport. Here, state power under the commerce doctrine affects the process of private profit maximization, but does not affect commerce. State interests in based on the fact that sport relies on addictive supporters and does not follow normal market behaviour. A third strand of public power acknowledges limited exceptions to the role of commerce in sport. This applies to private corruption,²⁹⁴ actions contrary to fundamen-

273 Ibid, 94.

274 24 F. Supp 490 (WD. Fa. 1938).

275 Cf. *Victoria Park v Taylor*, supra, Note 35.

276 433 US 562 (1977); 53 L.Ed 965.

277 Ibid, 576 - 577; Ibid, 976-977.

278 483 US 522; 107 S.Ct. 2971 (1987).

279 970 F. 2d 552 (9th Cir. 1992) See also, *FA v Panini*, supra, Note 41.

280 Supra, Note 47 Cf. Ibid, 597 F. 2d. 71 (5th Cir., 1979).

281 See *Bournemouth v Manchester United FC*, supra, Note 108.

282 See A-G Colomer's opinion in *Arsenal FC v Reed*, [2002] ETMR 975 (paras. 73-84).

283 Ibid. Similarly, the Nairobi Treaty on the

Protection of the Olympic Symbols 1981 was devised to protect the IOC's interest in the Olympic name and brand. For state action to protect local federations, see supra, Notes 237 and 239. See also, A.M Wall, "Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events", [1996] 7 *Marq Sports LJ* 77. Cf. *Trebor Basset v FA*, supra, Note 41 and *RFU Nike v Cotton Traders*, supra, Note 42.

284 Cf. Art. 1.9, UNIDROIT PICC 2004.

285 See supra, part 4.2. Cf. *Competition Law and the Access Doctrine*, supra, part 1.4.

286 See Res. 24, European Parliament on the Commission Report to the European

Council with a View to Safeguarding the Current Sport Structures and Maintaining the Social Framework Within the Community Framework, 7 September 2000. (Minutes 7-9-2000). ROBERT Siekmann & Janwillem Soek (Eds), *The European Union & Sport*, (The Hague, TMC Asser, 2005) 59. See Cf. M. Oloja, supra, Note 12.

287 States in this category are Cuba and North Korea. It is irrelevant that this position is classified as a modern version. Cf. Supra, part 3.2 and part 4.1. See also, *Blackler v New Zealand Rugby Football League*, supra, Note 23.

288 See Res. 7, Resolution of the European Parliament on the Broadcasting of

Sports Events, 22 May 1996. OJ C 166, 10-6-1996, 109.

289 See *Screensport/EBU*, OJ L 63, 9 March 1991, 32-44.

290 See, supra, part 1.

291 See RES. 5 and 7, supra, Note 284.

292 EC Commission, Consultation Document of DGX, *The European Model Of Sport - The Future Role of Public TV IN Europe*. See Robert Siekmann & Janwillem Soek (Eds), supra, Note 286, 38.

293 Political and public office corruption has been a serious problem in several jurisdictions. For global concern see, Transparency International, "Corruption in Sport". In Africa, it is huge. In

tal national and international public policies,²⁹⁵ and financial and economic criminals.²⁹⁶ The state has the power to intervene to correct practices that constitute excessive commercialisation.²⁹⁷

Part V - Conclusion

5.1. Findings

The examination and analysis undertaken confirm the existence of the “access”, “fair play”, “Olympism”, and “commerce” doctrines as fundamental transnational legal doctrines in sport theory and practice. These have evolved to direct or match the characteristics and spread of sport. Generally, they have a wide scope, contain general and specific rules and principles applied to issues, and impose high standards on participants and those subject to the doctrines. Their legal basis can be discovered in several international and national law sources and their application in local courts. Though there are cases where the doctrines have not been recognized or applied,²⁹⁸ in a large number of cases, courts will stretch existing laws or develop new methods to accommodate the doctrines.²⁹⁹

5.2. Stakeholders Standing

These four doctrines are to be applied in private and public tribunals as part of the applicable rules of every legal system. ISFs and entrepreneurs can enforce the fair play, commerce and olympism doctrines. In *AEK PAE & Anor. v UEFA*,³⁰⁰ a CAS arbitral tribunal ruled that defendant had a legitimate concern in prohibiting multiple ownership of football clubs entitled to play in the same competition. This was based on actual or potential public perception of the integrity of the sport. This concern sufficed to prevent claimants’ owners, English National Investment Company (ENIC), from multiple ownership of competing clubs based in separate jurisdictions. The tribunal held that the financial benefits from common proprietorship risked damaging the interests and perception of fans, other clubs, and gave rise to temptations and pressures. In the tribunal’s analysis, it did not matter that no sport rule was broken or actual offence committed. IOC and its regional and national affiliates remain primarily responsible for formulating the Olympism doctrine. All members of the Olympic movement are obliged to implement the principles. Governments have an interest in participating in the formulation and implementation of the access, fair play, and commerce doctrines. While not a principal party in the formulation of the Olympism doctrine, government has a duty to implement the rules and principles.³⁰¹ Sport persons have a vested interest in all four doctrines.³⁰² While supporters have interests, the cases show they are marginalised.³⁰³

5.3. General Functions, Strengths, and Limitations of Doctrines

The doctrines generally establish the existence of an autonomous *lex*

sportiva. They justify a *lex specialis* status, provide a framework of responsibility and support to sport federations, and affect the powers and competence of national governments. Doctrinal sources have considerable strength as inherent and transnational law of sport. Their existence allows a distinct inward analysis of issues, rather than the application of external doctrines and methodologies. Because they pre-date the various public sources of ISL and are applied by the legal and diplomatic community, they achieve a status of customary ISL.³⁰⁴ They eliminate the need to rely exclusively on national statute or jurisprudence, particularly in achieving a just and desirable result.³⁰⁵ They may therefore challenge inconsistent general international law resolutions and principles or supplant domestic law doctrines. Domestic authorities would generally be obliged to apply them. However there are practical limitations of recognition, identification, evolution, and management within national legal systems. Domestic courts generally do not refer to the doctrines in cases before them. This may be due to the failure by ISFs to publicise these doctrines in the legal academy. There is also resistance to applying the doctrines to modern trends.³⁰⁶ Apart from being related, the doctrines remain elastic.³⁰⁷ Cases may have connections with more than one doctrine. The conflicting and competing aims of claimants make doctrines difficult to apply or reconcile.³⁰⁸

5.4. The Future

The access, fair play, Olympism, and commerce doctrines will continue to loom large and be accepted to influence the direction of private and public activities in international sport law’s landscape. Unlike other existing controversial and problematic doctrines,³⁰⁹ these four doctrines have the innate ability to evolve to suit the growth of sport, and enjoy popular acceptance by a wider spectrum of participants and stakeholders. Nonetheless, pressures from businesses, politicians, and bureaucrats, require that the doctrines be fully developed and formally documented in international instruments and national sport provisions. A failure may lead to reliance on territorial practices with consequent adverse affect on sport and sport law. Indeed the doctrines promote the need for a model Sport Law to safeguard and promote the development of sport.

The International Sports Law Journal

Nigeria, it was recently discovered that \$37m was missing out of a budget of \$43m. See O. Olatawura, “‘Complaints United v Opportunities United’ - Realities, Challenges, and Opportunities of Promoting Sport in Nigeria” forthcoming (Causa Sport) In South Africa, see John Nauright, Sport, Cultures, and Identities in South Africa (Leicester, Continuum, 1998) 119-120. In Kenya, see BBC Sport, “Kenya ‘riddled with corruption’”, Friday, 26 October, 2001, news.bbc.co.uk/sport/hi/football/africa and Transparency International /Kenya TI, “Red Card for Corruption in Sport? Reforming Sport Management in Kenya”.
²⁹⁴For jurisdictions on “sporting fraud”, see supra, Note 207. Cf. Reuters, “Back down or face suspension, FIFA warns Poland”; - “FIFA threatens to ban Greece”; BBC, “Tanzania face football ban”, 27, October 2000.
²⁹⁵Exceptions apply to betting and gambling, and denial of access to local investors. For the former, see L. Siddons, supra, Note 251, and H.

Wallop, “FBI seizes British online bets chief”, The Daily Telegraph (UK), Telegraph Business, Tuesday July 18, 2006, 1. See generally, O. Olatawura, supra, Note 251. For the latter, see M. Oloja, supra, Note 12.
²⁹⁶See Graham Johnson, Football and Gangsters, (Edinburgh, Mainstream, 2007).
²⁹⁷Cf. David Rowe, Sport, Culture & Media - The Unruly Trinity (Berkshire, Open University, 2004) 74 - 79.
²⁹⁸See Victoria Racing v Taylor, supra, Note 35 (Access/Fair Play), DeFrantz & Ors. v USOC, supra, Note 194 (Olympism); Wheeler v Leicester City Council, supra, Note 201; and Carlton Communications v ITV, supra, Note 138 (Fair Play).
²⁹⁹See for examples, Zacchini v Scripps-Howard, supra, Note 276; Boston Professional Hockey Ass v Dallas Cap & Emblem, Note 47; Football Association, supra, Note 122; and Irvine v Talksport, supra, Note 262.
³⁰⁰Supra, Note 28.

³⁰¹ There is neither power nor obligation to enforce formulated rules that contravene constitutional rights, international law, or international sport law. See R. 45 (2), Olympic Charter 2007 (Absolute power by IOC to deny access to persons from participating in the Olympic Games).
³⁰² See generally, Kemp v NZRFL, supra, Note 37 (Access); Raguz v Sullivan, supra, Note 121; (Fair Play), DeFrantz v USOC, supra, Note 209 (Olympism); and Khan v E-A Sports, supra, Note 269 (Commerce).
³⁰³ See generally, FIFA v McDonald, supra, Note 6; Duft v Newcastle United FC, [2000] ISLR -SLR 101; and Arnolt v FA, Unreported 2 February 1998. See also, Paul Weiler, supra, Note 50.
³⁰⁴ Cf. Oscar Schachter, International Law in Theory And Practice (Dordrecht, Martinus Nijhoff, 1991) 335.
³⁰⁵ Cf. Ex parte RAM Racecourses Ltd., supra, Note 14.
³⁰⁶ See, D. Lloyd, “Lloyd: Give umpires full use of ‘Hawkeyes’”, The Evening Standard, Tuesday 20 July 2004, 73. (In

a lecture titled ‘Spirit of Cricket’, Mr. Clive Lloyd called for approval of excluded technology by the International Cricket Council (ICC) for match officials on the basis that they aided performance analysis and decisions.) See also, M. Scott, “Weary Wenger says it is time to tune in to video technology”, Sport, The Guardian (UK), Wednesday, November 1, 2006, 5... Cf. the Puma catsuit case, supra, Note 47.
³⁰⁷ Contrast “Fair play” under the Council of Europe’s Code of Sport Ethics 2001, supra, Note 89 with Olympism., See also, Deborah P McDonald, A Conceptual Analysis of Fair Play within Olympism, 95-100. See supra, IOA, Note 145.
³⁰⁸ Ibid. See, Trebor Basset v FA, supra, Note 42. Cf. FA Premier League v Panini, supra, Note 42.
³⁰⁹ These doctrines are subject to an examination in a further article titled: ‘Problematic Doctrines of International Sport Law’. (Forthcoming).

Some Day the Mountains Might Get 'em but the Law Never Will*

by David McArdle**

This paper was presented at the International Institute for the Sociology of Law's Workshop in Law and Popular Culture, Onati, in May 2008. It was written in the North of Scotland immediately after completing the last in a series of interviews that are concerned with Scottish adventure activities providers' perceptions of the legal and regulatory framework that applies to their activities. These interviews represent the first stage of a much larger comparative project into adventure activities regulation in Scotland and South Africa, funded in part by the Carnegie Trust and in part by Commonwealth Universities/British Academy collaborative research programme, with the South Africa element being carried out in collaboration with Steve Cornelius at the University of Johannesburg. The paper hasn't undergone many changes since the train left Aviemore (although I have got rid of the spelling mistakes) and ordinarily I wouldn't consider sharing it with others, but I'm keen to offer it for peoples' consideration because I think it (inadvertently) shows some insight into the thought processes that can lie behind empirical research. As (academic) sports lawyers we don't do enough of empirical work, which is to the detriment of both the discipline as a whole and our personal understanding of how law and policy issues actually impact upon sport and recreational activities.

The Mountain Cafe, Aviemore, April 28

This is just an initial reflection on a series of interviews carried out the past couple of months. It's too early in the piece for it to amount to more than a collection of first impressions, ideas for future directions, pleas for help and general jottings at the moment; and while it concerns a project I've got quite excited about and I've loved doing the fieldwork for, I really should just mull it over for a few months in order to decide where it's going and decide what use I can make, if any, of the data gathered thus far. I probably shouldn't be even trying to turn it into a paper right now, but I don't think it's entirely without merit and hopefully it will stimulate some discussion.

At the moment, the project's not progressed beyond this series of preliminary interviews that have been concerned with establishing what issues there are, if any, and thus trying to determine how to take the research forward. That initial part has been funded by the Carnegie Trust, a wonderfully arcane Scottish funding body (they just send a cheque, no questions asked) which kindly provided the sum of £770 - which has been enough to cover my expenses in carrying out seven unstructured interviews with the people who own or manage adventure activities centres in the far North of Scotland. None of the interview sites have been further south than Aviemore, some of them have been out on the islands and, on occasion, it's taken two days to get there and back for the purpose of doing a one-hour interview. Actually, make that three days in the case of one of the island trips, when Caledonian MacBrayne decided to cancel the ferry services because of a wee bit breeze. That was when I decided it was time to buy a laptop, so having finally embraced all the modern technology that the new millennium has to offer, I'm typing this in a cafe in

Aviemore ("the best panini's in the Highlands") after finishing one last interview in the Cairngorms and cycling back in the snow to await the afternoon train.

The remoteness of the locations - both here and in South Africa - has been a key aspect of the funding bids and underpins the thinking behind the whole enterprise. These are the places where, to quote one of the interviewees, "our strength is our location, and our weakness is our location". The strength, of course, is in the beauty of the landscape and the challenges presented by an environment that attracts climbers, walkers, mountain bikers and sundry outdoor enthusiasts of all standards from the world over - people whose contribution to the economy of the region is so important because there's not many ways of earning a living up here beyond tourism. The drawback is that you can't get here from the big population centres of central Scotland, participate for a reasonable period in an activity and then travel back in the same day, which is a particular consideration when your main market lies in schools groups - a sector where both the time and the money to take part in outdoor activities are increasingly scarce thanks to every-declining education budgets and an ever-expanding curriculum. Apparently there are secondary schools in Scotland where the children spend an average of *less than one minute a week* in off-site activities. In Orkney it's nearly five hours a week. Now, there are all sorts of reasons for that, and given that not all of these centres offer accommodation (most of them are non-residential both by preference and by necessity), their attractiveness to schools and other groups from anywhere south of Perth is decidedly limited. So, these places operate on very narrow profit margins and are highly reliant on a few busy periods (May and June) with their work coming predominantly from private schools or the wealthier parents in the state sector who can afford either the accommodation that is available on site or that which is available nearby - usually the Youth Hostel Association or similar lower-end accommodation. Outwith those times and those people there's not much work around, and a wet summer has the potential to stretch the smaller centres beyond breaking-point, so in order to remain economically viable they make extensive use of freelance instructors who support the one or two permanent staff that run the business on a daily basis (and who take some of the sessions when the need or the opportunity arises). Sometimes, instructors are employed on short fixed-term contracts, especially at the larger centres in the busier periods.

Usually, the freelancers, fixed-term workers and the permanent staff are multi-qualified - because instructors who are able to offer one or two activities aren't much use to a multi-activity provider, whereas somebody who can offer several disciplines can have a group for a week and do different activities with them each day. Most of the centres just operate with their permanent staff during the winter months, if they operate at all, and the freelancers and those who work on fixed-term contracts go off to do other things. Some of the younger ones go work in the Alps; one of them is a stamp dealer; one is a practising

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artist (dreadful watercolours of roaring stags etc but the tourists love it); a few pick up work as ski instructors closer to home while others work in retail/catering in Aviemore, Inverness, Fort William.

But what was the idea behind this research? Why have I spent far too many hours being cold, wet, dirty and generally prone to abuse by ScotRail and the hoteliers of this bucolic jewel in the septic isle? Well, first of all it's important to note that in the first week of 2008 sixteen people died on Scotland's roads - the same number as were killed during the first week in 2007 - that's always a worthwhile retort to colleagues who like to tell me how nasty London is - and this year, once again, at least sixty people will die on the roads in Aberdeenshire alone. In contrast, I'm fairly sure that nobody has died during an activity run by a Scottish outdoor activity centre since the Cairngorms disaster in 1971 (when seven young people out of Edinburgh Council's flagship Lagganlia Centre died in an avalanche). In 2007 a 14 year-old girl died during an army cadet expedition in the Western Isles, in an escapade that bore a chilling similarity to the Lyme Bay disaster in its macho stupidity and breathtaking incompetence (the poor girl had been provided with a completely inappropriate lifejacket and after her boat capsized more than ninety minutes elapsed before anyone even realised she was missing), but people are far more at risk in their journey to and from the centre than in anything they undertake once they arrive. I was, and remain, confident that whatever issues and concerns this research might ultimately reveal about adventure activities in Scotland, the safety of the participants won't be among them.

Beyond that, there wasn't any particular motivating factor at all. It's a project I've wanted to do since I moved to Scotland six years ago, and I guess it comes out of some personal injury research I've been doing with Mark James, plus my previous minor excursions into the role of Adventure Activities Licensing Association (AALA, the regulatory body). There were issues that I expected the activity providers would identify as relevant - child protection obviously; accommodating kids with special needs; various employment law, personal injury and health and safety matters - but I didn't have any particular questions I 'wanted answers to'. This project isn't about what I think is interesting or important, because I'm very much the outsider in this context and what might strike me as of great import may be quite immaterial to those who work in these environments on a daily basis.

Accordingly, the first two interviews were completely unstructured, the initial question simply being 'tell me about the centre and how you got involved with it', and then seeing what direction that took us in. Sitting with a Dictaphone in front of a complete stranger with no preconceptions and no comfort blanket of questions to fall back on if the conversation ran dry was difficult, and I guess I was relying on what I'd discovered with my previous qualitative research projects - that people will happily talk for hours about themselves and their jobs. Fortunately, both my first two interviewees were quite talkative, although that wasn't always the case.

Over the summer, I'll go through the data and see which issues have consistently been raised, and which ones have only arisen a few times. Then I need to decide how to structure the next stage, which will involve teasing out the similarities and differences with the regulatory framework in South Africa. At this early stage it seems the substantive legal issues that cause most concern in this jurisdiction are indeed concerned with child protection issues; and, less expectedly, the provisions dealing with who can drive minibuses. It seems the relevant Regulations were changed in 1997 and it's a lot harder to get the licence now - I think it used to be the case that if you were over 21 and had a driver's licence, you were OK. Other issues that are related to who can drive and for how long have also arisen. There does seem to be some confusion about what the Regulations require so I will have a go at clearing that up, but of course people's *perceptions* of the juridical field are no less important than what is actually required. There, three pages before alluding to Bourdieu or any other dead French theorist.

Other oft-raised issues have centred on what appears to be the declining opportunities for children to participate in a whole range of outdoor adventure activities. According to the respondents, responsi-

bility for same lies variously with fearful parents and scaredy-cat local education authorities, under-resourced schools, the putative national malaise ("my biggest competitor isn't another activity provider, it's the play-stations"), an overcrowded curriculum especially at secondary level, schools' fears of litigation and our being a country so obsessed with football that anything else is simply too uncool to contemplate, especially if it lends itself to periods of quiet contemplation and requires the ability to think for yourself. A closely-allied theme concerns the declining opportunities for children to undertake the Duke of Edinburgh award scheme - many of the centres want to offer DofE activities and there are schools and plenty of kids who want to do them, but all except the wealthiest state schools and those in the private sector are budgeting around £25 per child per day for DofE and the centres are saying they can't do it for less than £300 a day as a minimum, due in part to AALA/local education authority requirements about ratios (1 highly qualified instructor for every eight clients) and the cost of freelance staff:

"We don't do Duke of Edinburgh; it doesn't pay and we're not set up for it. Occasionally people will ask if we can (run an activity) and I think about what I need to do, risk assessment, instructors and so on, and I'll say 'OK we can do it for £600' and the group is, like, 'err, no, it's only three kids for one night. Can't you do it for about £100...?'"

The schools that want to bring DofE groups can usually do so only at a time when the centres are busy anyway - May and June - and when, consequently, most well-established centres are full and the freelancers with the necessary qualifications to take those groups are already turning work away at that time.

So, we have the broad issue of declining participation opportunities and a small number of substantive legal issues that have arisen frequently. Beyond that, another important, recurring theme concerns the consequences of what is regarded as excessive regulation. AALA, the local education authorities, sports governing bodies, VisitScotland (which deals with various tourism-related issues) and sundry other organisations have provisions that the centres need to comply with before they can gain accreditation - and the relationship between AALA, the governing bodies and the local education authorities means that if you don't have the accreditation required by all of them you can't work with particular groups such as unaccompanied children. Consequently, some providers are wondering if they can survive by not working at all with unaccompanied children (which would spare them the hassle and expense of complying with the AALA/LEA frameworks) and rely instead on adult groups, families and the hiring out of equipment. AALA itself is well-regarded, and I've heard nothing but praise for the two fellas up here who actually carry out the inspections, but there is a view that it is unnecessarily expensive, duplicates what is done by the other regulators in terms of licensing and was an over-the-top reaction to the activities of a single rogue operator: to quote one participant, "setting up AALA was using a sledgehammer to crack a nut, and it was the wrong nut." Rightly or wrongly, AALA, the national governing bodies and VisitScotland are perceived as using outdoor activity providers as an income stream, charging too much and offering too little in return:

It's really, really, really important to understand that awarding awards is a money-making business, without a doubt. The rich (governing bodies) must turn over close to a million pounds through course provision alone, and being membership organisations can encourage people to upgrade through the 4 or 5 different levels, and to cross-qualify. So somebody who wants to be a top-level ski-instructor and a medium-level snowboarder can end up doing 6 or 7 courses, and they don't come cheap. There are plenty of instructors who make a very nice living by doing nothing other than getting people through those courses, getting them from zero to hero very quickly.

So at this early stage it appears that the focus of the research is going to be on a handful of specific legal issues that have repeatedly arisen, together with concerns about the regulatory framework and the impact of those issues on participation opportunities especially for children who are not from particularly privileged backgrounds (both in terms of parental income and the attitudes of the Schools and educa-

tion authorities). While the outdoor activities field is clearly subject to various regulatory structures, it also remains resistant to change for various legitimate and less legitimate reasons. Cairngorm and Lyme Bay were obviously important in changing how these centres operate, but does this regulatory framework truly use a sledgehammer to crack the proverbial nut?; Is too much being charged for too little by the regulatory agencies?; Is there unnecessary duplication in what they do?; Have we created a framework that serves to restrict access to outdoor activities rather than encouraging it? No less importantly, how do we reconcile those concerns with the entirely proper demands for effective regulation that gets rid of the cowboy operators and ensures proper consideration of the risks that one reasonably ought to antici-

pate? If that framework is regarded, rightly or wrongly, as facilitating a money-making enterprise, and if these centres do decide to bail out of AALA and their relationships with local education authorities as a consequence, what impact is that going to have on the provision of safe, well-run activities for school-age participants, in particular those from less privileged backgrounds? While it's too early to answer those questions, there are clearly issues and interests at stake here that I didn't anticipate two months ago. But that's why empirical research is important, and why we need to do more of it. Sure, you get cold and wet occasionally; but you also come across important issues that you'd never uncover otherwise.

The International Sports Law Journal

Global IP & Patents Meeting London 2008

The Importance of IP Rights in Sport

by Ian Blackshaw*

Introductory: The Commercialisation of Sport

Sport is now big business accounting for more than 3% of world trade. In the European Union, sport has developed into a discrete business worth more than 2% of the combined GNP of the twenty-seven Member States. Indeed, according to Sepp Blatter, the President of FIFA, the World Governing Body of Football, and I would entirely agree with him, sport is now a 'product' in its own right, and there is much to play for not only on but also off the field of play. Whether this is a good thing as far as the integrity of sport is concerned is, of course, another matter!

For example, licensing and merchandising rights in relation to major sports events, such as the FIFA World Cup and the Olympic Games, are 'hot properties', commanding high returns for the rights owners ('licensors') and concessionaires ('licensees') alike. See Chapters 10 & 11 by Ian Blackshaw in *'Sports Law'* by Gardiner et al, 2006 Third Edition, Cavendish Publishing, London, ISBN 10: 1-85941-894-5.

Again, the commercial exploitation of the image rights of famous sports persons, such as David Beckham and Tiger Woods, is also big business. See *'Sports Image Rights in Europe'*, Ian S. Blackshaw & Robert C. R. Siekmann, 2005 TMC Asser Press, The Hague, The Netherlands, ISBN 90-6704-195-5.

Likewise, sports broadcasting and new media rights are also money-spinners. For example, the English FA Premier League has sold its broadcasting rights for the 2007-2010 seasons for a record sum of £1.7 billion!

Underpinning all this commercialization of sport are the corresponding IP Rights, especially trademarks and copyright, since under English Law there is no legally recognized right in a sporting event *per*

se. See *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor and Others* [1937] 58 CLR 479. In that case, Latham CJ held that:

"A spectacle cannot be 'owned' in any ordinary sense of that word."

Likewise, under English Law, there is no right of personality *per se*. So, sports 'stars' have to rely on a 'rag bag' of rights, including trademarks, copyright and 'passing off' to protect their images and capitalise on them.

Other IP Rights, such as Patents, for example, are of limited application and importance in sports law, although they do figure - to a certain extent - for example, in connection with the commercialisation of sports equipment and so-called 'sports movements' such as the *'Fosbury flop'*.

Sports Event Marks

Perhaps the most distinctive and recognized sports event mark in the world are the five interconnected rings in blue, yellow, black, green and red symbolizing the world-wide reach of the Olympic Movement and the Olympic Games - often referred to as the 'greatest sporting show on Earth!'. The Olympic Rings enjoy special legal protection at the international and national levels around the world. At the international level, they are protected by the so-called 'Nairobi Agreement' - the Agreement on the Protection of the Olympic Symbol of 1981. At the national level in the UK, the Rings are protected under the provisions of the London Olympic Games and Paralympic Games Act of 2006. This Act also protects the use of the Olympic Motto and the use of such expressions as *'the Games'*, *'Olympians'*, and *'Olympiad'*, as well as 'strap lines' in advertisements, such as *'Come to London in 2012'* and *'Watch the games here this Summer'*. All these measures are designed to provide Olympic brand protection and combat various forms of so-called *'Ambush Marketing'* for the benefit of the Official

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Sponsors of the Games, who pay mega bucks for a package of 'top line' sponsorship rights, against those who, in the advertising and promotion of their products and services, falsely and unfairly claim an association or affiliation with the Games. However, these measures have been described by the UK Advertising Industry as "draconian" and threatening the right of free speech, which includes advertising speech!

As regards trademark protection, which is probably, in practice, the most important form of legal protection of sports events, sports bodies and organisations and sports persons, the UK Trade Marks Act of 1994 defines a trademark in section 1(1) as:

"... any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging."

This is a wide definition and so a trade mark may be granted in respect of, for example, distinctive sounds, as in the case of the Australian Football League, which has registered the sound of a football siren for football and associated services.

Thus, provided the basic legal requirement of distinctiveness is satisfied, it is possible to register the names and associated *logos* of sports events as trademarks. However, the name 'Euro 2000' failed the distinctiveness requirement and could not be registered as a trademark *per se*. But, *prima facie*, combined with a distinctive *logo*, this event name could be registrable as a trademark. Likewise, an attempt in 1998 to register the name 'World Cup' also failed through lack of distinctiveness. Again, combined with a distinctive and original *logo*, such a mark can be protected as a trademark and also enjoys copyright protection as an 'artistic work'. Under section 4 (1)(a) of the UK Copyright Designs and Patents Act of 1988, "a graphic work, irrespective of artistic quality" qualifies for legal protection as an 'artistic work' under the Act.

Sports event 'mascots' may also qualify, in principle, for registration as trademarks, again subject to their being distinctive.

Although not an event mark, it would perhaps be remiss not to mention the ADIDAS 'three stripes' trademark case, in which the long-awaited Preliminary Ruling by the Court of First Instance of the European Court of Justice (ECJ) (C-102/07) was rendered on 10 April, 2008. This case, which well illustrates the need for trademark protection in the sporting arena generally, concerned the extent of the legal protection under Trademark Law within the European Union afforded to the three vertical stripes on sports and leisure goods produced and sold by Adidas. The facts of this case are as follows:

The Parent Company of the Adidas Group, Adidas AG, is the proprietor of a figurative trademark composed of three vertical, parallel stripes of equal width that feature on the sides of sports and leisure garments in a colour which contrasts with the basic colour of those garments. Its Subsidiary Company, Adidas Benelux BV, holds an exclusive licence, granted by Adidas AG, to use this mark on garments marketed in the Benelux countries.

Marca Mode, C&A, H&M and Vendex are competitors of Adidas, who also market sports garments featuring two parallel stripes, the colour of which contrasts with the basic colour of those garments.

Adidas took the competitors to Court in The Netherlands claiming the right to prohibit the use by any third party of an identical or similar sign which would cause confusion in the market place. Marca Mode and the other defendants to these proceedings, however, claimed that they are free to place two stripes on their sports and leisure garments for decorative purposes. Their defence was based on the so-called requirement of availability, namely that stripes and simple stripe motifs are signs which must remain available to all and, therefore, they did not need the consent of Adidas to use the two-stripe motif on their garments.

Adidas won at first instance; were overruled on appeal; and the case finally came, on a point of law, before The Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*), which sought clarification from the ECJ on the main point at issue, namely, whether the require-

ment of availability is an assessment criterion for the purposes of defining the scope of the exclusive rights enjoyed by the owner of a particular trademark.

The ECJ ruled, first, that the requirement of availability of certain signs is not one of the relevant factors to be taken into account in the assessment of the likelihood of confusion. The answer to the question as to whether there is that likelihood must be based on the public's perception of the goods covered by the mark of the proprietor on the one hand and the goods covered by the sign used by the third party on the other. The national court must determine whether the average consumer may be mistaken as to the origin of sports and leisure garments featuring stripe motifs in the same places and with the same characteristics as the stripes motif of Adidas, except for the fact that the competitors' motif consists of two rather than three stripes.

Secondly, the ECJ turned its attention to the specific protection granted to trademarks with a reputation. It noted that the implementation of that protection does not require the existence of a likelihood of confusion between the sign and the mark. The mere fact that the relevant section of the public establishes a link between the two is sufficient. Since the requirement of availability is extraneous both to the assessment of the degree of similarity between the mark with a reputation and the sign used by the third party and to the link which may be made by the relevant public between that mark and the sign, it cannot constitute a relevant factor for determining whether the use of the sign takes unfair advantage of the repute of the mark.

Finally, the Court stated that, even though the proprietor of a trademark cannot prohibit a third party from using descriptive indications in accordance with honest practices, the requirement of availability does not constitute, in any circumstances, an independent limitation on the effects of the trademark. In order for a third party to be able to plead the limitations of the effects of a trademark contained in the EU Directive on Trademarks (First Council Directive 89/104/EEC, 21 December, 1988) and to rely on the requirement of availability, the indication used by it must relate to one of the characteristics of the goods. The purely decorative nature of the two-stripe sign pleaded by the defendants does not give any indication concerning one of the characteristics of the goods, such as kind, quality, quantity, intended purpose, geographical origin, size and price.

In the light of the ECJ Preliminary Ruling, it is now up to The Netherlands Supreme Court to finally decide the case. In view of the final point made by the ECJ as noted above, which recognises and attempts to reconcile the apparent conflict between the exclusivity of trademarks rights and the freedom of movement of goods within a single European market, it looks as though it is a case of two stripes and you are out and ADIDAS will ultimately triumph in these protracted legal proceedings!

The full text of the ECJ Preliminary Ruling can be found on the European Court of Justice Internet site at: curia.europa.eu/jurispl/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-102/07.

In relation to the commercialisation of sports events, it is essential to have trademark, copyright or other legal protection of event marks and *logos* as otherwise there is nothing that an event organiser can exploit for sponsorship and merchandising purposes, which provide a lucrative source of income for sport in general and sports events in particular.

Sports Image Rights

As previously mentioned, under English law nobody owns their own image - the law does not grant such a right. However, for tax purposes, image rights are recognised in the UK as a species of intangible property - as an asset. See *Sports Club plc v Inspector of Taxes* [2000] STC (SCD) 443, in which Arsenal Football Club succeeded in having payments made to off-shore companies in respect of the Club's commercial exploitation of the image rights of their players, David Platt and Dennis Bergkamp, classified, for tax purposes, as capital sums

and, therefore, non-taxable. Likewise, these sums do not attract social security payments either!

In other words, in the UK, apart from the tax exception, there is no right of personality *per se*, as there is generally in Continental Europe protected under written Constitutional legal provisions. See the case of *Oliver Kahn v. EA-Sports* (Hamburg District Court, 25 April, 2003) in which the famous German goalkeeper's image/likeness which was used without authorization in an official FIFA computer game was protected under the provisions of articles 1 and 2 of the German Constitution. It is interesting to note, *en passant*, that in Continental Europe, Constitutional protection of a personality right not only applies to 'celebrities' but also to ordinary persons!

Likewise in many of the States of the United States of America, especially California, due to the influence of 'Hollywood', image rights, known as 'rights of publicity', are also legally protected. But there are some limitations. See the case of *ETW Corporation v. Jireh Publishing, Inc.* (2003 U.S. App. LEXIS 12488, 20 June, 2003), in which a painting entitled 'The Masters of Augusta' commemorating Tiger Woods' 1997 victory, produced and sold by Jireh without Woods' consent, was held by the Court not to infringe his 'right of publicity'.

Image is a word with more than one meaning - photograph, perception or physical appearance are three of the options. Nicknames, voice and caricatures are others. A typical 'grant of rights' clause in a sports image licensing agreement defines 'image rights' in rather broad terms as follows:

'Access to the services of the personality for the purpose of filming, television (both live and recorded), broadcasting (both live and recorded), audio recording; motion pictures, video and electronic pictures (including but limited to the production of computer-generated images; still photographs; personal appearances; product endorsement and advertising in all media; as well as the right to use the personality's name, likeness, autograph, story and accomplishments (including copyright and other intellectual property rights), for promotional or commercial purposes including, but without limitation, the personality's actual or simulated likeness, voice, photograph, performances, personal characteristics and other personal identification.'

Image, in whatever form, may be protected if it is registered as a trade mark. However, in order to be registered as a trade mark an image has to conform to the requirements of the relevant trademark legislation and, in particular, it must not fall foul of the absolute and relative grounds for refusing an application for registration. Anyone can apply to register a trade mark using the name of a famous person, not just the famous person him/herself, and that application may be granted, unless there is an objection that shows that the application is made in bad faith - that is, the mark is being registered to deceive the public.

There are two aspects to image rights' protection. There are those who wish to control the use made of their image as a form of privacy. There are others, sportsmen and women with a high reputation, who wish to control the use made of their image as it affects their income. If an individual's reputation is threatened, action may be taken either through a 'passing off' action or through the law of defamation. Particular images, such as an individual's photograph, will be the property of the owner of the copyright in that image (usually the photographer) and protected by copyright law. Personal information about someone may be protected by Data Protection law. Lastly, the UK Human Rights Act of 1998 provides that everyone has a right to respect for his private and family life. See article 8 of the European Convention on Human Rights (ECHR); and see also the right to private property protected under article 1 of the First Protocol of the ECHR.

Reference here should also be made to the landmark decision in the UK involving the former Formula One racing driver, Eddie Irvine, in the case of *Edmund Irvine v. Talksport Ltd.*, [2002] EWHC 367 (Ch), in which the Court protected Irvine against the use of his image/like-

ness in a false and misleading endorsement of 'Talksport' radio, developing and extending the English Common Law Doctrine of 'Passing Off.'

Less litigious routes to protection may lie through the UK Media Regulator, OfCom, and the Advertising Standards Authority for broadcast and print media respectively. See the decision of OfCom upholding the complaint by David Bedford, the British athlete, against 'The Number' over the advertising of their '118-118' directory service, in which Bedford's image had been caricatured without his consent. The decision can be found at 'www.ofcom.org.uk/bulletins/adv_comp/content_board/?a=87101'. The Office of Fair Trading also has, as part of its remit, the power to prosecute those guilty of misleading advertising under relevant Legislation, although this will not provide compensation for the person whose image is used in the advertisement, as the remedies lie in the criminal law only.

Similarly as to trade marks, sports personalities may also register a domain name (the electronic equivalent of a trademark), in order to establish an individual internet site and also protect this 'property' pursuant to the provisions of the ICANN Uniform Domain Name Dispute Resolution Policy under corresponding administrative proceedings conducted through the Arbitration and Mediation Center of the World Intellectual Property Organization, which is a specialised Agency of the UN based in Geneva, Switzerland. See, for example, WIPO Case No. D2000-1673 involving the domain name 'venusandserenawilliams.com'. This Domain Name Decision is accessible through the WIPO official website at 'www.wipo.int'.

Image right exploitation can be enhanced and facilitated by the provision of promotional services, including appearances at functions, autographed merchandise, photo-opportunities and so on. Once protected, image rights are best used by way of association with the sports person concerned, rather than by that individual exercising the right to prevent others from using that image. In other words, it is not a question of ensuring privacy, but getting paid to appear in public and commercially exploit those opportunities.

Sports Licensing and Merchandising

The licensing and sale of official merchandise relating to sporting events or sports teams, such as football 'trips', bearing the logos of the events or the teams also provide event organisers and promoters with very valuable income, which helps to defray the costs of staging the sporting events concerned.

In order to take advantage of such commercial opportunities, the event organisers and the teams need to have some 'intellectual property' to exploit. As mentioned above, trademark rights and copyright protection are essential. Otherwise, the licensors and licensees are not able to protect their interests against infringers, 'ambush marketers' and counterfeiters, of which there are always many! All wanting to jump on the 'sports marketing bandwagon' and make a fast buck or two! In such an event, there need to be clear contractual provisions on the reporting and handling of trademark infringements and counterfeiting.

Sports Licensing and Merchandising is, thus, a vast and complex subject and would merit an entire Conference being devoted to it. The clauses in the corresponding Agreements need to be carefully drafted and reflect the particular circumstances and dynamics of the sporting events to which they relate. Where trademarks are involved, in particular, there need to be 'quality control' provisions to protect the integrity and value of the 'brand'. Thus, the quality and content of all advertising and promotion of the 'licensed products' needs to be carefully controlled, as well as the 'distribution channels'. All such matters being aimed at preserving and indeed enhancing the value of the sporting marks and the corresponding goodwill in them.

Where Sports Personality Licensing is involved, the Agreements also need to contain a so-called 'Morality Clause' to guard against and deal

with all kinds of foreseeable contingencies affecting the value of the association with the sports person concerned. In particular, against any doping offences or loss of form or performance.

Such a Clause may be couched in the following terms:

“The Sports Personality shall, at all times, during the term of this Agreement act and conduct himself/herself in accordance with the highest standards of disciplined and professional sporting and personal behaviour and shall not do or say anything or authorize there to be done or said anything which, in the reasonable opinion of the Licensor is or could be detrimental, whether directly or by association, to the reputation, image or goodwill of the Licensor or any of its associated companies. The Sports Personality shall not, during the term of this Agreement, act or conduct himself/herself in a manner that, in the reasonable opinion of the Licensor, offends against decency, morality or professionalism or causes the Licensor, or any of its associated companies, to be held in public ridicule, disrepute or contempt, nor shall the Sports Personality be involved in any public scandal.”

Any breach of the provisions of this Clause may trigger termination of the Licensing/Merchandising Agreement.

Also, rights of exclusivity and options to renew, especially combined with so-called ‘matching options’ need to be carefully worded to ensure that they don not fall foul of National or European Competition Rules.

Furthermore, attention also needs to be paid to the financial and fiscal provisions of the Agreement, especially where the Sports Licensing/Merchandising Programme is an International one transcending several national boundaries.

Finally, it is advisable to include a ‘Dispute Resolution Clause’ referring disputes to arbitration or mediation, as sports bodies and sports persons prefer not to ‘wash their dirty sports linen in public’ but settle their disputes privately, quickly, inexpensively and effectively. The Court of Arbitration for Sport and the WIPO Arbitration and Mediation Center, provide such alternative dispute resolution services, especially the latter in relation to IP-related sports disputes, which are on the increase. This is also an important topic and is the subject of a forthcoming Book, entitled ‘*Settling Sports Disputes Through WIPO*’, written by the author of this Paper and due to be published by the Asser Press in The Hague, later this year. Further information may be obtained by logging onto ‘www.asserpress.nl’.

Sports Broadcasting and New Media Rights

Again, this is a vast and, in many respects, complex and technical subject, and, in the confines of this Conference, it is only possible, therefore, to merely scratch the surface of it in this Paper. In any case, this important money-spinner for sports bodies, sports teams, sports persons and sports promoters and marketers, as well as public and commercial broadcasters themselves, not to mention mobile phone companies and the transmission of sports events through the Internet, is the subject of a forthcoming Book, of which I am one of the authors, on ‘*Sports TV Rights*’ to be published later this year by the Asser Press in The Hague. For more information, log onto ‘www.asserpress.nl’.

Of the sports marketing mix, which includes sports sponsorship, merchandising, endorsement of products and services, and corporate hospitality, perhaps the most important and lucrative one is the sale and exploitation of sports broadcasting rights around the world, which contribute mega sums to many sports and sports events, including the Summer and Winter Olympic Games and the FIFA World Cup. Indeed, it is fair to say that, without the sums generated by sports broadcasting, such major events - and, in fact, many others - could not take place and consequently sport - and sports fans - would be the losers. In this respect, the commercialisation of sports broadcasting rights may be considered as the ‘oxygen of sport’. There is a ‘symbiot-

ic relationship’ between sport and TV broadcasting.

For example, the English Premier Football League, the richest in the world, as already mentioned above, has sold its principal broadcast rights to its matches for the next three seasons, beginning in August 2007 and ending in 2010, for a record sum of US\$3.1bn (£1.7bn). Again, the lion’s share of these rights, namely 92 live matches per season, have been sold to the satellite broadcaster, BSkyB, which will be shown as part of its Sky Sports package on a subscription basis. The deal means that BSkyB is paying about £4.8m per game. The Irish pay-TV firm, Setanta, has won the right to show 46 matches per season at a cost of about £2.8m per game. BSkyB is owned by the Australian media magnate, Rupert Murdoch, through his Group, News International, who, incidentally, considers “sports as a battering ram and a lead offering” in all his pay television operations around the world. Other broadcast rights packages to the Premier League, comprising overseas rights, highlights packages and mobile phone and internet rights, have been sold separately to other companies.

It may be added that the exploitation of broadcasting rights in football are so valuable and important that many leading football clubs, such as the English Club Manchester United, now operate their own television channels for the benefit of their fans and also their commercial sponsors, made possible with the advent of digital TV.

But football is not the only sport to benefit from the television phenomenon. The International Olympic Committee, for instance, has sold the broadcast rights for the 2008 Beijing Summer Olympic Games for mega bucks too!

Among the legal issues raised in the commercialisation and exploitation of sports broadcasting rights are the following:

- the ownership of sports broadcasting rights, including the position of individual sports persons, teams, clubs, venue owners;
- the different methods of protecting them, including copyright;
- the different methods of exploiting them, including collective selling and buying, as well as ‘pay per view’ and ‘free to view’ arrangements;
- the so-called new media rights, including the ‘streaming’ of sports broadcasts on the Internet (so-called ‘webcasts’) and on the so-called ‘third generation’ mobile phones; and last but by no means least
- the impact of the EU and National Competition Rules on the broadcasting of sports events.

As to the impact of EU Competition Rules on sports broadcasting rights, the vexed legal questions of the collective selling and collective buying of those rights - whether on an exclusive or non-exclusive basis - also come into play. In particular, the leading 2003 Decision of the Commission involving the collective selling of the broadcasting rights to the UEFA European Champions League, which has been used as kind of ‘template’ in subsequent sports broadcasting cases at the national level, and also the unresolved legal questions regarding the matter of the so-called ‘organisational solidarity’ in sport - considered to be legally and politically sensitive - are of crucial importance too.

In line with the approach taken in the UK, based on the case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor and Others* [1937] 58 CLR 479, mentioned above, the BBC lost their case against Talksport, who were broadcasting ‘live’ commentary of a ‘Euro 2000’ Football Championship on their radio station using ‘live’ pictures from BBC television to enable them to do so. Such ‘off tube’ radio broadcasts do not infringe any property rights in the live television broadcast, and so the Court refused to grant the BBC an injunction to stop such broadcasts by Talksport. See *British Broadcasting Corporation v. Talksport Limited* (official transcript no HC 00002692; [2000] TLR).

Likewise, in the UK, a sports game is not a “dramatic” work, and thus not entitled to copyright protection under the UK Copyright Designs and Patents Act of 1988. The question arises, therefore, what rights

exist in a sports event and how may they be commercially exploited, if, as noted above, English law does not recognise any proprietary right *per se* in the event itself?

The sports event organiser and/or promoter clearly own the event; for example, Aintree Racecourse owns the goodwill in the annual "Grand National" steeplechase horse race. This goodwill would entitle Aintree to restrain a third party from attempting to stage a race and passing it off as a "Grand National". Whilst there is no specific tort of unfair competition as exists in many Civil Law jurisdictions which would help, there may well be registered or unregistered trade marks, or copyright logos or other material, which belongs to Aintree, and which might be infringed in such circumstances. However, mere ownership of the goodwill in the event does not automatically extend to the "broadcasting rights" unless it is underpinned in various ways. The two primary elements of such underpinning are: the control of the arena rights where the sporting event takes place; and restrictions placed on spectators who attend the event. The "broadcasting rights" are thus created and may be reinforced principally using the law of contract and special contractual arrangements between the parties concerned. These Sports Broadcasting Agreements, including such documents as Host Broadcaster Agreements, are complex and beyond the scope of this Paper.

Mention should also be made of the legal position of the participants in sporting events - players and officials - and the spectators attending them. Players are excluded from the definition of those accorded statutory performers' rights - they are not engaged in a copy-rightable performance. Most will be employed, like the officials. Normally, their contracts of employment will require them to play in

televised events and will stipulate that such performances and/or public training may be filmed and televised as their employers may organise. The contractual terms of employment may also extend to the players giving certain interviews. Spectators similarly consent to being filmed while attending sporting events, either expressly in the terms and conditions of issue of the tickets, or impliedly by attending in the knowledge that the events are being televised. In other words, neither sports participants nor spectators are entitled to claim any "broadcasting rights" in sporting events in which they are 'involved'.

As mentioned at the outset, sports broadcasting rights and their corresponding contractual arrangements are a very complex and technical subject!

Conclusion

It will be clear from the above comments and remarks that the role played by Intellectual Property Rights in connection with the organization and promotion of sporting events and the commercial exploitation of sports persons and teams is a crucial and significant one and is not to be underestimated. Indeed, without the creative use of such Rights, many major sports events could not be staged - as there would be nothing that could be commercialised and exploited and, therefore, no financial returns available for defraying the costs.

As with the granting and commercial exploitation of all Intellectual Property Rights, attention to detail is key to their success; as also is a holistic approach, especially one that reflects and respects the special characteristics and dynamics of sport. Something to be overlooked at one's peril!

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Protecting IP Rights under English Common Law and European Continental Law: 'Passing Off' and 'Unfair Competition' Compared

by Ian Blackshaw*

Introductory Remarks

Unfair competition - in a business and an economic sense - takes many forms. Perhaps one of its more common and traditional forms is so-called 'Passing Off' where one trader or business organisation 'passes off' its goods and services as those of another rival trader or business organisation. In other words, tries to take unfair advantage of and cash in on the rival's fame, reputation and goodwill that it has established in the market place.

'Passing Off' under English law is a doctrine which has been established and refined over the years in the Courts through the application of the Common Law principle of judicial precedent (*stare decisis*), whereby, generally speaking, decisions rendered in previous cases tend to be followed in similar cases (*in consimili casu*) in the future, unless they can be 'distinguished', in which case they are not followed. The whole system procedures under the legal fiction that Judges do not create new law but merely interpret and apply existing law!

By contrast, under the European Continental Civil Law system, judicial precedent, generally speaking, is only one of the 'sources of the law' - and not necessarily an important one at that! However, a separate 'tort'- civil wrong - of 'Unfair Competition' has grown up

and, as such, this tends to provide more legal certainty than under the Common Law system, where, again generally speaking, there is more room for interpretation and less rigidity.

In this Paper, we will examine and compare the two legal approaches using some sports personality rights examples.¹ Before doing so, we will define the concept of 'Passing Off' under English Common Law, which also applies in the so-called Anglo-Saxon jurisdictions, such as the United States of America and other former English colonies.

The Common Law Doctrine of 'Passing Off'

(i) Concept

As mentioned, 'Passing Off' has as its objective the protection of the 'goodwill' that the claimant has built up in his field of business, and the resulting reputation enjoyed in the market place. And 'goodwill' has been defined as "*the attractive force which brings in custom*".²

Goodwill is an intangible property right, whose legal nature has been judicially described as follows:

*"A man who engages in commercial activities may acquire a valuable reputation in respect of the goods in which he deals, or the services which he performs, or of his business as an entity. The law regards reputation as an incorporeal piece of property, the integrity of which the owner is entitled to protect."*³

The claimant must show that there has been misrepresentation and the public has been deceived into believing that the goods or services of the trader or business organization are those of the claimant. Damage as a result of the 'Passing Off' must also be established.⁴

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'Sports Image Rights in Europe' 2005, TMC Asser Press: The Hague, The Netherlands.

² See *IRC v Muller & Co's Margarine Ltd* [1901] AC 217.

¹ See generally on this subject: Blackshaw, Ian S, and Siekmann, Robert C R (Eds),

³ Per Buckley, LJ in *Bulmer Ltd v Bollinger SA* [1978] RPC 79.

These three elements required to constitute a case of 'Passing Off', namely:

- 1 reputation or goodwill acquired by the claimant in his goods, services, name or mark;
- 2 misrepresentation by the defendant leading to confusion (or deception); causing
- 3 damage to the claimant

have been well described as "the classical trinity".⁵ In other words: three in one and one in three!

It should be noted, however, that there is no legal requirement for the misrepresentation to be intentional or deliberate. In other words, innocence is no defence to a claim of 'Passing Off'.⁶

(ii) Some Examples

As mentioned above, 'Passing Off' provides a rather limited - and, to a certain extent, rather technical - form of legal protection and the extent will depend upon the facts and circumstances of each particular case. Very much a matter, to use the old adage, of 'circumstances altering cases'!

For example, to take an early case⁷, a children's radio personality, 'Uncle Mac', was unable to stop a cereal manufacturer from using his name on their product, because there was no 'common field of activity' between the claimant and the manufacturer. 'Uncle Mac' was not in the business of manufacturing and selling cereals; he was purely a radio presenter. So there was no risk of confusion to consumers. Likewise, in a more recent case⁸, the former 'Spice Girl', Geri Halliwell, suffered the same fate when she tried to sue in 'Passing Off' the Italian company, Panini, the manufacturer of stickers bearing her name and likeness. She was an entertainer and not in the business of manufacturing, selling or endorsing stickers. Again, there was no 'common field of activity'. And so consumers would not be misled! Incidentally, Panini were not successful in a later case brought against them by the English Premier League in respect of an unofficial and unauthorized sticker album and collection which included Premier League players bearing the logos of their Clubs and also the League.⁹

Again, in the well-known case of the street trader Matthew Reed, which went to the European Court of Justice and back to the English High Court and on to the Court of Appeal, selling 'unauthorised' football souvenirs bearing the registered trademarks of the Arsenal Football Club outside their ground, Arsenal failed in their claim of 'Passing Off' because Reed's stall contained a 'disclaimer' notice that the goods were not official Arsenal merchandise, or endorsed by them. Thus, Arsenal fans would not be misled by Reed's activities - one of the key requirements for establishing 'Passing Off'. However, the Court of Appeal did uphold Arsenal's other claim that Reed had infringed their registered trademarks, even though Reed claimed - quite persuasively, I would add - that they were being used "as a badge of support loyalty or affiliation to those to whom they were directed".¹⁰ That is, Arsenal's fans and supporters! The Court of Appeal held that, whilst being considered 'badges of allegiance', all the evidence suggests that the trademarks also designate origin of the goods to a substantial number of consumers. And that is the primary function of a trademark - a badge of origin!

However, the rather strict line taken by the English Courts in such cases as 'Uncle Mac' and Geri Halliwell, has been softened in the subsequent High Court decision in the case of *Irvine v Talksport Limited*¹¹ - generally regarded as representing a 'breakthrough' in the

field. In that case, the Court unequivocally recognised - for the first time - that a well-known sports personality, Eddie Irvine, the former Formula One driver, can prevent third parties from exploiting their name or image in circumstances where members of the public will be confused into thinking the sports personality concerned has endorsed or in some way authorised/licensed such use by that party, when such was not, in fact, the case. And the Court also assumed that, because Irvine was a 'celebrity', he was in the habit of exploiting his notoriety by licensing his name, likeness and image, from time to time, in respect of various goods and services, but not necessarily in the radio field. In paragraph 6 of his judgement, Mr Justice Laddie ditched the idea of the hitherto 'common field of activity' requirement in 'Passing Off' cases in the following terms:

"6. I should make it clear that I am only considering a case in which the Claimants are in the business of endorsing products. As I explained in my judgment, Mr Irvine was, at the time of the events of which complaint was made, probably the premier Formula One racing driver from Britain. He made a significant part of his income from endorsing products. He was, therefore, in a real sense in the business of giving endorsements. It is not suggested that he has ever given an endorsement for a radio station or done anything similar to that, but nevertheless in general terms he was in the business of using his fame as a basis for earning money through endorsements. Although that was an important source of income for him, it is not suggested that the activities of the defendant deterred anybody else from seeking Mr Irvine's endorsement, whether for a radio station or anything else."

Again, in certain Commonwealth jurisdictions, such as Australia, the Courts are more relaxed in making the connection between the personality and the unauthorized products. Thus, in the case of *Hogan v Pacific Dunlop*,¹² the actor, Paul Hogan, who played 'Crocodile Dundee', successfully sued the defendants in 'Passing Off' for using the 'knife scene' from the film 'Crocodile Dundee' to advertise their shoes. The Court held that there was a misrepresentation because the 'Dundee' character was seen sponsoring the shoes even though no authorization to do so had, in fact, been given by him.

The European Civil Law Doctrine of 'Unfair Competition'

(i) Concept

Under European Continental Civil Law, these kinds of cases and claims are, relatively speaking, easier to resolve, because there is a general 'tort' of Unfair Competition, which protects claimants, especially in relation to trademarks - whether registered or unregistered. This general legal protection supplements the legal protections afforded by trademarks for goods and services and also for individuals. This is part of a general Civil Law principle that anyone who inflicts harm on another must make good that harm.

In certain jurisdictions, the principles of Unfair Competition have been codified in the country's Civil Code or in separate Unfair Competition Acts. For example, in Greece, there is an Unfair Competition Law¹³, article 1 of which (in translation) provides as follows:

"Any act which is contrary to good morals and which is made with the purpose of competition in the commercial, industrial or agricultural business is forbidden."

The concept of 'good morals' ('*bonos mores*') also figures in the Austrian Unfair Competition Act, which in a so-called 'blanket provision' protects good practice in trade and secures the functioning of competition.¹⁴ Of course, what constitutes 'good morals' is a matter for interpretation.

Again, in Switzerland, article 28 of the Swiss Civil Code provides (in translation) as follows:

"1. When anyone is injured in his person by an illegal act, he can apply to the judge for his protection from any person who takes an active part in effecting the injury.

2. Any injury is illegal where it is not justified by the injured person's consent, by a predominantly private or public interest or by the law."

4 See the judgement of Lord Oliver in *Reckitt & Coleman Products v Borden Inc* [1990] RPC 341, at p. 406.

5 Per Nourse LJ in the *Parma Ham* case: [1991] RPC 351, at p. 368.

6 *Parker-Knoll v Knoll International Ltd* [1962] RPC 265.

7 *McCulloch v May* [1946] 65 RPC 58.

8 *Halliwell & Ors v Panini & Ors*, 6 June, 1997 (unreported).

9 *FA Premier League Ltd & Ors v Panini*

UK Ltd, Times Law Reports, 17 July, 2003 (Court of Appeal).

10 *Arsenal Football Club plc v Matthew Reed* (Case C-206/01) [2003] 3 ALL ER 865.

11 [2002] 1 WLR 2355.

12 [1989] 21 IPR 225.

13 Law 146/1914.

14 Section 1 of the Austrian UWG (Gesetz gegen den unlauteren Wettbewerb).

In Italy, article 10 of the Italian Civil Code establishes the general principle that, if an image is displayed or published except where permitted by law, or its display causes prejudice to the dignity and the reputation of the persons concerned, the Italian Courts may issue a cease and desist order and also award damages.

(ii) Some Examples

A good example of how intellectual property rights are protected concerned the case of the German National Team goalkeeper, Oliver Kahn, whose name, likeness and image was used in a computer game without his specific consent. The International Professional Players' Association, Fifpro, had given consent, but this was not sufficient. The Hamburg District Court held that his personality right, which is protected under German law, including articles 1(1) and 2(1) of the German Constitution (Grundgesetz), had been infringed and awarded him damages accordingly.¹⁵ The German Law does not require the claimant to prove a 'common field of activity' or a 'valuable reputation or goodwill in his name, goods, services or mark' as is generally required under the English doctrine of 'Passing Off'.

Again, in France, Eric Cantona, the well-known former professional French footballer, was awarded damages for the unauthorized publication of his name and image in a special edition of the French Magazine 'BUT' entitled 'Special Cantona'.¹⁶ The Court held that Cantona had suffered "moral harm" through the use of his name and image in such circumstances as were comparable to a commercial deal in which the public might believe he had voluntarily taken part, which was not, in fact, the case. Shades of the English case of *Tolley v Fry*.¹⁷ In that case, Tolley, an amateur golfer, was depicted in an advertisement for Fry's chocolate with a bar of chocolate sticking out of his pocket. This advertisement, the Court held, implied that Tolley had endorsed the product and compromised his amateur sportsman status.¹⁸

In the Netherlands, the case of *Bovenlander en Leomill BV v Denor Sportfashion BV*¹⁹ provides an interesting example of unfair competition. The Leomill Company launched a hockey shoe under the name of 'Bovenlander'; the shoe being named after Floris Jan Bovenlander, a very well-known hockey international. Leomill's competitor, Denor, subsequently brought out a new hockey shoe under the trademark, Cruyff Sports, and advertised with the slogan 'Floris Johan Cruyff'. Bovenlander began an action because he took the view that the use of

his first name was unlawful and harmful to himself and Leomill, to whom he was under contract. The Court ruled that Bovenlander had not consented to the use of his first name. Nevertheless by using this first name in the advertisements, the impression was wrongly created that Bovenlander had given his cooperation to the product. As this was not, in fact, the case, the Court ruled this to be unlawful and a cease and desist order and damages were awarded.

Conclusions

The English Common Law Doctrine of 'Passing Off' and the European Continental Civil Law Doctrine of 'Unfair Competition' are similar in concept and nature - not least in the elements of misrepresentation and lack of consent - but different in the practice. The latter being more user friendly than the former.

For some time, IP legal practitioners have had to grapple with the vagaries of the English Common Law Doctrine of 'Passing Off' with - at times - hit and miss results for their clients. So, it is probably high time that this concept were given a decent burial and replaced with a general statutory right of unfair competition similar to the law and practice in the rest of Europe.

When it comes to protecting the images and privacy of 'celebrities', there is also a need for a statutory right of personality, as well as a right of privacy, which the English Courts have got close to recognizing but have not yet created - that being a matter for Parliament.²⁰

Of course, with other legal issues competing for Parliamentary time in the UK, such measures are not likely to be high on the political agenda of the present or any foreseeable future British Government!

The International Sports Law Journal

¹⁵ *Oliver Kahan v EA-Sports*, 25 April, 2003.

¹⁶ Judgement of the Court of Nanterre of 6 April, 1994.

¹⁷ [1931] AC 333.

¹⁸ See also the case of an Australian footballer, who was photographed naked in the shower and such photograph was published in the Press without his consent: *Eittingshausen v Australian Consolidated Press* [1991] 23 NSWLR

443. In that case, the footballer successfully argued that the taking and publication of the photograph in a magazine would lead ordinary members of the public into thinking less of him if they thought that he was the kind of person who do that sort of thing!

¹⁹ *Den Bosch District Court*, 18 November, 1997, KG 1997, 390.

²⁰ See *Douglas and others v Hello! Ltd*, [2001] FSR 732.

University of Bayreuth (Germany): Sports Law

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What exactly is sports law?

Many have asked the author this question before in his capacity as a "sports lawyer" researching and lecturing at the university. The answer varies depending on the context in which sports law is being considered. The following is an approach to the problem from the perspective of the law, sports economics and legal education at the University of Bayreuth, the Department of Civil Law, Commercial and Economic Law, Comparative Law and Sports Law (Civil Law VI) and ultimately from the personal viewpoint of the author as chair of the department and co-publisher of the journal "Causa Sport", concerned with issues of sports law (www.causasport.ch).

Sports law in general

Sports law rests on two pillars. First of all, it incorporates the entire body of government law including its references to European law inasmuch as sports are concerned. Today, practically all sectors in law can be applied to any occurrence in sports. Based on an example in public law, we could discuss the law of sports sponsoring, building law, social law, and the law concerning respective interests of neighbours or (association) tax laws, and continuing on to European Law, the basic freedoms. In civil law one can find points of contact to sports in law on associations, con-

tract law and law on compensation, but also in wide segments of commercial law. Unfortunately, sports is also not spared from having to review relevant factual circumstances from the perspective of criminal law, as can be seen in more recent times in the examples in relation to the manipulation of referees or in doping cases. Furthermore, sports law includes the laws pertaining to sports associations governing the right to self-government of sports associations as protected by constitutional law. In bylaws, bodies of rules, implementation procedures, etc. of sports associations and clubs, on the one hand this law governs the rights and obligations of members and any other person subject to the power of the association and on the other hand the enforcement of obligations by the bodies of the respective associations and generally speaking the (association relevant) practice of the sport itself.

Sports law in the context of an education in sports management

Since the 1980s, sports law is considered one of the three pillars of a course in studies in sports management at the University of Bayreuth. Alongside the growing commercialisation of sports, any legal problems that accompany the topic have gained in significance. An education in sports management involves achieving the objective of teaching students basic knowledge of the laws based on Civil Code as well as those found in business and commercial law. Once that is achieved, in another lecture, building on the needs for practical application at a later date, the discussion is delved into more deeply with regard to topics concerning sports law with references primarily in business administration law. The goal for the students of the University of Bayreuth in the course of studies in sports management is to develop a feel for dealing with the problems relating to (sports) law in their future professional function so that if necessary they can take suitable countermeasures at an early stage. But the Department also offers law students various opportunities to address issues of sports law, from an in-depth lecture on sports law for students of jurisprudence, via seminars on sports law - many in cooperation with lawyers from important sports associations (previous guest speakers from the German Football League, German Football Association and Bavarian Football Association) or clubs (FB Bayern Munich) and specialist sports lawyers from various practices - to student dissertations or doctoral theses related to sports law.

Research in sports law in the Department of Civil Law VI

The course of studies in law at the University of Bayreuth is geared strongly towards business administration law. This also applies to research activities that the Department of Civil Law VI undertakes inasmuch as sports law is concerned. As examples here one can list the legal problems that have been the subject of scientific analysis, expert law reports or other departmental activities over the last four years:

- The extent to which purely sporting association rules can be excluded from the scope of state law is particularly significant here. In recent years anti-trust law, whose influence on the field of sport was discernable even before the European Court of Justice decisions in the *Meca Medina* and *MOTOE* cases, has assumed increasing relevance for the practice of sports law and thus for the department's research activities too. The anti-trust developments play(ed) a central role in the following cases: ban on the one-piece kits (shirts and shorts sewn together at the waistband) developed by sports goods manufacturer Puma and worn by the Cameroon national squad, banned by FIFA; ban on the use of the "3 stripes" typical of sports goods manufacturer adidas on Olympians' sportswear during the Turin 2006 Winter Olympics and the summer Games in Beijing 2008 and - at least temporarily - on the sports clothes of professional tennis players. In the near future the author intends to make the tense relationship between sport and anti-trust law the subject of a comprehensive scientific study.
- Research activities also extended to the question of liability in connection with manipulation of referees in German football (Hoyzer affair) and to licensing procedures in League sport under association law. A significantly more comprehensive, illuminating scientific study of the problem of liability entitled "Das Haftungsrecht im Sport" [The Law of Liability in Sport] was completed in summer 2008 and will be published in early 2009. Other research projects are strongly linked to European and anti-trust law, such as the ban on majority holdings in

German football limited companies (known as the 50%+1 clause) or central marketing of TV, radio and Internet rights to sporting events by sports associations.

- One subject that was focused on was - not only in the run-up to the FIFA Football World Cup 2006 and EURO 2008 - a problem concerning what is being called ambush marketing. This issue deals with the misleading (because based on a legal pre-judgement) method used in advertising that is referred to as "freeloading". Typically, companies that do not belong to the circle of official sponsors and supporters, take advantage of the good reputation of a renowned sporting event in their ads (e.g. by selling "world cup rolls" or by using the name "football world cup" or "world cup 2006"). The legal question, which is both complicated as well as it is fascinating, is in how far this method in advertising should be subject to legal limitations.
- Sponsoring agreements play an important role in sports and thus also within the range of the department's research activities. What effect does the decision by the German Federal Constitutional Court relating to the government sports betting monopoly dated 28 March 2006 have on sponsoring agreements with private (e.g. bwin) and government suppliers (e.g. ODDSET)? These legal questions still have not received conclusive answers. In 2007 the author was deeply involved with contract law issues connected with a sponsorship contract - not merely academically this time, but as a member of an arbitration panel. Did the German Football League prematurely extend its supply contract with long-term partner Adidas to equip its national team, after national players had for the first time been given the option of wearing boots made by other sports goods manufacturers, instead of football boots with the characteristic "3 stripes" used for decades? Or could the GFA consequently still have accepted the allegedly much more economically attractive offer made to it at the end of October 2006 by sports goods manufacturer Nike? The underlying dispute was settled amicably during arbitration proceedings in August 2007.
- At the same time the exploitation of the athletes' personality rights by their employers in league sports or by sports associations during international matches with regard to team sports still raises a number of different legal misgivings, which simply demand to be reviewed in a scholarly fashion.
- Finally, the boundaries between issues with regard to sports law and sports policy demands are becoming increasingly more muddled. At this time, there is a discussion in the "Independent Sports Review 2006" (the so-called Arnaut report) having to do with bringing about a legal special standing in sports within the medium or long term on a European level. In December 2006, a legal expert report "Performance protection laws for sporting events organisers?" was published on behalf of German sports associations (among others DFB, DFL, DOSB) with the intention of convincing national lawmakers of the necessity of giving special legal treatment to sporting events organisers. The Commission of the European Communities Sport White Paper of 11-7-2007, whose influence on further developments remains to be seen, should, of course, also be mentioned in this context. These processes are also reviewed by the Department of Civil Law VI as a part of its research activities.
- Additional information on the legal problems that were mentioned above and further subjects of discussion in sports law that have been discussed over the last few years in special publications, doctorates, diploma and seminar papers can be found on the department's website (<http://www.uni-bayreuth.de/departments/rw/lehrstuehle/zr6/>) or at the online sports law portal run by the department (<http://www.sportrecht.org>).

So, now what is sports law exactly?

Even if one were to limit this question - as the author has done - to the scope of research involving the business and commercial law aspects of sports, sports law still represents a multifaceted as well as up-to-date and lively legal subject matter. One is regularly faced with new legal challenges. This is already to be seen when taking a closer look at the sports section in the newspaper, which today has become a must-read for sports lawyers not only as a means to satisfy their own personal enthusiasm for sports.

Lewis Hamilton Loses Formula One Time Penalty Appeal: Was Justice Done?

by Ian Blackshaw

British Formula One racing driver, Lewis Hamilton, received a 25-second time penalty for cutting a chicane during this year's Belgian Grand Prix at Spa. As a result Hamilton, who drives for McLaren and was winning - and would have won - was demoted into third place, and Felipe Massa, who drives for Ferrari, won the event. Thus, Hamilton's lost four points and leads the drivers' standings now by only one point from Massa, with four races remaining in the 2008 Formula One season. Hamilton appealed against this penalty to the Court of Appeal of the Federation Internationale de l'Automobile (FIA), the sport's governing body, which is based in Paris.

His appeal was dismissed. In fact, the five Judges of the FIA Appeal Court held that the appeal was inadmissible, pursuant to Article 152 of the International Sporting Code, which provides that drive-through penalties are "not susceptible to appeal".

The Judges had to decide two points:

- whether McLaren's appeal was admissible, as Formula One rules do not allow teams to appeal against drive-through penalties; and the penalty imposed on Hamilton by the race Stewards was technical - a drive-through penalty; and
- whether Hamilton sufficiently surrendered the advantage he had gained when cutting the chicane.

On the first point, McLaren's legal counsel argued that, because the penalty was awarded retrospectively, no actual drive-through took place, and, therefore, the appeal should be admitted and considered.

As regards the second point, the facts were as follows. Hamilton was battling with Massa's team-mate, Kimi Raikkonen, when he cut the 'Bus Stop' chicane, resulting in his overtaking the Finnish driver. Despite allowing Raikkonen to immediately reclaim the lead, Hamilton then overtook the Ferrari driver at the next corner to go back in front. Video footage of the incident was shown, and Hamilton told the Court that he was trying to avoid crashing into Raikkonen. "We had a great battle and there was no need to take stupid risks, so I had to cut the chicane," he said. And added: "I've since studied the footage about 10 times and I can remember it vividly like it was yesterday. I believe I then gave the advantage back. I honestly, hand on heart, feel I did so."

However, the FIA Appeal Court, sitting in Paris, held on 23 September, 2008 that the penalty was a so-called 'drive-through' one and, under the Rules, Hamilton's Appeal was inadmissible and, therefore, must be dismissed.

The Hamilton Appeal case is a very good illustration of the general rule in Sports Law that on-field - in the case of Formula One, on-track - decisions by referees are not appealable before the 'courts'/tribunals' of sports bodies. The only exceptions to this rule are where the decisions were wrong in law or there was malice on the part of the referee. The rationale for this general rule is that a 'court' is not in a position to adjudicate after the event has taken place on the application of technical rules of a sport made by officials at the time of competition. In other words, to 'second-guess' the experts' rulings is not on! It is a harsh rule and its application at times - as in the Hamilton case - may seem, to some observers at least, to be unfair and lead to injustice. However, without such a rule, apart from doping cases, there would never be a definite winner in any sport! The rule is akin to the 'strict liability' rule in doping cases, which also has its critics.

This principle is well-established and has been consistently followed in CAS Appeals. For example, in the case of *M v Association Internationale de Boxe Amateur* ((1996) 1 Digest of CAS Awards 413), the Appellant sought to challenge his disqualification for a 'below-the-belt' punch in a preliminary bout. This was during the Atlanta Olympics and he asked the CAS Ad Hoc Division (AHD), which, incidentally, was in session for the first time, to review the video footage of the fight, which, he claimed, showed that the relevant punch was delivered to the liver region of his opponent, and did not deserve disqualification. The CAS AHD ruling acknowledged that the AHD was far less well placed to decide on the applicability of technical rules of a sport than the officials who made the particular decision. There was no suggestion by the athlete that there was an error of law; nor that a wrong or malicious act had been committed against him by the technical judges in reaching their decision to disqualify him. As such, the AHD refused to become involved and adjudicate on the matter.

As was pointed out in the Hamilton Appeal, no-one wants to win Grand Prix races in court! However, in view of the fierce rivalry between the Ferrari and McLaren Formula One teams, whether there was malice on the part of the FIA stewards in favour of Ferrari over McLaren - as previous history may seem to suggest, although flatly denied by the FIA - is another matter entirely and, of course, in any case, one that is very difficult to prove!

The International Sports Law Journal

The Olympics Should be Scaled Down

by Ian Blackshaw

The Olympics have often been billed as 'the greatest sporting show on earth'. The origins of the Games go back to Ancient Greece. In the meantime, over the centuries having fallen into desuetude, in 1894, a French aristocrat, Baron Pierre de Coubertin, revived the idea of the Games and, in 1896, the First Olympics of the modern era returned to their roots and were held in Athens. And so, as a result of the noble Baron's initiative, modern Olympism was born.

Nowadays, the Games cost mega dollars to organise and stage and involve thousands of athletes, officials and volunteers. The 2008 Beijing Summer Games involved 302 events, 10,178 athletes; a further 6,000 or so officials; and some 70,000 volunteers. All having to be housed and fed, apart from the costs of getting there. Beijing cost bil-

lions of dollars and lasted for 16 days. The next edition of the Summer Games will take place in London in 2012, and already the budget for organising them amounts to £9.3 billion, and this cost is escalating. Some commentators expect the cost to rise to over £12 billion by the time the Games are held!

The Olympics are administered by the International Olympic Committee (IOC), based in Lausanne, Switzerland, under the provisions of the Olympic Charter, the present version of which dates from 7 July, 2007. For each edition of the Games, pursuant to article 46.1 of the Charter, the IOC establishes the so-called Olympic Programme. In other words, the sports that will be included in the Games. Under article 46.2 of the Charter, the decision to include a

discipline or event in the Programme falls within the competence of the IOC Executive Board - the so-called IOC 'Cabinet': a very powerful and influential body indeed within the Olympic Movement as well as in world sport! There are currently 25 so-called 'core' sports and 3 additional sports in the Programme.

These sports include such 'sports' as beach volleyball, tennis, association football, basketball and various disciplines of cycling, including BMX cycling. They also include the more traditional sports, such as the marathon, the long jump and the javelin, which, in the opinion of the author, more fully reflect the ancient Games, which comprised running, jumping and throwing.

By any and all accounts, the 2008 Beijing Summer Games were the most successful Games ever - but then every IOC President so pronounces and describes each of the Games! They were also remarkable for their spectacular and lavish Opening and Closing Ceremonies! Not least the pyrotechnics, for which the Chinese are world renowned. So, London has a hard act to follow. A correspondent writing in *'The Times'* newspaper following the end of the Beijing Games, suggested that London should not try to emulate these ceremonies, but that the Mayor of London, Boris Johnson, a larger than life and colourful character, should cut a ribbon to declare the London Games open; and to close them merely hand over the Olympic flag to a representative of the Host City of the 2016 Summer Games, yet to be decided, without any further ceremonies! Low key, but cost-effective!

For some time, within and outside the Olympic Movement, many have thought that the Olympics had become too big and unmanageable. And that the number of sports and events should be scaled down. Amongst them, is the present IOC President, Dr Jacques Rogge, who described the 2008 Beijing Olympics as being the end of

an era. In other words coded language that future Games should be on a smaller scale.

I would entirely agree with him and would suggest that the Games go back to their roots and include only the original running, jumping and throwing sports of Ancient Greece. Apart from the fact and the farce that the Olympics are supposed to be for amateur sportsmen and women. How tennis qualifies and the likes of Venus Williams, who is a professional tennis player is able to participate and, moreover, win a gold medal, defeats logic and credulity! After all, as the Preamble to the Olympic Charter declares sport is a human right and every individual should have the opportunity of practising it. Not just multi-millionaires. What a farce!

However, such calls for scaling down the Games will almost certainly meet with opposition from several quarters - not least the 'TOP' Olympic Sponsors, the likes of VISA and COCA-COLA, who pay some US\$100 million for the privilege; sports marketers and commercial and public broadcasters; as well as powerful political forces and players in international sport, such as the likes of Sepp Blatter, who runs the world's most popular and indeed most lucrative game - association football! They would not like, I am sure, to see their power and influence eroded.

Call me old-fashioned and a crank, if you like, but, if it is not too late, we should inject more sanity into sport and its organisation and protect and safeguard its essential integrity - not only for the benefit of the present generation of sportspersons, particularly at the grass roots, and fans alike, but also for the benefit of the generations to come. Baron de Coubertin must be turning in his grave at the present state of affairs!

The International Sports Law Journal

Dwain Chambers Loses High Court Challenge to overturn his Lifetime Olympics Ban

by Ian Blackshaw

The decision on 18 July, 2008 by the English High Court (Mr Justice Mackay) not to overturn the British Olympic Committee (BOA) lifetime Olympics ban imposed on the British sprinter, Dwain Chambers, for a doping offence and allow him to compete in the Beijing Olympics, on the grounds that it is not an unreasonable restraint of trade is, in my opinion, a travesty of justice and a sad day for the widely held principle of the rehabilitation of offenders.

On the restraint of trade point, one argument before the Court was that the lifetime ban does not prevent Chambers from working but, I would counter that by saying that it does prevent him from participating in the Olympics - the dream of every athlete - and, as such, gaining other lucrative work from being an Olympian and possibly a gold medallist in his event. The BOA lifetime ban, in my opinion, is an unreasonable restraint of trade, because it goes further than is reasonably necessary to achieve its objective, namely, drug-free sport. In other words, it is disproportionate; the punishment does not fit the 'crime'. It was also argued on behalf of Chambers that the lifetime ban was contrary to UK and EU Competition Law, with which I would entirely agree, for the same legal reasons, namely disproportionality and the limits on the so-called 'sporting exception' in Competition Law matters.

On the rehabilitation point, in other walks of life, there is a clear policy to rehabilitate offenders, who have committed offences, so why should sport be different? He has served his time - his two years' ban imposed in 2003 - and paid his debt to the sporting world and wider society. So he should be allowed to compete, if he has met the sporting criteria, which he has, by qualifying - quite fairly - for the 100 metres event in a time of 10 seconds! In any case, the two year ban imposed on Chambers is in accordance with the sanctions imposed by the World Anti Doping Agency, to which the entire Olympic

Movement, including the BOA, is subject. So, why should the BOA be grossly out of line with such a world body dedicated to driving drugs out of sport?

Under other circumstances - in the present case, Chambers was seeking a preliminary injunction, which, under English law, being an Equitable remedy, is always in the discretion of the Court and, therefore, problematic - and, hopefully, in a future legal challenge by some other British athlete facing a similar Olympic ban for doping, I am sure that the BOA lifetime ban will be held by the Court to be an unreasonable restraint of trade; and also not in the public interest, which supports the widely held opinion that everybody, including sports persons, should be allowed a second chance.

As to the effect on other athletes, especially British ones, of allowing Chambers to compete in the Beijing Olympics, a particular reason given by Mr Justice Mackay for refusing the injunction, there will be many other athletes competing in Beijing, who have tested positive for banned substances and served their penalties, but whose National Olympic Committees, of which there are more than two hundred worldwide, do not impose a lifetime Olympics ban. So, that, in my opinion is no argument at all!

Apart from all that, it seems strange that Chambers may not compete in the Beijing Olympics, but may compete in other world sporting events. Either he should be banned from all or allowed to compete in all events, including the Olympics! This is only logical and, I would add, fair!

So, let us hope that reason and common sense will ultimately prevail.

The International Sports Law Journal

The Sporting Exception in European Union Law

By Richard Parrish and Samuli Miettinen, T.M.C. Asser Press, The Hague, The Netherlands, 2008, ISBN 978-90-6704-262-8, Price: GBP 45,00

When, in the course of their activities, sports associations come into conflict with Community law and/or European antitrust law - as has happened increasingly in recent years - a specimen argument is sketched out to justify the claimed breach of the law. The sports associations regularly stress the sport's -actual or alleged - special features and derive legal consequences from this which, in the event of the facts of the matter being uncontested, range from non-applicability of the legal provisions in question to postulation of a modified application of standards. And when from their perspective the sports associations concerned feel that their association's autonomy as guaranteed by Art. 11 European Convention for the Protection of Human Rights and Fundamental Freedoms risks being too greatly restricted by the EC Convention's regulations, this is often followed by a call for the legislator, as occurred most recently during the Arnaut Report (Independent European Sport Review, 2006). On 11 July 2007, the EU Commission, which is at the leading edge of the problems in question, published a "Sports White Paper" (COM (2007) 391 final) as a reaction to the various political interventions.

Compared with other legal entities, sports associations doubtless exhibit special features. Frankly, the extent to which these special features extend into the law of fundamental European freedoms and EC antitrust law and necessitate modifications in the event of application of the relevant standards is dubious. It is at this very point in their far- (but certainly not too far) reaching study completed in late summer 2007 that Parrish and Miettinen, both members of the Centre for Sports Law Research at the University of Edge Hill in the United Kingdom, start. Their work "The Sporting Exception in European Union Law" fills a gap that has long existed in English-language scientific literature and which can regrettably be lamented still in the German-speaking legal sphere.

In Chapter I the authors address the question of the extent to which sports associations can claim the sport's special features with regard to the activities it carries out, rules it specifies and structures it creates. In the process they take a brief, but absolutely worthwhile look at the application of American antitrust law in the field of sports (p. 22 et seq.), inasmuch as many of the legal problems that have arisen in recent years have been the subject of scientific discussion in the USA for decades. Chapter 2 is devoted to the politics of European sport. In addition to well-known documents, critical light is cast on the "Sports White Paper" published just a few weeks before completion of the work under discussion (pp. 42-46). In the process the White Paper's significance as a reflection of the status quo in the decision-making of the Directorate-General for Competition, the Court of First Instance of the European Communities (CFI) and the European Court of Justice (ECJ), and as a point of reference for the other Directorates-General and EU institutions is accurately described. The White Paper's criticism of individual sports associations and functionaries is sometimes clearly dismissed. Chapter 3 takes as its subject the scope of the sport's special features when applying the EC Convention's fundamental freedoms in ECJ case law and ultimately that of the CFI. In Chapter 4 Parrish and Miettinen investigate how the sport's special features have been taken into consideration in individual decisions, using the ECJ judgements in the "Walrave", "Donà", "Bosman", "Delière", "Lehtonen", "Kolpak" and "Simutenkov" cases and in the "Meca-Medina" case. In this context case law's trends are traced in detail. In so doing particular attention is paid to what is known as *purely sporting rules*. Inasmuch as they represent a part of economic life within the terms of Art. 2 of the EC Convention, according to the current prevailing case-law view these basically fall within the scope of the EC Convention, without the regulations on the fundamental freedoms or Art. 81, 82 EC Convention applying to them. In Chapter 5 the authors then knowledgeably explain application to the facts of EC antitrust where sport is concerned. The ECJ's "Meca-Medina" judgement of 2006, in which the Court expressed an opinion

for the first time on the interesting legal question of the tense relationship between sport and antitrust law, is highlighted. The legal knowledge gleaned up to this point is subsequently used in explaining other problem areas: sports media law in Community law (Chapter 6), professional sportsmen and women in the European employment market (Chapter 7) and other legal questions with regard to the regulatory power of the sports associations (Chapter 8). The study closes with carefully balanced conclusions (Chapter 9).

Although there may already be monographs on the individual topic areas, the particular attraction of Parrish and Miettinen's thorough investigation not only lies in it setting out the different legal developments in parallel, but drawing connecting lines. This approach ultimately leads to some new insights fully worthy of consideration that cannot be reviewed in detail here. The legal considerations do not remain general and abstract; instead the authors also shed light on a variety of sometimes highly topical problems in sport with reference to the fundamental freedoms and EC antitrust law. This can be illustrated by three examples:

- It may be difficult to believe that the work on what is known as the "Webster case", on which the Court of Arbitration for Sport (CAS) first ruled on 10/01/2008 (CAS 2007/A/1298, 1299 and 1300) and thus after conclusion of the proceedings, offers a well-founded opinion (p. 185).
- The authors express their scepticism regarding the "6+5 rule" most recently repeated by FIFA and others (p. 197 et seq.).
- And the detailed description of what is known as the "G14 case" with regard to the duty to release national team players for international matches, which was settled out of court at the start of 2008 (p. 224 et seq.) is impressive proof of the work's currency. At this point Parrish/Miettinen do not voice their opinions, but in this respect refer with cautious approval to a critical legal assessment of previous practice by Weatherill (International Sports Law Journal 2005, 6).

Reading this sensibly, clearly structured and fluently written work is unreservedly recommended for anyone interested in, or even concerned with, the question of the impact of sport's special features on the application of the fundamental freedoms and EC antitrust law. Even if one does not necessarily concur with all of the authors' legal evaluations, by skilful inclusion of countless practical examples they deliver a more than solid dogmatic basis for the root problem. It is easy for the reader to get his or her bearings, not least because of evaluating summaries at the end of each section. This applies even if one dips directly into a specific chapter using the detailed layout or subject index.

Parrish and Miettinen have placed a shining star in the firmament of sports literature. The concluding suggestions should not, therefore, be taken for criticism, but rather as suggestions for subsequent editions.

It is noticeable that the authors have - apparently very thoroughly - assessed English literature only (even if the authors are German, c.f. footnote 666). (Unfortunately the same problem is wide-spread in German-language sports law publications, admittedly under reversed circumstances, although the reviewer has no room to talk!). German scientific literature might, however, have been able to provide a relevant contribution to the initial topic. The work ultimately offers a unique opportunity, though, to obtain a comprehensive overview of the status of opinion in English-language, specifically in British, literature and utilise it for one's own work.

As ECJ and CFI cases might suggest where the initial problem is concerned, sport's increasing commercialisation affects not only the sports associations' relationships with their members, i.e. the sportsmen in particular and possibly third parties such as players' agents (ECJ, Judgement of 26/01/2005, Mn. T-193/02 - "Laurent Piau", c.f. in particular p. 227 et seq.) or investors in football corporations (Commission dec. of 25/06/2002, COMP/37.806 - "ENIC/UEFA", c.f. in this regard p. 217 et seq.). Unfortunately, the work under discussion largely omits the relationship between the sports associations and the sporting goods industry, i.e. those who equip the sportsmen, although English law at least has a pertinent and explosive decision to

offer in the form of the *Strike Out* case (High Court of Justice, dec. of 7/6/2006, Case No. HC 06CO1465, Neutral Citation Number: [2006] EWHC 1318 (Ch) – "adidas/ITF et al.").

In conclusion, "The Sporting Exception in European Union Law" by Parrish and Miettinen is a must for all legal practitioners working in the field of European sports law.

Peter W. Heermann

The original German-language version of this review was published in *Causa Sport* (CaS) 2008 at pp. 78-79.

The International Olympic Committee and the Olympic System

By Jean-Loup Chappelet and Brenda Kubler-Mabbott, Routledge, London and New York, 2008, pp. 208 + XVI, ISBN 978-0-415-43168-2, Price: GBP 14.99 (softback)

What is the International Olympic Committee (IOC)? How is it organised, governed and regulated? And what does it actually do? The IOC is easy to describe, but difficult to define from a juridical point of view. This useful monograph is the twenty-fourth volume in a series of publications on Global Institutions, edited by Professor Thomas G. Weiss of the CUNY Graduate Center, New York, USA, the aim of which is to shed light on the history, structure and activities of key international organisations. Previous volumes have covered various United Nations Organs and Specialised Agencies, such as the Security Council and the World Intellectual Property Organisation, and other International Bodies, such as the World Trade Organisation, the World Bank and the European Union, to mention but a few. Within its short compass, this publication on the IOC adequately answers the above often asked questions about the IOC in a clear, concise and very readable way. And also provides, in a concluding Chapter, some food for further thought on the future organisation and governance of the IOC, founded in 1894 by Baron Pierre de Coubertin and some influential friends, for its survival in the Twenty-First Century, especially in view of the challenges facing international sport, including corruption, doping and violence on and off the field of play.

The IOC is often described as a private members' club consisting mainly of high profile gentlemen and also a few ladies from some 70 nationalities. In other words, the international great and the good - the likes of Princess Anne of the United Kingdom and Prince Albert of Monaco. Legally speaking, the IOC is an NGO - a Non-Governmental Organisation - established as a legal Association under Swiss Law under articles 60 -79 of the Swiss Civil Code. As the authors, Dr Jean-Loup Chappelet, Professor of Public Management at the Swiss Graduate School of Administration, and Brenda Kubler-Mabbott, an editor and translator for various international organisations, including the IOC itself, point out, the IOC is an informal civil institution - rather than a formal political one. But how is it regulated both internally and externally, bearing in mind particularly the billion dollar budget that it commands and oversees for organising, staging and safeguarding the Olympic Games - the greatest sporting show on earth - and their values enshrined in the esoteric and arcane ideal of Olympism?

This publication explains the functions of the IOC and the National Olympic Committees (NOCs); the relationship between the IOC and the International Sports Federations (ISFs), in particular, the criteria for them and their sports to be accepted into the Olympic Movement and thus participate in the Olympic Games; the Organising Committees of the Olympic Games, who are entrusted with them; the importance and increasing relationship between the IOC and Governments around the world, not least that of its host country, Switzerland; and the role played by the regulators underpinning the Olympic system: the Court of Arbitration for Sport, the World Anti Doping Agency and the IOC Ethics Commission.

Regarding the legal status of the IOC in Switzerland, the Swiss Government (the Swiss Federal Council), after several requests from the IOC during the 1970s, issued a Decree on 17 September 1981 confirming that the IOC had "the specific character of an international institution" and also confirming two important privileges that the IOC had acquired many years before, namely: exemption from direct tax on its revenues; and the appointment of members of its adminis-

trative staff without any limitations on their nationality. This latter privilege is an important one in a country like Switzerland, where, generally speaking, it is still difficult for foreigners to obtain work and residency permits. In the same year (1981), the IOC gained international recognition and legal protection of its most famous symbol - the five interconnected rings - under the Nairobi Treaty.

The IOC also enjoys a special relationship with the United Nations Organisation. After intensive lobbying by the IOC, the 48th UN General Assembly in 1994 passed two significant Resolutions, which have put the IOC firmly on the world stage and have underscored its recognition as an international organisation. These Resolutions, which were adopted unanimously, were: the proposal of an Olympic Truce in connection with the 1994 Lillehammer Games; and the designation of the year 1994 - the centenary of the founding of the IOC - as the International Year of Sport and the Olympic Ideal. The idea of an Olympic Truce, which revives an ancient Greek custom requiring all UN Member States to cease all warlike acts during the 15 days of the Olympic Games, continues to the present day in respect of each Olympiad. As the authors point out: "During ancient times, the Olympic Truce (*Ekecheiria*) protected those travelling to Olympia to take part in the Games, which were considered to be a sacred festival. The Greek city-states were supposed to guarantee them free passage despite their incessant wars." The Olympic Truce is more of a symbolic gesture towards promoting world peace than a reality, although it may be noted that the United States did not bomb Iraq during the 1998 Nagano Games; but the Olympic Truce did not stop the Italian troops' operations in Iraq continuing during the 2006 Turin Games! In addition, the IOC has signed a number of co-operation agreements with specialised agencies of the UN, including the United Nations Environment Programme (UNEP) in 1992, promoting the idea of 'green' Games. It is also interesting to note that a former Swiss Federal President, Dr Adolf Ogi, was instrumental in setting up the first Office for Sport for Development and Peace at the UN headquarters in New York. Thus, the IOC has been and continues to be very active politically at the global level promoting good causes, not least the idea of peace through sport, which is also enshrined in the Olympic Charter that governs the Olympic Movement. Much of these initiatives came from the former IOC President, Juan Antonio Samaranch. In fact, if your reviewer may be permitted an aside, Samaranch and his well placed 'friends' in high places in the international community and organisations, have lobbied hard - but without success - for Samaranch to be awarded the Nobel Prize for Peace!

On the other hand, the IOC has what can only be described as an uneasy relationship with the European Union (EU) and a thorn in its side, in view of the EU's intervention in sport in such European Court of Justice landmark cases as *Bosman* and, more recently, *Meca-Medina*. The issue for the IOC and other leading international sports bodies, such as FIFA, is the autonomy of the Olympic movement and sport in general. The sports bodies prefer to be left alone to regulate their own affairs.

This slim volume is a fascinating and useful mine of information and lifts the lid on the IOC and the Olympic Movement (hitherto rather secretive and opaque) and the challenges they face in the next 100 years. It is well researched and includes a helpful Select Bibliography. It is also a very welcome addition to the literature on International Sports Bodies and the place they occupy in the ever evolving field of International Sports Law, and one that your reviewer can thoroughly recommend.

Ian Blackshaw



Beiträge zum Sportrecht

Edited by Kristian Köhl, Udo Steiner, and Klaus Vieweg

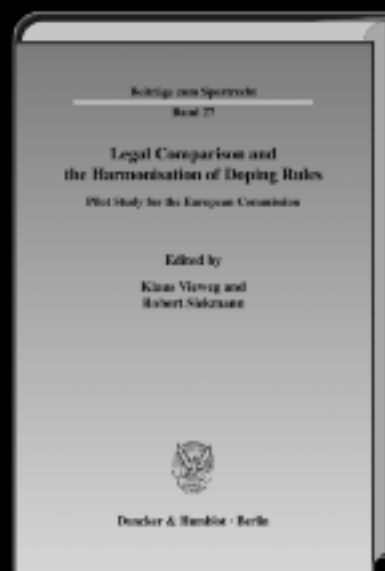
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Klaus Vieweg / Robert Siekmann (Eds.)

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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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 Raül-René Wüschelmaier, 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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8th Asser International Sports Law Lecture, The Hague, 4 June 2008

Comparing Agent Regulation in the United States and Europe

On Thursday, I had the unique opportunity of guest lecturing in The Hague, The Netherlands at a seminar hosted by the Asser International Sports Law Centre of the T.M.C. Asser Institute, which is a center for research and postgraduate education in the field of international and European law. The center publishes numerous books, including an international sports law series, and for those interested in how sports agents are regulated around the globe I highly recommend their recent publication on the subject, *Players Agents Worldwide: Legal Aspects*. The seminar provided a great opportunity to engage in a comparative approach to agent regulation, and there are glaring differences between the systems in the U.S. and Europe.

In Europe, FIFA has been very proactive recently in unilaterally adopting strict rules and regulations that govern the certification and activities of agents, including in the areas of exam requirements, compulsory insurance, charging of fees and conflicts of interests (to name just a few). The first question from the perspective of an American familiar with agent regulation in the U.S. is obviously, why should FIFA have any say whatsoever in how agents conduct their business

with players? That would be like the NFL dictating to players and agents how their relationship should operate. In the U.S., although we like to think that agent regulation is very complex with all of the various union agent regulations, state laws (UAAA), federal law (SPARTA), NCAA rules, and common law agency and fiduciary duty principles, agent regulation is much more complicated in Europe for a variety of reasons.

First, public regulation of agents via national law oftentimes expressly contradicts FIFA's agent regulations (which bind its member associations that are also bound by national law). For example, national law may prohibit intermediaries from receiving any compensation from workers and only permit compensation to be paid by the employer (which obviously prohibits a player from compensating his agent as permitted by FIFA). To make it more complicated, national law takes precedent over regulations of private associations such as FIFA. However, in the U.S., for the most part, state laws governing agents do not *contradict* union regulations. State law just adds another layer of certification and fee requirements, and in many respects

union regulations are actually more stringent on agents than state and federal law. Also, in the U.S., public regulators basically defer to the unions to monitor and regulate agent misconduct. As I discussed at the seminar, although players unions in the U.S. are private associations (like FIFA), the unions are essentially “quasi-public” regulators of agent activity involving both amateur and professional players because federal labor law affords them the status of “exclusive” representative of the players, which even exempts union agent regulations from antitrust law. While the FIFA regulations have been challenged before under the Treaty of Rome’s restraint on trade laws in the *Laurent Piau* case (in the Court of First Instance), without the benefit of an exemption, the regulations will most likely be challenged again on the same grounds as FIFA continues to make them more strict on agents.

Another glaring difference between the U.S. and Europe is the characterization of the agent’s role. In Europe, it is common practice for an agent - referred to as a “broker” - to represent both players and teams (and FIFA even permits it). Although prohibited by the FIFA regulations, clubs sometimes pay the agent’s commission on behalf of the player and some club owners and agents even have ownership interests in players’ transfer rights. These practices would simply be unheard of in the U.S., because the agent’s role is clearly defined as a “fiduciary” role on behalf of the player and the agent is required to serve the best interest of the player and avoid conflicts of interest. Ambiguity over the agent’s role in Europe leads to ambiguity regarding what constitutes “agent misconduct”. But even exclusively within the U.S. where the agent’s role is clearly defined, there is disagreement about what constitutes agent misconduct in certain situations. As an

example, is it a conflict of interest for an agent to represent both coaches and players? The NBPA regulations prohibit it (and the union has indicated that it is going to start enforcing that provision) and the NFLPA regulations don’t prohibit it. What should the agent certification process entail? And how aggressively should the regulations be enforced against agents? Most importantly, who gets to decide the answers to all of these questions? In the U.S., the labor laws clarify that the union is the proper entity to make these decisions, and, in theory, the players are the ones that should be making these decisions. In Europe, it is not at all clear who is the appropriate entity to regulate and determine the “industry norms.”

While it is an industry norm in Europe for agents to work on behalf of both players and clubs, it is most certainly questionable whether FIFA should be unilaterally dictating to players and agents how to operate *their relationship*. Perhaps a more sensible and practical regulatory approach in Europe would be to bifurcate the club-agent relationship and the player-agent relationship. In other words, maybe FIFA (via its member associations) should only regulate the club-agent relationship, and leave it to the players and agents to figure out the industry norms within their relationship as well as how to regulate it. Such a bifurcation by FIFA would also have a better chance of withstanding future claims by agents that the regulations constitute an illegal restraint on trade.

The International Sports Law Journal

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