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CONTENTS

ARTICLES

The EU's Draft Constitutional Treaty and the Future of EU Sports Policy 2
Richard Parrish

Legal Aspects of Media Rights on Football Events under Italian Law: Ownership, Exploitation and Competition Issues 4
Luca Ferrari

United We Stand: Collective Media Rights Sales under Challenge in England 11
James Whittaker, Phil McDonnell and Tony Singh

Spain: Football Players: Single or Joint Actors? An IP Question 13
José Manuel Rey

Legal Principles Applicable to the Centralised Marketing of TV Broadcasting Rights in Germany 15
Martin Schimke

Ownership of TV Rights in Professional Football in France 17
Delphine Verheyden

European Social Dialogue in Professional Sports: the Legal Framework 18
Frank Hendrickx

Continuing to Build the European Model of Sport 22
Denis Musso

Council of Europe's Work on Sport 25
Mesut Özyavuz

PAPERS

The Professional Club Leagues in Portugal: What Legislative Reform? 28
José Manuel Meirim

OPINION

The Ephedra Problem and a Solution 32
Jim Gray

Bosman Principles Extended to Non-EU Citizens 33
Ian Blackshaw

CONFERENCES

Papers of the 7th I.A.S.L. Congress in Paris (2000) published : International Association of Sports Law Holds Conference in Paris 34

'Spektrum des Sportrechts': Joint Academic Sports Law Conferences in Berlin, June 2001 and 2002 35

BOOK REVIEWS

Richard Parrish, Sports Law and Policy in the European Union, Manchester 2003 37

Ardi Kolah, Maximising the Value of Sponsorship, London 2003 37

INFORMATION

Promoting the Social Dialogue in European Professional Football (EFFC project 2003/4) 39

What is Sports Law? (Masters in Sports Law at Griffith University) 43

EDITORIAL

The *ASSER International Sports Law Centre* is proud to announce that in October of this year the T.M.C. Asser Institute was granted a subsidy by the European Commission under budget heading B3-4000 for promoting the Social Dialogue in European professional football in the ten 'new' EU Member States. By means of the organisation of a series of regional seminars the Centre will aim to bring awareness and information to the football sector concerning the 'EU sport acquis' in general and the social dialogue and its framework for collective bargaining in particular. The project is a follow-up to the EFFC project which is currently being run in cooperation with the Centre regarding the fifteen 'old' Member States. The first seminar in the context of this project has just been succesfully concluded in London on 30 October last. The new Asser project will again be implemented in cooperation with EFFC and the first seminar is planned for the Baltic Region, to be organised in Vilnius (Lithuania) in January 2004. The other seminars will take place in Prague, Warsaw, Ljubljana, Bucharest and Nicosia. Again this October last, the European Commission granted another subsidy to the Asser Institute, this time under the AGIS Programme, for carrying out a one-year study on '*Football Hooliganism with an EU Dimension: Towards an International Legal Framework*'.

The present issue of *The International Sports Law Journal* is characterised by two distinct features. First, we have a thematic section on the collective or individual selling of TV rights in profession football which covers the current situation in the 'Big Five', i.e. the leading football countries in Western Europe - England, France, Germany, Italy and Spain - concerning aspects of ownership of rights and competition law. All five contributions were written by native sports lawyers. Two of them, James Whittaker and Luca Ferrari, spoke on this subject during the Third Asser International Sports Law Lecture on 29 September in The Hague. Second, the 'Latin' element resurfaces in this third issue of ISLJ 2003 and is further strengthened by the contributions of Denis Musso of INSEP in Paris, on the European sports model and Sports Law professor Jose Manuel Meirim on the reform of the Portuguese sports law system.

Since *Bosman*, the subject of 'the European Union and Sport' has become very important in international sports law and policy (cf., for example Richard Parrish' leading article in this issue of ISLJ on a sports provision in the new EC Treaty which was proposed by the Convention). However, the Council of Europe's traditional role in the area of sport in Europe must not be forgotten either (cf., the article by Mesut Özyavuz which provides basic information concerning the CoE and its involvement in sport).

Finally, we extend a heartfelt welcome to the Centre's new supporting partners Taylor Wessing, Munich, and Mees Pierson Intertrust, Amsterdam, and the Advisory Board's new member Jose Manuel Rey of Larrauri Lopez Ante, Madrid.

The Editors

The EU's Draft Constitutional Treaty and the Future of EU Sports Policy

by **Richard Parrish***

1. Introduction

The European Convention on the Future of Europe was formally convened by the European Council meeting in Laeken in December 2001. The Convention was requested to conduct a review of the activities of the European Union (EU) with a view to proposing a new constitutional Treaty for the Union. On the 18TH July 2003 the Convention published a Draft Constitutional Treaty proposing the incorporation of sport into the legal framework of the EU.[1] Such a move was previously resisted by the member states during the 1996/97 Amsterdam Treaty deliberations and the 2000 Nice Treaty discussions although these two intergovernmental conferences did produce two important political declarations on the role of sport in the EU.[2] This article examines the motivations of those advocating formal Treaty status for sport. In particular, it suggests that two largely separate agendas are being pursued. First, major sports federations wish to expand their autonomy by having sporting rules constitutionally protected from the application of EU law. Second, the EU wishes to use sport to further expand its range of socio-cultural policies in an effort to promote its image. The article concludes by suggesting that, for the EU, the danger lies in pursuing a socio-cultural sports policy that concedes too much legal ground to professional sport. A strong case can therefore be made for the maintenance of the status quo. If however, the member states adopt a legal passage on sport, the location and wording of it needs carefully drafting.

2. The Convention's Proposal

One of the central tasks of the Convention was to examine and report on a clearer delimitation of competences between the EU and the member states. In this connection it examined policy areas that should be defined as an *exclusive* competence of the EU, those areas in which competence should be *shared* between the EU and the member states and areas in which the member states retain competence but the EU can play a *supporting* role. Clearly, the Convention also retained discretion to define certain policy sectors as falling outside the competence of the EU, a category sport currently falls within.

Article 16 of the Convention's Draft Constitutional Treaty proposes a change in the legal status of sport by defining it as an area for 'supporting, co-ordinating or complimentary action'. Elaborating this, Article 182 (Education, Vocational Training, Youth and Sport) suggests that '*the Union shall contribute to the promotion of European sporting issues, given the social and educational function of sport*' and that *'Union action shall be aimed at: (g) developing the European dimension in sport, by promoting fairness in competitions and co-operation between sporting bodies and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen'*.

Supporting measures are to be of 'low intensity' and permit the EU to take action in areas which, although remaining the competence of the member states, do have a common European dimension. As such, supporting measures allow the EU to assist and supplement national policies where appropriate. Supporting measures may take the form of financial support, administrative co-operation, pilot projects and guidelines.[3]

3. Sport and the Treaty: The Federations' View

The International Olympic Committee (IOC), the National Olympic Committees (NOC) of the 15 member states, the European Non Governmental Sports Organisations (ENGSO) and the Union des Associations Europeennes de Football (UEFA) have traditionally supported a legal passage in the Treaty. This would be used as a legally binding reference point guiding the European Court of Justice and the Competition Policy Directorate in the application of European law to the sports sector. The 1995 Bosman ruling is a frequently cited example of the consequences of applying generic Single Market laws to a sector that operates under different market conditions to other industries. *Bosman* not only demonstrated the potential for private enforcement of Treaty rights through the prohibition of both the use of nationality restrictions in European club football and the operation of the international transfer system, it also opened the floodgates to a stream of public enforcement proceedings conducted by the European Commission on the basis of European anti-trust legislation.

A Treaty Article on sport would serve as some protection for sporting rules by placing a legal requirement on the EU's judicial bodies to respect the specificity of sport when deciding sports related cases. In particular, sports federations wish to insulate rules they consider central to their constitutions from the penetration of European law. These include the ability to collectively market broadcasting rights; the maintenance of a transfer system for players; the ability to set rules on the multiple ownership of clubs and rules maintaining federations' organisational monopoly. For such an agenda to be realised the wording of Article 182 would need to be much more specific. The above mentioned sports federations submitted such a proposal to the Convention which implicitly or explicitly sought protection for such rules .[4] The draft read rather like a wish list. Whilst UEFA was party to the proposal, their publicly stated position is to support the adoption of a protocol which would achieve the same result as a Treaty Article without the need to grant the EU a competence in sport.[5]

Since *Bosman*, sports federations have lobbied the EU for such a protective Treaty Article.[6] The 1997 Amsterdam Declaration on Sport remains the only Treaty based reference to sport, although Declarations are not legally binding. The Nice Treaty also failed to contain a legally binding passage on sport although an unusually long declaration on sport was released as a Presidency Conclusion. These two developments have greatly influenced the regulatory environment in which sport operates. There is evidence to suggest that the Amsterdam process is (from a federation perspective) positively affecting the application of European law to sport. However, a concern raised by sports federations is that the new regulatory environment offers sport no long-term protection as it is not legally incorporated into the Treaty. In particular, whilst the Amsterdam process has informed the application of competition law to sport, the decentralisation of the competition regime raises some practical questions con-

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1 Draft Treaty Establishing a Constitution for Europe. CONV850/03, Brussels, 18th July 2003.

2 Declaration 29, Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (1997). See also 'Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies', Presidency Conclusions, Nice European Council Meeting, 7, 8, 9 December 2000.

3 P.3-4. CONV 375/1/02.

4 See 'Sport at the Heart of the European Union's New Constitution', Official IOC press release, 17/05/03 - available at www.olympic.org.

5 Article 311 of the Treaty states 'The protocols annexed to this Treaty by common accord of the member states shall form an integral part thereof'.

6 See Blackshaw, I. The Battle for a Sports Protocol Continues, Sports Law Bulletin, 5(1): 14 - 15.

cerning the robustness of the Commission's line of reasoning on sport. Since Amsterdam, the Commission has sought to define a range of sporting activities as either falling outside the scope of Article 81 or falling within the exemption criteria. Currently the Commission holds a monopoly over these judgements.[7] The Regulation (17/62) establishing these powers will however be replaced in May 2004 by a new competition regime which empowers national competition authorities and courts to issue exemptions from competition law.[8] Whilst the new system will release sports federations from the need to continually notify the Commission of agreements, it has been suggested that the lack of hard law precedent in the Commission's sports related 'decisions' may pose difficulties for national competition authorities seeking guidance in the application of EU competition law to the sports sector.[9] This could result in a fragmentation of the Commission's line of reasoning on sport and lead to challenges to the consistency of its application which will create new uncertainties for sport. Ultimately this may re-engage the Commission and, more worrying for the sports federations, the European Court of Justice in sporting matters. The re-appearance of these actors as venues for legal clarification raises the prospect that in the absence of constitutional entrenchment a change in personnel at EU level could signal a change in the regulatory approach to sport. It is the privately held view of many sports administrators that they have already become victims of the personal vendettas of some working in the EU.

4. Sport and Ever Closer Union

The adoption of Articles 16 and 182 of the Draft Constitutional Treaty will not only resolve the legal status of sport, it will allow the EU to allocate specific budgetary appropriations for sporting actions subject to the confines of measures that are supporting in nature. This would resolve the argument over the legality of current measures with a sporting dimension. As the EU lacks a Treaty competence to make specific sports budgetary appropriations, any financial activity in the sports field is legally questionable. In *UK v. Commission*, the ECJ held that each budget item must have a legal base.[10] The EU's soft law initiatives in sport do not constitute a 'basic act'.[11] This ruling resulted in the Commission abandoning its sports related programmes and replacing them with actions bolted onto EU policies which do have a legal base in the Treaty. For example, unable to propose a European Year of Sport because of the basic act requirement, the Commission proposed that 2004 be declared European Year of Education Through Sport - an example of sport being linked to policies in related areas .[12] Nevertheless, such procedural niceties are still questionable without a specific legal base for sport. Calls for the submission of proposals for preparatory measures in the areas of anti-doping and youth that were published by the Commission in July 2002 have been cancelled due to such concerns.

Clearly for sports organisations wishing to participate in EU funded activities, the issue of a legal base is critical. Even without one, the linkage of sport to activities in which the EU does have competence is unsatisfactory. The concern expressed by the European sports movement is that sport is not the central theme of the programme. This leads to a supplementary problem - the issue of equality of access to EU funds. Those sports bodies wishing to exploit funding initiatives from the EU do not have parity of esteem with applicants from fields legally covered by the Treaty. An Article for sport would therefore lay to rest arguments over the legal fragility of sports funding programmes, place sport at the heart of new initiatives and give applicants equal access with other sectors to budgetary lines.

Above all, the establishment of a budgetary base for sports related appropriations is an essential precondition for those EU actors keen on exploiting sports integrationist potential. The European Parliament, elements within the European Commission and many member states have identified sport as one of the tools through which the EU can reconnect with its citizens. The so-called people's Europe project has been an ongoing concern for the EU. A line of thinking on sport and 'ever closer union' was first developed by the 1984 Adonnino Committee. The Committee suggested that sport could be used to strengthen the image of the European Community in the minds of its citizens, thus addressing the perceived legitimacy crisis within the Community at the time.[13] Given the lack of a Treaty base for the EU to pursue such a sports policy the Adonnino proposals failed to fully materialise. Nevertheless, the spirit of Adonnino has lived on. Following the completion of the Single European Market in 1992, the EU has sought to introduce a greater socio-cultural personality within its structure. The content of the Treaties of Maastricht, Amsterdam and Nice all reflect this trend. Furthermore, the construction of a 'people's Europe' is explicitly an area the EU is in the process of addressing through the current intergovernmental conference process. In the absence of a Treaty base for sports policy, EU actions in this field have been secondary, under-resourced and legally fragile.

5. Conclusions

Should the Draft Constitutional Treaty emerge unscathed from the current intergovernmental conference process, sport will become a legally rooted competence of the enlarged Union. This would represent a significant victory for the sports federations, particularly given the generosity with which the EU has applied its legal framework to the sports sector. For a range of political and administrative reasons, the EU has sought to define a policy of non-intervention in sport. Even the infamous *Bosman* ruling alluded to this. In the ruling the Court argued 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'*.[14] The Court's subsequent rulings in *Lehtonen* and *Deliège* in 2000 illustrate their willingness to respond to the Amsterdam process by acknowledging the specificity of sport.[15]

The construction of a non-interventionist policy in sport has also partly been the preoccupation of the Commission. Spurred by the Amsterdam Declaration and the Commission's own Helsinki Report on Sport [16], the Competition Policy Directorate has attempted to construct a regulatory policy on sport.[17] The Commission has in effect sought to locate sporting rules within a territory of sporting autonomy to which EU law will not apply (or touch softly) or within a territory of 'supervised autonomy'.[18] Only in exceptional circumstances has the Commission defined sporting rules within a territory of judicial intervention in which Treaty principles will continue to be rigorously applied.[19]

Given these developments, it is uncertain what added utility an

7 Council Regulation No.17 of 6 Feb. 1962, First regulation implementing Articles 85 (now 81) and 86 (now 82) of the Treaty, O.J. 1962, 13/204.

8 Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003, L 1/1.

9 See Kinsella, S. and Daly, K. European Competition Law and Sports, Sports Law Bulletin, 4(6): 7-13.

10 Case C-106/96, *UK v. Commission* ECR I-02729.

11 See OJ C 344, 12/11/98. Subsequently replaced by OJ C 172/1, 18/06/99 (Interinstitutional Agreement of 06/05/99). For a full review of the potential legal bases relating to sporting actions see Commission document 'Community Aid Programmes'. Available online at: http://europa.eu.int/comm/sport/doc/ecom/actions_comm_en.pdf.

12 Decision No. 291/2003/EC of the European Parliament and of the Council of 6 Feb. 2003 establishing the European Year of Education Through Sport OJ L43/1 18/02/03.

13 COM (84) 446 Final, A People's Europe, Report from the ad hoc Committee.

14 Para. 106 Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman [1995].*

15 Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga*, [2000] ECR I-2681. Joined cases C-51/96 & C-191/97, *Deliège v. Asbl Ligue Francophone de Judo and others* [2000] ECR I-2549.

16 CEC, 'The Helsinki Report on Sport', 1999, 644, Brussels.

17 DN: IP/99/133, 'Commission debates application of its competition rules to sport', 24/02/1999.

18 See Koster, K. (2000), How can Sport be Regulated? In Greenfield, S. & Osborn, G. (eds.) (2000), *Law and Sport in Contemporary Society*, London: Frank Cass.

Article for sport could offer the sports federations. Furthermore, the potential compromise deal involving the annexation of a sports protocol to the constitutional Treaty offers sport no additional protection against the application of EU law. By interpreting protocols narrowly, the Court has shown its reluctance to be straight-jacketed by their existence.[20] The governments of the UK, Denmark and Sweden all expressed the view at the 11TH European Sports Forum that the Amsterdam and Nice processes should be given more time to deliver a well defined and effective legal environment. This policy is consistent with the so-called open method of co-ordination (OMC) which allows the EU to exert a soft influence on policy in the absence of a harder legal authority to act. In the case of sports policy, this approach is delivering a general consensus among member states and other interested parties that the specificity of sport needs safeguarding in the context of the application of EU law. This does not necessarily require formal legislative action.

If the issue of the clarification of the legal environment can be successfully addressed by the soft law Amsterdam process and the approach to 'sports law' adopted by the ECJ and Commission, what of claims that the EU should develop a symbolically important common sports policy with associated budgetary appropriations? Three issues are of importance in this connection. First, the acquisition of new competences (such as sport) runs the risk of contradicting the EU's claims of subsidiarity. Such a move may well harden popular attitudes that the EU is seeking to centralise rather than devolve policy. Second, the aims associated with granting sport a Treaty base can already be achieved by the EU without the need to develop a common sports policy. For example, by granting sport commercial freedom (such as through the collective sale of broadcasting rights), the EU can contribute indirectly to the financing of socially and educationally oriented sports programmes. Third, a Treaty Article entails a financial commitment and given the impending enlargement of the EU and the reluctance of the member states to commit to large budgetary increases, any re-distributional element in a common sports policy is unlikely to be sizeable. The benefits of such a policy to both the EU and the European sports movement should not therefore be exaggerated.

The case for legal status for sport is therefore challengeable. Furthermore, the Draft Treaty's provisions on sport also contain an inherent danger. The process through which the provisions have been arrived at risk conflating two, largely unrelated, issues. On the one hand sports federations wish to see a legal base for sport established as a means of insulating sporting rules from the reach of EU law and hence expanding their own autonomy. On the other, the EU sees the potential for using sport for socio-cultural and integrationist purposes. The risk inherent in the second strategy is that it concedes too much to the first. Clearly whilst most observers would wish to see amateur sport shielded from the intensive application of Single Market law, the sports federations agenda has been driven by commercial and professional interests. Given the success of the Amsterdam process in plotting a legal path through this field, one may question why the EU should concede more to the professional game. However, the wording and location of the provisions on sport in the Draft Treaty (within the remit of Education policy) restrict the ability of the sports federations to claim special status under EU law. Rather like the Maastricht Treaty's provisions on culture, any reference to sport may end up leaning more heavily on symbolism than it does protectionism. Ultimately, as with cultural policy, this may fail to satisfy all involved.

19 Such as for broadcasting agreements with excessively long periods of exclusivity. See Case No. IV/36.033- KNVB/Sport (1996), OJ C 228, although see Case No. IV/33.245- BBC, BSB and Football Association (1993), OJ C 94 for a long exclusive contract exempted by the Commission.

20 The ECJ sought to limit the reach of the Barber Protocol in Cases C-128/93, *Fisscher v. Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583, and C-57/93, *Vroege v. NCIV Instituut voorVolkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I -4541.

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Legal Aspects of Media rights on Football Events under Italian Law

Ownership, Exploitation and Competition Issues

by **Luca Ferrari***

1. Introduction

The importance to football clubs and to the media[1] of the rights to the transmission of comments, images and data concerning football games cannot be overemphasised. To state the obvious, the economic exploitation of such rights is the lifeblood of football clubs. From that, it derives the likewise vital importance of affirming the legal ownership and extension of the media rights[2] to football events.

This article gives an overview of the legal background of such ownership and explores the ways in which the rights are marketed and the competition issues arising from their commercial exploitation.

With new communication technology becoming available to consumers, innovative ways to provide football content raise further legal questions and require a verification of previously developed legal analysis and solutions. In Italy, as we shall see, the recent legal battles over the definition of football broadcasting rights have taken place in relation to the exploitation of such rights through mobile telephone MMS and UMTS technologies.

2. The ownership of media rights

In Italy 'Each Serie A and Serie B Football Club is the owner of the television broadcasting right in codified format'[3]. Art. 2 of Law 78/1999 represents the only Italian statutory provision which expressly affirms ownership of (pay) television broadcasting rights; it certainly constitutes an important statement as it reinforces the prevailing opinion that rights to football events belong to the clubs rather than to the league or federation[4].

From a doctrinal point of view, it must be noted that the statute does not define the content and especially the nature of the pay-TV

* Partner Studio Associato LCA, Padova, Italy. With the valuable assistance of Francis X. Grossi, of counsel and Lucy Helen D'Odorico, trainee solicitor.

1 '*Media*' is used in this sense to mean radio and television broadcasting, internet communications, telecommunications and other forms of electronic transmission and display. It does not refer to print.

2 '*Media rights*' is used in this article to mean media rights concerning sports or football events.

rights. Indeed, the provision appears as a marginal content of a law whose objective is the pro-competitive regulation of the market position of buyers of pay-TV rights, introducing a 60% cap in the ownership of football pay-TV rights by a single operator in a multi-platform TV market.

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. Not so unanimously rejected is the more general classification of the media right to a sport event as a new kind of intellectual property, although it is noted that Italian Law does not provide a general discipline and definition of this category of rights, but rather a limited number of specific and narrowly defined rights (copyright; trademark; patent right etc...) none of which fits the idea of a right to commercially exploit a football game. No matter how entertaining, a football match does not involve any intellectual creation.

This pedantic effort is not just an academic exercise. Effective legal protection must be found for a value which undeniably is the object of investment, interest and negotiation, hence the importance of its identification as a value whose ownership or whose *control* can be affirmed by a court of law. The majority of the German courts and scholars appear to have come to the conclusion that such value cannot be the content of a *right.* Rather, the only available protection is that provided by the property or contractual management or organization of the venue where the event is staged and particularly the right to exclude or limit the media from entering the stadium. This is also referred to by English courts as a right to restrict access to the venue.

This approach has been adopted in many countries, including Italy[5]. However, the latest tendency seems to be that of providing a protection based on the idea of an exclusive right on the event as the result of the specific economic activity (value creation) of the club. From an idealistic perspective, it is the right of the club (or clubs) staging the game not to be deprived of the results of its economic activity and investments: the football game as a new kind of entertainment not protected by copyright and yet whose value cannot be 'siphoned away' and commercially exploited by other economic operators without the consent of the 'owner'[6].

While we await a clear, complete statutory definition and statement of this right, art. 2 of Law 78/99 and European Directive n. 89/552 of 3 October 1989 provide a rather solid argument for the legal protection (erga omnes) of the rights to sports events not simply based on the power to restrict access to the venue but as a right *per se*. Notably, the object of the act is very narrow, since it is limited to 'codified' pay television, with the exclusion, arguably, of cable TV, free-to-air TV, radio broadcasting, internet and mobile telephone transmission. Nonetheless, there seems to be no compelling reasons preventing an extension of the principle, if not the actual rule, affirmed by Law 78/99 to the other technologies for the broadcasting and transmission of sports events.

The conclusion that envisages an original right of exploitation of the sport event, does not necessarily resolve whether original ownership of media rights to championship or tournaments matches rests with the hosting club, both clubs participating, the league or federation. This has been the object of divergent decisions elsewhere in Europe[7]. In Italy, however, the individual ownership of such rights by the clubs is generally undisputed[8]. This precept, in conformity with the only existing statutory statements, rests with the vast majority of the scholars[9] as well as with the sports regulators.

In the Italian football federation's (FIGC) statutes and regulations, there is no declaration about ownership of media rights. However, the regulations of Serie A and - League (LNP) specifically address it. Under Art. 1.3.d), the LNP 'represents, upon specific appointment for each single contract by each single club, the clubs participating to official tournaments in the licensing of: 1) TV rights limited to the free-to-air highlights of the Serie A and B championship; 2) radio broadcasting rights to the Serie A and B championship; and 3) TV and radio broadcasting rights to the Coppa Italia matches...'. The foregoing provision is obviously based on the principle that such rights belong originally to the clubs. Moreover, art. 25.1 of the same regulations requires each club to submit to the LNP the agreements individually concluded for the licensing of (pay) TV rights, for the inspection of their content relating to certain obligations concerning access of the media to football stadiums and to protection of the championship logo. This, too, implies and so confirms the club's direct control of TV rights.

This conclusion is further supported by a few recent court decisions involving the exploitation of images of the football games by certain mobile telephone companies. We will later discuss this interesting jurisprudence, but here we stress that all decisions move from the premise that the hosting club is the holder of the rights to the economic exploitation of the game, including its transmission through all media.[10]

Indeed, as we know, Italian clubs have been selling pay TV rights individually for some years and their entitlement to the negotiation and fruits of such agreements have never been seriously challenged.

Based on this practice, and possibly taking into consideration the

3 Article 2 of the *Italian Law n. 78, of 29 March 1999 (L. 29 Marzo 1999, n. 78 - Urgent dispositions for the balanced development of television broadcasting and for the avoidance of the establishment or strengthening of dominant positions in the TV and radio market).*

4 In addition to *Law 78/99*, a further statutory reference to television rights to sports events is contained in *EU Directive n. 89/552 of 3 October 1989*, (as amended on 30 June 1997 by the *European Parliament and Council Directive n. 97/36*) *on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities,* commonly known as '*Television without frontiers EU Directive*'.

5 Corte di Cassazione, *decision no. 2118/1963*; Pretura di Bari, 29 December 1982 *Società cooperativa Olimpico v. AS Bari.*

6 Tribunale di Roma, 21 July 1978 - *Società Teleregione e altro v. Società Sportiva Lazio*; Corte d'Appello di Roma, 10 November 1980 - *Teleregione v. Società calcio Roma e altro*; Pretura di Roma, 3 July 1981 - *Lega nazionale settore professionisti FIGC v. Società Dimensioni P*; Pretura di Vercelli, 1 June 1984 - *Hockey Club mobilificio Anna v. Radio City Vercelli.*

7 The debate unfolds along two different lines of reasoning: the one reflected in the decision in *Bundeskartellamt, VI div., on 2 September 1994, DFB,* according to which the rights belong to the hosting club, who organizes access to and staging of the event and is responsible of the safety of the viewers and participants; and the one taken by the *Restrictive Practice Court of England and Wales - now Competition Commission - on 28 July 1999*, according to which the English Premiership is a product *per se*: *'the product which has a value is the Premier League Championship as a whole, rather than the individual matches played in the course of that championship'.* More critically, the Court held that *'while a club can prevent a broadcaster's cameras from entering its ground, this is a mere power of veto and does not enable the home club to sell the rights without the agreement of the away club'.* The Court in *Landsgerichtshof Frankfurt a. M. on 18 March 1998 -Eisele v. FIA and ISC* decided consistently with the English decision and contrary to the reasoning of the Bundeskartellamt. Nevertheless, as discussed *infra*, national competition authorities and the European Commission have rejected the assumption of the 'collective ownership' while evaluating compliance to competitive rules of the collective selling of TV rights. FIFA and UEFA, in their respective statutes seem to adopt the collective ownership assumption, although whereas FIFA includes the clubs (art. 53: *'FIFA, its member associations, confederations and clubs own the exclusive rights to broadcasts and transmissions of events coming under their respective jurisdictions*', UEFA only refers to itself and member associations as holders of such exclusive rights under art. 48.

8 We hereby recall Tribunale di Catania, 20 October 1988 - *Società Calcio Catania v. Società Telecolor* International, in which it is specifically stated that 'the exclusive owner of a sports competition is the entity organizing the event which - in the case of football - coincides with the club in whose field the game takes place'; equally stating ownership of clubs as 'organizing entities': Pretura di Roma, 18 September 1987 - *Radio Roma nord v. Lega Calcio;* Pretura di Roma, 10 December 1992 - *Società Teleroma 56 v. Lega nazionale professionistico*; also see decisions recalled in footnote 6.

9 Roberto Pardolesi and Cristoforo Osti, 'Avvisi di Burrasca: antitrust e diritti TV su manifestazioni sportive' in *Rivista di diritto sportivo - 1996,* Giuffrè editore page 11 and following*;* Roberto Simone, 'Diritti televisivi, sport e *siphoning effect*: tutela degli spettatori o delle emittenti in chiaro?' in *Rivista di diritto sportivo - 1997,* Giuffrè editore, p.50; Massimo Coccia, 'Diritti televisivi suglie venti sportivi e concorrenza' in *Mercato Concorrenza Regole, no. 3/1999*, Il Mulino editore, page 530; Massimo Coccia, 'Lo sport in TV e il diritto antitrust' in *Rivista di Diritto sportivo nn. 2/3 - 1999,* Imago Media editrice, page 310.

notion that the visiting club may also have rights in the single game and be entitled to a share of the profit thereof, the LNP has promoted specific agreements among its affiliated clubs to redistribute part of the revenues from gate receipts as well as season tickets and TV rights licensing. We will return to this last topic when addressing the economic exploitation of the TV rights. However, it is noteworthy that these agreements and the ambivalent language of art. 2 of Law 78/99 makes debatable whether the rights to the single game belong exclusively to the hosting club or jointly to the two clubs participating to the event.

Apart from the visiting team, there is another potential and indeterminate challenge to the otherwise undisputed legal ownership of the media rights by the hosting club: the players. This challenge is no doubt remote and so far completely embryonic. Yet one could argue that players are the legitimate owners, under Italian Law, of their own image rights, that their image cannot be utilised without their consent, absent the public interest exceptions listed by the Law, and finally that an employment contract does not necessarily imply an assignment or a licence of such image rights. The issue is whether under the player employment agreements the (playing) services of footballers constitute their only obligation under the contract or, in view of the value of the remuneration, the players necessarily grant the Club the right to 'put on a show' in which they agree to play. This poses a tantalizing and sensitive question for another article.[11]

3. The economic exploitation of broadcasting rights

Stated broadly, in Italy pay-TV rights are sold individually whereas free-to-air rights are sold collectively by the League. However, the clubs of Serie A and Serie B have agreed on a complex system of redistribution of revenues deriving from the individual exploitation of sports rights. The following chart provides an outline of the way in which the system works. The redistribution proportions, based on mutuality principles, are agreed at the League level each year. The chart refers to the season 2002/2003. At present the figures for the current season are under discussion.

3.1. Economic exploitation and freedom of press

Once the main forms of selling and the streams of revenues are identified, our analysis of the economic exploitation of broadcasting rights cannot ignore the relevant issue concerning the extent of such exploitation. As difficult as it may be, identifying the owner of media rights is one thing, defining the scope of the rights is another. A principal problem presently afflicting Italian law is the determination of the limits within which third parties can utilize the concept of the public interest and particularly, freedom of the press to disseminate aspects of sports events. This, obviously, poses real conflict with the exclusive exercise of the rights of those entities (the clubs) which claim to be the owners of the broadcasting rights.

Art. 21 of the Italian Constitution, stating the fundamental right to freedom of expression, has always been held as including or implying the protection of the freedom of the press.

Furthermore, article 5 of Law n. 422/1993 declares that '*the transmission of images and sound material and of information concerning all events of general interest (...) is allowed for the purposes and within the limits of the exercise of freedom of the press*'.

Accordingly, there can be no doubt that the public interest to sports events allow the media to invoke a right of access to the venues where football games are held and a right to the press coverage thereof. At the same time, the foregoing provisions do not define the extent to which the dissemination of information by the press crosses the line of free speech into commercialisation. It is no secret that news organizations are businesses no less than football clubs. Thus, there is a palpable tension between the rights of the press and the rights of the owner to fully exploit its media property.

In order to alleviate this dilemma, further regulations have been passed by the League disciplining these aspects in relation to television and radio broadcasting. On the contrary with regard to mobile telephone broadcasting via UMTS and MMS technology, the absence of specific self-regulatory provisions has lead, as we will examine further in this article, to great uncertainty.

3.1.1. Television and radio broadcasting rights and freedom of the press

Compared to the still developing economic exploitation of telephone rights, radio and television broadcasting has not taken the clubs by surprise. As mentioned, there exist specific regulations of the League[12] concerning the compatibility of the right to inform and to be informed with the exercise of ownership of broadcasting rights.

In particular, article 3 of the Regulation for the Exercise of Radio Reports passed by the LNP for the season 2002/2003, states that '*radio reports by those bodies which have been granted access to the prem-*

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10 Before entering the merits in Tribunale di Roma, *29 March 2003, Juventus F.C., A.C Milan. S.p.A and H3G S.p.A. v. TIM Telecom Italia Mobile and ANSA,* the court preliminarily analysed the character of football clubs as economic enterprises and of their consequent ownership of broadcasting rights. The judge held that sports clubs and associations must be considered as enterprises because they carry out economic activities which, among other things, consist in producing and offering sports shows and events to the public. Sports events are, therefore, susceptible of being economically exploited. The principal income of the clubs derives from the economic exploitation of the sports events. For example, the selling of tickets, of radio and television broadcasting rights and revenues from signage at the stadium - to mention a few - demonstrate, in the opinion of the court, that the clubs which host and organize the event should be considered the legal owners of all economic rights, including media rights.

11 *'[...]Within what limits can the club use the image of one or more players or that of the whole team, in its own marketing and merchandising activities?*
It is typically held in Italy that a part of the [players' image] *rights used by the Club are acquired almost automatically through the Convention in force on the regulation of advertising and promotional activities, which was executed between the Associazione Italiana Calciatori (AIC)* and Professional Leagues (the Lega Nazionale Professionisti and the Lega Professionisti Serie C) in 1981. On the basis of this Convention, the players, as consideration for the granting of their image rights as members of the team, would be collectively entitled, unless they waive them, to a part of the profits derived from the promotional and advertising activities of the Club. Such a waiver has, indeed, become a standard, thanks to a short clause that is always inserted in the contractual forms.*
But the player contract does not, however, resolve the doubts relative to ownership of the rights. In the first place, it wrongfully embarks with the supposition that the football players' image rights are not freely exploitable by the player (a supposition in opposition to Articles 1 and 5 of the same Convention*). This supposition has been denied, over the years, by the conduct of clubs and players and the decisions of the courts. It is, indeed, an error that could eviscerate the entire Convention.*
Moreover, numerous doubts arise both as to the efficacy of the Convention towards individual players, especially if they come from foreign federations and are not registered with the AIC, as well as to its hallmark as an agreement in restraint of trade. Furthermore, over the years many of the provisions contained therein (in particular Articles 4, 5, 9, 10, 14 and 15) have never been applied, which leads to the conclusion that they are no longer effective. From the invalidity or inefficacy of the Convention, it follows that the clubs should not be entitled to undertake advertising activities, which, in some way, imply the use of the players' image, ranging from the addition of the sponsor's name or logo on the jersey to the licensing of broadcasting rights, and the like.
But even if one wished to hold the Convention as totally valid and effective, contrary to the evidence indicated above, it would still be possible for players with sufficient economic power to refuse to have the customary wording added to their playing contracts agreements, by which they renounce their part in promotion and advertising revenues. They would then be entitled to 10% of such revenues.
If we include the proceeds derived from the sale of television rights to this income, we can easily reach 70% of the club's overall turnover. One can easily understand what unsettling effects would result if this problem, which heretofore has never been raised, were to emerge.
In such a way as to ward off these risks, it would be opportune for the Club to explicitly negotiate the acquisition of its registered players' image exploitation rights, thus ensuring itself against any possible dispute as to its entitlement to the full income generated by each business activity conducted in the media and advertising sectors. (Luca Ferrari, Sports Image Rights and the Law, Idrottsjuridisk skriftserie Nr. 7, Artikelsammling 2002, Svensk Idrotts Juridisk Förening).

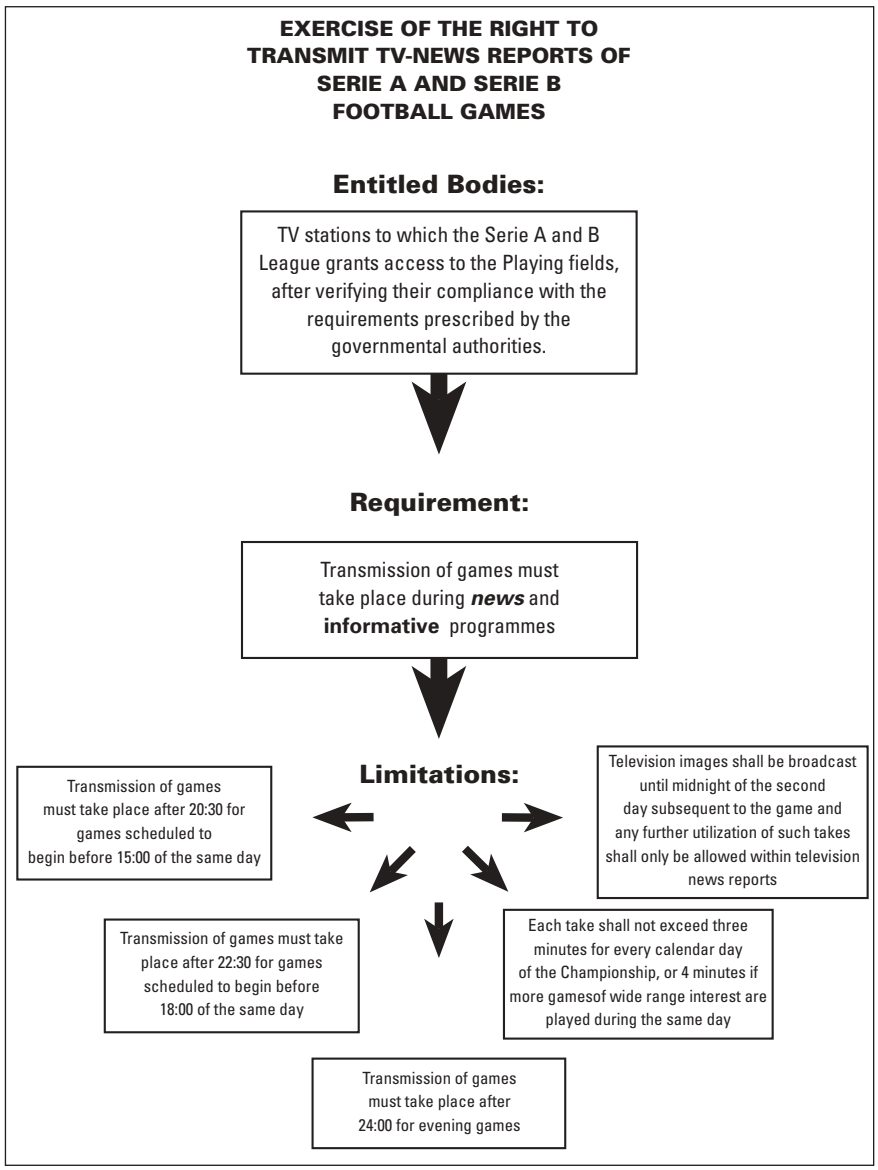
* Art. 25, paragraph 2 of the AIC'S Articles of Association, it is foreseen that those footballers who wish to join are obliged to assign to the association, without any temporal limits, 'the rights to use their likeness in the case in which the likeness is displayed, reproduced or sold together with or in concurrence with that of other footballers and, in any case, within the ambit of the commercial exploitation that refer to the entire category'. These are, clearly, restrictions that greatly hinder the potential of exploiting one's image rights. (*Giorgio Resta, Diritto all'immagine, right of publicity e disciplina antitrust, in Rivista di diritto sportivo, Aprile-Giugno 1997, page 351*).

	Pay TV Rights of domestic games	TV rights of Coppa Italia Games	Free-to-air highlights and radio broadcasting rights of Serie A and B games
Ownership	Single Clubs	Single Clubs	Single Clubs
Method of sale	Individual selling	Collective selling (by the League)	Collective selling (by the League)
Re-distribution of revenues based on mutuality principle	Hosting Club: 82% Hosted Club: 18%	Serie A Clubs: 25% (equally divided); Serie B Clubs: 25% (equally divided with a minimum guaranteed of € 100.000.000,00*); 50% divided among Clubs whose games are broadcast	Serie A Clubs: 50% (equally divided); Serie B Clubs: 50% (equally divided, with a minimum guaranteed of € 100.000.000,00*)

* The sum of € 100.000,00 is a 'one time' total sum guaranteed. Should 50% of free to air highlights and radio broadcasting rights and 25% of the Coppa Italia Games TV rights - which are attributed to Serie B clubs - not reach the aggregate amount of € 100.000,00, it is the Serie A Clubs' duty (at least according to the interpretation of the Serie B clubs) to guarantee such amount by cutting in to their own shares.

ises of the stadium must be broadcast within programmes the purpose of which is purely informative' and not, may we add, for purposes of producing an entertainment radio program.

The same article continues by stating that the broadcasting stations, for each day of Serie A or Serie B Championship, are entitled to a maximum of one three-minute informative window every 15 minutes of the game, with a maximum of three windows for each of the two halves.



12 Lega Nazionale Professionisti, *Comunicato Ufficiale N. 46 of 13.09.2002*, '*Regolamento per l'esercizio della cronaca Radiofonica per la stagione sportiva 2002/2003*'and '*Regolamento per l'esercizio della cronaca Televisiva per la stagione sportiva 2002/2003*'.

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In a very similar way, article 3 of the Regulation for the Exercise of Television Reports issued by the LNP regulates television broadcasting rights. For the season 2002/2003: the television stations - which have obtained the authorization to broadcast games of the Serie A and Serie B Championship[13] - can utilize exclusively recorded takes. The stations can thereupon transmit them during television news and other programmes the purpose of which is, again, informative. This dissemination is further limited in time, namely, only after 20:30 in the evening for games commencing no later than 15:00, after 22:30 for games commencing no later than 18:00, and after 24:00 for evening games. For example, the 11:30 news report may show images of the goals of the game which started at 18,30, whereas it can only announce without images the outcome and any relevant news regarding the match started at 20:30.

Furthermore, each take shall not exceed three minutes for each calendar day of the Championship or four minutes if more games of wider interest are played during the same day.

Television images shall be broadcast until midnight of the second day subsequent to the game, and any further utilization of such footage shall, in any case, also only be allowed within television news reports.

Hereafter we summarize in two charts the League's regulations for the access of radio and TV stations to football events.

It is easy to see how provisions such as these avoid the nebulous divide between 'news' and commercial exploitation. We will now focus upon problems arising from mobile telephone broadcasting, where the absence of a specific regulation has left the issue to be resolved by the Courts.

3.1.2. Telephone broadcasting rights and freedom of the press

During the course of the last football season, the Italian mobile telephone company Telecom Italia Mobile and the news agency Ansa have encountered a series of legal disputes involving *freedom of the press* to justify the transmission of football games highlights on mobile telephones without having been licensed by the football clubs, nor having paid any recompense.

Obviously this practice has been firmly opposed by the clubs and by other entities, such as telephone companies and sports agencies, which have paid considerable amounts to obtain the license for the broadcasting of images and videos through mobile telephones. It is a legal dispute aimed at protecting the economic advantages deriving from the exclusive exploitation of the sport event.

To date, after several judicial battles before the Italian Courts, the applicability of the concept of freedom of the press to the representation of matches on mobile phones has in general reached a good degree of certainty only with regard to *videos* and *slideshows*.

It has been concluded, in fact, that freedom of the press is not fostered by transmission of videos of the games. Consequently that the only bodies entitled to transmit them are the clubs themselves or the entities to which the clubs have licensed those rights. The same conclusion has been reached with reference to the so-called 'slideshows' (sequences of photos).

However, in keeping with the old adage that a picture is worth a thousand words, a lesser degree of certainty has been reached with reference to the practice of transmitting *single photos* on mobile phones. Should their unauthorized transmission be allowed as an exercise of the freedom of the press? Italian case law is not harmonious.

With an order of 29 March 2003[14], concerning the dispute between major Serie A clubs AC Milan and Juventus FC (as legal owners of the rights to their home matches) and H3G (the exclusive licensee of the right to transmit photos and footage of the domestic games) against TIM (Telecom Italia Mobile), the Court of Rome prohibited the broadcasting by TIM of photos of goals and highlights during the games.

The Court recognised the football clubs as exclusive owners of the broadcasting rights based on the premise that a sports event is the product of the economic activity of a business enterprise and that article 41 of the Italian Constitution in guaranteeing the freedom of economic enterprise also implies protection of the business investments and the results thereof. Accordingly, any exploitation of such rights by third parties without a previous authorization of the holders of the right is to be considered unlawful.

In its reasoning the court noted that sports competition produces events which generate wide public interest and information about them should be available, consequently, on TV, Radio, Internet and mobile phone technology. This is indeed an exercise of the freedom of expression and related freedom of the press under article 21 of the Italian Constitution. However, the constitutional right to be informed cannot be abused to justify the exploitation of a sports event by interlopers not investing in the business. The right to be freely informed should be satisfied by reporting to the public the development of the event and does not entail the broadcasting and transmission of live spectacular images and highlights.

What should be really kept in mind is the distinction between entertainment and information. The court declared that even *still images* of a game if transmitted and viewed before the relevant game is over can be spectacular and constitute entertainment. Such transmission diminishes the exclusivity of possessing the economic value of the event.

However, as anticipated above, Italian case law is not uniformly in agreement with this tendency. A recent decision of the Court of Milan[15], actually moving from the same premise, came to an opposite conclusion. The judge decided to allow TIM to transmit *contemporaneous, live still images* of the games, notwithstanding the fact that MP Web - to whom the broadcasting rights had been sold by A.C. Parma - had not sub-licensed the relevant right, which were in fact part of the package licensed to H3G.

According to the court of Milan, football events are a source of wide interest for the public and any information concerning them represent real news, which may be broadcast by virtue of the principle of freedom of the press. Such news, which shall be transmitted exclusively for information purposes, may also include still pictures capturing a certain instant of the event, as long as this reporting activity is not entertaining to the point of satisfying completely the desire of the spectator to watch the sports show on other programmes. This would, indeed, create a situation of competition with the club and any licensees thereof[16].

The court of Milan concluded that the live transmission of a photo representing a goal would not satisfy the interest to watch the entire football match or even a part of it. This ruling noted the fragmented and disjointed characteristics of a still picture when compared to the representation of an entire playing action. Therefore, according to the Milanese judge, the transmission of a picture may indeed stimulate the spectator to search for a more detailed and complete vision of the event at case, the same way a brief piece of news would encourage the reader or the spectator to deepen his knowledge of the event by reading other articles or exploring other sources of information.

The same reasoning applies even to live broadcasting of the image, should that be technically possible, because freedom of the press does not admit any temporal limitations to the circulation and broadcasting of the news.

The above decisions reflect how the opinions concerning broadcasting of still images of a football game on mobile telephones are not yet univocal. However, the reasoning of the Court of Milano seems to be prevailing and setting the tone for the other cases presently still under review. As a consequence licensing agreements, at least in Italy, should not include still images for use on mobile telephones.

13 The Lega Nazionale Professionisti authorizes TV Broadcasting Stations to have access to the stadiums exclusively for those games which take place within the area covered by the relevant TV Station's Governmental license. Nevertheless, Broadcasting Stations are obliged to obtain a further authorization by the hosting clubs, which will grant them access also according to the spaces available.

14 As recalled above in note 10.

15 Tribunale di Milano, 14 July 2003 case MP Web S.r.l. and A.C. Parma S.p.A. v. TIM Telecom Italia Mobile S.p.A. and ANSA.

16 The same line of reasoning was followed by Corte d'Appello di Roma, *decision of 10.11.1980*.

4. Competition and collective selling of television broadcasting rights

4.1. Collective selling in the Italian football market. General considerations

Competition issues related to the sale and acquisition of TV rights to football games have generated controversy and litigation throughout Europe and within the European Union. The antagonists include the European Football Leagues as well as international associations such as UEFA and FIFA. Italy, of course, has not avoided the fray.

As already indicated, each Italian football club sells pay-TV and similar rights individually, while the League markets the free-to-air rights. In this, football is different from other Italian team sports such as basketball, where collective selling is the rule[17]. It has not always been so. Originally, the LNP sold all TV rights to Italian football collectively. The decisions of the Italian Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato,* hereafter also referred to as the 'Authority') *n. 7340 of 1st July 1999* established the new direction. It was supported with enthusiasm by the leading and most powerful clubs but accepted with resignation by the others. In fact, individual selling appears more the result of the overweening economic and political power of the 'Big Five' (Juventus FC, AC Milan, FC Internazionale, AS Roma, SS Lazio) than a strict consequence of the legal requirements of competition law.

Actually, on 1st July 1999, the Authority declared that articles 1 and 25 of the LNP regulations, which at the time entitled the League to sell centrally all TV rights including pay-TV, were in breach of antitrust law (Law n. 287 of 10 October 1990, art. 2, II paragraph, letter a), by constituting a price fixing cartel[18]. More precisely, the Authority outlawed collective selling of pay and free-to-air TV rights to the individual games, while granting an exception (pursuant to art. 4, 1st paragraph of Law 287/1990) for the collective sale of the rights to Coppa Italia and free-to-air highlights. The Coppa Italia is a competition based on the direct knock-out system (making it impossible for TV broadcasters and individual clubs to know how many matches each club is going to play in the course of the tournament). Serie A and B highlights constitute a package of the most interesting images from the games of the day, which cannot be sold individually by the clubs. The Authority's reasoning emulates the Bundeskartellamt, in considering collective agreements anticompetitive by definition. Under this premise, exceptions are allowed where there is compelling evidence that individual selling is impossible or unreasonable under the circumstances, or if collective selling has beneficial effects for the relevant market or the end-consumer which outweigh the negative ones[19].

Before the Authority had pronounced its decision, the Serie A and B clubs, not without intense discussion and internal negotiation[20], voted in the general assembly of the league to amend articles 1 and 25 of the league's regulation, limiting the collective sale by the LNP to the highlights and the Coppa Italia games[21].

One year earlier, the Antitrust Authority had decided another case which considered an horizontal restraint on the opposite side of the buyers of TV rights. In decision n. 6633[22], the Authority declared that the agreements that had been concluded between RAI, Cecchi Gori Communications and RTI, at the time the three national free-to-air television operators, for the subdivision among themselves of TV rights to the Coppa Italia were in restraint of competition on the TV advertising market and constituted an abuse of dominant position by these three TV operators.

Moving from horizontal to vertical restraints, the Italian parliament addressed the cosy contractual relationship between clubs and the television broadcasters, concluding that exclusive pay-TV contracts for extended terms competitively foreclosed access to the market to other TV operators. One result was to impose a statutory limit to the market penetration of a single operator.

In order to prevent situations of dominant positions on the market, article 2 of Italian law n. 78 of 1999[23] prohibits '*any single operator from acquiring, under any form, directly and indirectly, [...] more than 60% of the pay television rights of games of the Serie A Championship [...].*

In the event of the existence of only one buyer on the market, the 60% limit can be exceeded provided that the relevant contracts are executed for no longer than three years. The Authority for Competition and the Marketplace, after consultation with the Authority for the Telecommunications, may waive the 60% limit [...] and set other limits in consideration of the general conditions of the market, of the availability of other sports rights, of the duration of other sports rights contracts, of the necessity to ensure effective competitiveness of the market [...]'[24].

The Authority also intervened, in June 2000[25] in a case of vertical restraint, ruling that the consummation by Tele+ of exclusive pay-TV and ppv contracts with several important football clubs for a term of 6 years constituted an abuse of dominant position[26]. A few months later, the Court of Milan[27] confirmed the legitimacy of an earlier termination by Calcio Napoli of its six years contract with Tele+, on ground that such excessive duration had been obtained by the digital TV operator abusing its dominant position on the pay-TV market.

4.2. The issue related to Sky TV and Gioco Calcio

Today, as we know, we have different players in the market. From the current season Sky Italia, formed through a merger of Stream and Canal+ controlled Tele+, operates in the Italian TV football market. This Italian pay-television channel, as authorized by the European Commission, soon clashed with an unexpected competitor, Gioco Calcio.

The European Commission's (conditional) clearance of the merger of the two competing satellite operators in the Italian pay-TV market (Stream, jointly owned by NewsCorp and Telecom Italia, and Telepiù, ultimately owned by Vivendi Universal) illustrates, under certain circumstances, how creation of a monopoly from a merger may represent the best available option[28]. The Commission conceded that a regulated 'quasi monopoly' in Italian pay-TV was better than the

17 Lega Basket, *Regolamento interno di Lega*, article 1.3.

18 In *decision n. 7340 of 1st July 1999* the Authority stated that the agreement between the single clubs allowing the collective sale by the League of the Serie A and - games TV rights - according to the provisions contained in articles 1 and 25 of the LNP Regulations - is '*price-fixing (...) and is, therefore, to be considered anticompetitive in the market of the premium sports TV rights, in violation of article 2 of Law n. 287/90*'.

19 In the same decision, the Authority - with regards to the TV rights to Coppa Italia games - held that as there is a high number of clubs participating in the national tournament and that such number is '*uneven in terms of commercial value*', '*in the event of the relevant television rights being sold on an individual basis, the broadcasting stations would be forced into a multiplicity of negotiations with the clubs which own the rights. The additional costs could be so high as to make the transmission of the games (() not convenient from an economic point of view*'.

The Authority continued by stating that '*the TV broadcasting stations have held that - with regard to the present characteristics of the national tournament - (..) undoubtedly they prefer collective selling by the League of the Coppa Italia TV rights. The uncertainty concerning who the seller of the rights will be seems to represent a high cost for the broadcasting stations*'.

20 The redistribution of revenues derived from individual selling, as outlined in the previous chapter, is the result of such negotiations.

21 Article 1 of the League's Regulations was amended by the Italian Professional Football League in 1999. In fact, the previous version of it entitled the League to be the exclusive representative of the clubs for the selling and the negotiation *of all image and broadcasting rights* regarding all events organized by the League (Serie A and Serie B Championships and Coppa Italia) and provided for specific obligations of the clubs to preserve this representation power of the League.

22 Autorità Garante della Concorrenza e del Mercato, *decision n. 6633 (I299) of 3 December 1998.*

23 Art. 2, of Law 29 Marzo 1999, n. 78 is entitled *Disciplina per evitare posizioni dominanti nel mercato televisivo.*

24 In *decision n. 7419 of 27 July 1999*, the Italian Antitrust Authority interprets this 60% cap as a '*mere quantitative limitation, which is to be calculated as a percentage of the total number of the events of the Serie A Championship (...).*'.

25 Autorità Garante della Concorrenza e del Mercato, *decision n. 8386 of 21 June 2000.*

26 In its decision the Authority stated that the behaviour of Telepiù was to be considered restrictive given that '*with the exclusive six year purchase (1999-2005) of the pay-TV rights of a large part of the Serie A and - games, it prolongued, and doubled, the duration of the exclusive pay-TV compared to what had up to then been the contractual practice and it prevented the competitors from making a profit out of the principal football events for a long time*'.

27 Tribunale di Milano, 4 August 2000, *Telepiù v. Calcio Napoli.*

most likely alternative absent the merger: Stream suffering bankruptcy, consumers dislocated from the disruption, and Telepiù consequently emerging as an unregulated *de facto* monopolist.

Had Sky Italia remained the only pay TV operator in the market, the exception set out in the above article 2 of Italian Law n.78 of 1999 would have certainly applied. To recall, it provides that '*in the event of the existence of only one buyer on the market, the 60% limit can be exceeded provided that the relevant contracts are executed for no longer than three years*'.

However, from the moment it was created in July 2003, Sky Italia has had to face several obstacles due to the apprehension over whether it would face competition from a planned second satellite television soccer channel, Gioco Calcio. This new channel was formed with the League taking a 10% stake, Plus Media Trading[29] holding 25%, and was expected to start its transmissions in time for the upcoming football season, at the end of August. Possible delays were anticipated, if the Channel was not ready by that date. It was clear, however, that the new pay-tv did not have the time or the resources to implement its own platform and would rely on the digital technology of SKY Italia.

By the end of July, Sky TV Italia had already acquired the broadcasting rights of 10 top clubs; the presence of Gioco Calcio in the market would have obviously restricted Sky TV Italia from buying the rights to more clubs, inasmuch as it had already reached the 60% limit.

At the end of August 2003, the eleven clubs which are part of the Plus Media Trading consortium further clarified their plans for the new channel Gioco Calcio and declared themselves ready to launch it even though the group had not yet reached any agreement with Sky Italia regarding the transmission of the new channel on the Sky platform.

With regard to this last aspect, in fact, Sky had undertaken a 'must carry' obligation before the European authorities, according to which it would have to 'host' other pay-tv channels on its own platform on a *fair* and *non-discriminatory* basis.

In exchange for the utilization of its platform and decoder and in accordance with the above mentioned obligation, Sky requested Gioco Calcio to pay it (800.000 plus (2,00 for each subscriber to the new channel: but Gioco Calcio flatly refused the deal, considering the offer to be not fair.

It will be up to the Italian Authority for Telecommunications to judge whether the sums proposed by Sky Italia in exchange for the utilization of its structures are fair and whether the terms of the offer should be unconditionally accepted by the new pay-TV. It is expected the Authority will issue an imminent decision on the case.

Meanwhile, Sky TV Italia and Gioco Calcio have reached a temporary agreement by which Sky accepted the requests of Lega Calcio and Gioco Calcio to broadcast the Championship games of the competitor channel on its own frequencies until a final solution is found subsequent to the decision of the Authority.

28 European Commission, *decision M2876 of 2 April 2003*.
The Commission imposed, among the several conditions for clearance, the so-called '*Access to Platform*' conditions. Thanks to these conditions - noted the Commission - actual or potential competitors will have the possibility to broadcast by satellite without having to set up their own platform, which could represent a very high barrier to entry. Newscorp will grant satellite competitors access to its own platform and will offer all related services under fair and reasonable conditions. Moreover, Newscorp will grant licenses for its proprietary CAS technology to all applicants on a fair and non-discriminatory basis. Finally, Newscorp will be obliged to enter into simulcrypt agreements within nine months from the request by competitors willing to adopt a CAS technology other than the one owned by Newscorp.

29 Plus Media Trading is a consortium comprising the following clubs: Atalanta, Brescia, Chievo, Como, Empoli, Modena, Perugia, Piacenza, Venezia, Verona and Vicenza.

United We Stand: Collective Media Rights Sales Under Challenge in England

by **James Whittaker, Phil McDonnell and Tony Singh***

1. Introduction

As negotiations conclude for the English Premiership ('EPL')'s next round of television rights deals, football executives are viewing an environment in which they need television more than television needs them, possibly for the first time since the inception of the EPL. Then, Sky agreed to buy the TV rights for what was considered the blockbuster sum of £38million a season. Now, the structure of English television rights deals in relation to the EPL has come under the scrutiny of the European competition authorities and the UK media landscape is presently in a position of flux. All these factors are causing uncertainty over the rights fees that can ultimately be achieved for the EPL and the lower English football divisions. This article considers the legal background and commercial pressures which have shaped negotiations in England.

2. Ownership of rights and their exploitation

Under English law there is no right in a football match as such. The value of television and other media rights are derived by limiting access to the ground to broadcasters, creating an exclusive supply of the footage of the match. Such footage will have copyright protection and can be therefore exploited, assigned, licensed and split in the same way as any other copyright work. The clubs have control over who has access to their stadia and therefore control (in the first instance) the rights to their home games.

The position of the organisation that exploits those rights to home games is then dependent on the competition or league in which the club is participating; for example rights to EPL games have historically been sold collectively (although this position is under challenge this time, as discussed in more detail below), rights to home UEFA cup games can be sold by the club individually. Champions League rights are split, with collective TV deals by territory but certain mobile and broadband rights being available to the clubs. Indeed, there are opportunities for clubs to sell their own matches to television under a complicated formula if these matches have not been selected by any of the broadcast partners.

Rights to other competitions such as the FA Cup and the Carling Cup are also sold collectively at present. Clubs in the lower leagues in England also sell their rights collectively. Legally, this position is

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achieved through a contractual assignment of the club's applicable rights in its agreement to participate in the competition or league concerned.

Pre-season friendlies are sold by the clubs themselves and are seen as a way of generating extra income as well as sharpening the players before action starts in earnest. This backs up the fact that the clubs control their home games. The other competing club obviously has some power over the rights position on such matches in the sense that they can refuse to turn up unless they get a cut of the revenue but the primary driver remains the club which controls access to the venue at which the match takes place.

Secondary rights sales are not as clear cut; for example the EPL clubs have the rights to screen 'as live' coverage of their Premiership matches on their own channels (and indeed their websites) 24-48 hours after the fixture (depending on when it was played) but there is also a collective deal to sell highlights, as well as a group broadband delayed 'as live' offering.

3. A change to the existing position?

There are varied factors, external as well as internal, which have shaped the negotiations over EPL rights. The first of these is the position of the dominant subscription channel, BSkyB. The last round of negotiations took place in the summer of 2000 when there were more competitors to BskyB, with ITV Digital and the cable companies in the race for content. General economic conditions are now much tougher and this has impacted on the broadcasters revenues for advertising and sponsorship. In 2002 for example, ITV's advertising revenues were down 6.5% on the previous year. As a result of these pressures, a number of well-publicised insolvencies, restructurings and mergers have occurred in the media sector in the UK and across Europe. The net result is that there is less competition for BSkyB this time around.

BSkyB is also now at a different stage in establishing its platform and subscriber base. Premiership football has been the prime content with which Sky has sought to grow the numbers of its subscribers. They have done so very successfully, with 6.6 million homes in the UK now subscribing to Sky Digital, over 5 million of which pay monthly for access to live EPL games.

To some extent, Premiership football has been a loss-leader for Sky in direct economic terms - its value has been in persuading people to sign up to the general Sky proposition rather than the subscription fees or advertising revenue it directly generates. For example, Ford's sponsorship of BSkyB's Premiership output is worth around (15million per season which is obviously a small proportion of the rights fee. Sky now appears to be concentrating on its ARPU (average revenue per user) figures rather than simply trying to grow its subscriber base at all costs. As a result, its rights acquisition strategy is likely to become more focused on exclusivity and premium rights.

EPL rights are still clearly premium rights and the rights fees have held up accordingly. Unfortunately for the Premiership, it is not as simple as that. Another major issue will affect the deal that is ultimately done in relation to EPL television rights; the European Commission ('EC') investigation into the way the EPL sells its television rights. The outcome of this investigation could dramatically change the way in which football is broadcast in the UK.

4. Competition law issues

In December 2002, the EC issued a formal Statement of Objections to the EPL, explaining the grounds upon which they would be investigating the current arrangements. The Statement is strongly worded, referring to joint-selling being a practice 'tantamount to price-fixing', suggesting that if clubs sold rights to their own home games individually, the market would create a value for each of those games, rather than having a value derived (under the present system) from being a proportion of the central deal.

Underpinning the Commission's concerns is a view that the collective sale mechanism drives prices higher so that other media organisations cannot compete for the premium content regarded as crucial for access to and expansion in the sports and more general broadcasting markets. At the same time, a system which allows the exclusive live rightsholder (BSkyB) to control the amount of football on television reduces output when the Commission believes that there is unfulfilled demand amongst both fans and broadcasters for more live football on television. The theory is that a system of multiple packages with lower priced entry-points should lead to increased competition amongst broadcasters which would overcome the competition law concerns of lack of access, output reduction and price fixing.

However, the European Council's declaration in Nice in December 2000 accepts that sport cannot be treated in the same way as any other sector and welcomes the 'solidarity' principle whereby part of the revenue from TV rights sales is redistributed throughout the game. In England, this works on a number of levels. First of all there is a payment made out of broadcasting income to the Professional Footballers Association to support projects providing for ex-players who may be injured or require re-training for another career. This currently stands at around £12.9m per year. Premiership clubs also pay a voluntary contribution of five per cent of all domestic broadcasting deals to the Football Foundation, which primarily benefits grass-roots football facilities. Finally, lesser clubs see the benefit of this redistribution - TV money is used to make the 'parachute payments' to relegated clubs and the method of 'sharing' TV money is designed to ensure that the gaps between haves and have-nots is relatively narrow: one third is split equally between the 20 clubs, one third is divided as 'prize money' according to league finishing positions, and one third is shared between clubs as facility fees for televised games. There is a minimum number of live games that each club must be involved in and therefore a minimum income that they receive in this way.

The recent compromise agreement with UEFA over Champions League rights shows that the Commission does find some form of collective sale acceptable. Recently, British MPs have travelled to Brussels to lobby the EC on this point, insisting that the trickledown mechanism inherent to the collective sale process is good for the game. However, James Purnell, MP for Stalybridge & Hyde and a former government sports adviser, returned from the meeting telling the EPL that 'the status quo is not an option'.

The EPL has had to make proposals to the Commission which satisfy the Commission's competition law concerns, but which will also satisfy the EPL's own commercial aims. Broadly, these were to at least match the £1.64billion (over three years) that was shared by clubs under the terms of the last deals. They must also draw an acceptable compromise between the different positions of their member clubs. At one end of the spectrum are champions Manchester United, whose share of EPL television income last season was roughly £33million. United could have earned much more than that by selling their rights individually. At the other end is the replacement for relegated West Bromwich Albion who earned less than half of that but would have been much happier with their share, likely to have been much more than if they had sold their rights individually.

The argument is that the collective sale mechanism has a positive effect on maintaining real competition (in a sporting sense) in the EPL. Relegation from the Premiership brings with it a severely straitened financial position; Nationwide One clubs are guaranteed just over £500,000 each per season from their main television deal. Clubs selling rights individually would polarise the rich club / poor club divide even further. Clubs such as Manchester United and Arsenal would feel that it evened up their ability to compete as part of the European super-powers at Champions League level, but it would lead to serious financial issues for even mid-tier EPL clubs. In financial terms, it would be the equivalent of ten clubs being relegated from the EPL in a single season.

A domestic solus-sale model therefore has its problems as it damages much of the domestic sporting competition. If the status quo is not an option, how does the EPL come up with a third way? The Commission has suggested this might be achieved by following the precedent set by the latest Champions League rights structure.

5. A way forward?

One of the major differences between the new Champions League deal and existing EPL arrangements is the concept of rights windows rather than rights packages. Packages are defined by a combination of media platform and territory and whether the game is shown live or in highlights. The last EPL deals provided for eight packages, usually sold exclusively but occasionally shared: for example, the Pay Per View package of 40 second-choice live games is shared between Sky and the cable companies; the overseas live rights are shared between a consortium of Newscorp, Octagon CSI, SportFive and TWI, who resell to broadcasters in pre-defined territories.

Rights Windows are more complex, combining another element; time. They are combinations of games which combine packages with a defined timeline: so the rights to a particular game move between different rightsholders and different media depending on a number of factors. By way of example, a 'main' broadcaster might be given first choice of which games to televise. Rights for the games that they do not choose could revert to one of the clubs involved, who could choose to broadcast the game itself on a proprietary channel such as MUTV, Manchester United's own channel, or sell the rights on a one-off basis to an alternative broadcaster. If the club fails to sell the rights within 48 hours, they could move on again - perhaps to a 3G or broadband partner.

One of the concerns raised by the Commission in relation to collectively sold, exclusive rights deals, is the amount of unused, unexploited rights which are not made available to either the upstream (where rights are bought and sold) or downstream markets (where they are broadcast or otherwise distributed to consumers). In simple terms these are the games that don't appear on television, the games that do not form part of Sky's 66 first-choice live games, or part of the 40 pay-per-view second-choice live games. The concept of windows is designed to ensure that those consumers who would like access to these games get it in some way.

The concept has been very successful with the Champions League, where in the UK ITV will get first and third choice of games and BSkyB will get second and fourth. Some rights then revert to clubs, and there are of course highlights packages and defined new media rights, most of which are held and sold by clubs individually rather than by UEFA collectively. Interestingly, if games remain unsold on a live coverage basis there is an opportunity for them to be swept up by a digital PPV operator (in this case Sky). There are likely to be some clubs selling their rights to their own Champions League games for individual matches in the UK market this season due to the number competing this year. There is then the prospect of unsold games (which are likely to be all those not involving UK clubs) being made available to Sky subscribers on the basis that they can press red, go interactive, and choose which game they wish to watch live.

This arrangement has resulted in a 35% increase in Champions League total broadcast revenues in the UK. It satisfies the clubs desire to become media owners by returning significant rights to them and it satisfies the EC. The EPL however was not willing to simply follow this structure and has suggested it should be treated differently.

6. The EPL proposals

Most observers feel that the only way for the EPL to maintain its broadcast revenues is for its main broadcast partner to have substantial exclusivity. The view is that making more windows available almost inevitably draws in more broadcasters, and as soon as the product loses its exclusivity, its value plummets. Not all Sky subscribers watch every game every week; in fact, most don't, with around five million homes subscribing to Sky Sports but single games rarely producing more than 400,000 viewers. There is a strong possibility that many homes would not take the Sky service if they could see their team say once every month on terrestrial television. That would be catastrophic for both Sky and the EPL, the exclusivity premium currently works well for both parties.

The EPL took on board some of the EC's concerns and their proposals in fact invited broadcasters to bid on the basis of three separate live rights packages covering many more games than at present, a free to air highlights package and a delayed rights package. One of the three live rights packages was then split again to reduce its size and cost for commercial reasons and following pressure from the EC.

The result of the bidding was that Sky won all the four live rights packages for a three year deal worth a total of £1.024bn. The BBC (the UK's state owned broadcaster) bought the highlights rights for £105m. The packages were as follows:

a Package one 38 games, first pick, £358m;
b Package two 38 games, second pick, £282m;
c Package three 31 games, £230m
d Package four 31 games, £154m.

The EC's response has been to call for evidence as to whether the packages were bid for by more than one broadcaster, to ensure the packages were not tailored in design to the requirements of particular broadcasters. The Commission did however acknowledge that the EPL had made 'tremendous progress' in offering the split packages. The Commission spokesman said that if there was competition for every package then they would acknowledge it was a competitive tender and take no further action: if there was not, and if it appeared the packages had been structured to favour one bidder then the EC would follow up. More recently at the beginning of October, Mario Monti, the European Competition Commissioner stated his view that Sky's continued exclusivity was bad for competition and bad for football. Commission officials are thought to be preparing a statement of objections which will be sent to the EPL in late October. It looks as if the EPL's requirement to maintain its revenues has set it on a collision course with the Commission.

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Spain

Football Players: Single or Joint Actors? An IP Question

by **Jose Manuel Rey***

Nobody could have thought in 1880 that a sport consisting of kicking a ball around, brought to Spain by English sailors who landed in Huelva in the South West of the country, would end up becoming the mass media show that it is today. Football has not just become something characteristic of the Spanish way of life, but also a huge business that handles thousands of millions of euros.

Although in Spain football has always been felt with a special pas-

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sion, the fact is that over the past few years this sport has been experiencing a real boom. This football mania is intimately linked with the interest that the Spanish media, TV stations in particular, are showing in the 'king of sports'. I would not dare to elucidate or try to discover who was first, the chicken or the egg: whether football raises all that interest and passion because of the media coverage, or if it gets that coverage precisely through the interest that it raises amongst its fans.

The fact of the matter is that, since the TV market was liberalised in Spain with the appearance of the first private TV stations in 1988, football has been growing, both financially and in terms of the audience's expectations, and this interest is not expected to wane in the short term.

The expectations are no match for the already magnificent football stadiums, so we also find ourselves talking about the 'virtual stadium' in reference to the unbelievable numbers who faithfully follow the games on TV. Obviously, in the current Spanish scene, football and television need each other. TV obtains enormous revenues for each game that is broadcast and football increases the size of TV audiences thanks to the intense media coverage.

It is a widely known fact that this symbiotic relationship is played out against a background of economic interest, which derives directly from the commercial exploitation of the TV images, and a legal background in terms of the ownership of TV images.

There are a lot of factors in the creation of football as an object of the audience's viewing demand. The image of a particular football player would not have much value if he had not reached his notoriety through his participation in a football club. In the same way, the images of the football clubs so typical and well defined (starting from their own uniforms), would not raise so much interest if they would not be involved in prestigious sports competitions held by diverse entities or organisations.

The high interest in and expectations from the final product are due to the intervention of each of these elements. Therefore, it is understandable that each party involved wants a piece of the pie and share in the revenues and profits obtained through broadcasting rights.

As for the professional football players, it has been said that their performance on the field bears some resemblance to artistic creation and that consequently they should hold the copyright to the final product. In this view, football players could be compared to actors improvising in a play, with only the rules of play for a script. But according to doctrine and as evidenced in practice, football is not considered an artistic activity, but simply a physical exercise.

It goes without saying that a football player owns the rights to his own image, as regulated and laid down as a fundamental right in Section 18 of the Spanish Constitution. However, in Spain players habitually give up the rights to their image to the clubs which employ them.

Spanish clubs and Spanish tradition where football is concerned deal with the importance of broadcasting rights by having the players sign at least two individual contracts. One is an employment contract (subject to labour legislation) for the exclusive performance of the player's professional activities (i.e. playing football) and the other is a private law contract by which the player gives up his broadcasting rights and the right to his own image to the club or to a third commercial party which is generally owned by the club. The economic rewards for the player resulting from the relinquishment of his rights in most cases makes up the bulk of his income.

The system explained above comes without any higher theoretical reflections to justify football clubs' ownership of image rights. From the point of view of football as an artistic creation (as mentioned above), it has been considered that if the football player were an actor performing a part and creating a work, the football club could be regarded as the entity managing and coordinating the creation of this work. Therefore, any rights in relation to the work would in accordance with Spanish intellectual property laws belong to the club.

Last but not least, it is a fact that any given team will be either more or less interesting for audiences to follow depending on the degree of success it achieves in the competitions in which it is involved. In the same way, any given match could generate either more or less demand for the TV rights to it. Accordingly, competition organisers will claim a corresponding piece of the TV rights pie. This fact is reflected in the legislation of various countries, such as Portugal and Brazil, where the economic profits from sports events are considered to belong to the entities which make the sport financially and organisationally possible. In France, Law no. 84-160 established that '*the right to the exploitation of sport shows or competitions belongs to the event's organiser*'. In Germany, the Supreme Court in a judgment of 11 December 1997 declared that those entities assuming the responsibility of organising a sport championship must be considered as the broadcasting rights' joint owners. Finally in England the Restrictive Practices Court in the case *British Sky Broadcasting / British Broadcasting Corporation* recognised that the Premier League was offering a product whose commercial rights belonged to the same as far as the Premier League had taken charge of the championship's promotion and organisation.

Unfortunately, there is no such system in Spain. Even the different Spanish football clubs integrated in the 'Liga de Fútbol Profesional Española' (LFP; the Spanish professional football league) are unable to come to an understanding whether to negotiate their TV rights individually or collectively.

In Spain, there is no general regulation entitling the parties mentioned to TV rights. The situation has become even more complicated, now that the clubs seem to feel that they can individually transfer TV rights not taking into account any possible share for the competition' s organisers. Nevertheless, the management of the Spanish football competition seems to have resigned itself to this system, or has at least raised no objections so far, so that it can be said that tacitly at least and for the moment the current situation is taken for granted and accepted.

In 1997 the transfer of TV rights was taken over by a specially established company called Audiovisual Sport, S.L. This company is co-owned by three partners: Sogecable, Telefónica and Corporació Catalana de Radio i Televisió. First and Second League Spanish clubs signed over their TV rights to this company for the Spanish League and the King's Cup matches (except the final, which is considered a matter of general public interest and is therefore reserved for TVE, i.e. the Spanish public channel). Audiovisual Sport has as its objective to sell the remaining TV rights to TV channels interested in their acquisition and broadcasting.

The contract referred to above regulating the transfer of TV rights was concluded on 30 June 2003 to apply to all first and second division football clubs (but excluding Real Madrid CF and FC Barcelona). At present, however, Spanish football is experiencing some upheaval, as these same clubs are now unable to agree whether to negotiate the transfer of their image rights collectively or individually. Neither Real Madrid, nor Barcelona - the two most remarkable and most widely-supported teams in Spain - participated in the collective negotiation with Audiovisual Sport, but instead discussed the transfer of their rights 'one on one' with the company, which landed them preferential treatment in an agreement that will be in force until 2008. Similarly, the contract for Atlético Madrid CF, S.A.D., has already been drafted and is merely awaiting the solution of some minor details.

At the time of writing, the Spanish clubs have agreed, subject to possible changes in the near future, to negotiate collectively for the transfer of television rights throughout the LFP, thereby vetoing the teams which intended to negotiate individually, but respecting, however, the contracts in force for Real Madrid and Barcelona and the draft contract of Atlético Madrid. The income from the TV rights will be distributed in accordance with past sporting performance, last season's score and the applicable share of TV audiences.

Negotiations between Audiovisual Sport on the one hand and LFP as the representative of the Spanish football clubs on the other, promised to be tough and ruthless. Audiovisual Sport, which paid 219 million euros per season under the last contract, had revealed its intention to negotiate for a lower price for TV rights, arguing the bankruptcy of several similar companies in Europe (like the Kirch Group

in Germany, which was unable to make a profit from the broadcasting rights for German League matches) and the lower amounts involved in contracts concluded in other European Leagues. LFP, however, wished to receive a price exceeding the price under the old contract by 35% resulting in the amount of 360.6 million euros, according to a valuation of the rights as performed by consulting firm 'Accenture'. The parties became so entrenched in their respective positions that LFP announced that it would postpone the beginning of the 2003/2004 League season (which was supposed to start during the first weekend of September) in case negotiations had not been concluded by then. LFP even applied to the Spirito Santo Bank for details of a possible loan which would enable it to afford running the competition for a whole year without the revenues from TV rights. Taking into account that TV rights make up 51% of the total income of Spanish football clubs it was obvious that LFP would not back down easily.

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Legal Principles Applicable to the Centralised Marketing of TV Broadcasting Rights in Germany

by **Martin Schimke***

This contribution intends to give a short, comprehensive overview of the present discussion in Germany with respect to the subject of the centralised marketing of TV broadcasting rights to professional football league (*Bundesliga*) matches. Contrary to the usual practice in articles concerning legal matters, the detailed mention of references has been consciously abandoned here. A compact overview of the protracted discussion on this topic has recently been supplied by Dr. Martin Stopper in the March/April 2003 issue of the *Zeitschrift für Sport und Recht (SpuRt)* on page 48 and following, including further references to case law and doctrine.[1]

1. Holder of TV broadcasting rights

In accordance with consistent case law and the prevailing opinion in doctrine the holder of the TV broadcasting rights to sports events is the *organiser* of such events. Based on various legal factors and depending on the kind of situation involved, all organisers of sports events are entitled to legal protection against illegal broadcasts in order to safeguard their economic interests. One of the legal principles supporting the prevention of film and TV recordings by third parties is the residential right of the organiser as the owner of the sports grounds.

TV broadcasting rights are therefore not defined positively, but rather as a result of claims in defence of other rights.

2. Legal status of the organiser of home matches

If the holder of TV broadcasting rights is the *organiser* of home matches in the Federal Football League, the further question arises: who indeed is the organiser of these matches?

According to by now fixed case law, the organiser is the entity responsible for the event with respect to its organisation and financing (the so-called copyrighted title of organiser). This applies to both *single* organisers and *joint* organisers, when several natural persons or legal entities are co-organisers of a sports event.

3. 'Financial/entrepreneurial risk'

Obviously, no direct financial risk for the League exists with respect to individual Federal League football matches.

Rather, it could be said that the League bears a 'mediate' financial risk. This is especially the case where original marketing rights providing revenues have been assigned to the League Association (DFL). The value of those marketing rights depends on the success of the League and the attractiveness of the individual matches. For this reason, the financial situation of the League Association and the success of the clubs are interdependent.

Therefore, the 'mediate' risk alone is not a sufficient criterion to give rise to the legal status of joint organiser.

4. The organiser's performance as an element of the legal status of organiser

The significance of the organiser's performance has been repeatedly emphasised and conditioned in the case law. Although it has not been possible to come up with a formula for weighing the financial risk and the performance of the organiser against each other in numerical terms, it can nevertheless be said that the organiser's performance is highly relevant for the definition of the organiser's legal status.

The following applies:

a The definition of the League Association as 'organiser' in the articles of association or match regulations can only be an indication and cannot be used to define the term of organiser in the context of legal proceedings. Instead, the *actual* situation is decisive.

b The following items may be listed as part of the organiser's performance in the League Association:
- the granting of licences (ensuring that only solvent clubs take part in the League, in essence: performing an economic efficiency audit);
- making available the normative 'equipment' (match regulations, invitations to bid, etc.);
- determining the competition system and scheduling matches;
- ensuring the performance of the matches by a system of sanctions (the mere scheduling of matches is not sufficient to guarantee that they are played. Moreover, a system of sanctions is to guarantee that a club's failure to appear will have consequences);
- training referees and technical officers,
- deploying referees.

A club is only one element within the League. If the exclusive right of exploitation were to be conceded to one club, this would insufficiently take account of the fact that there are always *two* clubs involved in any match. If the home club were given exclusive rights, this could lead to seriously unfair results. For example, if a club which is from a sports point of view hardly interesting plays a top club at home in an important match for the latter, the broadcasting rights will have a relatively high value. And if the home team were then granted the exclusive right of exploitation, it would gain an advantage which could not be justified by its sporting performance or, consequently, its market value. The League Association which organised this match for the mediocre club should not be entitled to broadcasting rights either, as the legal system's task is not to grant advantages by conceding exploitation rights as if running a lottery. These advantages have to be won by sheer performance. The following quotation from a decision concerning the question of the status of an entity organising car races is significant:

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1 See also in great detail Klaus Vieweg (ed.), *Vermarktungsrechte im Sport, Rechtsgutachten*, Berlin 2000.

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'... for it is organisational measures like regulating individual competitions and the overall contest, establishing the conditions for qualification and admission of the drivers, monitoring the regulations and the event itself on site and the reflection of those measures in the granting of licences for the racing event, by which the defendant (in this case the International Racing Sports Association) makes racing events products which it authorises and for which it enjoys the relevant appreciation.'[2]

In accordance with these principles it can be assumed that the mere acceptance of an economic risk by the organisers on site (in our case the home clubs) is not enough to create a marketable product and consequently does not justify the club's exclusive right.

It can therefore be assumed that, with respect to Federal League home matches, the League Association has the status of a co-organiser.

5. Legal consequences

Where several parties are jointly entitled to a right 'as explained above ' in the absence of special rules (e.g. Section 8 of the Copyright Act) a legal community within the meaning of Sections 741 et seq. of the German Civil Code exists. Different rules only apply when the right can be divided. In that case, several independent partial rights will exist alongside each other.

TV broadcasting rights to Federal League football matches, however, are indivisible. They can only be exercised in unison for each particular match. For this reason, the TV rights to these matches are governed by a legal community made up of the League Association and the relevant home club.

It is important to note that there is, therefore, no legal community between all Federal League clubs and the League Association. Instead, each individual hosting club forms a legal community with the League Association for each individual League match in which it participates.

Further legal consequences are also governed by the Civil Code. For example, the community is to be managed jointly in accordance with Section 744(1) Civil Code. The participating parties may also decide to transfer the community's management to one of them. The agreement between the League Association and the club concerning the TV broadcasting rights can be considered to be such an agreement concerning the transfer of joint management.

If it is true that the club and the League Association are the joint holders of the right of exploitation under Section 741 Civil Code, participating in the sports broadcasting market will generally be impossible without the joint exercise of powers. This means that the agreement concluded by the club and the League Association does not restrict competition. On the contrary, it leads to intensified competition in the market for TV broadcasting rights, because it widens the circle of competitors by one further player.

Due to these considerations and due to efficient lobbying,[3] new legislation (Section 31 Anti-Cartel Act) was enacted in Germany which reads as follows:

Section 1 shall not apply to the centralised marketing of rights to the TV broadcasting of sports contests performed in accordance with the articles of association by sports associations which 'as a way of discharging their socio-political responsibility 'help promote youth and amateur sports and are rewarded for this by an appropriate participation in the revenues resulting from the centralised marketing of those TV broadcasting rights.

The afore-mentioned Section 1 prohibits all agreements restrictive of competition in a wording similar to that of Article 81 EC Treaty (formerly Article 85).

Meanwhile, the European Commission is currently examining whether the centralised marketing of the TV rights to Federal League matches is in accordance with Article 81 of the EC Treaty. Should the result of the Commission's inquiry be that this practice violates EC law, the relatively new Section 316 Civil Code quoted above would be utterly void, as European legislation prevails over national legislation.

2 *Decision of the Frankfurt Landgericht* of 18 March 1998, cited in *SpuRt* 1998, p. 195. This decision refers to the 'landmark' judgment of the Federal Supreme Court of Justice (*Bundesgerichtshof*) of 11 December 1997 by which the centralised marketing of TV broadcasting rights of *European* Cup games by the German Football Association (DFB) were considered contrary to German competition law, see *SpuRt* 1998, p. 28.

3 See in detail Bunte, 'Die 6. GWB-Novelle 'Das neue Gesetz gegen Wettbewerbsbeschränkungen', *Der Betrieb* 1998, p. 1748.

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Ownership of TV Rights in Professional Football in France

by **Delphine Verheyden***

Law n°84-610, published on July 16TH 1984, defines the general rules for the organisation of sport in France. Like all French sports associations, the French Football Association has incorporated these rules in its regulations.

However, as the most popular and the most powerful in terms of finances, the football lobby has been attempting to force an amendment of Law n°84-610 providing special treatment for the sport of football, especially regarding the ownership of TV rights.

Following his appointment in May 2002, the Minister of Sport from September to December 2002 organised a general hearing of interested parties in the field of sports to find out how Law n°84-610 could be modified.

This process subsequently led to the rewriting of Law n°84-610, which was passed in its new form on August 1ST 2003 as Law n°2003-708. The amendments are to be introduced one at a time in the regulations of the sports associations.

For a better understanding of the system of ownership of TV rights in professional football, one has to know how the French sports system works.

The state delegates to the associations the task of organising sport. There is one association for each sport. The associations exist by virtue of delegated state competence.

When a sport turns professional, the association in charge may create a special body (called League) in charge of representing, running and coordinating professional clubs and competitions. The association and the League then sign a binding contract.

Clubs participating in the first and second League football championships must be professional football clubs. When their revenues or the salaries they pay exceed a certain limit, the clubs have to establish a company. The relationship between this company and the original club (established as an 'association under Law 1901') is to be contractually defined.

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Regarding the ownership of TV rights, Article 18(1) of the former Law n°84-610 specified that associations and bodies authorised by the associations to organise competitions were the exclusive owners of the exploitation rights of these competitions, including TV rights.

According to this principle, Article 25 of the protocol signed between the French football association (FFF) and the French national Football League (LFP) specified that the FFF delegates to the LFP for a period of four years the right to commercially exploit the League 1 and League 2 championships. This right did not include ownership.

Article 7 of the financial protocol completing the general protocol mentioned above further specified:

'*FFF and LFP are the only entities authorised to negotiate with public and private TV channels the sale of rights concerning:*

- *either the broadcasting, live or as live, by any audiovisual means of matches or brief clips from matches or competitions they organise or authorise,*
- *or the broadcasting of regional or national programmes such as news magazines.*

No club can sign an agreement with a TV channel for the broadcasting, live or as live, of official or non-official matches they play in, without the express authorisation of the FFF and the LFP.

Every national agreement signed with TV channels must be signed by both the FFF and the LFP. Agreements for specific matches broadcast live or as live are signed either by the FFF when they concern association competitions (international matches and the French Cup championship), or by the LFP for matches under its responsibility.

These agreements must be respected by every club concerned. When refusing to respect obligations originating from the agreements, a club may face a fine or a sporting penalty as follows:

- *for first infractions: suspension of the club's President for a period of 3 to 6 months, suspension of the club in addition to a € 32,000 to € 160,000 fine and the loss of three points in the championship,*
- *for repeat infractions: dismissal of the club's President, removal of the club's revenues from TV contracts and relegation.*'

As regards restrictions on the ownership of TV rights, Article 18(2) and (3) of Law n°84-610 provided certain guarantees for the public.

First of all, Article 18(2) protected the right of the public to be informed with respect to competition matches. The owner or buyer of TV rights could not prohibit other channels from broadcasting brief clips of their own choice for free during the news or news-related programmes.

Article 18(3) guaranteed that at least part of the competition would be broadcast live. If the buyer of broadcasting rights did not provide live broadcasts of significant parts of a match, any other channel was be free to broadcast either the entire match or parts of it.

This Article was complemented by Article 20(2) of Law n°86-1067 of September 30TH 1986 concerning the freedom of communication, which provides that it is not allowed exclusively to broadcast major events in such a way that a significant portion of the general public is unable to watch it, either live or as live, on a no-fee channel.

As appeared above, Law n°84-610 was amended by Law n°2003-708. The amendments hinge on the need for solidarity between professional and amateur sports.

The amendments provide that associations will be able freely to transfer the ownership of TV rights to professional clubs.

The aim of this measure is to improve the financial stability of the clubs and to attract new sponsors.

In these cases, the League will be in charge of selling the rights under the conditions defined by the state for reasons of general interest.

In view of the principle of solidarity, the money earned from the sales will be distributed between the association, the League and the clubs.

The amounts payable to the association and the League will be determined by the contract they concluded.

The money due to the clubs participating in the competition as organised by the League will be distributed by the League in accordance with criteria established by the League. The criteria will take account of the club's reputation, its sporting results and the need for solidarity between clubs.

The exceptions of Article 18(2) and (3) of the former Law have been retained.

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European Social Dialogue in Professional Sports: the Legal Framework

by **Frank Hendrickx***

1. Introduction

Professional sport manifests itself on a global scale. Most sporting relationships therefore also have an international dimension. One of these relationships is the employment relationship, i.e. the relationship between the athletes and the clubs with which they have concluded an employment contract. This international component of employment in sports has become quite noticeable in European football and, almost as a consequence, in the case law of the European Court of Justice. Indeed, any employment relationship with European dimensions implies the application of European law, as was demonstrated in the well-known *Bosman* case[1] and, recently, in the *Kolpak* case.[2] In these cases, most issues came up either under the EC Treaty's[3] provisions on free movement and non-discrimination on the basis of nationality, or under the competition rules based on the EC Treaty.

Professional sport, however, is not only connected with these - in the sport sector, well-known - chapters of the EC Treaty. The chapter on Social Policy should not be underestimated either when it comes to relevance for sporting employment relationships. This is typically the case for team sports, such as professional football, where there is an employment contract between the player and the club. Whereas sports associations often have a negative view of European law for impeding or abolishing sporting rules, such as transfer systems and nationality clauses, the Social Chapter of the EC Treaty may instead offer opportunities for the European sports sector and support either present or future sport structures. The present article will deal with one particular aspect of this matter, namely the European social dialogue as laid down in Articles 138 and 139 of the EC Treaty.

Undeniably, the issue of social dialogue is a highly relevant topic for discussion, as both recent and not so recent initiatives in professional football have demonstrated. An international organisation representing the interests of players is already operative in professional football.[4] Clubs too have sought to organise themselves in certain ways,

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1 Case C-415/93, *E.C.R.* 1995, I-4921.

2 Case C-438/00.

3 Treaty establishing the European Community (EC Treaty).

4 Cf. Fédération Internationale des Associations de Footballeurs Professionnels (FIFPRO).

not necessarily within the context of the FIFA or UEFA structures. They are looking for a type of institution which would offer a platform for discussion and negotiation with other parties and defend their own interests. The best-known example is the G14 group, but there are other initiatives.

The development of these initiatives offers scope for a process of social dialogue at the European level, i.e. negotiations and discussions between players' organisations and clubs' organisations concerning player-club relationships in which the respective parties represent the interests of their members. The result of such a process could be either binding agreements or non-binding rules and guidelines that would govern the employment relationship between clubs and players Europe-wide. The difference with FIFA/UEFA rules would be that the results of the social dialogue might attain the status of labour law rules instead of sporting rules. Compared to sporting rules, autonomous labour law rules through social dialogue would occupy a completely different legal position under European and national law.

Bearing the above in mind, this contribution will present an overview of the legal infrastructure that is available at the European Union level, providing a general framework for social dialogue at a European-wide inter-industry level or sector level, which in the latter case could be the level of professional sport or professional football. In other words, what follows is a legal outline describing the tools that are provided by the European Union which may be capable of achieving a process of social dialogue and collective bargaining in the sector of professional sports. From this point of view, the present article is intended to be analytical rather than prescriptive.

2. The concepts of social dialogue and collective bargaining

The concepts of 'social dialogue' and 'collective bargaining' may have many meanings.[5] As explained by Bamber and Sheldon, collective bargaining in its (historically) early form was used as a means for employees to negotiate pay and working conditions with employers from a stronger bargaining position compared to individual bargaining. When unions started to gain factual importance and legal recognition, and when collective bargaining agreements received legal status, collective bargaining became a key element of many industrial relations systems.[6] Collective bargaining and social dialogue, although closely related, are not synonymous concepts.

The ILO defines social dialogue as including 'all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy'.[7] This definition implies a tripartite notion of dialogue, including the government in addition to the two sides of industry. The general concept of social dialogue could be described as all types of bipartite or tripartite negotiations, consultations or exchanges of information involving employers' and workers' representatives.

Collective bargaining is more narrowly defined than social dialogue. Collective bargaining concerns negotiations or discussions between management and labour with a view to concluding an agreement. In many countries, the agreement resulting from collective bargaining, i.e. the collective bargaining agreement, is legally binding upon the employers and employees to which it applies. Nevertheless, the binding nature of the bargaining result is no precondition for coming under the definition of collective bargaining.

3. The identification of social dialogue at the European level

The social dialogue at the European level originated from a series of talks, initiated in the 1980s under the driving force of Commission President Jacques Delors. These discussion rounds involved informal meetings held at *Val Duchesse* which were soon labelled 'social dialogue'. The parties invited to participate in these talks were, from the employers' side, UNICE[8] and CEEP [9], and from the trade union side, ETUC.[10] Later, this cross-industry social dialogue was formalised and was given a prominent role in the mechanisms of the EC Treaty.

3.1. The European sides of industry

At present, various representatives of the two sides of industry can be identified at the European level. The general cross-industry representatives[11] on the employers' side are UNICE and CEEP and on the trade union side, ETUC. There are also cross-industry organisations which represent certain categories of workers or undertakings, such as UEAPME [12], Eurocadres and CEC.[13] In addition, there are many organisations at the sector level.[14]

3.2. The question of representativeness

In order to be able to *act* as a representative of either the employers or the employees, one has to *be* representative. Representativeness is related to the question which organisations are able or allowed to participate in negotiations and consultations and which are competent to conclude collective bargaining agreements. At the European level, the issue of the representativeness of the management and labour sides is problematic. It should be noted that within the context of European Community law, the issue of representativeness plays a role in several provisions, namely with regard to the consultations on the basis of Article 138(2) and (3) EC, with regard to the negotiations and subsequent conclusion of an agreement under Article 138(4) EC and finally with regard to the implementation of European collective agreements in Community legislation on the basis of Article 139(2) EC (see further below).[15]

The main problem is that there is no legal rule at the European level that defines the concept of representativeness or determines which organisations are representative and which are not. However, the European Commission has fairly recently taken the initiative of formulating criteria for representativeness. In subsequent communications,[16] the Commission laid down three main criteria, requiring that organisations should:

1 be cross-industry or relate to specific sectors or categories and be organised at European level;
2 consist of organisations which are an integral and recognised part of Member States' collective bargaining structures and are competent to negotiate agreements, in addition to being as far as possible representative of all Member States;
3 have adequate structures to ensure their effective participation in the consultation process.

On the basis of these criteria, the Commission has drawn up a list of organisations which it considers to be representative and which the Commission will consult in accordance with EC Treaty procedures. The list is assessed periodically.

The disadvantages of this approach - compared for example with a legislative and regulatory approach - are illustrated by the *UEAPME* ruling of the European Court of First Instance in 1998.[17] UEAPME requested the nullification of Directive 96/34 of 3 June 1996 which

5 M. Sewerynski, 'Social dialogue - economic interdependence and labour law', in *Reports to the 6th European Congress for Labour Law and Social Security*, Warsaw, ISLLSS, 13-17 September 1999, 12.
6 G.J. Bamber and P. Sheldon, 'Collective bargaining', in R. Blanpain and C. Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Kluwer Law International, The Hague, 2001, 550.
7 Definition by Infocus Programme on Social Dialogue: www.ilo.org.
8 Union of Industrial and Employers' Confederation of Europe (UNICE).
9 European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP).
10 European Trade Union Confederation (ETUC).
11 Cf. List of European employers' and employees' organisations consulted under Article 138 of the Treaty, Annex 1 of Communication from the Commission, The European social dialogue, a force for innovation and change, COM(2002)34 final of 26 June 2002, 32 p.
12 European Association of Craft and Small and Medium-Sized Enterprises (UEAPME).
13 Confédération Européenne des Caders (CEC).
14 E.g.: European Banking Federation (FBE), International Confederation of Temporary Work Business (CIETT-Europe), European Transport Workers' Federation(ETF), European Metalworkers' Federation (EMF).
15 E. Franssen, *Legal aspects of the European social dialogue*, Intersentia, Antwerp, 2002, 83.
16 COM(93)600 final of 14 December 1993; COM(98)322 of 20 May 1998.

implements the European collective agreement on parental leave. UEAPME, an employers' organisation that represents the interests of small and medium-sized enterprises, argued that the final stage of the European social dialogue as provided in the EC Treaty is basically a closed shop in which only big players like UNICE, CEEP and ETUC play a role.[18]

Concerning UEAPME's claim that the Parental Leave Directive should be nullified,[19]the Court of First Instance argued that the provisions of the - then - Agreement on Social Policy did not confer on any representative of management and labour, whatever the interests purportedly represented, a general right to take part in any negotiations entered into in accordance with Article 3(4) of the Agreement, which relates to the right of the social partners to intervene in the legislative process and take over the initiative of the Commission (ground 78). Nevertheless, the Court continued, the Commission must act in conformity with the principles governing its actions in the field of social policy (grounds 84-85). On regaining the right to take part in the conduct of the procedure, the Commission must, in particular, examine the representativeness of the signatories to the agreement in question (ground 85). The Council is also, according to the Court, required to verify whether the Commission has fulfilled its obligations under the Agreement (ground 87). The Court considered that, in accordance with the principle of democracy on which the Union is founded, where the Parliament does not participate in the legal procedure, the participation of the people has to be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement (ground 89). On this basis, the Court concluded that, where that degree of representativeness is lacking, the Commission and the Council must refuse to implement the agreement at Community level (ground 90).

Nevertheless, the Court found that the Commission and the Council rightly took the view that the collective representativeness of the signatories to the framework agreement was sufficient (ground 110), among other things based on the fact that the signatories were the three bodies listed by the Commission as general cross-industry organisations (ground 95), that the mandate of these signatories is a general mandate, to defend the interests of undertakings of whatever kind (ground 99), that about two-thirds of small and medium-sized enterprises are also affiliated to one of the organisations represented by UNICE (ground 103), and that the very wording of the framework agreement makes it clear that the small and medium-sized enterprises were not left out of the negotiations leading to its conclusion (ground 105).

Clearly, the Court did not solve the problem of representativeness with its decision in this case. Rather than that, it marked the importance of the matter by allowing the two sides of industry to attack the legislative procedures under the EC Treaty in a case where representative organisations were mistakenly left out of the negotiation process. It further ruled out specific bargaining rights under the EC Treaty's Social Chapter. The current situation is naturally the subject of severe criticism. Betten has rethorically asked whether it does not go against democracy if the majority rule is not respected, as UNICE, CEEP and ETUC do not represent the majority of employers and workers in Europe.[20] Blanpain has argued that, if the criteria of representativeness are not clearly spelled out at Community level, the European Court of Justice should look at the relevant ILO Conventions.[21]

As will be shown below, the Commission has interpreted its three criteria for representativeness according to how they would apply to a social dialogue at sector level.

3.3. Levels of social dialogue

Social dialogue and collective bargaining can take place at various levels: at cross-industry level, at sector level and at enterprise level. It can be noted that while social dialogue is recognised in the EC Treaty and by the Commission and identified as a key element of European social policy, there is little European regulation of the subject. In this context, some remarks can be made with regard to the different levels of social dialogue.

3.3.1. Cross-industry level

Ever since the *Val Duchesse* dialogue meetings some form of cross-industry level social dialogue has existed at the European level. With the Amsterdam Treaty, cross-industry level social dialogue was institutionalised in the Social Chapter of the EC Treaty (inclusion of the Maastricht Agreement on Social Policy). Under Article 138 of the EC Treaty, the Commission is now obliged to follow the procedure for a two-stage consultation of the two sides of industry (see below).

In addition to the compulsory consultation procedure, the Commission systematically consults the cross-industry employers' organisations and unions concerning all important developments in the field of economic and social policy. Many of such consultations concerning Community policies take place in the *advisory committees* which have been set up by the Commission since the 1960s. These are tripartite fora whose role is to advise the Commission on the formulation of specific policies and assist in their implementation.

3.3.2. Sector level

European social dialogue at the sector level has been taking place since a long time, more specifically since the 1960s, when the Commission set up various *sectoral committees*, either in the form of Joint Committees or as informal working groups. The sector-specific consultations aim to improve and harmonise working conditions and also, in some cases, improve the economic and competitive position of the sector concerned.[22] On 20 May 1998, in an effort to achieve a more harmonised and effective approach to the structures of sector dialogue, the Commission adopted a Decision providing a framework for *Sectoral Dialogue Committees*.

According to this Decision, Sectoral Dialogue Committees are established in sectors where the two sides of industry jointly apply to take part in a dialogue at European level, and where the representing organisations fulfil the following requirements:

1 relate to specific sectors or categories and be organised at European level;
2 consist of organisations which are an integral and recognised part of Member States' collective bargaining structures and are competent to negotiate agreements, in addition to being representative of several Member States;
3 have adequate structures to ensure their effective participation in the work of the Committees.

On this basis, the Commission has been able to create about 27 committees at the joint request of labour and management in various sectors. The committees have given rise to some 230 commitments of different types, such as opinions, common positions, declarations, guidelines, codes of practice, charters and agreements.[23]

Where social dialogue in professional sports is at issue, it is this sector dialogue that is meant.

3.3.3. Enterprise level

According to the European Commission, 'European integration encourages companies to develop on a transnational scale. Reinforcing European or transnational dialogue among firms has become a fundamental challenge for tomorrow's Europe, particularly in regard to mobility, pensions and equivalence of qualifications'.[24] Enterprise-level social dialogue and collective bargaining at the European level can be

17 *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) vs. Council of the European Union*, Case T-135/96, Judgment of the Court of First Instance of 17 June 1998, *European Court Reports* 1998, II-2335.
18 L. Betten, (The democratic deficit of participatory democracy in Community social policy(, European Law Review, 1998, 31.
19 Pursuant to Article 173 of the EC Treaty; see on this point: E. Franssen and A.T.J.M. Jacobs, 'The question of representativeness in the European social dialogue', *C.M.L.R.* 1998, 1302-1308.
20 L. Betten, 'The democratic deficit of participatory democracy in Community social policy', European Law Review, 1998, 32.
21 R. Blanpain, *European labour law*, 7th edition, Kluwer Law International, The Hague, 2000, 148.
22 COM(98)322 of 20 May 1998, p. 7.
23 Numbers of 2002, cf. *The sectoral dialogue in Europe*, European Commission, Employment & Social Affairs, Office for Official Publications of the European Communities, Luxembourg, 2003, 10.
24 COM(2002)341final of 26 June 2002, p. 11.

identified through European works councils established in more than 700 transnational undertakings in Europe following the adoption of Directive 94/45/EC on European works councils.

4. The role of labour and management in the legislative process under the Social Chapter

The two sides of industry can play various roles in the creation of European law, which take the form of consultation, intervention and initiative. However, the results of social dialogue or collective bargaining are not necessarily legally binding by nature.

4.1 Consultation

While in principle the Commission has the power to initiate the legislative process under the EC Treaty by submitting legislative proposals to the Council, the Treaty has also provided for a specific role for labour and management in this process.

Article 138 of the EC Treaty provides for the compulsory consultation of labour and management by the Commission. The consultation consists of two stages.

1. *First stage of the consultation*: Article 138(2) EC provides that, before submitting proposals in the field of social policy, the Commission shall consult management and labour on the *possible direction* of Community action.
2. *Second stage of the consultation*: According to article 138(3) EC, if, after such (first-stage) consultation, the Commission considers Community action advisable, it shall consult management and labour on *the content of the envisaged proposal*. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

According to the Commission[25] the two-stage consultation has a dual purpose:

- the opinions of the interested parties can be taken into account and the impact of any legislation assessed. The Commission can thus formulate policies appropriate, in their form and substance, to the problems dealt with and incorporate the aim of social modernisation and improving companies' competitiveness;
- the outcome may be independent social dialogue, multi-sectoral or sectoral, and ultimately, therefore, agreements which may subsequently be incorporated into Community law. This is a practical application of the principle of social subsidiarity. It is for the social players to make the first move to arrive at appropriate solutions coming within their area of responsibility; the Community institutions intervene, at the Commission's initiative, only where negotiations fail.

This compulsory consultation under Article 138 of the EC Treaty is additional to the consultations that take place within the context of advisory committees, which operate under the supervision of the European Commission.

4.2 Intervention

Article 138(4) of the EC Treaty provides that, on the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 139. The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

This means that management and labour may intervene in the legislative process initiated by the European Commission by informing the latter that they wish to proceed on their own regulating the subject by concluding a European-wide agreement (as provided under Article 139 of the EC Treaty).

4.3 Initiative

The EC Treaty explicitly provides the possibility for the two sides of industry to conclude a Community-wide agreement at any time and of their own free will.

Article 139(1) EC Treaty stipulates that, should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

According to Article 139(2) of the EC Treaty, these European agreements can be implemented in two main ways:

- either in accordance with the procedures and practices specific to the management and labour and the Member State in question or,
- in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

In the case where labour and management conclude a Community-wide agreement, either at the inter-industry level or at the sector level, the ultimate legal character of the instrument is partly dependent upon the will of the parties themselves. They can decide to conclude a binding agreement, but they are also free to present the result of their bargaining as a common opinion, a recommendation or a code of practice. In the following section, the European collective bargaining agreement will be discussed in more detail.

5. European collective agreement

As explained above, employers' and employees' organisations are free to conclude collective agreements at the European level. In labour law, a collective agreement is often defined as an agreement between one or more employers or employers' organisations and one or more employees' organisations, concerning the terms and conditions of employment and the rights and obligations of the contracting parties.

While Articles 138 and 139 of the EC Treaty have forced a breakthrough in European labour law and social policy, European Community law does not contain any specific provisions with regard to European collective agreements. In the absence of such specific European legal rules, many questions remain as to which legal rules should apply in case a collective agreement is concluded at the European level. In many cases, national law will be applicable to such European agreements. There is even scope for parties to determine which law will govern the European collective agreement. As indicated above, depending on the parties' wishes, social dialogue and collective bargaining may also lead to non-binding agreements, such as recommendations or codes of practice.

As explained above, according to Article 139(2) EC Treaty, a European collective agreement may be implemented in two main ways:

1 Implementation in Accordance with National Practice

This form of implementation does not imply any obligation on the part of the Member States to apply the agreements directly or to work out rules for their transposition. Neither is there any obligation to amend national legislation in force to facilitate their implementation. This means that the European agreements will have to be implemented in the Member States through the collective bargaining system itself which is prevalent (at the national level) in each country.

2 Implementation by a Council Decision

The Council can, at the joint request of the signatory parties and on a proposal from the Commission, implement an agreement by a Decision. The Council and the Commission can of course only act in matters for which they are competent on the basis of the EC Treaty.

This type of implementation, which normally takes the shape of a Council Directive, has already been used for several inter-industry agreements, but also for a number of sectoral collective agreements.

6. Conclusions

The sector of professional sports can be considered a sector of industry like any other sector, such as the metal sector, the textile sector, the transport sector, the banking sector, the entertainment sector, etc. Like many of these sectors, professional sports has a clear international and European dimension. Therefore, there is no presumptive reason to exclude the sports sector from European social dialogue under the EC Treaty. A typical example of a sector which may be

25 COM(2002)341 final of 26 June 2002

ready for such dialogue in the near future is professional football. An organisation such as FIFPro could assume the role of workers' organisation in this European context and recent initiatives generate the belief that a representative employer organisation may shortly emerge at the European level.

Social dialogue and collective bargaining are tools for regulating or, as a more modest objective, simply addressing the relationship between clubs and players, both Europe-wide and at the European level. They could lead to the creation of autonomous labour law, apart from and in addition to the sporting rules produced at the level of sports organisations. It has been pointed out above that not all forms of social dialogue need to result in binding agreements, but that the outcome may also take the shape of recommendations or codes of practice.

It is obvious that the legal preconditions for social dialogue and collective bargaining have to be fulfilled. Of crucial importance is the issue of representativeness. The criteria for being representative as an organisation representing players-employees or clubs-employers were formulated by the European Commission. At this time, a longstanding and vested partner on the employers' side cannot immediately be identified. It is however theoretically possible to 'create' a specialised European organisation, representing for example professional football clubs. However, such a European organisation should have a sufficient national industrial-relations background in order to be considered representative at the European level. In addition to the legal preconditions, it is obvious that social dialogue cannot exist without an actual drive for industrial relations and social dialogue. The international dimension of sport, however, may provide more than one reason for the parties involved to play the dialogue-game at the European level.

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Continuing to Build the European Model of Sport

by **Denis Musso***

1. Introduction

The recent European Court of Justice's *Kolpak* ruling[1] gives us another opportunity to focus on the combination of public law and sporting rules in sports law matters, particularly regarding professional sport.

Each sporting situation is positioned in the spotlight of different levels of legality. Three geographical zones may be distinguished: the regional level as, for example, in Italy or Spain, where Regional Sports Acts exist; the central national level; and the European level where Community law applies

What has changed since 1995 and the famous *Bosman* ruling[2]? Although *Deliege* and *Lethonen* have confirmed the applicability of the freedom of movement of workers in sport, they also have allowed more flexibility in the application of Community law to sport.

Nevertheless, with respect to fair competition, have the sports federations, in the light of their monopoly, secured their role in the future of professional sport?

As professional sport includes not only sporting and economic, but also cultural and historical dimensions, a special treatment is needed.

2. Basics

Some basics have to be stressed before considering the future.

With reference to the pertinent document that was drafted by the European Commission in 1998[3], one could say that if there is no real model of sport in Europe, there still are enough shared values and forms of organisation to make up a genuine model, which is based on some established principles.

It is time now to define them. Different aspects may be observed.

2.1. System of Sports Organisations

Some aspects concern the system of sports organisations. The Nice Declaration, which was adopted in December 2000, stressed the need to preserve and promote the social functions of sport and the key role of sports federations to ensure the necessary solidarity between the various levels at which sport is practiced: from recreational to top-level sport. In Europe, sports federations have a historical legitimacy to run the professional sports system. The pyramid form of sports organisation and the promotion/relegation system are a common feature and a guarantee of the sporting dimension, which is superior to the economic one.

If public actors - like States and the European Union - recognise the social, educational and identity-building roles of sport, it means that sport is not an ordinary article. Sport must have ethical meaning, i.e., encouraging team spirit, solidarity and fair-play, helping to fight against doping[4], racism and xenophobia and protecting young people who are taking part in top-level competitions.

2.2. Legal nature of Sports Federations

Another issue is the legal nature of the sports federations. Originally, the federations are non-profit organisations, run by elected volunteers. Board members are not the owners of the federation, they are militants pursuing the goal of the federation and implementing its actions. This is the main difference in comparison with the management of private commercial companies[5].

2.3. Decision-making Process

The third issue concerns the decision-making process. The typical method used in the sports federations is the one-sided decision. Today, it is an outdated and inadequate instrument for running professional sport. In professional sports management, the various actors must be involved in the decision-making process; in particular, the clubs and the players. This is the essence of the Social Dialogue, which was launched by the European Commission[6]. The Social Dialogue is a consultation mechanism for employers and employees, 'both sides of the industry', at the central European level and at the

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1 Case C-438/00, 8 May (2003). See Opinion on this case by Ian Blackshaw at p [cross refer to my article in ISLJ 2003/3].

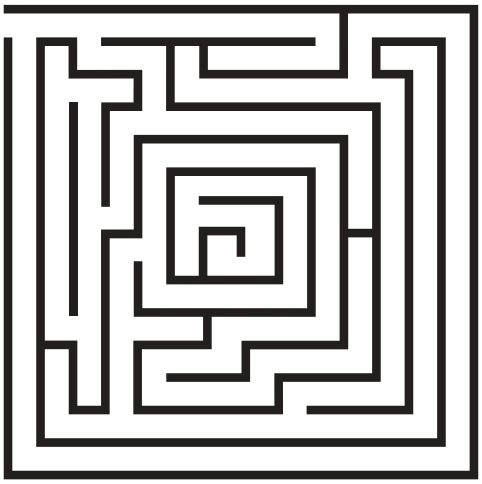
2 Case C-415/93, (1995) ECR I-4921.

3 'The development and prospects for Community action in the field of sport', 29 September 1998.

4 The US professional leagues remained apart from the World Anti-Doping Code, which was accepted at the World Conference on Doping in Sport, Copenhagen, March 2003.

5 See the property rights theory; for instance: ALCHIAN A. A. (1969), 'Corporate Management and Property Rights', in H.Manne (ed), *Economic Policy and the regulation of corporate securities*, American Economic Institute, Washington.

6 Conference on the Social Dialogue in professional football, Brussels, 3 April 2003.



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level of the industrial sectors. The Social Dialogue is incorporated in articles 138 and 139 of the EC Treaty. However in the EU, professional sport is not an industry. It is under control of the federations; and a key success factor for the Social Dialogue in professional sport will be how to imagine and create an original way to integrate sports federations in the process.

With regard to the various aspects, it is important to have a better knowledge of the characteristics and initiatives undertaken in different European countries.

3. Matters to be considered

3.1. Foundations
For example, the United Kingdom tells us that sport essentially is an autonomous movement, based on private initiative, where superior goals are not of an economic nature. Therefore, both State intervention and economic power should be limited.

In Italy, it is interesting to see how the professional sport sector is construed[7]. If the federation decides to set up a professional sports sector, the employment contract of each athlete has to be concluded under a collective bargaining agreement, which is signed every three years by the representatives of employers and employees under the aegis of the federation.

Inspiration can be drawn also from France. Some particular points, which are included in the present Sports Act[8], may serve not as a model but as food for thought.

3.2. Relationship between Sports Federations and the State
The French model of sport is based on a special relationship between the State and the federations. Since 1940, the State delegates the organisation of all sporting competitions to the federations and only one federation is authorised for each specific sport[9]. This monopoly also allows them to organise and control the professional sports sector. If an organiser, who is not a member of the federation, invites athletes and makes competition prize money available, he has to obtain federal agreement beforehand[10]. Therefore, in France, the federation is in a strong position to organise and/or control professional sport, but, at the same time, to a certain degree, being dependent on the State. For example, when the private company 'Société du Tour de France' wants to organise the 'Tour', it needs the agreement of the French Cycling Federation. The authorised federation has to respect, as in public service, principles of equality and legality. By way of compensation, the federations are state-subsidised.

3.3. Relationship between Sports Federations and the Economic Sector
The second aspect concerns the powers of the clubs and leagues. The main aim in France is to limit their powers and bring them under the control of the federations. Professional clubs now have to adopt the status of commercial companies but with various obligations[11]. For example, they cannot be involved in the stock exchange and, until the 1999 Act, they were not allowed to share profits. They were 'non-profit companies'. Today, only one kind of legal entity allows the profit to be shared[12]. Professional clubs can be grouped in a league. However, the league has to be under the control of the federation. Leagues can have an autonomous legal personality only through a non-profit organisation[13].

3.4. Property Rights Partition
The confrontation between commercial companies and non-profit organisations may be unbalanced. Therefore, the Act gives the federations the exclusive right to commercialise competitions[14]. It is up to them to share TV rights income, for instance between the different actors, i.e., themselves, leagues and clubs.

This system is based on a centralised negotiation of TV rights by the league on behalf of the federation.

The brand and logo of the clubs (having the status of non-profit organisations according to French law) can be sold only through establishing a commercial company for professional sporting activities[15].

3.5. Collective Agreement
Albeit late, the French sports organisations are now involved in negotiations to prepare and adopt a collective agreement for the whole sports activities branch. It will include a chapter on professional sport, which is currently being discussed. The lack of an Act - like the one in Italy, where the federations are obliged by law to sign the agreement - undermines the position of the federations in the France. The clubs organised themselves in a specific structure named 'Conseil Social du Mouvement Sportif' (C.O.S.M.O.S.[16]) to be involved and be active in the negotiating process. On the part of the players, a common organisation - named 'Fédération Nationale des Associations et Syndicats de Sportifs' (F.N.A.S.S.)[17] - was set up.

4. Conclusion

In conclusion, these brief illustrations remind us that the future of the professional sports system has to be considered also taking history into account, in order to preserve the aim of the Olympic and sporting movement. Today, the genuine European model of professional sport is living on borrowed time. Its future structure in the European Union has still to be built, despite some progress having been made. A new impulse can be given by the European Convention. Article I-16 of the draft proposal provides that the Union may take supporting, coordinating or complementary actions, in particular, in education, vocational training, youth and sport. For the first time, the word 'sport' is included in the basic legal document of the Union. Despite possible threats, this will provide a first opportunity for continuing to build the European model of sport.

7 Legge n°91 del 23 marzo 1981, sullo lo sport professionistico.
8 Loi n°84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives. In 1999, the Act was amended.
9 Art. 17 ibid.
10 Art. 18 ibid.
11 Art. 11 ibid.
12 (Société Anonyme Sportive Professionnelle.
13 Art. 17.II ibid.
14 Art. 18-1 ibid.
15 Currently, the French Parliament is discussing a Sports Bill including some changes.
16 www.cosmos.asso.fr.
17 Contact : UNFP, 32 rue Feydeau, 75002 Paris, phone : + 33 1 40 39 91 07 ; fax : + 33 1 42 36 22 21.

Case Digest

United Kingdom: Sporting Trade Marks - Arsenal v. Reed, Court of Appeal, [2003] EWCA Civ 96
The long-running dispute between Arsenal Football Club and trader Matthew Reed over the sale of unauthorised Arsenal branded merchandise outside their ground may finally have been resolved. The Court of Appeal held in favour of Arsenal in their judgment in May 2003, over-ruling the decision in favour of Reed in the High Court in December 2002. The Appeal Court found that the trade marks, when applied to the goods, were purchased and worn as badges of support loyalty and affiliation to Arsenal, but that did not mean that the use by a third party would not be liable to jeopardise the functions of the trade marks, namely the ability to guarantee origin. On the contrary, the wider and more extensive the use, the less likely the trade marks would be able to perform their function. This decision means that trademark holders will be able to enforce their rights more effectively.

Compiled by the Teaching Faculty of the Asser-Griffith International Sports Law Programme - www.gu.edu.au/sportslaw

(Taken from SportBusiness International, July 2003, p. 52)

Council of Europe's Work on Sport

by **Mesut Özyavuz***

1. Introduction

If a European Sports model exists, the Council of Europe is certainly the body, which made the most substantial contribution to pave the way for the so-called model. It was the first international intergovernmental organisation to take initiatives and to offer an institutional framework for the development of sport at the European level and establishing numerous legal instruments.

The approach of the Council of Europe to sport can be seen through its main texts on sport, such as the European Sports Charter and the Code of Sports Ethics; the European Convention on Spectator Violence; and the Anti-Doping Convention. While the Charter and Code aim at promoting sport for all as a means of improving the quality of life, facilitating social integration and contributing to social cohesion, particularly among young people, the two Conventions on violence and doping attempt to counter the negative sides of sport.

The Council of Europe, the first international organisation set up in Europe after the Second World War, is today's representative, with its 45 member States, of the 'wider Europe'. The Council's main purpose is to strengthen democracy, human rights and the rule of law, while promoting the great diversity of Europe's common heritage.

The European Cultural Convention of 1954 forms the basis for international co-operation in the field of education, culture, European heritage, sport and youth activities.

Sport co-operation within the Council of Europe is organised in partnership with governmental and non-governmental bodies in the framework of the *Committee for the Development of Sport (CDDS)*, which was set up in 1977. The CDDS meets once a year in Strasbourg, adopts its programme and discusses current topical questions in sport. Bringing together all the 48 States Parties to the European Cultural Convention, the CDDS draws up and manages a pan-European work programme, and prepares the *Conferences of European Ministers responsible for Sport*. These Conferences, which meet on average every other year, give political guidelines for the direction of future cooperation in the field of sport.

Sport is a cultural, social and economic phenomenon of prime importance, and it is, therefore, natural that the Council of Europe should give it considerable attention. The first stage of the Council's work in this field was marked by the adoption of the Committee of Ministers' Resolution on Doping of Athletes in 1967.

Aware of the primary importance of *sports legislation* to ensure democratic principles and accountability, and equal access to sports facilities and activities, the CDDS elaborated and put in place numerous legal instruments (resolutions, recommendations, and conventions) to help governments and national sports organisations to establish democratic sports laws and rules.

The Council of Europe and the CDDS are conscious that democratising global sport is one of the main challenges in coming years and this is why this issue should be firmly on the agenda of the next Ministerial Conference planned in 2004 for modernising sports governance.

2. General instruments and themes

In 1975, *the European Sport for All Charter* was launched by the European Sports Ministers prior to its endorsement and official adoption on 24 September 1976. Both dates are milestones in the Council of Europe's work in sport, as the Charter meant that, from these dates, sports policies in Europe had a common programme based on the fundamental belief of the Council of Europe in the values of sport.

The European Sports Charter, adopted as a recommendation of the Committee of Ministers of the Council of Europe in 1992 (revised in 2001) provides the framework for sports policy to which all European countries have put their names. It is a reference for public authorities and sports organisations alike.

In adopting the Charter, governments have made a commitment to give their citizens, in co-operation with the sports movement, the opportunity to practice sport under well-defined conditions, set out in 13 Articles. According to the Charter, sport must be healthy, safe, fair, tolerant and fulfilling; respectful of the environment; protective of human dignity; and accessible to everybody through the widest possible co-operation and the appropriate distribution of responsibilities between governmental and non-governmental organisations. *The Code of Sports Ethics* complements the Charter, placing fair play at the centre of the intrinsic value of sport. This is aimed particularly at children and young people, directly or indirectly, to influence and promote their experience of sport; governments; sports organisations; and individuals (parents, teachers, coaches, umpires, doctors, journalists, top sportspeople) who often serve as role models.

The role that sport can play in furthering *social cohesion* is another area where the Council of Europe - supported by the Committee of Ministers' adoption of a Recommendation (No. R(99)9) on the role of sport in furthering social cohesion - contributes to the democratisation process, particularly among young people. Considerable emphasis has been laid on providing sports programmes for minority groups, such as migrants, refugees, the unemployed, prisoners and young delinquents, and people with disabilities. The programmes are either carried through in close connection with central, regional or local government or entrusted to the voluntary sports sector in the countries concerned. Social cohesion through sport has a special and very important role to play in the reconstruction and reconciliation process in conflict regions.

As all children have *Physical Education* as a compulsory subject at school, it is a vital part of a child's learning process and also the way that many children are introduced to sport and games and other physical activities. Not surprisingly, therefore, the Conference of European Ministers responsible for Sport and the Committee for the Development of Sport (CDDS) have been permanently interested in this topic and desirous of taking steps to improve the opportunities for Physical Education and the quality of the teaching and experiences dispensed during the classes. This includes the opportunities for children with disabilities to have equal chances during their school time.

At the 16th Informal Meeting of Sports Ministers at Warsaw in September 2002, on the basis of a European survey commissioned by the CDDS, there was an intensive and in-depth discussion of measures that could be taken at the European level, as well as national steps, to achieve the goals of improving the opportunities and the quality of Physical Education experiences. These measures resulted in the adoption by the Committee of Ministers of the Recommendation No R (2003)6.

3. Violence and racism

The Council of Europe acts against the negative side of sport, in particular, *violence* and *doping*, through Conventions: binding legal instruments which, in the case of doping, operate equally outside the boundaries of Europe.

Although particularly acute today, the problem of *violence* has been a matter of concern to sports officials for a very long time. As early as 1983, the Council of Europe expressed its determination to take action against the increase in violence - both on and off the sports field. It was in that year that the Parliamentary Assembly adopted its recommendation on cultural and educational means of reducing violence.

* **Deputy Head, Sports Department, Council of Europe.**

The Heysel disaster gave added urgency to Council action in this field. Shortly afterwards, the member States set out to find the best means of combating violence and developing international co-operation. The events at Heysel required a response; and it was in this dramatic context that the European Convention on Spectator Violence and Misbehaviour at Sports Events and, in particular, at Football Matches was signed in Strasbourg on 19 August 1985. 36 States have now ratified this Convention.

This Convention provides governments with measures and remedies for the control, prevention and, when necessary, punishment of violence, as well as educational measures to prevent outbreaks of violence. Its Standing Committee monitors compliance with its measures and issues practical recommendations.

Amongst the principal measures recommended by the Convention, notably under Article 3, are:

- deploying public order resources in stadia and along the transit routes used by spectators;
- separating rival groups of supporters;
- strictly controlling ticket sales;
- excluding trouble-makers from stadia and matches;
- prohibiting the introduction and restricting the sale of alcoholic drinks in stadia;
- conducting security checks, particularly for objects likely to be used for violence;
- clearly defining responsibilities between organisers and the public authorities; and
- designing football stadia in such a way as to guarantee spectator safety.

In addition to the Convention, numerous Recommendations have been adopted by the Standing Committee, covering the following aspects:

- ticket sales (efficient management of ticket production, sale and distribution of tickets, key factors for overall football match safety);
- identification and treatment of offenders;
- stewarding (reducing police numbers in football stadia);
- efficient crowd management inside stadia, taking account of spectator safety and security (clear definition of responsibilities, appropriate stadia design, measures concerning the sale of alcoholic drinks, and so on);
- action against racism and xenophobia;
- police co-operation and information exchange; and
- social and educational measures to prevent violence in sport.

The Convention on spectator violence encourages close international co-operation among States and close co-operation among the relevant national sports authorities.

The Standing Committee is the body responsible for monitoring implementation of the Convention. UEFA and FIFA are both associated with the Committee's work. During the major international championships - the World Cup, European Championships, and others - the Standing Committee sets up an ad hoc working group to assess the security measures adopted and, after the major event in question, to draw conclusions from implementation of such measures.

Major sports events are often marred by racist behaviour. Such behaviour must be firmly condemned, given the educational role sport has to play in promoting mutual respect, tolerance and fair play, and combating discrimination.

Adopted following the proposal of the Standing Committee, the recommendation R(2001) 6 of the Committee of Ministers on the prevention of racism, xenophobia and racial intolerance in sport urges governments of member States to adopt effective policies and measures aimed at preventing and combating racist, xenophobic, discriminatory and intolerant behaviour in all sports, particularly in football.

In January 2003, the Standing Committee of the Convention adopted Recommendation R (2003) 1 on the role of social and educational measures in preventing violence in sport. Drawing on the experience of recent major championship events, it recommends adopting measures to improve the welcoming and coaching of supporters. Fan coaching activities and projects; fan embassies; and fan coaches are the cornerstones of the recommended prevention policies.

Long-term activities are also recommended, including encouraging football clubs to broaden their co-operation with their fans and supporters' clubs and to acknowledge the role of the latter in their social environment. Lastly, local authorities are encouraged to play a major role in developing youth projects for preventing violence.

A Round Table on sport, tolerance and fair play was organised in 1996. As part of the follow-up to this event, many European States have appointed national ambassadors for sport, tolerance and fair play.

To date, 24 States have appointed such ambassadors, known and respected by their fellow-citizens. Their role is to promote fair play in sports in their respective countries and implement programmes to encourage tolerance in sport, in order to guide and inspire national programmes encouraging all citizens to practise sport fairly and with respect for the other players.

4. Doping

With regard to *doping*, this is not only contrary to the values of sport and the principles for which it stands, such as fair play, equal chances, fair competition, healthy activity, but it also endangers the health and life of athletes.

Doping in sport is nothing new, but it has grown, expanded geographically and become more visible in recent years. It is a true scourge for many competitive sports and jeopardises the health of millions of young athletes throughout the world.

Since the 1960s, the Council of Europe has realised the extent of this problem and decided to fight it. The Anti-Doping Convention, opened for signature on 16 November 1989 in Strasbourg and entered into force on 1 March 1990, demonstrates this commitment. It expresses the Contracting Parties' political will to combat doping in sport in an active and co-ordinated manner. To date, the Convention has been ratified by 41 countries.

The main objective of the Convention is to promote the harmonisation, at national and international levels, of the measures to be taken against doping. The Convention does not claim to create a uniform model of anti-doping, but sets a certain number of common standards and regulations requiring that the Parties adopt legislative, financial, technical, educational and other measures.

Its spirit derives from the political desire to help safeguard the ethics of sport and to preserve the integrity of 'clean' sport.

By adopting the principles and objectives of the Convention, the contracting Parties undertake, in their respective constitutional provisions, to put into place a national anti-doping policy to:

- create a national co-ordinating body;
- reduce the trafficking of doping substances and the use of banned doping agents;
- reinforce doping controls and improve detection techniques;
- support education and information programmes;
- guarantee the efficiency of sanctions taken against offenders;
- collaborate with sports organisations as well as at international level; and
- use accredited anti-doping laboratories.

An additional Protocol to the Convention, concerning principally the mutual recognition of anti-doping controls, was opened for signature in September 2002 and has been signed by 18 States to date.

A project on monitoring compliance with commitments started in 1998. It studies how well member States implement the Convention. Advisory visits are organised to help the countries put in place the policies and programmes necessary to carry out the requirements laid down in the basic texts. Evaluation visits are organised and the resulting evaluation reports published.

Furthermore, each Party must complete a detailed questionnaire annually on their national anti-doping policy.

The recently adopted (2002) Protocol to the Anti-Doping Convention includes an article making it an obligation for Parties to be available for evaluation, thus making it one of the few international conventions with a stringent control system.

The Anti-Doping Convention is the only international legal reference instrument in the fight against doping. It is open to all countries.

The body responsible for monitoring the implementation of the Convention is the Monitoring Group. It also involves the World Anti-Doping Agency (WADA), the International Olympic Committee (IOC) and international sports federations in its work.

Several other non-European countries regularly participate as 'observers' in the activities of the Monitoring Group of the Convention, including China, Japan, New Zealand, South Africa and the United States.

Following the Lausanne Conference on Doping in Sport in February 1999, a new body was set up in November 1999 in the fight against doping: the World Anti-Doping Agency (WADA). The Council of Europe played an active role in the creation of this agency, which is the first joint venture between the sports movement and the public authorities in this field, and its expertise contributes substantially to the work of the WADA, in particular, for the elaboration of the World Anti-Doping Code and its standards.

The Unesco Round Table of Sports Ministers decided in January 2003 (and confirmed by the Unesco Executive Committee in April 2003) that the Council of Europe's Anti-Doping Convention will serve as the base for the future global instrument against doping, which will be prepared for the next MINEPS IV Conference (Sports Ministers Conference of UNESCO), to take place just before the Athens Olympic Games in 2004 and to be adopted, if possible, before the Winter Olympic Games in 2006.

5. Conclusion

The European Sports Charter and the Conventions are permanent constituents of the Council of Europe's sports programme. In addition, the CDDS runs specific programmes for periods of 3 to 5 years.

Thus, many different subjects have been treated over the years. Once these programmes are finalised the committee passes the responsibility to the member states to follow up the work at national level. Examples of areas - other than those mentioned above - where the Council of Europe has been involved are:

- Sport and physical education for children and young people;
- Sports facilities;
- Promotion of sport;
- Sport policy, management and economy;
- The economic impact of sport; and
- Sport and the environment

To conclude, the Council of Europe is quite aware that Sport has a distinctive role to play as a force for social integration and understanding. It is open to all, regardless of age, language, religion, culture, or ability. It is already the single most popular activity in modern society. Its potential for improving health and as a school for democracy is increasingly acknowledged.

The Council of Europe continues to play an active role in European sports affairs to establish international standards for States, parties to the European Cultural Convention, to help public authorities, in cooperation with national sports organisations, to promote and develop sport that is open to everyone, without discrimination, and run in a healthy, safe and ethical environment.

Case Digest

United States: NFL Player Wrongful Death Lawsuit Reaches Settlement With Doctors

In May 2003, the Estate of Korey Stringer reached a settlement with the Minnesota Vikings' training camp physician, Dr. David Knowles, and his Mankato Clinic, both of whom were independent contractors for the team, for an undisclosed sum. The Stringers had sued for $100 million ((84.4m) and contended that Korey Stringer, an NFL All-Pro offensive lineman, did not receive proper medical care when he collapsed during the 2001 football training camp season. The lineman died of heat stroke one day after his collapse.

However, last April, the Stringers' legal claims against the Vikings were dismissed. The court ruled that the evidence was insufficient to determine that the conduct of any of the Vikings defendants constituted 'gross negligence' which is the State of Minnesota's legal standard the plaintiffs must meet in order to proceed to trial. This case highlights the potential liability of sports doctors in circumstances where they are overseeing specific training regimes such as the high-temperature conditions Stringer was subject to.

Europe: Movement of Professional Sportsmen - Deutscher Handballbund eV v. Kolpak, European Court of Justice, Case C-438/00.

Maros Kolpak, a Slovak national, played as goalkeeper for the German second-division handball team TSV Östringen eV. He signed a contract of, was resident in Germany and held a valid residence permit.

The Deutscher Handballbund eV issued Kolpak with a player's licence marked with the letter A as he was a national of a non-member country whose citizens do not benefit from the equal treatment provisions under the EC Treaty. Under the federal rules, teams in the federal and regional leagues may, in league or cup matches, field no more than two 'A' players.

Kolpak considered that he was entitled to take part without any restriction whatsoever by reason of the prohibition of discrimination set out in the Association Agreement between the EC and Slovakia.

The ECJ determined that Slovak workers lawfully employed in the territory of a member state are entitled to the same treatment as nationals of that Member State in regard to conditions of work, remuneration or dismissal.

Compiled by the Teaching Faculty of the Asser-Griffith International Sports Law Programme - www.gu.edu.au/sportslaw

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The Professional Club Leagues in Portugal: What Legislative Reform?

by **José Manuel Meirim***

Although I am not exactly what one might call 'a football man' - indeed, I am actually highly critical of the organisation and management of Portuguese football, I received and accepted the invitation from the *Liga Portuguesa de Futebol Profissional* (Portuguese League of Professional Football - LPFP) to participate today in this forum for reflection.

Whilst not a 'football man', for want of a better definition, I am, as a friend of mine put it, a dog without an owner.

Although it is true that I enjoy a considerable degree of freedom through having no owner, it is no less certain that at times I feel somewhat like a stray, without the dedicated care of an owner, of any owner.

The atmosphere surrounding this conference, and which to a certain extent determines its theme, is that created by the declaration of intent by the Government to reform sports legislation.

Indeed, the Programme of the 15th Constitutional Government, with regard to sport, is impressively guided by this intention to *reform sports law* or, in other words, *sports legislation*.

In this political text, the following diagnosis of the sports system is given:

The existing model of sports development in Portugal is outdated and incapable of fulfilling its mission, which is that of promoting and guiding the general expansion of sports activities.

In order to rectify this situation, a series of measures are, naturally, proposed.

The first of these, interestingly, is expressed as a *development of the reform of the sports legislation system*.

However, from a perspective closer to the interests of professional sport, the text also refers to *strengthening the international dimension of sport*, and, in this field, to *strengthening support for the preparation and participation of athletes or club teams in international competitions* and to increasing the competitiveness of professional sports activity.

Since the Government's Programme was approved, there have been several dates mooted for the start of work on the reforms.

Reforms were first due to have been concluded by the end of 2003; this was later postponed until the end of the present legislative session.

There was talk of a revision of the Basic Law governing the Sports System, a revision of the law governing sports federations and even a revision of the legal position of volunteer sports managers.

At this point, I believe it would be neither imprudent nor excessive to formulate two initial conclusions regarding the said legislative reform:

a The first is that the State doesn't know or isn't sure what it wants;
b The second is that the State doesn't know or isn't sure when it wants to act.

We thus run a serious risk of merely indulging in intellectual exercises.

Consider the following.

The State, the programme of the Government, claims that the model is outdated, that it has passed its expiry date.

But what does this claim mean if we look at the normative structure that sets out the limits of professional sports competitions?

Will sports federations no longer have professional leagues?

Will the professional leagues no longer be bodies with a degree of autonomy well grounded in the law?

Are we going to see closed leagues, outside the scope of the federations?

The fact of the matter is that the current position of the professional leagues of clubs is one of the key structural elements of the professional component of the sports system.

I believe, nevertheless, that none of this is desired or even taken into consideration and, therefore, that the claims made in the Government programme and the *reformist intent* are little more than exercises in rhetoric.

Having said this, we could almost finish our presentation at this point.

I believe, however, that in all modesty I have something to say that may facilitate joint reflection, or indeed increase knowledge of what the current national legislative system conceives to be a professional league of clubs and its principal functions.

The possession of this knowledge would, at least, be an important step towards contemplating alterations to the legislation in force, however modest these alterations may be.

Let us now clarify the object of our attention.

In the vast expanse of legislation and regulations that affect the different facets of professional sports competitions - sports clubs, sports enterprises, sportsmen and women, television rights, advertising, etc. - there are many topics of direct or indirect interest to professional leagues of clubs and on which they should reflect and propose appropriate changes.

The LPFP is, to the best of my knowledge, working towards these ends.

The purpose of this speech is modest, however, and I do not intend to offer an extensive assortment of proposals for legislation.

What I propose is that we try to recall some basic and essential ideas about a sports organisation that has many complex facets: the professional league.

Firstly it must be said that professional leagues of clubs, as they are today, are quite a recent phenomenon.

Created 25 years ago, the LPFP was, at that time, a mere association of clubs, private in nature and activity, a pressure group in search of representative space within its particular sports federation.

The Basic Law on the Sports System (LBSD) - Law No. 1/90, of 13 January, the legal framework applicable to sports federations and to the status of sports bodies aimed at benefiting the public (RJFD) - Decree-Law No. 144/93, of 26 April - and also the amendments to both acts, introduced in Law No. 19/96, of 25 June and Decree-Law No. 111/97, of 9 May, respectively, significantly changed the initial premise on which the framework was built.

From the time of their creation by the clubs until a solution arose from this *onslaught of legislation*, the leagues of clubs changed from clear and simple non-profit making associations, clearly private in their make-up and their activities, into the *autonomous bodies* of an entity - the sports federation - that, although private, exercises public powers and has a mission of public service.

The leagues are, today, many-headed beasts, one might say:

- they are an association of clubs
- they are an employers' association
- they are members of the sports federations
- they are bodies of a sports federation
- they are an integral part of important Public Sports Administration bodies
- they are (or should be) regulatory entities for the markets of professional sports competitions.

* Prof. José Manuel Meirim, Legal adviser in the Constitutional Court of Portugal and Professor of Sports Law in the Faculty of Physical Education of the University of Lisbon. This paper was presented at the headquarters of the *Liga Portuguesa de Futebol Profissional* (Portuguese League of Professional Football), Oporto, 22 April 2003.

In this complex situation, one fundamental aspect that shapes *the current existence* of the leagues of clubs in Portuguese sports law stands out.

Although they remain private associations, the leagues, at least since 1997, have exercised public powers with regard to the organisation, management and the administration of disciplinary law regarding professional sports competitions.

Some of their activities are of the same nature as those practiced by the sports federations, considered to be aimed at defending the interests of the sport community of which they are a part.

Furthermore, we must not forget the following: by bringing together clubs and sports enterprises, the leagues appear, right from their foundation, to be detached from their associates.

The leagues have acquired a 'proper distance' from their members.

They exercise over their members powers of management and discipline and, strictly speaking, from this perspective, clubs and companies end up being seen as third parties, as entities separate from the domain of the leagues.

A second aspect that is worthy of note is the fact that, in the Portuguese sports system and unlike the North American leagues, the professional leagues of clubs are firmly established within a federated sports model.

It could even be claimed that a professional league is like a 'sports federation within another sports federation', but what we must not forget is that the professional leagues are an integral part of a sports model in which the federations are the central axis, acting as an essential reference for the system.

In Europe, and therefore also in Portugal, the leading role belongs to the sports federations.

I could quote a sufficiently impressive number of legislative provisions that corroborate this understanding of the situation.

However, I will give just one example taken from clause 3 of the Protocol signed by the LPFP and the FPF (Portuguese Football Association):

'The organisation, regulation and management of competitions [...] fall within the exclusive competence of the LPFP, as an autonomous body of the FPF, as established in the act, Statutes and Regulations of the FPF'.

This positioning of the sports federations is even supported by the political discourse of the European Union.

In this context, we can note the provisions of the so-called Helsinki Report on Sport - Report from the Commission to the European Council, of December 1999 - on enhancing the role of sports federations within the Community framework and also the system of promotion-relegation, one of the characteristics of the European sport system.

It is also worth noting the constant emphasis in the Annex on the specific characteristics of Sport and its social function in Europe (European Council of Nice - December of 2000), in which, while taking into account developments in the world of sport, it is established that sports federations should continue to be a key feature of a form of organisation providing a guarantee of sports cohesion and participatory democracy.

The third issue we would like to raise refers to another important determining factor for any intent to reform the professional leagues of clubs.

Portugal is a country, essentially on a par with other countries in Southern Europe, where there is significant public (State) involvement in sports.

Without going into great detail, which time constraints prevent on this occasion, firstly, it could be said, in summing up, that a considerable portion of the federated sports area has become public.

What used to be a private sporting competition, what used to be private regulations, because of the legal status of public sports interest held by the sports federations, has, to an extent, been *made public,* with this 'publicness' spreading to the organisation and regulations governing the professional sports competitions themselves.

Take this highly significant example.

If the State didn't want us to, we wouldn't be meeting here today to review these issues, however strong the will of the clubs that are members of the LPFP.

However, I would go even further in this absurd - apparently absurd - claim of mine.

The league of clubs, as it is today, part of the regulatory framework of the Portuguese sports system, does not exist through the will of its members.

It exists, in fact, because this is the will of the State.

It is the State's will that decides on the existence of a professional league of clubs.

The fact of the matter is that, if we look at the existing legal regulations, leagues of clubs only exist where there are professional sports competitions.

However, professional sports competitions only exist when there is express action by the member of the Government responsible for sport, endorsing the positive opinion of the *Conselho Superior do Desporto* (High Sports Council) with regard to their qualification.

In Spain, as we know, they go even further: the statutes and regulations of the leagues are approved by the Public Sports Administration.

Given this framework - without making use of the legal references that are always somewhat tedious in an intervention of this type - we should not, however, fail to recall, although briefly, some legal provisions that in our opinion corroborate what we have been saying.

For this purpose, we have chosen 4 laws.

Three contain core structural standards; the last, being in part almost a *legal aberration*, comprises - amongst a multitude of perplexities - what one might consider to be an exceptionally 'integrationist' vision of the league of clubs in relation to the sports federation.

The first reference is unavoidably the LBSD.

Here we find the aforementioned professional sports competition as a prerequisite for the 'birth' of a professional league of clubs (Article 24(1)), as well as the nature of this entity as an 'association of clubs of compulsory and exclusive membership'.

On the other hand, it can also be noted that the league of clubs appears, unreservedly, to be an autonomous body of the professional sports federation, with legally established powers (Article 24(2)).

The essential core of its aims - required by the LBSD - includes two blocks of powers: *a)* the organisation and regulation of the powers of a professional nature that fall under the scope of a sports federation; *b)* the exercise of duties of regulation, control and supervision of the clubs and sports enterprises who are its members (to a certain extent, not unlike the idea of a market regulation authority).

In the RJFD, the league of clubs appears, from the outset, as one of the statutory bodies of the sports federations (Article 23(2)), but also as an association of clubs that is part of the general assembly of the federation (Articles 26 and 26-A(1) and (3)).

The chairman of the league, in turn, is presented as the legal substitute of the chairman of the sports federation (Article 27(3)).

On the powers of the leagues, as autonomous bodies of the sports federation, Article 34(3), stipulates, in general terms, that the professional league of clubs is responsible for exercising, with regard to powers of a professional character, the powers of the federation on issues related to organisation, management and discipline.

Later, in Article 39, we find a list of the minimum powers and the possibility of more powers being provided for in the federation statutes.

In the same article, besides reasserting the essential core already present in the LBSD, the *regulatory function* is emphasized.

Examples of this are the provisions of paragraphs (1)d and e: to define allocation criteria and to ensure the supervision of revenue directly from professional powers and to define rules for the management and control of accounts applicable to the clubs that take part in them.

Another law worthy of greater attention is Decree-Law No. 303/99, of 6 August, on parameters for the recognition of the professional nature of sports competitions and consequent assumptions regarding participation in them.

This law can be analysed in terms of two separate parts.

The first part contains the regulations on how to achieve the classification as a professional sports competition.

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FREELY RENDERED FROM ARTHUR SCHOPENHAUER (1788-1860)

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The second brings together regulations on the organisation of professional sports competitions.

We will concern ourselves only with this second group, for the moment, given that it is the professional league that is the organiser of these competitions.

Here we have listed a set of requirements of an economic nature, a field in which the duties of the participants in sports competitions are mapped out.

For example, the presentation of a financial plan (Article 8), balanced financial position (Article 9), tax compliance (Article 10) and presentation of yearly revenue (Article 11).

The professional league has a duty to regulate sports sanctions in cases of failure to fulfil those duties (Article 12).

Special attention should be given to Article 13.

It states that, in the case of failure by the appropriate professional league of clubs to exercise the powers established in the licence, these powers should be exercised by its sports federation (Paragraph 1).

Here we have the unequivocal affirmation of the sphere in which the professional league of clubs moves, the natural sphere, so to speak, of the sports federations.

On the other hand, the failure, on the part of the sports federation, to exercise the powers referred to in the law, results in the suspension or annulment of the status of public sports interest held by the body in question (Paragraph 2).

Herein lies the sphere of public intervention, the *publicness*, in sport: the State no longer recognises the non-compliant sports federation.

Finally, let us take a look at part of Law No. 112/99, of 3 August, a law that approved the disciplinary system of sports federations.

Article 11, on disciplinary authority, is a good example of the *overvaluation* of the disciplinary bodies of a federation that can intervene, even in the sphere of professional competitions.

Let us now present some conclusions about what we have been discussing.

Firstly, we believe that in the event of legislative reform in the field of professional leagues of clubs, this will never amount to a 'legislative revolution'.

This is due to two facts. Firstly, leagues of clubs are part of a sports model based on sports federations and of a sports system characterised by a high level of public regulatory intervention.

Secondly, legislative reform is more likely, in our opinion, and given these determining factors - besides others, to be dictated by UEFA (licensing of the clubs) or everyday life (profound economic crisis among the clubs and sports enterprises that participate in professional sports competitions) - if the professional leagues of clubs take full responsibility for their raison d'être: the organisation and management of a professional sports competition or, in other words, the marketing of a unique product, *the sports event as one of the components of the industry of public entertainment*.

Bearing in mind the above-mentioned determining factors, this task would not be easy even taking into account its own structure as an association.

Nevertheless, the law in force already says almost everything.

In normative discourse, the professional leagues of clubs are regulatory entities for that sector of the sports entertainment market.

Current *regulation* is based on two fundamental ideas: the establishment and implementation of rules and the maintenance or guarantee of the balanced operation of the system.

In other words, appropriate competitive balance and confidence in the truth of the results.

If this can be achieved, maybe it isn't too late!

Case Digest

United States: Limitations On Athlete Trademark And Publicity Rights - ETW Corporation v. Jireh Publishing, Inc., 2003 U.S. App. LEXIS 12488, (20 June 2003) the United States Sixth Circuit Court of Appeals

This decision has established limitations on athlete trademark and publicity rights. ETW Corporation ('ETW'), which is the licensing company owned by golfer Tiger Woods, claimed that Jireh Publishing, Inc. ('Jireh') infringed on their registered trademark mark 'Tiger Woods' and violated Woods' publicity rights pursuant to Ohio state law.

ETW's legal claims addressed a painting produced by Jireh entitled '*The Masters of Augusta*', which commemorated Woods' 1997 victory at The Masters Tournament. This painting was produced and sold without ETW's consent. Among other things, this painting includes three views of Woods in different poses, likenesses of famous golfers, such as Arnold Palmer and Jack Nicklaus looking down on Woods, and the artist's name. Jireh claimed that this painting's artistic expression was protected by the First Amendment of the United States Constitution, and, therefore, did not violate American federal trademark law or Ohio publicity rights.

ETW had registered Woods' name as a trademark, but it did not register any image or likeness of Woods. In ruling against ETW, the Court held that *'images and likenesses of Woods are not protectable as a trademark because they do not perform the trademark function or designation . . . No reasonable person could believe that merely because [this painting] contain Woods' likeness or image, [it] all originated with Woods.'*

Further the Court said that *'the right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity.'*

When balancing ETW's intellectual property claims with Jireh's artistic expression rights, as guaranteed under the First Amendment, the Court held that *'we conclude that [Jireh's] work has substantial informational and creative content which outweighs any adverse effect on ETW's market and that [Jireh's] work does not violate Woods' right of publicity.'*

United Kingdom: Sponsorship Contracts - Jordan Grand Prix Ltd v Vodaphone Group PLC, High Court (being heard July 2003)

Jordan is suing Vodafone for reneging on a verbal agreement it claim it had for a sponsorship deal. Vodafone, the telecommunications firm in fact signed a deal to sponsor rival team Ferrari.

Vodafone's Peter Haines denies entering into a three year title sponsorship with Jordan in a phone call to Eddie Jordan on March 22 2001, where he is alleged to have said 'You've got the deal' - even though Vodafone's board had agreed to enter into secondary sponsorship with Ferrari. Jordan claimed that this delay in knowing of Vodafone's decision is claimed to have damaged Jordan's negotiations with Gallaher, a sponsor since 1996 and other sponsors for renewing their commitment to Jordan.

What is in question is essentially whether there was an oral agreement. An oral agreement *is* a legal contract just as if it was in written form. However, if there is a dispute over an alleged oral agreement, the issue is one of evidence of proof. Jordan is likely to win the case if it can establish 'on the balance of probabilities' that such an agreement existed. The potentially costly lesson to be learnt is that during complex contractual negotiations, if a party wants to rely on an agreement having been made, it should always be reduced to a written document.

Compiled by the Teaching Faculty of the Asser-Griffith International Sports Law Programme - www.gu.edu.au/sportslaw

(Taken from SportBusiness International, August 2003, p. 54)

The Ephedra Problem and a Solution

Ephedra is making news. During the last several months, the law and the media have focused on athlete use of ephedra. For example, the families of Baltimore Orioles pitcher, Steve Belcher, and Illinois high school football player, Sean Riggins, maintain that ephedra based products used by both Belcher and Riggins caused their deaths.

Presently, the Bechler estate has filed a $600 million lawsuit against one of the manufacturers and distributors of ephedra, claiming that it knew of ephedra's dangers and failed to warn Bechler of these dangers before he purchased and used its products. However, the autopsy performed by Broward County, Florida Medical Examiner, Dr. Joshua Perper, also revealed that Belcher had suffered from other ailments at the time of his death, including hypertension, abnormal liver functions, asthma, an enlarged heart, and excessive weight. Further, on February 17, 2003, the day of Belcher's death, it was a warm, humid day at the Orioles Florida spring training facility and he was not yet acclimated to the prevailing weather conditions while he was running wind sprints.

During the Fall of 2002, Riggins had passed a pre-season physical to play high school football in Lincoln, Illinois. Afterwards, Riggins had suffered from flu-like symptoms. On September 3, 2002, he had a seizure and died of cardiac arrest. It was later learned by the Riggins family that before his death Sean had purchased ephedra pills at a local gas station in order to gain a competitive advantage over other players. Riggins autopsy report indicated that while he did not have a history of any heart problems, he died of acute myocardial infarction, which is when the blood ceases flowing to the heart. Logan County, Illinois Coroner, Dr. Charles Fricke, said that despite the absence of ephedra in Riggins' body, he had no doubt that it caused his death.

As a result of Riggins death, his family was instrumental in Illinois' recent ban of ephedra sold within its borders. The ban took effect last May. This law prohibits ephedra from being sold to anyone in Illinois regardless of the age of the purchaser. Violations of this law are punishable by up to five years of imprisonment, or a fine of not more than $20,000 or both. Illinois governor, Rod Blagojevich, urged other states to follow Illinois' lead and institute similar bans.

In addition to Illinois on the state level, California passed a new law that bans the sale of ephedra to minors and requires warning labels on such products. Further, under California's Corporate Criminal Liability Act of 1990, managers of businesses, including officers and executives, can face criminal prosecution for concealing dangers in products or workplace settings that could put consumers or workers at risk of death or injury if they fail to notify state officials within fifteen days of learning of the defects. Failure to notify the appropriate state agency could be a felonious act under this law.

Last May, in Florida, a new state law banned the sale of all over the counter weight loss products to those under 18 even though ephedra is not present. In June, the Westchester County, New York legislature banned the sale of ephedra, but not the use.

On the federal level in the United States, ephedra is classified as a 'dietary supplement' pursuant to the Dietary Supplement Health and Education Act of 1994. More importantly, this law categorizes dietary supplements as 'foods,' not 'drugs.' This means that before a drug can be sold in the United States the manufacturer is required to prove that it is safe and effective. By contrast, the federal government has the burden to prove that a dietary supplement is unsafe before the FDA can recall it from the market and prevent any additional sales.

Presently, ephedra is available in health food stores, drug stores and on-line. It is estimated that 12 to 17 million Americans annually consume more than three billion doses of ephedra products. These sales produce approximately $18 billion of annual revenues. With this amount of money at stake the dietary supplement industry desires to have a minimum of government regulation and oversight. For instance, the industry may be willing to accept warning labels on their goods similar to those found on tobacco products. In stark contrast, many medical professionals as well as victims and their families advocate a complete ban on ephedra manufacture and sales.

Athletes use ephedra for two reasons. First, it provides a stimulant effect where an athlete feels that he has additional 'pep' or 'energy.' Second, ephedra enhances the body's metabolism which helps weight loss, known popularly as 'fat burners.' On the other hand, medical evidence suggests that ephedra constricts blood vessels, raises blood pressure and inhibits the body's ability to cool itself. For instance, Belcher was running wind sprints in hot, humid weather when he collapsed of sudden heatstroke.

Moreover, athlete ignorance of ephedra and its doses, coupled with strenuous exercise, hot weather conditions, pre-existing heart related diseases or the use of other drugs, such as caffeine, can result in severe injury or death. Dr. Andrew Tucker of the University of Maryland Sports Medicine Department stated that 'part of the problem is that athletes think the more you take the better. Often people take much more than the recommended dose. Since these products are not regulated by the FDA the purity of a product is not guaranteed. There could be more or less of a product in that pill.'

This medical evidence is not new. In September, 1994 a Food and Drug Administration ('FDA') medical bulletin stated that ephedra based products caused reactions varying 'from the milder adverse effects known to be associated with sympathomimetic stimulants (e.g. nervousness, dizziness, tremor, alternations in blood pressure or heart rate, headache, gastrointestinal distress) to chest pain, myocardial infarction, hepatitis, stroke, seizures, psychosis and death.'

In response to the high profile deaths of Belcher and Riggins, along with an increase of nationally reported ephedra related health problems, the United States Federal Trade Commission ('FTC') filed lawsuits against manufacturers who falsely claimed that ephedra 'would allow users to lose substantial weight without diet or exercise,' or that the products were 'perfectly safe,' or had 'no side effects.' Last June, the FTC settled their lawsuits against Health Laboratories of North America, Inc. and USA Pharmacal Sales, Inc. after the companies promised to stop making false and deceptive advertising claims. The companies also agreed to include warnings about the health risks of ephedra to consumers and to pay $370,000 in consumer redress. Additional FTC lawsuits are pending.

Last May, in perhaps a precursor to the Bechler proceeding, a California class action lawsuit found Cytodyne Technologies, Inc., which is one of the defendants in the Bechler case, liable for their ephedra products. The Court held that the manufacturer's ephedra claims were either false or misleading and ordered a class restitution of $12.5 million.

In addition, the FDA has proposed new federal regulations that products must include large labels that warn potential users that ephedra can cause death, heart attacks and strokes as possible side effects and that certain people with heart disease and other medical conditions should avoid taking these products.

Through legislation and lawsuits, the 'legal war on ephedra' is gaining momentum. It seems that a ban, or at least ephedra warnings labels, will be the law of the land in the near future. While this action is good public policy in order to protect public health, it may come with a price based upon market price and consumer demand. In this regard, the true principle of 'law' applicable to ephedra use, and attempts at its eradication, may be the 'laws' of supply and demand. Accordingly, the 'war' on ephedra may be likened to the United States 'war' on drugs. As presently waged, it is a losing proposition. Unless one can lower, or eliminate, the demand, there will always be a supply.

Moreover, as history has shown, once a ban occurs without any additional education efforts attached to it, 'underground' or illegal use will continue without any government regulation or oversight. It seems that in the end, the ephedra problem will only be solved by an educated public who understands the health risks. No demand, no ephedra.

Jim Gray

Bosman Principles Extended to Non-EU Citizens

Maros Kolpak, a Slovakian professional handball player in the Second Division of the German League held a so-called 'A' Licence. Under the League's rules, not more than two players holding that kind of Licence were allowed to play in League matches. Kolpak's chances of selection were thus restricted and he claimed discrimination under article 39 of the European Treaty.

This article safeguards the freedom of movement of workers - one of the four basic 'freedoms' in the European Union. In particular, it protects workers of Member States from discrimination on the grounds of nationality regarding employment, remuneration and other working conditions. But this provision expressly applies to EU citizens. And Kolpak is Slovakian.

However, Kolpak argued before the European Court of Justice (ECJ) in Luxembourg that the EU worker non-discrimination rules should apply to him, because of the Association Agreement between Slovakia and the EU. Under this Agreement, Slovakians lawfully working in a Member State should not be discriminated against in relation to their working conditions, including the terms of their remuneration and the grounds for their dismissal. The ECJ agreed and applied the principles established in the Bosman case to the present case (C-438/00 Deutscher Handballbund e.V./Maros Kolpak)[1].

The ECJ held that the principle of freedom of movement of workers applied to sporting associations such as the German Handball League and that the restrictions on Slovakians restricted Kolpak from being selected to play in matches when participation in them was the basic purpose of his activity as a sportsman. These restrictions were discriminatory and there was no sporting justification for them (cf. the cases of Donà v Mantero (Case 13/76 [1976] ECR 1333) and ENIC/UEFA (Case COMP/37 806 [2002]). Thus, the League's rules, limiting the number of non-EU players in its matches, were in breach of Kolpak's rights under the Association Agreement.

This decision, however, has wider sporting and commercial implications. It not only applies to Slovakians but also to other non-EU citizens whose countries have similar Association Agreements with the EU. Thus, it applies to sports persons from the other Candidate Member States, who are expected to join the EU next year, and also to the Member Countries of the EEA (European Economic Area) - Norway, Iceland and Liechtenstein.

The decision not only applies to sporting issues - such as eligibility and selection - but also to non-EU sports persons' employment and commercial rights. Their employment contracts must contain the same basic provisions as those of EU-nationals, particularly in relation to their remuneration and other financial terms. Likewise, they must not be treated as 'second class' citizens so far as other ancillary commercial arrangements are concerned. For example, the rights to bonuses and the protection and exercise/commercialisation of their image and endorsement rights.

Another important commercial implication of the Kolpak case is that there must be no discrimination in relation to access to employment. This could lead to claims under anti-race, ethnic and sex discrimination rules, subject generally to the specific defence of justification on sporting grounds - the so-called 'sporting exemption'[2].

In the light of Kolpak, which confirms and further develops the principles established in Bosman, the drawing up of sporting employment contracts and other related commercial agreements needs careful consideration and professional handling to avoid costly and time consuming discrimination claims - especially at the higher levels of sport - under National and EU rules. Yet another field day for sports lawyers!

Ian Blackshaw

1 It is interesting to note, en passant, that the earlier football case of Tibor Balog, which has come to be known as 'Bosman 2' and also, for obvious reasons, as 'Bosmanovic', and concerned the right of the Hungarian professional footballer, Tibor Balog, to move freely from the Belgian club 'RSC Charleroi' to the French club 'AS Nancy' at the end of his contract, which had been in litigation since 1998, was settled 'out of court' on 28 March 2001 on certain financial terms.

2 For example, the UK Race Relations Act of 1976 (section 39) and the UK Sex Discrimination Act of 1975 (section 44).

Case Digest

United States: Latrell F. Sprewell v. NYP Holdings, Inc. and Marc Berman, New York State Supreme Court, Case No: 122923 (2002)
In July, Latrell F. Sprewell, guard with basketball side the New York Knicks, won a motion preventing a dismissal of his $40 million (€35.5m) libel lawsuit against the New York Post and its sportswriter Marc Berman. The defendants contended that Sprewell's reputation was previously damaged in 1997 where he was suspended for 68 NBA games for choking former Golden State Warriors coach PJ Cadesimo. The judge disagreed.

In the lawsuit, Sprewell argues that the Post published four reports that claimed he fractured a finger during a fight on his boat, The Post contended that Sprewell injured his shooting hand by hitting a wall with a punch aimed at the boyfriend of a woman who had vomited on the boat. Sprewell argues he suffered the injury accidentally.

The Knicks fined Sprewell $250,000 (€221,718), for his failure to report the injury. They also suspended him for one game.

Switzerland: the Independence of the Court of Arbitration for Sport - Lazutina and Danilova v. Court of Arbitration for Sport (CAS), Tribunal Fédéral Suisse

Two Russian cross-country skiers, Larissa Lazutina end Olga Danilova, were disqualified by the IOC after the 2002 Winter Olympic Games in Salt Lake City for doping. The International Ski Federation (FIS) suspended both of them for two years. Their appeal to CAS, calling for the IOC and FIS decisions to be overturned was rejected. Finally, they appealed against the CAS awards to the Swiss Federal Tribunal.

The court rejected the appeal on all grounds and confirmed that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, particularly where IOC is a party.

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(Taken from SportBusiness International, September 2003, p. 58)

Papers of the 7th I.A.S.L. Congress in Paris (2000) published

International Association of Sports Law Holds Conference in Paris*

The seventh conference of the IASL (International Association of Sports Law) took place on 30 November and 1 December last in Paris. It was organized in cooperation with the *Institut de Formation en Droits de l'Homme du Barreau de Paris Centre Louis Pettiti* and the *Fédération Française d'Éducation Physique et de Gymnastique Volontaire* (FFEPGV). The venue was the Maison du Barreau, which is located in a restaurant on the river Seine, which, judging from the sign next to the entrance, also houses the offices of the Paris Bar!

The Conference's theme concerned sport and human rights, especially the existing evils in this context: 'Sports and Human Rights - Assault - Doping'. With 'Assault' the focus was on the issues of football hooliganism, health risks (apart from doping) and the protection of young athletes. This way a wide range of subtopics was covered. Travel and accommodation expenses and the loss of income during the period in which one attends a conference abroad in Paris proved to be factors causing most of the 60 participants to be French. The next conference (2001) will be held in Montevideo (Uruguay; Olympic and World Football Champion in 1924, 1928, 1930 and 1950) and doubtless the participating nationalities there will mostly be South American. The official languages of the IASL, by the way, are French, English and Greek. Greek, because in 1992 the Association was established in Athens, which is also where (Olympia) it has its seat. Moreover, the honorary committee of the IASL is entirely composed of Greek nationals, including the Ministers of Justice and Sport. The two Athenian Professors of Sports Law Dimitrios Panagiotopoulos (Secretary-General of the IASL) and Andreas Malatos, Chairman of the Greek Association of Sports Law) have, by the way, recently joined the Advisory Board of The International Sports Law Journal (ISLJ). France currently chairs the IASL in the person of Professor Gerard Auneau, who has meanwhile also joined the ISLJ's Advisory Board, as have French Professors of Sports Law Pierre Colomb (Nice University; Chairman of the French Association of Sports Law) and Gerald Simon (Dijon). Most speakers in Paris spoke French, because there were quite a number of 'non-sports law' French lawyers who presented papers.The composition of the Conference's Scientific Committee in Paris, was very balanced, as among the nine members - besides, among others, Collomb and Italian Professor Colantuoni - American Professors Robert Davis and Jim Nafziger, British national Dr Simon Gardiner and German Professor Klaus Vieweg were represented.

Variations on the French theme were provided *inter alia* by the Dutch delegation. On the morning of the first day, the present writer presented an introduction on the subject of 'Football Hooliganism as an International (European) Problem: Legal Aspects - Between Freedom of Movement and Public Order', which argued in favour of a joint European approach built on the success of EURO 2000, but also applying the lessons learned. One of these lessons is that the various national (criminal, etc.) legislations in Europe have to be harmonized more extensively. When the away country claims that it cannot stop its potential hooligans from going to see the match, but is labouring under the impression that the home country can refuse to admit them while this is in fact not the case, it is safe to speak of a problem of coordination. And when on top of that the home country arrests misbehaving hooligans and, instead of prosecuting them, immediately deports them while there are no guarantees that they will be prosecuted in their own country, the misunderstandings just pile up. Another matter - concerning ticketing - is the fact that the true supporters, the active members of football clubs, had such a hard time getting tickets through the official channels during EURO 2000, even or especially for matches of their own national team, as a result of the democratic principles applied to the sale of the tickets. This democracy was the result of the requirements of European competition law and policy, but exceptions should be possible based on the principle of 'vertical solidarity'. The club members after all represent the grass roots of organized football: the amateur leagues. During this part of the Conference, Christophe Pettiti, son of the late Louis Pettiti and Secretary-General of the aforementioned Institute which was named after his father, had earlier spoken on the anti-football hooliganism treaty of the Council of Europe. Further speakers were Hamid Oussedik, head of UNESCO's sports unit and in this capacity a colleague of Jaime Andreu at the EU and George Walker at the Council of Europe, and Manual Meirim, Professor of Sports Law at Lisbon University and a fervent Benfica supporter, who spoke on fair play and the fight against violence in sport. Meirim has also joined the Advisory Board of the ISLJ. Portugal does not have a sports law association of its own, but instead Portuguese sports lawyers are often members of the Spanish association which is very active organizing conferences and publishing its own periodical. Finally, American Professor Annie Clement of Florida State University spoke on the subject of sex discrimination in sport. The speakers scheduled for this part of the Conference were seriously pressed for time, among other things because the day had started with the highly elaborate commemoration of deceased IASL members and other legal personalities.

On the afternoon of the first day the speakers were, among others, Italian Professor Lucio Colantuoni of Genoa University, legal adviser in the reform of the Italian Olympic Committee (CONI), and marine yachtsman Francois Coutant, concerning risks and risk assumption in sport. The other speakers were French ' non-sports law' lawyers (like Pettiti earlier). This meant that sport was usually considered from a general legal perspective, with all the associated advantages and disadvantages.

The second day was almost completely devoted to doping in sport, subdivided into the concept of doping, anti-doping regulations and doping controls. In the morning, under the first heading, Professor André Boué, a member of the French council for the prevention of and the fight against doping, discussed the ethical aspects of doping, Dr Jacques Mombet, chairman of the medical committee of the international rugby federation (FIRA-AER) spoke on doping behaviour and Dr Jean-Pierre de Mondenard recalled the deaths that have occurred in the Tour de France since 1974 (Tommy Simpson!). In the afternoon, under the heading 'anti-doping regulations', the first speaker was Mesut Ozyavuz, George Walker's right hand in the sports unit of the fourth Directorate General of the Council of Europe in Strasbourg. He discussed the Council's anti-doping convention. This convention, which non-European countries are also welcome to accede to, has now been signed and ratified by 42 and 36 countries respectively. Ozyavuz informed the conference that the first selection for the definitive seat of the WADA had recently taken place in Oslo. So far, six cities had been selected out of ten candidates. New selection rounds will follow within a few months. If Europe will prove unable to agree on a joint candidate city, the feeling is that Montreal, hometown of WADA chairman and IOC vice-chairman Dick Pound, will probably be the city of choice. One could pick up in the corri-

* **Translated from: *Sportzaken* 2004, pp. 62-64 (adapted/abbreviated version).**

dors of this conference that because of the WADA, which does of course incorporate an important legal component, the Council of Europe's importance in this respect is dwindling. According to reports, the Council of Europe has meanwhile been preparing a new Code-like text, with the apparent intention of regaining the initiative in the harmonization of regulations. But is a Code not rather a matter for the IOC and WADA instead? The Council of Europe as an inter-state organization already has a convention. Should the Council not focus instead on the harmonization of national doping legislation, a task which is closely connected to the assignment of the treaty's state parties to take national measures?! A role for the United Nations (UNESCO) would also be conceivable to tackle the problem of doping worldwide in a new truly global treaty, in addition to the IOC and the activities of global organization WADA. Next Gerard Auneau spoke on the topic of sport, doping and human rights in general, and finally Klaus Vieweg, who is the vice-chairman of the German association for sports law, addressed the problem of the international harmonization of regulations, with the aid of his well-known cybernetic model. He also mentioned the European Commission funded study concerning these matters which his university (Nuremberg), the T.M.C. Asser Institute, Anglia University (Gardiner) and the Max Planck Institute for international criminal law are carrying out in close cooperation. In the context of this study Vieweg will hold a survey among the international athletics federations in Europe concerning the question how they view the legal side of the doping problem: in other words, what is the level of support for new, harmonized regulations?

Doping controls

In the afternoon the subtopic of doping controls was discussed. Unfortunately, Clemens Prokop, vice-chairman of the German athletics federation (DLV) and a member of the anti-doping committee of the IAAF, due to illness was unable to hold his general introduction concerning procedures and analysis during doping controls himself. Former Dutch National Doping Agency (NeCeDo) director Emile Vrijman, who is now an attorney with the firm of Lamsma Veldstra and Lobé in Rotterdam and these days also a doping adviser in scientific research conducted by the T.M.C. Asser Institute, competently relieved him of his task. Following this, Dr Gabriel Dolle, head of the anti-doping unit of the IAAF, especially discussed the problem of control procedures, while Professor Peter Hemmersbach, scientific director of the IOC laboratory in Oslo, especially addressed the problems encountered during sample analysis. Finally, Janwillem Soek (T.M.C. Asser Institute) and Emile Vrijman discussed the new IOC anti-doping code. Soek gave a clever and strictly scientific account concerning the definition of doping and the accompanying concept of liability. Vrijman, partly based on his broad practical experience as counsel for suspects in doping cases up to the level of the CAS, in turn questioned the preferential position enjoyed by the IOC laboratories when it comes to proof and evidence, following which Vrijman had a heated discussion with Hemmersbach, who (obviously) did not agree at all and accused Vrijman of speaking purely as a lawyer preparing a case. The fortunate outcome of this debate was that the adversaries agreed that Vrijman would write down his ideas for improvement to which Hemmersbach would subsequently respond. The result could then be published as an article..

During the final part of day two of the conference, dealing with legal remedies in connection with violent acts, risks and doping in sport, two French non-sports lawyers first discussed sport sanctions and disciplinary committees. They were followed by Professor Nafziger, the vice-chairman of the IASL, on arbitration in the United States, who had some news: traditionally only amateurs are tested for doping in American sports, but now, for the first time, an admittedly very mild penalty of 5 days' suspension had been imposed there on a professional basketball player.

A final remark: what struck the present writer yet again, also at this conference, was that the party in the dock, which is what every athlete, no matter what sport he plays, potentially is, was not represented by e.g. a chairman or legal adviser of an international or at least a national athletes' committee (not forgetting the special position of Vrijman at this conference). The dialogue between managers and organized athletes seems to me to be the missing link in the entire story. How to counter doping in cycling, when it is impossible to finish in the Tour de France without it? How to handle the situation when in a tournament 'everyone' resorts to doping because the competition does too?

Robert Siekmann

Sport et Garanties Fondamentales: Violence - Dopage /
Sports and Fundamental Guarantees: Assault - Doping
Nathalie Korchia and Christophe Pettiti (eds),
Human rights Training Institute of the Paris Bar Association - Center Louis Pettiti
Papers of the 7TH International Congress of I.A.S.L.,
Paris, 30 November-1 December 2000
Paris, 2003, pp. 712, ISBN 2-9520431-0-8, price € 35,-

Spektrum des Sportrechts

Joint Academic Sports Law Conferences in Berlin, June 2001 and 2002*

A miscellany of sports law

On 21 and 22 June 2001 the Universities of Erlangen-Nuremberg and Tübingen held their joint conference in the German Olympic Institute. At this meeting, the onrushing youth in German sports law was given a chance to display its talent by presenting introductions. The first three introductions had a clear connection with the interim meeting of the international research group for the EU project 'Legal Comparison and Harmonization of Doping Rules' which had been held the previous day at the same venue. First Dr Mario Krogmann discussed *Verbandsautonomie im europäischen Rechtsvergleich*, then Frank Oschüz (who is currently an intern at the CAS in Lausanne) addressed *Die Doping-Rechtssprechung des CAS und ihre Bedeutung für die Harmonisierung* and finally biologist/lawyer Christian Paul spoke on *Grenzwerte im Doping - Naturwissenschaftliche Grundlagen und rechtliche Bedeutung*. Further speakers on this first day of *Spektrum des Sportrechts* were Dr Isolde Hannamann concerning *Kartellverbot und Verhaltenskoordinationen im Sport*, Eva Stanzel concerning *Sport und Kartellrecht in den USA*, Almuth Werner concerning *Stiftungen im Sport*, and on the second day, Susanne Beer on *Gleichbehandlung im Sport*, Simon Weiler on *Nominierung als Rechtsproblem - Bestandsaufnahme und Perspektiven* and finally Dr Adrian Fikentscher

* **Translated from: *Sportzaken* 2001/2, pp. 55-56 (adapted/abbreviated version).**

on his recently completed Ph.D. thesis *Rechtsvergleich der Mittbestimmungsformen im deutschen und US-amerikanischen Leistungssport*. These contributions will be collected in the book to be published by Duncker & Humblot in Berlin, who also publish the series *Beitrage zum Sportrecht* and the German sports law journal *SpuRt*, organ of the *Konstanzer Arbeitskreis*, the German Association for Sport and the Law.

Strict liability

Especially hotly debated in Berlin were the contributions by Paul concerning cut-off limits and by Oschütz concerning the CAS. Important about Oschütz' contribution is that as far as I can tell this is the first attempt at a systematic analysis of the CAS' case law concerning doping. It is true that this is also a topic of research by Anglia University in the framework of the EU study, but there the issue is viewed from a different perspective, i.e. not that of harmonization, but more in particular as the contribution made by the CAS to the current process of law creation in the field of doping. It is clear that there is little consistency in the CAS' case law on doping. This is the result of its arbitrational character, which causes for example the common law arbitrators headed by Michael Beloff (who is among other things also the editor-in-chief of the new journal International Sports Law Review) to reach different conclusions from the continental lawyers. An interesting finding by Oschütz is that CAS case law vacillates between the extremes of strict liability and suspicion of guilt (in German *Anscheinsbeweis* and *Vermutensregel* respectively). Insiders may claim that strict liability is merely a slogan which does not accurately describe what it means to convey, but reversing the burden of proof for demonstrating one's own innocence would make it nearly impossible to escape penalties. Strict liability is much stricter in its consequences than when the suspect's guilt would only be established prima facie! Also during *Spektrum des Sportrechts* it again became clear that the sports world considers strict liability a necessity, because otherwise the athlete's guilt would be virtually impossible to prove. And that, it is feared, could spell the end of doping prevention in sport. In addition (apart from the application of strict liability) the arbitral awards of the CAS are nearly impossible to challenge before the Swiss courts. Some international federations use the requirement of guilt as a component of the doping offence. However, it emerges from Oschütz' analysis that in these cases the margins for using guilt are broad, or at least it is hard to predict the criteria which will be used. What's more, in the ordinary, opposite situation counter evidence is not even accepted when for example a third party admits that he/she put the substance in the athlete's food and the suspect has meanwhile been tried and convicted under both criminal and private law. Of course it is a nuisance when the offender as an outsider is not subject to the jurisdiction of the sports federation in question and of course he or she could have been part of a conspiracy(The case law of the CAS is casuistry without establishing precedent. However,at the IAAF arbitration panel, it had always been attempted to keep the case law consistent. The only international sport federation to have published its case law on doping in a book (see: Laura Tarasti, Legal Solutions in International Doping Cases - Awards by the IAAF Arbitration Panel 1985-1999) is therefore the IAAF. Where the case law of the CAS is concerned, I refer to Matthieu Reeb, Recueil des Sentences du TAS / Digest of CAS Awards 1986-1998, Berne 1998 (this year Kluwer Law International will publish a new, up to date edition) and CAS Awards - Sydney 2000, Decisions Delivered by the Ad Hoc Division of the Court of Arbitration for Sport during the 2000 Olympics, which is a CAS publication. How will the CAS ever be able to fulfil the task of a harmonizing/unifying 'World Court of Sports' when its case law is this inconsistent in an important field like doping?!

Robert Siekmann

Spektrum des Sportrechts
Klaus Vieweg (ed.)
Beitrage zum Sportrecht, Band 12
Duncker & Humblot, Berlin, 2003
pp. 412, ISBN 3-428-11256-3, price € 74,80

From the Foreword:

From 20 to 22 June 2001 and on 13 and 14 June 2002 the Chairs of the Universities of Erlangen-Nuremberg and Tübingen, both active in the field of sports law, held their joint conferences in the German Olympic Institute in Berlin. The participants were post-graduates, research fellows and students from Erlangen, Tübingen, Bonn and Bayreuth on the one hand, and well-known sports law experts, both from the academic and the business world, on the other.

'Spektrum des Sportrechts' contains the papers of these meetings. These show that sports law has developed into an independent multi- and interdisciplinary field of expertise with interesting themes of great practical value. The multifaceted nature of the topics also reflects the diverse interests of young sports lawyers, both from the point of view of the various disciplines and of the various problems that are discussed. This multi- and interdisciplinary versatility of the contributions is indicated in the title Spektrum des Sportrechts - A miscellany of sports law.

(Meanwhile, on 28 and 29 July 2003, the German Olympic Institute in Berlin hosted the third joint conference - this time on the initiative of the Universities of Erlangen-Nuremberg and Heidelberg; eds.)

Case Digest

Switzerland: the Independence of the Court of Arbitration for Sport - Lazutina and Danilova v. Court of Arbitration for Sport (CAS), Tribunal Fédéral Suisse

Two Russian cross-country skiers, Larissa Lazutina end Olga Danilova, were disqualified by the IOC after the 2002 Winter Olympic Games in Salt Lake City for doping. The International Ski Federation (FIS) suspended both of them for two years. Their appeal to CAS, calling for the IOC and FIS decisions to be overturned was rejected. Finally, they appealed against the CAS awards to the Swiss Federal Tribunal.

The court rejected the appeal on all grounds and confirmed that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, particularly where IOC is a party.

United Kingdorn: FA Premier League Ltd & Ors V Panini UK Ltd, Court of Appeal, (2003) Times Law Reports, 17 July

Panini distributed an unofficial football sticker album and a sticker collection including Premier League players in club strip bearing the logo of the club end of the Premier League. Panini was not licensed to do this. Proceedings claiming infringement of copyright ownership of the League and club logos were brought. Panini relied in its defence on s.31 Copyright, Designs and Patents Act 1988, which permitted 'incidental' inclusion of a copyright work in another work.

It was held that, in order to test whether the use of one work (here the PL logo) in another was incidental, it was proper to ask why the one had been included in the other. Applying that test it was evident that the use was not incidental in this case as to produce a collectable sticker the player had to appear in appropriate and authentic club strip.

Compiled by the Teaching Faculty of the Asser-Griffith International Sports Law Programme - www.gu.edu.au/sportslaw

(Taken from SportBusiness International, September 2003, p. 58)

Sports Law and Policy in the European Union

By Richard Parrish

Manchester University Press, July 2003, pp. 271, paperback,

ISBN 0 7190 6607 7, Price €14,99

As the author, Dr. Richard Parrish, Senior Lecturer in Law at Edge Hill College in the North West of England, points out in his Introduction, the title to and subject of this Book is 'provocative'! Is there such a thing as a discrete body of sports law at the national level, let alone at the European Union level? Put another way; 'what has the Common Market got to do with sport?'

A great deal as Parrish demonstrates and explains in this timely Book. I say timely because, despite there currently being no legal basis for regulating sport in the existing EC Treaty, in the last twenty-five years or so, the EU has been active both legally and politically in the sporting arena, culminating in the famous or infamous - depending on your point of view - Bosman ruling by the European Court of Justice (ECJ) and the comprehensive Nice Declaration on Sport of December 2000. Both of these significant milestones (including the subsequent Balog and Kolpak cases which apply the Bosman principles) are fully documented and discussed and also put into the context of an emerging EU sports law and policy. Likewise, with the enlargement of the EU from 15 Member States to 25 foreseen in 2004 and the ongoing discussions for a new Treaty to take account of this, it is possible that it may contain a specific provision dealing with the sporting sector, which now accounts for more than 1% of the combined GNP of the existing Member States.

As sport has become so commercialised, the EU has had to take account of this and reconcile two potentially conflicting policies: regulating sport as a business, especially under the Competition Rules, and developing the cultural and social aspects of sport as a political instrument, in furtherance of its Policy on a People's Europe. But as the author rightly points out: 'Today, the regulatory and political policy strands of EU involvement in sport relate to one another in a more co-ordinated manner'. And this trend is likely to continue in the future and be further developed in - as yet - unknown but exciting and challenging ways to the sporting world.

Apart from looking at the future of EU sports law and policy in a final chapter, which your reviewer found most fascinating, there are also insightful chapters charting the birth of an EU sports law and policy; the relationship between sport and the ECJ; sport and EU competition law; and the possibility of sport being exempted from EU law. As for the latter issue, UEFA is reviving its campaign for a special Protocol on Sport, but it is not yet clear whether the political will, which was lacking at Nice, now exists to make this feasible.

Throughout the text, there are copious references to relevant cases, official EU reports and publications, books, articles and other useful materials for further reading and research, as well as a short - but adequate - Index.

All in all, this is a most interesting and thought-provoking Book, which is published as part of the Manchester University European Policy Research Unit series of advanced textbooks and thematic studies of key policy issues in Europe. And a very welcome addition - not only for academics but also practitioners - to the existing and growing body of literature on Sports Law, the fact of which the author cites as an argument for claiming that Sports Law has now come of age and must be taken seriously as an academic discipline and area of legal practice in its own right. This will not please the 'sport and the law' adherents!

Ian Blackshaw

Maximising the Value of Sponsorship

By Ardi Kolah

A Sportbusiness Report, August 2003, Price £ 595,-/$ 925,-/€ 875,-

Global sponsorship, of which sports sponsorship forms a significant and increasing proportion, is expected to reach an all time high this year of over $26 billion - an increase of around 7.5% on 2002. The European sponsorship market is currently worth some 8.3$ billion.

With such mega sums to play for, it is crucial to get the best out of your sponsorship dollars. To do so, it is not only necessary to understand sports sponsorship from a commercial and financial point of view, but equally important to appreciate the legal intricacies of this very valuable marketing and communications tool.

At a time when there are signs that the world economy is recovering, this report is both a timely and welcome addition to the literature on sports marketing and promotion. However, it certainly does not come cheap!

The Report looks at a variety of marketing, commercial and financial issues, including sponsorship evaluation and research techniques and processes. There is also a useful section on how to protect a sponsorship investment through 'due diligence'; enforcement of intellectual property rights - especially trade marks; and anti 'ambush marketing' measures, highlighting the draconian measures (including jail terms for offenders!) adopted by South Africa in connection with the 2003 World Cricket Cup under the specially passed Merchandise Marks Amendment Act 2002. All of which topics are of particular concern and interest to sports lawyers and their sponsor clients.

Likewise the section on key legal issues, including in-depth analyses of essential clauses and provisions in sponsorship agreements and the controversial topics of 'matching options' and UK and EU legal measures banning sponsorship of sports events by tobacco brands which come into effect on 31 July 2005. Formula One will be particularly hit by these measures. There is also a review of the relevant legal provisions affecting broadcast sponsorship.

In a final section, the author looks into his crystal ball at the challenges facing sports sponsorship in Europe over the next four years as the continent becomes the focus of the staging of several major international sports events - not least the Summer Olympics in Athens next year; the FIFA World Cup in Germany in 2006; and the Winter Olympics in Turin in the same year!

Whilst the author is to be congratulated on producing a very workmanlike Report, the lack of footnotes, references and a bibliography will annoy - as it did your reviewer - many sports lawyers who may find it difficult to follow up topics or issues of particular professional interest to them. On the other hand, sports administrators and executives will welcome the wealth of statistics, tables, bar and pie charts contained in the Report. All will appreciate the comprehensive and impressive Glossary of marketing and legal terms associated with sponsorship that completes the Report! Although the term 'VIK' (Value In Kind) was not included.

Ian Blackshaw

Beiträge zum Sportrecht

Band 12

Klaus Vieweg (Hrsg.)

Spektrum des Sportrechts

Referate zweier Gemeinschaftstagungen der Universitäten Erlangen und Tübingen im Deutschen Olympischen Institut, Berlin

Abb.; VIII, 412 S. 2003 ⟨3-428-11256-3⟩ € 74,80 / sFr 126,-

■ 11. Susanne Zinger
Diskriminierungsverbote und Sportautonomie
Eine rechtsvergleichende Untersuchung im deutschen, europäischen und US-amerikanischen Recht
251 S. 2003 ⟨3-428-10807-8⟩ € 64,– / sFr 108,–

■ 10. Adrian Fikentscher
Mitbestimmung im Sport
Eine rechtstatsächliche und rechtsvergleichende Untersuchung der Mitbestimmungsformen im deutschen und US-amerikanischen Leistungssport
393 S. 2002 ⟨3-428-10364-5⟩ € 82,– / sFr 141,–

■ 9. Hans-Peter Neumann
Sport auf öffentlichen Straßen, Wegen und Plätzen
unter besonderer Berücksichtigung des Motorsports
311 S. 2002 ⟨3-428-10592-3⟩ € 76,– / sFr 131,–

■ 8. Isolde Hannamann
Kartellverbot und Verhaltenskoordinationen im Sport
Abb.; 546 S. 2001 ⟨3-428-10349-1⟩ € 79,– / sFr 136,–

■ 7. Klaus Bepler (Hrsg.)
Sportler, Arbeit und Statuten
Herbert Fenn zum 65. Geburtstag
Frontispiz; 303 S. 2000 ⟨3-428-10193-6⟩ € 40,– / sFr 71,–

■ 6. Klaus Vieweg (Hrsg.)
Vermarktungsrechte im Sport
Rechtsgutachten
180 S. 2000 ⟨3-428-10179-0⟩ € 52,– / sFr 90,–

■ 5. Hermann Waldhauser
Die Fernsehrechte des Sportveranstalters
365 S. 1999 ⟨3-428-09858-7⟩ € 68,– / sFr 117,–

■ 4. Hans-Ralph Trommer
Die Transferregelungen im Profisport im Lichte des „Bosman-Urteils" im Vergleich zu den Mechanismen im bezahlten amerikanischen Sport
261 S. 1999 ⟨3-428-09757-2⟩ € 52,– / sFr 90,–

■ 3. Markus Buchberger
Die Überprüfbarkeit sportverbandsrechtlicher Entscheidungen durch die ordentliche Gerichtsbarkeit
Ein Vergleich der Rechtslage in der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika
481 S. 1999 ⟨3-428-09546-4⟩ € 72,– / sFr 124,–

■ 2. Mario Krogmann
Grundrechte im Sport
254 S. 1998 ⟨3-428-09340-2⟩ € 52,– / sFr 90,–

■ 1. Klaus Vieweg (Hrsg.)
Doping
Realität und Recht. Internationales Symposium am 4. und 5. 7. 1997 in Erlangen
Abb.; 420 S. 1998 ⟨3-428-09570-7⟩ € 52,– / sFr 90,–

In Vorbereitung (Arbeitstitel):

■ Antje Weihs
Zentrale Vermarktung von Sportübertragungsrechten
Kartellrechtliche Zulässigkeit nach deutschem und europäischem Recht mit vergleichenden Betrachtungen zum amerikanischen und englischen Recht
⟨3-428-11248-2⟩

■ Grischka Petri
Die Dopingsanktion
⟨3-428-11358-6⟩

■ Christian Paul
Grenzwerte im Doping
Naturwissenschaftliche Grundlagen und rechtliche Bedeutung
⟨3-428-11299-7⟩

■ Steffen Krieger
Vereinsstrafen im deutschen, englischen, französischen und schweizerischen Recht
Insbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden
⟨3-428-11169-9⟩

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Promoting the Social Dialogue in European Professional Football

Background

The European Federation of Professional Football Clubs (EFFC) was founded on 20 September 2002. The founding organisation is the Dutch *Federatie van Betaald Voetbal Organisaties* (FBO). FBO represents all Dutch professional football clubs regarding socio-economic issues and is, in fact, the employers' organisation in the Dutch professional football industry. FBO members include not only Ajax Amsterdam, Feyenoord Rotterdam and PSV Eindhoven, but also the smaller clubs in the second division. Clubs in Holland have established the FBO in 1968 to operate as a counterweight to the players' associations. One of the main areas of FBO activity is concluding collective bargaining agreements with the players' associations.

Under the authority of the FBO, a research study has been carried out in a number of EU member states. The main conclusion of the study was that the only way to create a legitimate basis for the regulation of employment law aspects in European professional football is by means of a collective agreement resulting from the Social Dialogue at the European level.

The Social Dialogue is a consultation mechanism set-up for employers and employees (both sides of the industry) at the central European level and at the level of the European industrial sectors. The Social Dialogue is laid down in articles 138 and 139 of the EC Treaty. The Social Dialogue has a number of functions. In the first place, both sides of the industry can consult with regard to the social subjects that they consider to be important in connection with European integration. They can draw up recommendations, which, however, are not legally binding. Besides, the Social Dialogue has a co-legislative function. The Commission is obliged to consult the Social Dialogue partners on all plans for social regulations that the Council can decide upon with a qualified majority. Both sides of the industry can then decide to negotiate about the subject concerned and to try to come to an agreement. They have nine months in which to do so. When an agreement is reached, both sides of the industry can present it to the Council, with the request to make it binding for the member states. However, the parties concerned, the employers and employees, are not dependent on action taken by the Commission. They can come up with agreed proposals on their own initiative.

In this context, a second important conclusion could be drawn from the above mentioned research study. In order to establish the Social Dialogue in the professional football industry, it is necessary to create an employers' organisation at the European level. By means of the incorporation of the EFFC a counterpart to the worldwide players' union, FIFPro, was established and the first steps towards a social dialogue were taken.

The structure of European professional football and employment law

Professional football in Europe is on the eve of a new legal revolution. After the much-discussed Bosman case, the roots for this new legal revolution lie once again in European employment law. Since the Belgian football player pointed out to his club that the payment of a transfer fee at the end of an employment contract is an infringement of the free movement of persons as formalised in the EC Treaty, the transfer system officially came to an end.

At first, it seemed that this would result in a disaster for clubs and players. The clubs were seeing their players move to a new club at the end of their contracts without the payment of a transfer fee. The players would not be able to benefit anymore from the circulation of money in the football sector and the amount of their wages would decrease. Eventually, the abolition of the transfer system would lead to the end of the professional football sector as a whole, according to the opponents of Bosman. The disaster was prevented by concluding contracts for a definite time (fixed term contracts) for a very long term. Sometimes fixed term contracts had the duration of even ten years. The transfer of players would occur during the contract period. As a result, the player would never reach the end of his contract and, as a consequence of this, he would never, in fact, be 'transfer free'. The transfer fee had disappeared, but the payment of damages for mid-contract breach made its appearance in the professional football sector.

This system did not last for long. The European Commission argued that this 'alternative transfer system' was breaching European competition law. The EC went on to look for a solution to this problem. The solution was found after laborious negotiations with FIFA and UEFA. FIFA drafted new transfer regulations, which came into force in September 2001. The transfer regulations function as a framework for the international movement of professional football players from one club to another. Commissioners Reding (sport), Diamantopoulou (social issues) and Monti (competition) agreed to the new transfer system, but they added an observation: employment law issues need separate regulation. So, FIFA and UEFA were asked to introduce the Social Dialogue in international football. The reason is that the new transfer system is covered by European law, because the main object of its regulation are employment contracts. This has important consequences. In the International Labour Organization (ILO) employers and employees are equally represented. The regulation of international football has a different, i.e., pyramidal structure, with FIFA at the top as the main regulatory body. The FIFA regulations can be defined as 'association law' and need to respect national and European law, which are higher in the legal hierarchy.

This state of affairs causes confusion in the member states of the European Union. Not only in the member states where there is a collective bargaining agreement (CBA) in force between the social partners in the professional football sector (for example, in the Netherlands an agreement is in force between the VVCS and ProProf at the players' side and FBO as a representative of the clubs), but also in member states where such an agreement is not (yet) negotiated. In the first place, the confusion results from the fact that the CBA has legal precedence over FIFA regulations. In practice however, it is not easy to put the FIFA regulations aside and to apply national law, since FIFA is the most powerful organisation in world football. In the second place, where there is no CBA in force, the situation, in fact, is the same. General national labour laws regulating the fixed term contracts have to be respected. The management of football clubs and other entities in professional football are not always aware of this fact because they are embedded in the organisational structure of international football, with FIFA at the top.

This lack of clarity leads in certain cases to conflicts in the legal regulation of the sector. A clear example is the fact that the use of fixed term contracts is customary in professional football in the EU. Moreover, FIFA regulations prescribe the minimum and maximum duration of a contract. Due to the compulsory implementation of EU directives in national law, fixed term contracts can change into contracts for an indefinite period. In some member states, like England and Germany, a solid legal framework has not yet been drafted to prevent the possible negative effects of European law to fixed term contracts in professional football. As was mentioned before, the use of fixed term contracts is the only possibility to ensure the circulation of money resulting from the transfer of players. The termination of this system could eventually mean the end of professional football in Europe. In fact, there is only one solution in order to have a legally sound, logical, transparent and efficient regulation of the framework for employment contracts in the European professional football sector. The appropriate

legal tool is the Social Dialogue, as the Commissioners had suggested in their communications to FIFA and UEFA.

The agreements between both sides of the industry can, in principle, deal with any subject. So, the agreements between both sides of the industry should not only deal with social subjects. The Brentjens ruling by the European Court of Justice is relevant in this regard. According to this ruling, in principle, provisions are even permissible that restrict economic competition between member states, when they were laid down on the basis of collective negotiations. Although a certain amount of restriction of competition is not unusual in collective agreements between employers' organisations and trade unions, the possibility of reaching the objectives of social policies that is strived for in such agreements will be seriously hampered, as article 81 of the EC Treaty should always be taken into account.

The European Commission considers the Social Dialogue the most important instrument to solve and avoid legal conflicts, to create stability and clearness in the regulation of contracts of employment between players and clubs at the European level. Additionally, the Social Dialogue can induce member states to improve industrial relations in the professional football sector at a national level and promote the conclusion of CBA's in those member states where such is not yet the case. EFFC was founded, amongst others, in order to realise these objectives.

In the following, it will be made clear what the criteria are to enter into the Social Dialogue as a social partner organisation.

Criteria for participation in the European Social Dialogue

In general, it can be stated that the level of representation of social partner organisations must be in accordance with the nature and scope of the subject. In a Notice from 1993 the Commission has set out in detail what is expected from a European social partner organisation. In this Notice, the Commission described three criteria that are to be met in order to have adequate representativeness:

- The organisations must be representative at branch-coordinating, branch and professional levels and be organised at the European level;
- They must consist of organisations that are themselves an integral and recognised part of the structures of social partners in the member states, can negotiate agreements and are, as much as possible, representative for all member states;
- They must have adequate structures so that they can effectively take part in the consultation process.

So far, we have seen that the branch-coordinating employers' organisations UNICE and CEEP are most closely involved in consultation and advice. The employees are represented by ETUC. These three organisations have been involved in the process that eventually led to the present articles in the EC Treaty with regard to the Social Dialogue.

Apart from that, sector organisations have been active for a long time already at the Community level. On the basis of its Notice concerning the development of the social dialogue at the Community level, the Commission has taken the initiative to strengthen the sectoral dialogue. By now, the Commission has over 25 committees in different industrial sectors to support the Social Dialogue. These include civil aviation; sea transport; railways; telecommunication; trade; and electricity.

Now it is necessary to point out which organisations play a key role in the professional football sector in Europe.

EFFC has been created in order to promote the idea of the Social Dialogue as a platform for the regulation of employment law issues in European professional football. After the one year project (see below), EFFC will communicate to the European Commission, and to the 'football world' at large, what the status of industrial relations in the sector is and, additionally, whether the introduction of the Social Dialogue is feasible considering relations in the sector.

EFFC can, at this moment, be characterised as an academic research instrument having the required structure to possibly operate as a social partner organisation in the future.

EFFC intends to inform about and thereby promote the concept of the Social Dialogue and of collective bargaining at the sectoral level of the professional football industry in Europe; at the level of the individual member states; as well as at a European level. Its aim is to contribute to facilitating the start of consultations of management and labour at Community level and, in pursuance thereof, the establishment of relevant contractual relations. In this context, EFFC also intends to help to improve knowledge on industrial relations by the exchange of information and experience on a European basis, in particular, regarding employment contracts and collective bargaining agreements.

EFFC is a non-profit organisation. Its head office is in The Hague. Members of EFFC may only be organisations working in the European Union, having legal personality and which were admitted as members to the official national football association (individual professional football clubs). Moreover, organisations working in the European Union that are authorised to represent individual clubs in the fields of socio-economics and labour law (for example, FBO), can also become members of EFFC.

Objectives of EFFC

The general objective of EFFC is to look after the interests of professional football organisations in the European Union. EEFC tries to achieve this objective, inter alia, by:

- Looking after general and particular interests in the fields of socio-economics and labour law;
- Supplying information about developments that are important to the collective and individual position of the members;
- Promoting co-operation and undertaking intermediary activities between the members and other entities;
- Concluding collective labour agreements;
- Using all other lawful and permitted means that may be conducive to achieving the objective.

In 2003/2004, EFFC will undertake the project 'Promoting the social dialogue in European professional football', which is supported by the European Commission. The project will consist of the organisation of a series of regional seminars throughout Europe. It is expected that the project will be helpful to pave the way for starting the Social Dialogue in the European football industry by creating awareness amongst organisations concerned of the possibilities the Social Dialogue offers for establishing effective industrial relations and, in particular, by creating common ground amongst management for the purpose of future negotiations with labour. The creation of a social partner organisation, which meets the criteria set up by the European Commission, is envisaged as a result of the project.

In separate meetings with representatives of the management of national football clubs, EFFC will start to organise cooperation between clubs at the European level to achieve the above- mentioned objectives.

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FIFA

FIFA is an association under Swiss law and is based in Zurich. At a global level, FIFA unites the national football associations and their members, which it has recognised as the organisations controlling football. Only one association is allowed per country. Within FIFA, there are several confederations and they each represent a continent of the world.

The registered aim of FIFA is to promote football with all means at its disposal, to encourage friendly relationships between national associations and the confederations, as well as their officials and players, by promoting the organisation of football matches at club and national team level. FIFA is involved with all types of football. It implements measures to prevent the violation of its articles of association and regulations. FIFA provides the basic rules, in the form of regulations, in order to solve any possible conflicts, which may arise within or between national associations.

In short: FIFA is mainly concerned with the organisation of the game.

UEFA

UEFA is one of the regional confederations of FIFA. The members of UEFA are the football associations in Europe. UEFA now has a total of 52 member countries. UEFA is based in Nyon, Switzerland. The statutory purpose of UEFA is to deal with questions relating to European football; to promote football in Europe in a spirit of peace; to promote unity amongst member associations in matters relating to European and world football; and to organise and conduct international football competitions and international tournaments at the European level.

For several reasons, UEFA is not in a position to represent the employers in the Social Dialogue. In the first place, UEFA is an organisation of associations. It is an association itself. The associations at the national level deal with the regulation of football at large in a particular country. The clubs are the members of the national association. Professional football players also have to become members of the national association in order to be able to perform their employment contracts. This means that the players and the clubs are both linked with UEFA. However, it is impossible for an organisation to represent both employers and employees in the Social Dialogue, since it would result in a conflict of interests. The second reason is that the UEFA is above the clubs (and players) in the pyramidal structure of European football.

Association of Leagues

The Association of European Union Premier Professional Football Leagues was founded in 1998. Professional football leagues, consisting of the clubs participating in the highest divisions of professional football in the member states of the European Union, and which are recognised by their national football association, can become members of the Association. The (founding) members of the Association are the premier leagues in the following countries: Austria; Belgium; Denmark; England; France; Germany; Greece; The Netherlands; Italy; Portugal; Scotland; and Spain.

The main objective of the Association of Leagues, is to promote cooperation; to foster friendly relations; and to create unity between the national leagues. The Association is the centre at which an exchange of relevant information is coordinated for the benefit of individual members. Additionally, the Association looks after the interests of its members. An important fact is that the Association closely cooperates with UEFA. The Association discusses new UEFA regulations and assists its members in the implementation of UEFA regulations in the football sector at the national level. As a consequence, the Association of Leagues has expressed views about the efficient regulation of the transfer of players amongst the leagues.

The Association of Leagues has a pan-European structure. For several reasons, the current organisational and legal structure of the Association does not make it possible to represent the clubs as employers in the Social Dialogue. The first reason is the fact that the leagues are members of the Association, not the clubs. And the leagues are not members of the Association as an employers' organisation or social partner. The Association's objectives are rather commercially motivated. Secondly, the Association only represents the highest divisions (premier leagues) in a member state. That means that the clubs that are relegated to the second division do not benefit anymore from the actions of the Association, or, at least, they are not the direct addressees of the efforts of the Association. Thirdly, national leagues do not only consist of clubs, but also represent the players. The Association looks mainly after the sound economic existence and the efficient management of the leagues as a whole. However, the Association also needs to defend the (collective) rights of the players when the overall interests of the national leagues is at stake. This could imply a conflict of interests in the context of the European Social Dialogue.

G-14

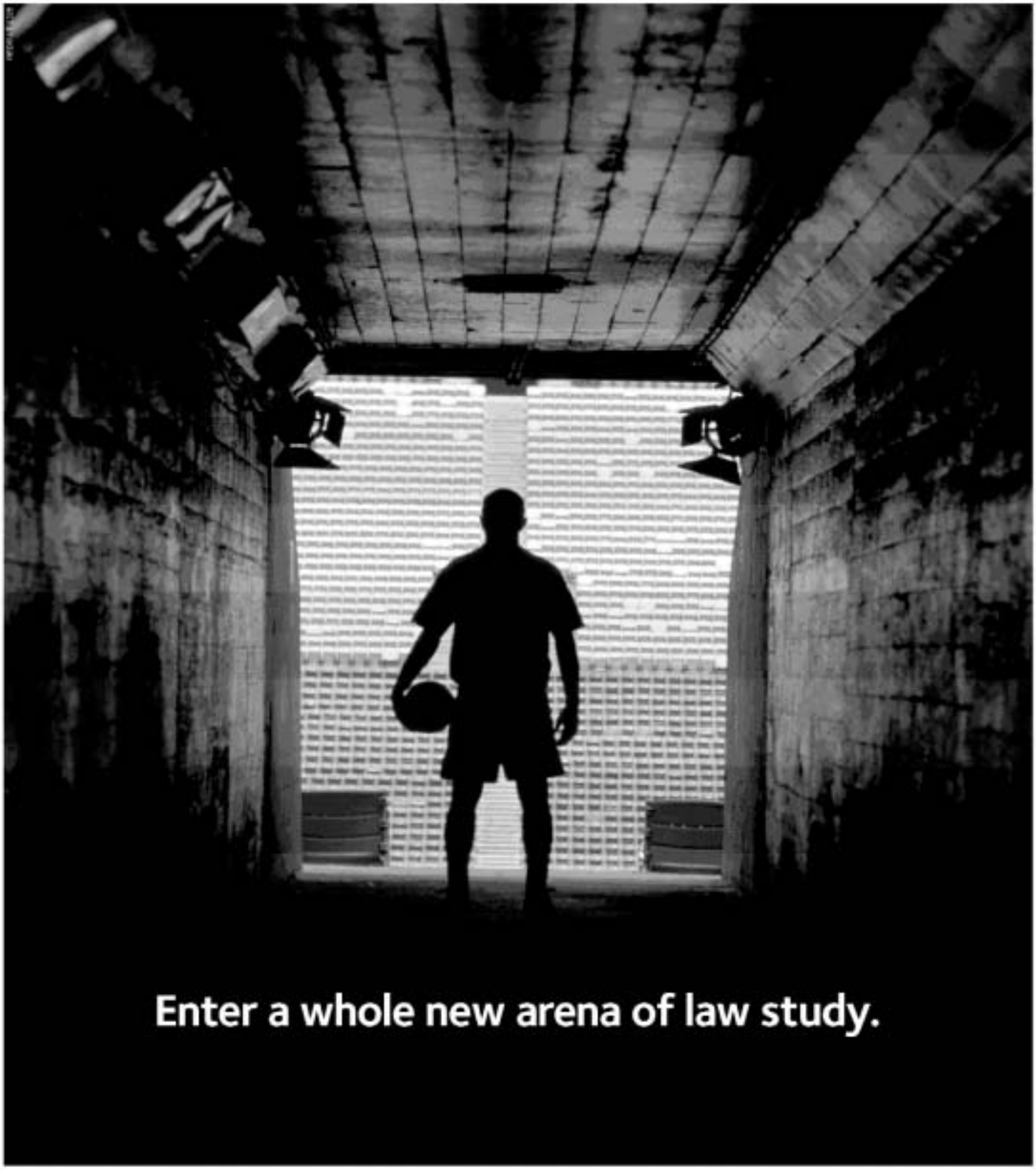
In legal terms, G-14 is a European Economic Interest Grouping (EEIG). The G-14 headquarters are in Brussels. The following clubs were involved in the foundation of the G-14: AFC Ajax; Borussia Dortmund; FC Bayern Munchen; FC Barcelona; FC Internazionale Milano; Juventus; Liverpool FC; Manchester United FC; AC Milan; Olympique de Marseille; Paris Saint-Germain; FC Porto; PSV; Real Madrid CF. At a later stage, four other clubs joined the G-14: Arsenal FC; Bayer 04 Leverkusen; Olympique Lyonnais; Valencia CF. The G-14 now has a total of 18 members. To become a member of the G-14, clubs have to meet certain requirements. In the first place, clubs have to participate in UEFA competitions. If they fail to qualify for these competitions in three consecutive years their membership can be suspended. The same goes for the clubs that have been relegated from the top division in their country. If they fail to win promotion the next year they can be suspended as a member. The most important requirement for the membership of the G-14 is the annual membership fee. The amount of this fee makes it only possible for elite clubs to become members.

The main purpose of the G-14 is co-operation. The clubs want to exchange know-how; to fine-tune their policies; and, in particular, to make their voice heard in the leading institutions of European professional football. First priority was given to the commercialisation of media rights by clubs at the European level. The G-14 has made several statements concerning the distribution of income from UEFA competitions. Additionally, the G-14 wishes to implement measures to regulate the budgets and financial stability of the member clubs. One of the topics recently discussed also was the introduction of a salary cap for the G-14 members. And the G-14 raised discussion about the fact that national associations should reimburse salary costs when a player of a G-14 club has to play for his national team. The G-14 can be characterised as a lobby organization, without political interests.

The G-14 cannot represent the clubs as employers because its sole duty is to defend the interests of its members in general (not in relation to the players). The G-14 cannot act objectively on socio-economic issues because the socio-economic topics of the G-14 clubs differ from the socio-economic topics as a whole for the sector.

Conclusion

From the survey presented above, it becomes clear that the present representative organisations in European professional football cannot act as an employers' organisation in the Social Dialogue. In order to introduce the Social Dialogue in the European professional football sector, it is necessary to create a European employers' organisation.



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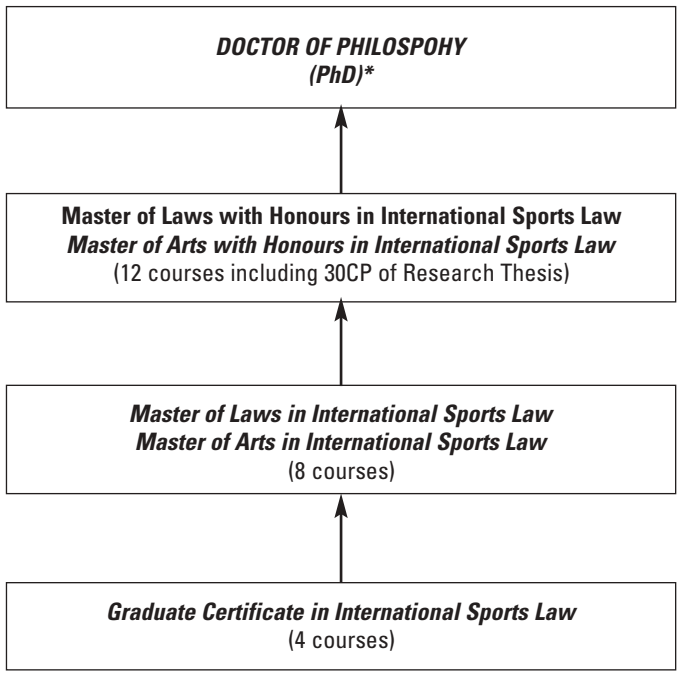

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Applicants who have completed their bachelor degree in a language other than English or who are applying from a country with a non-English speaking background, must provide evidence of their English language proficiency.

Credit
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Fees
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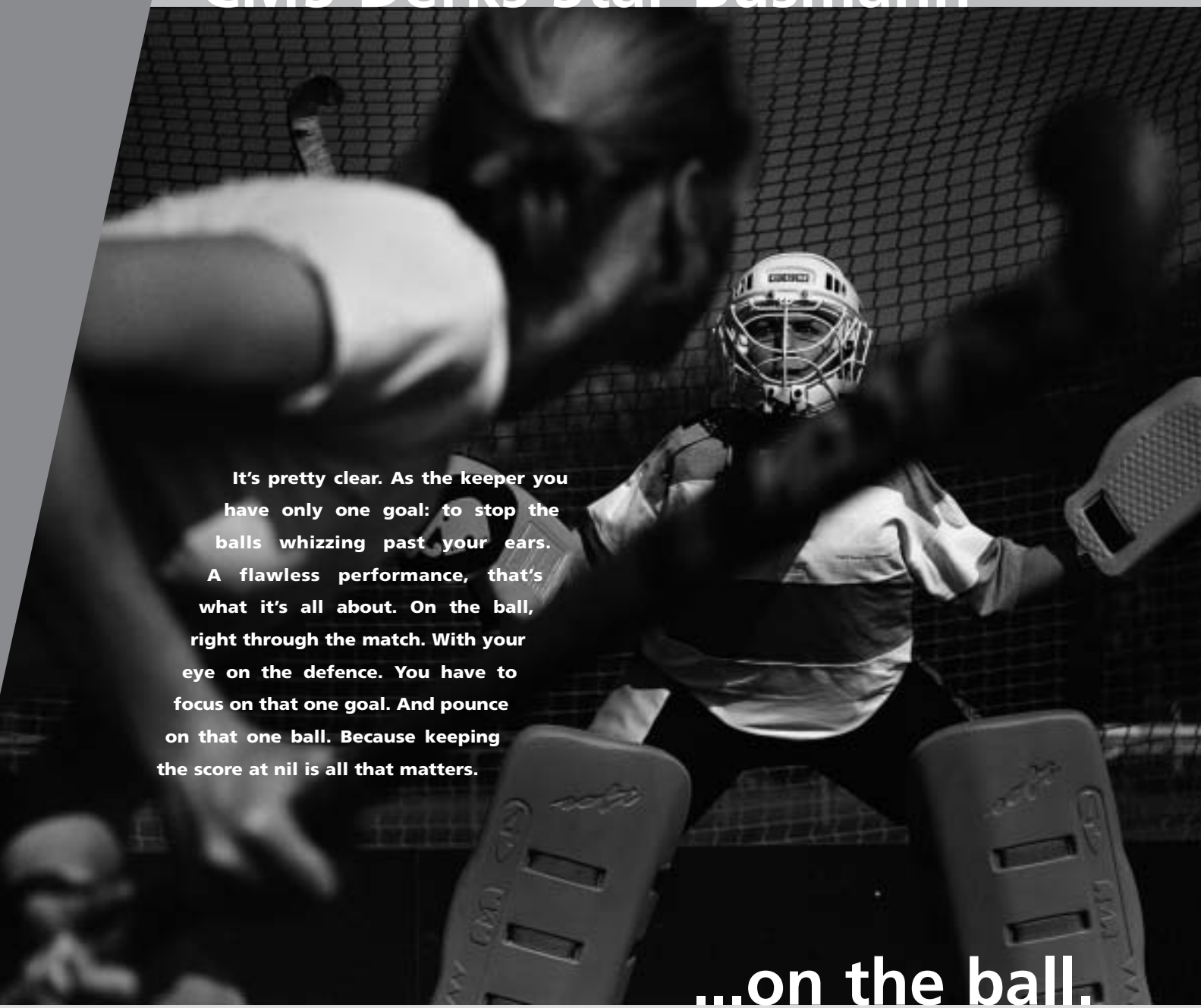

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