

The International **Sports Law** *Journal*



2004/3-4

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In the second half of 2004, three EU-commissioned one-year projects were finalised by the ASSER International Sports Law Centre. A twin project concerning *Promoting the Social Dialogue in the European Professional Football Sector* encompassing all 25 EU Member States was undertaken in co-operation with EFFC as was a study on *Football Hooliganism with an EU Dimension: Towards an International Legal Framework*. In this double issue of ISLJ attention is paid to the legal aspects of combating football hooliganism in Spain, and in the first issue of 2005 the subject of "EU and Football Hooliganism" will be extensively dealt with. In that issue "EU and Doping" will be on the agenda too. Both contributions are based on the Centre's 900-pages volume "The European Union and Sport: Legal and Policy Documents", which appeared in December 2004 (T.M.C. Asser Press).

No less than five articles in this issue of ISLJ are related to Social Dialogue issues, including the full texts of the final chapters of the Asser/EFFC twin project on the 15 "old" and 10 "new" EU Member States with recommendations on how to proceed further with respect to this subject.

Besides football hooliganism and the social dialogue, a third theme in this and the next issue of ISLJ is the position of women in sport. In the first 2005 issue a study on sport, gender and law will appear, while this issue already contains both the papers given at a seminar which was organised by the Centre in April 2004 in The Hague concerning equality aspects of the position of women in sport.

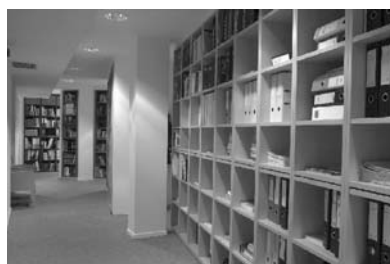
Last but not least, a heartfelt welcome is extended to the Centre's new supporting partners "Europe/US" Legal Netlink Alliance, De Keersmaecker Vromans, the *Brussels office of the ASSER International Sports Law Centre* and SENSE, Amsterdam/Brussels, which operates as *The Networks of the ASSER International Sports Law Centre*. SENSE for example organised the Centre's contribution regarding the draft "sports article" in the Constitution for Europe for the benefit of the informal meeting of the sport directors of the 25 EU Member States who convened in Rotterdam on 23 September 2004 under the aegis of the Netherlands EU Presidency.

The Editors

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Little FIFA. FIFPro's Problems with "Social Dialogue"

by Thomas Hüser*

1. The status quo: "Tripartite Dialogue" instead of partnership

Since the start of the year one thing has been certain; the international umbrella organisation for football players' unions, the Fédération Internationale des Footballleurs Professionnels (FIFPro), intends to start a "European Football Dialogue" in conjunction with the European Football Association (UEFA) and the Association of European Union Premier Professional Football Leagues (EUPPFL). This is the result of FIFPro's efforts to bring about a "Social Dialogue" in professional football, as in other sectors, with the aim of achieving a common pay framework for every professional league. This contribution aims to set out clearly the political aims and organisational structure of the players' unions and represent their political motivation.

2. How FIFPro is organised

In terms of world football, FIFPro is a young organisation. It was founded in Paris under French law in 1968. Its beginnings were hesitant; only in 1978 did FIFPro convene an annual meeting, which is held in different cities in turn. FIFPro was thoroughly reorganised in 1994, with the creation of a sustainable board organisation that ensured professionalisation of FIFPro. FIFPro achieved its public breakthrough with its support, in December 1995, for former professional footballer Jean-Marc Bosman in his battle against the transfer rules. Bosman's success at the European Court of Justice gave the players' unions in most European countries noticeable impetus. It was only after this turning-point in European sports law that, for the first time in their vacillating history, the players' unions were able to really establish themselves. The organisation was also able to develop financial independence with the establishment of a commercial arm, the FIFPro Foundation, in 1999. Since then the FIFPro Foundation has developed a whole series of successful commercial activities, including marketing of players' name rights for animated computer games. This economic progress has benefited the organisation of the individual players' unions enormously. For example, FIFPro members in England, Spain, and France succeeded in agreeing workable pay agreements with the respective leagues. FIFPro is an organisation that focuses on Europe. In the meantime, FIFPro has assumed representation of the rights of 4,000 to 5,000 professional players and around 70 national teams. According to the most recent statistics, around 44 national associations throughout the world are members of FIFPro. Further growth would see FIFPro faced with major financial challenges, because the money the Foundation earns has to be divided among an ever-increasing number of countries. The "minnows" of world football ultimately swim in less developed football markets and so are scarcely in a position to contribute to FIFPro's economic success. In these cases FIFPro aid is mostly restricted to active transfer of know-how to these smaller countries. The work of the players' unions is also accompanied at national level too by an entire range of problems. Public acceptance of players' unions is not especially high as a result of the prejudices that the supposedly highly paid professionals encounter. Particularly in the "Big Five" leagues of France, England, Spain, Italy and Germany, however, there is great solidarity amongst the professionals. Only in the German Bundesliga have the players not yet gone out on strike in support of their interests. In England the PFA (Professional Footballers' Association) is almost of exactly the same age as the national association. The roots of the English players'

union reach back to the 19th century. At present FIFPro is managed by English union boss Gordon Taylor and his general secretary Theo van Seggelen, who is simultaneously chairman of the Dutch players' union. They make a successful team. In the meantime, FIFPro itself is represented in FIFA bodies (Dispute Resolution Chamber) and actively influences political organisational developments at FIFA and UEFA. In summary it can be said that FIFPro's history is one of a lasting struggle for recognition and acceptance, now being played out on the European stage.

3. FIFPro and "Social Dialogue"

Since September 2002 FIFPro has been making efforts to develop a "Social Dialogue" as part of a project promoted by the European Commission, with the long-term aim of a collective bargaining agreement for professional football within the EU. In conjunction with the "Social dialogue" FIFPro is also pursuing a whole series of complementary aims, less intended to promote uniformity of labour legislation contracts in European football, than force development of unions in the individual countries. I would like to briefly shed some light on these additional aims from the following points of view:

- 1 Who is FIFPro representing and which aims is it pursuing in the "Social Dialogue"?
- 2 Are the structures and degree of organisation of FIFPro adequate for a pan-European social partnership?
- 3 The "Tripartite Dialogue": What outcomes are possible in collaboration with UEFA and EUPPFL?

Re 1) The FIFPro European Union member associations have developed very differently. Whilst some countries (e.g. England, France) have built superb structures and social partnerships, there are player organisations that are comparatively weak and cannot yet meet the minimum requirements of a representation in a potential collective bargaining situation. In the process it must be noted that talk of a European pay settlement largely overlooks the professionals in the national leagues. This aside, FIFA still lays down the authoritative regulations in professional football. The players often do not realise the conflict between labour law jurisdiction and association rules.

FIFPro's aims are unclear. During preliminary meetings with representatives of UEFA and EUPPFL, the employers demanded a "shopping list" to be discussed by the three participants in the "European Football Dialogue". From what I hear the following points may be rated as fundamental FIFPro aims:

- Uniform transfer system;
- Minimum wages;
- Clarity about training compensation;
- International match calendar - relief for national players;
- Regulations for non-EU foreigners;
- Pay agreements (Collective Bargaining Agreement/CBA) in every EU state.

These aims should in particular be viewed against the background of impending introduction of a new FIFA transfer system. As a result of permanent dialogue with the European institutions, FIFA must take into account the European legal situation when formulating a new transfer regulation. The "Tripartite Dialogue" has not yet succeeded in respect of a pay agreement, though, yet FIFA cannot develop any more regulations without consulting these three officials. FIFPro has also widened its sights to encompass development of its structures in

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German Professional Football Players' Union - VdV.

weaker countries too. It is in the new EU states such as Poland, Hungary or the Czech Republic that the position of the players' unions is still very weak. An agreement at European level could force the national leagues to the negotiating table with FIFPro.

Re 2) FIFPro is a European-dominated organisation, which has in fact developed the characteristics of a "little FIFA" with regard to its very heterogeneous worldwide membership. In this case it is more about establishing existing power structures than continued democratic development of the entire organisation. Board members can be replaced only with great difficulty. As a result of the lack of financial independence of smaller unions, FIFPro and the FIFPro Board have been able to create a system of dependency that insiders occasionally refer to as "little FIFA", in which the power of the Executive Committee is also based on the trust of the financially dependent national organisations. Objectively it is questionable whether FIFPro, with its obvious democratic and structural defects, can be regarded as a suitable partner for the "Social Dialogue". The structural defect - the weakness of the smaller unions - should be alleviated as part of the "Social Dialogue". After the FIFPro Congress in Buenos Aires in November 2003 the democratic defect worsened. FIFPro's restrictive statutes scarcely allow removal of board members by democratic standards. FIFPro demands greater democratic participation from its UEFA partners, FIFA and even the leagues, although it is far from being a transparent, democratic organisation in its internal structure. Thus, to date, FIFPro has not published its budget or allowed inspec-

tion of its actual member numbers. The budgets of the individual leagues, on the other hand, and even those of clubs, are public knowledge and, generally speaking, are comprehensible. In this case FIFPro cannot meet its own demands. There are, though, individual voices within FIFPro that address these failings, but they are not represented on the authoritative bodies.

Re 3) The "Tripartite Dialogue" on European Football agreed with UEFA, EUPPFL and FIFPro has already clearly shied away from the original aims. Since employers were not ready to find an organisation able to negotiate pay for the Social Dialogue, it is doubtful whether the "Social Dialogue" in football will achieve a result comparable with other sectors. For FIFPro, the "Social Dialogue" is thus an opportunity for further emancipation compared with the remaining players in football and not for democratic participation.

4. Conclusion

FIFPro has, however, achieved a partial political success with the development described. It has risen to be an equal player with UEFA, clubs and national associations at European level, without having to provide evidence of its actual structure, performance and representativeness. At the same time it would have gained a further tool for improving its negotiating position in respect of FIFA with regard to continued development of the international transfer system. FIFPro is thus on board and can influence direction, but because of its structural defects it can't take overall control yet.

The International Sports Law Journal



From Bosman to Collective Bargaining Agreements?

The Regulation of the Market for Professional Soccer Players

by Henk Erik Meier*

Because of the scarcity of prime athletic talent the labour market for professional players is characterised by a strong competition on the demand side. This peculiarity of the players' market caused the rise of American players' unions. The adviser of the international union for football players, Braham Dabscheck, has recently predicted that labour relations in European professional football would turn towards the American model of comprehensive collective bargaining agreements between sports leagues and players' unions. Due to the liberalisation of the European players' market by the European Union the sport bodies were forced to engage in a dialogue with the international players' union. Yet, this article is more sceptical about the perspectives of a social dialogue in European football. The strong involvement of political stakeholders prevented the social partners from developing the necessary institutional capabilities. At the same time the intergovernmental authorized transfer compromise reduced the scope for collective bargaining.

1. Introduction

Due to the scarcity of prime athletic talent the labour market for professional players is shaped by a strong competition on the demand side. Since professional players can obtain their highest salaries on a competitive labour market all professional sport leagues attempt to regulate their players' market (Scully 1995). This is the primary reason why the American players' unions have risen to extremely influential employee associations after competition regulations had dismantled the purchasing cartels of the team owners (Staudohar 1996; Duquette 2000).

Expert in labour law and consultant to the international players' trade union FIFPro, Braham Dabscheck (2003), recently predicted that labour market relations in European professional soccer will adapt to the American model of comprehensive collective bargaining agreements (CBA) between professional leagues and players' unions. The prediction is based upon the fact that the European Union (EU) has forced the soccer associations to engage in a social dialogue with FIFPro. This paper looks at the prospects for a social dialogue in European professional soccer with greater scepticism because the strong involvement of political stakeholders in the regulation of the players' market has proved to be a hindrance to the promotion of a social dialogue.

2. The peculiar regulation of the players' market

The key instrument to regulate the European players' markets was the transfer system. The transfer system required the payment of a so-called transfer fee when a player moved from one club to another - even when the player's contract with his old club had expired. If the new club was not willing or able to pay the transfer fee, the old club denied the player to assert his right of free movement (Trommer

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try" that was supported by the Federal Institute for the Science of Sport. Its German version appeared in the October 2004 issue of *Zeitschrift für Industrielle Beziehungen*.

1999). Despite the transfer regulations practiced by the national soccer associations varied strongly - some associations actually did not practice a transfer system (Malatos 1988) -, the regulations of FIFA and UEFA created an international transfer system for the transnational movement of professional players. This system demanded a transfer fee to be paid after the expiration of a contract when a professional player moved from one country to another (Flory 1997).

Professional sport leagues and sport associations have always argued that such regulations of the players' market are necessary to guarantee the enduring economic viability of professional leagues (Franck 1995). In Europe the political stakeholders of sports saw regulations in the players' market as elements of a specific European sports model dedicated to maintaining the the social functions of sports and its contribution to keeping the population fit (EU-Commission 1998).

The classical argument for restrictions on player mobility is competitive balance. This argument is based on the - problematic - premise that the demand for league sport is maximised when the competitive balance is as high as possible. Therefore, restrictions on player mobility are necessary to prevent strong drawing teams from buying up all top players and in so doing damaging the competitive balance (Balfour/Porter 1991). Furthermore, the transfer system has been considered to be a solidarity mechanism that guaranteed payments from strong drawing clubs to clubs with more limited revenues (Büch 1998). However, sport economists have long rejected the competitive balance argument. Rottenberg (1956) claims that top players will always end up at the top clubs as long as player transfers are allowed and as long as there exist considerable revenue differentials between the clubs because the marginal revenue product of the top players will be higher in top clubs. Unlimited demand for playing talent will be prevented by the profit orientation of the team owners. As a matter of fact, empirical research has not provided evidence for an effect of the restrictions on player mobility on competitive balance (Scully 1995; Fort/Quirk 1995; Vrooman 1995). Rather restrictions on the players' market create a demand cartel of the team owners allowing for redistribution of revenues from players to team owners (Scully 1995; Rosen/Sanderson 2000). Restrictions on player mobility result in player salaries moving between the marginal revenue product of the players and their reservation price, i.e. the income they are able to earn in other sectors (Downward/Dawson 2000; Dobson/Goddard 2001). The transfer system enabled the old club to internalise part of the increased marginal revenue product that a player would generate in his new club (Flory 1997). The soccer associations knew the distributional effects of the transfer system quite well - and in fact approved of them. Professionalism had been introduced into many leagues against the deliberate intend of the associational elites dedicated to the ideal of amateurism and regarding professionalism as "a necessary evil to get sufficient means to finance amateurism" (Van Raay 1967, S. 40). For the German Soccer Association (DFB) the transfer system served to prevent the top players from stripping the clubs - i.e. "soccer" - of their assets (Samstag 1971, S. 106).

The second classical justification for mobility restrictions in the players' market is the alleged tendency of competitive players' markets to result in hyper investments which severely damage the prosperity of the league as a whole. According to this argument, competition in the players' market is susceptible to so-called "rat races"¹ because the investments in playing strength by one team reduce the relative strength of all other teams while the revenues of the teams depend on their ranking in a tournament (Franck 1995; Rosen/Sanderson 2000). It has been argued that since all clubs are forced to increase their investments in playing talent, this increased expenditure for players is wasted because an increase in player salaries of all clubs is unlikely to change the "natural" ranking of the teams. Thus, free movement of players results in social inefficient hyper investments in playing talent which decrease the total revenues of the league (Rosen/Sanderson 2000). In European soccer this general tendency increases due to the European super competitions and the relegation system. In addition, the corporate governance of European soccer clubs create incentives for club management to maximise sporting success, not profits, so that short term goals hardly outlasting one season dominate in the

European soccer clubs (Franck/Müller 1998). Yet, the strong standards of welfare economics for the diagnosis of rat races are not fulfilled, because weak drawing clubs often succeed in outrunning top clubs und thus overthrowing the alleged "natural ranking" of clubs (Quitau 2003). Furthermore, empirical proof of inefficient rat races is very difficult to establish. On the other hand Vrooman (2000) found that even US team owners seem to invest much more in playing talent than would be rational from a profit maximising point of view (Vrooman 2000).

For the political evaluation of the restrictions in the professional soccer players' market it was of great importance that the regulations were considered to be instruments to secure vocational training in the professional clubs. Vocational training in professional sports was seen to constitute a common good dilemma because players, through training, acquire human capital specific to their industry, whereas the training club only partially acquires human capital. Thus, clubs would hesitate to engage in training if they were not refinanced in the case of a job change. Therefore, the transfer system has been seen as an institutional safeguard for the refunding of vocational training. Through the exorbitant transfer fees soccer clubs insured themselves against the uncertainty of the success of their training investments. Without the transfer system, according to some sport economists, the uncertainty of playing talent would be paid by the weak players (Schellhaaß 1984). According to the scarce data available, transfer sums were mostly paid between big clubs, meaning that small clubs benefited much less from the transfer system than claimed (Moorhouse 1999).

However, the alledged positive training effects of the transfer system were of great importance to the political soccer stakeholders as team sports are considered not only to be an instrument for promoting public health but also of social integration, teaching young athletes central social values such as subordination, team spirit, co-operation and discipline (Eisenberg 1991; Mangan 1996; Merkel 2000). Furthermore, according to the sport associations and their political stakeholders, sport clubs are only able to contribute to social integration and health care if they succeed in attracting people. It was assumed that they could only do so if the openness of professional sports for young talents was guaranteed by substantial training on the part of the professional clubs (European Commission 1998). Eventually, it was also decisive for the political evaluation of the transfer system that the European national soccer associations because of their role as organizers of national team competitions, exerted a special regulation of the players' market. According to the DFB regulations, a professional team had to consist in principle of German players only, however the teams were allowed to contract a maximum of three foreign players each. For sport politicians these rules secured the unity of the national sports system because national championships were mainly played with home-grown players. For the players this discrimination on grounds of nationality served as to protect national job in that a certain number of home-grown players were guaranteed to reach the top leagues. Thus, national talents could acquire the playing skills necessary for the strength of the national team (Riedl/Cachay 2002). For sport politicians, the role of sports for the symbolic representation of the national community was crucial for their position towards discrimination on grounds of nationality. Especially post-WWII Germany with its highly precarious national identity shows that successful national teams could serve as strong symbols of national cohesion and pride (Knoch 2002).

3. First liberalisation of the European players' market

The liberalisation of the European players' market resulted from a typical spill-over from European Community law, triggered by the coming into effect in 1970 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on the free movement of workers. After an ex post

¹ The specific rationality of the rat race, i.e. the social inefficient run of several rats for a piece of cheese, resulted from the fact that "[i]n the rat race the

chances of getting the cheese increase with the speed of the rat, although no additional cheese is produced." (Akerlof 1976, p. 603)

decision that a Belgian club had lost a league match because it had fielded an excessive expatriate player - a German national - the club appealed the decision to the European Commission.² The Commission scrutinized the opportunities to take legal action against the Belgian soccer associations (FAZ 08.12.70). The Commission considered discrimination on grounds of nationality to be a clear violation of the right of free movement, yet the Commission was unsure of its legal competencies. Until then the question of horizontal effects of internal market freedoms, i.e. the application of European Community (EC) law to discriminations in purely private affairs, was still unsettled. On the other hand, the Commission stated that the requirements for legal actions based on European competition law were not fulfilled (EG-Amtsbl. 16.10.71 C 103/3).

However, the Commission started to engage in negotiations with the soccer associations to persuade them to revise their labour market regulations in a way compatible with EC law. Until the Bosman judgment the Commission committed itself to a highly pragmatic approach. It has been argued that the Commission did so because it recognized that far-reaching intervention into professional soccer would likely harm its legitimacy (McArdle 2000; Greenfield/Osborn 2001). The Commission tried to avoid radical changes in European soccer (EG-Amtsbl. 03.06.85 C 135/44). An early solution of the conflict between soccer association regulations and EC law was impeded not only by the economic interests of the professional clubs and the soccer associations but also by the self-image of the sport associations. The associations saw themselves as autonomous bodies not subject to susceptible to state legislation. On the other hand, the European soccer association UEFA had a legitimate interest in upholding uniform regulations. Thus, UEFA refused to accept the regulations of the then regionally bounded single European market since UEFA represented all European soccer associations.

Yet, simultaneously decentralised enforcement of EC labour market laws began to work. The Commission's preoccupation with discrimination in soccer brought legal actions to the European Court of Justice (ECJ). The ECJ extended its integration-oriented judicature into the realm of professional sports and supported the legal viewpoint of the Commission that restrictions on free movement are illegal. The ECJ was prevented from making a final judgment in the Walrave case because the case was withdrawn after the international cycling association had forced the sportsmen involved to do so (ECJ, Slg. 1974, 1405). In contrast, the Donà-case, which reached the ECJ in 1976, seemed too obviously to be constructed to abolish the absolute prohibition to employ expatriate players which was practised by the Italian professional league. Thus, the ECJ hesitated to take the opportunity to ban foreign national clauses in soccer (ECJ, Slg. 1976, 1333).

After these judgments the Commission succeeded in 1978 in pressuring the soccer associations into making their first concessions as the associations wanted to avoid the risks of further legal actions. The soccer associations no longer made restrictions on the signing of contracts between clubs and expatriate players from EC member states, but "only" on the fielding of these players. In the first division and its relegation competitions of the national leagues the clubs were allowed to field two players from other EC member states in a match. Furthermore, in the lower leagues the soccer associations abandoned all discriminations against EC citizens. Eventually, foreign national clauses would no longer apply to players from EC member states who had taken up residence in another EC country for five years (Official Journal 07.08.78 C 188). On their part, the involved soccer associations tried to reduce the risks of further legal actions by enforcing the transfer system by means of drastic sporting sanctions which were no longer primarily addressed to the players but to the clubs. In case a sport association failed to avoid legal proceeding against their labour market regulations, the associations tried to force the involved parties into amicable arrangements (Blanpain/Inston 1996).

While the Commission regarded the 1978 agreement as being only a transitional solution, the soccer associations considered it a gentlemen's agreement that prevented a further liberalisation of the players' market. The efforts by the Commission to further ease foreign nation-

al clauses therefore provoked fierce resistance from the soccer associations - even after the adoption of the single market project in 1986. On its plenary session on 24 June, 1987 the Commission decided to demand that the soccer associations implement freedom of movement for professional soccer players at the latest at the completion of the single market in 1992. The soccer bodies rejected the offer of a transitional scheme by the Commission president, Jacques Delors. The soccer associations appealed to their national governments in order to achieve political exception (UEFA 1989; Karpenstein 1993) and succeeded. The member states forced the Commission to reconsider its regulatory approach toward sports. Both the national sports politicians and soccer associations were convinced that the restrictions on player mobility were essential for the coherence and the social functions of European sports. Furthermore, the interventions of the Commission contradicted the well-established doctrine of the autonomy of sports which was the agreed policy paradigm of sports politicians as well as sports associations. Yet, the primary reason for national sport politicians' resistance towards the Commission policy was probably fear of losing of further national regulatory competencies to the supranational level (Coopers & Lybrand 1995). Maybe due to this political support the soccer associations did not try to make the transfer system or foreign national clauses part of an international CBA - even though some national leagues, prior to the Bosman judgement, already knew CBAs with players' representatives.

In this dead-lock situation, negotiations between the soccer associations and the Commission were pushed by the European Parliament (EP). The international players' union FIFPro which, since its founding, had been dedicated to the abolition of the transfer system, capitalised on its chairman, Janssen van Raay, being a MEP. In reaction to the break-down of the negotiations between the Commission and UEFA and based on a report by van Raay, the EP passed on 11 April, 1989 a motion characterizing the transfer system as modern form of slavery and demanded the abolition of all restrictions on player mobility. The motion requested the Commission to enforce by all legal means EC law in professional soccer. The Commission then dedicated itself to a more authoritative approach (FAZ 12.04.89). Despite this commitment the Commission accomplished only modest liberalisation of the players' market in the shape of the notorious "3+2"-agreement. This agreement was accepted by the Commission on behalf of the Commissioner for the Single Market, Martin Bangemann, and the President of the Commission, Jacques Delors, in April 1991 (Van Miert 2000). According to this agreement, first national division professional clubs were, from 1. July 1992, allowed to field three players from EC member states plus two assimilated players. This regulation was to be extended to all professional clubs by 1997. At the same time, UEFA agreed that the "delivering" soccer associations could no longer use the measure of an international transfer certificate to exert pressure on the players. After the revision of the UEFA transfer regulations a player was entitled to enter into an agreement with a new club if his old contract had expired. Yet, the previous club was eligible for a transfer fee from the new club now referred to as compensation for training delivered. In addition, the negotiations on training compensation were no longer restricted by lower or upper limits. In result, by tolerating restrictions on the fielding of players from EC member states, with the "3+2"-agreement, the Commission had effectively accepted discriminating practices in the players' market (Parrish 2003, S. 92).

Despite considerable concessions on the part of the Commission, UEFA failed to enforce a less restrictive administration of transfer regulations by the national soccer associations. This failure partly caused the famous Bosman proceeding - even if one has to admit that the Bosman case was based on a very specific legal constellation which could hardly have occurred outside the Belgian soccer association.³ Of central importance for the far-reaching consequences of the Bosman judgment were the interdependencies between national and interna-

2 A procedure before a regular court did not seem to have been possible because the regulations of the Belgian soccer

associations specifically prohibited all parties from taking legal action on sporting matters.

tional transfer regulations. The Belgian club Standard Liège refused to issue an international transfer certificate for the player Jean-Marc Bosman who intended to move to the French second division club US Dunkirk. Standard Liège feared that Dunkirk would not be able to pay the transfer sum for Bosman whose contract with Standard Liège had already expired. In order to get the transfer certificate Bosman took the first proceedings in 1990. When the case in 1995 finally reached the ECJ, the court extended the right of free movement considerably moving toward a comprehensive ban on discriminatory practices in the labour market. Prior to its judgment the court had criticised the give-and-take approach of the Commission vis-à-vis the soccer associations (Zuleeg 1993). In the Bosman judgment (ECJ, Slg. I-1995, 4921) the ECJ not only prohibited national clauses for EC citizens. The court also imposed a ban on transfer payments after the expiration of contracts. The court ruled that such regulations prevented clubs from signing contracts with players from a club in a different member state and thus restricted the players' right of free movement. The ECJ considered the arguments of competitive balance and training costs but decided that the labour market regulations were unsuitable to serve these goals. However, the court seemed to have acknowledged the arguments per se as being legitimate (Weatherill 1996).

However, the court left a number of questions unsettled. Thus, the Commission had addressed the question whether the transfer system could be seen not only as a violation of free movement but also of European anti-trust law. The answer to this question was crucial for the future of the transfer system. As has been shown in the US case any regulation of the players' market can be considered as a cartel agreement of the clubs to reap the profits from playing talent from the players (Greenfield/Osborne 2001; Parrish 2003).

4. The Players' Market in the Post-Bosman Era

The labour effects of the first liberalisation of the players' market were well-known from the US experience. The shift of property rights in the players' market in favour of the players resulted in a boost of player salaries and the labour costs of the clubs (Caiger/Gardiner 2000; Swieter 2002; Riedl/Cachay 2002; see fig. 1).

Since the Bosman judgment did not interfere with the long-established practice of paying compensation for players with running contracts, the clubs adapted to the new situation by extending the duration of labour contracts. Thus, they were able to generate further revenues from transfer deals - and to include these payments in their balance sheets. On the other hand, the clubs now had to bear part of the career risks of the players (Frick 2000). This development amplified the tendency to speculative investments in playing talent and resulted, in combination with a strong increase in TV revenues, in an "overheating" of the players' market. At the same time, the enormous growth of TV revenues attenuated the redistributive effects of the Bosman judgment (Antonioni/Cubbin 2000).⁵

The Bosman judgment enhanced the capital needs of professional soccer clubs and pushed the German professional clubs into converting themselves into corporate entities. The DFB, dominated by an

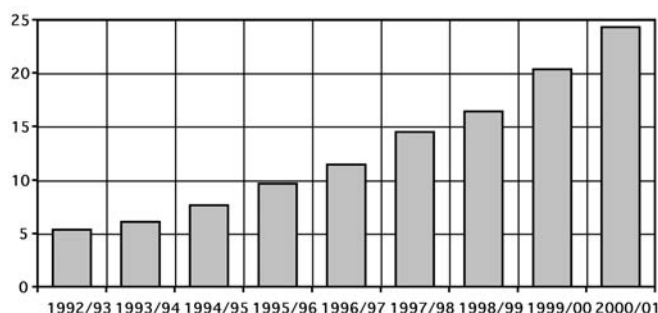


Figure 1: Development of the Labor Costs in the First Federal Soccer League Average Labor Costs per Club in Mio. EUR

Source: Swieter (2002, S. 100)⁴

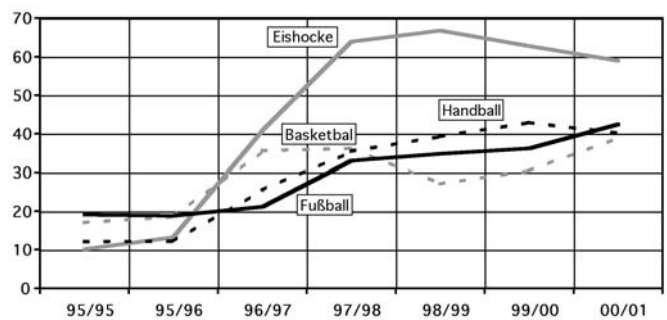


Figure 2: Share of Foreign Players in the First National Divisions of German Leagues in Percent

Source: Riedl/Cachay 2002, S. 94-5

amateurism faction, had by then resisted the professionals' endeavours to do so. The DFB leadership had always feared a corruption of sports and a threat to solidarity payments in favour of the amateurs due to the dominance of economic interests in professional clubs organised as corporate entities. When the professional clubs threatened to leave the DFB, the association had no choice and allowed on 24 October, 1998 the clubs to convert into corporate enterprises (FAZ 23.10.98).

For the national sport politicians at least in Germany this decision marked a looming erosion of the traditional sorts model of with its connection between amateur and professional sports. Yet, the heavy resistance of national sports politicians to the Bosman judgment was primarily caused by changes in the recruiting policies of the clubs. The partial abolition of discrimination on grounds of nationality resulted in a considerable global migration of professional soccer players in the prospering European leagues (Maguire/Pearson 2000). The professional clubs responded to the enhanced elasticity of the supply of experienced players with an increase in external recruitment (Figure 2). Thus, the clubs avoided the risky in-firm training of own talents. In doing so they reduced the chances of German talents to be fielded in league matches (Riedl/Cachay 2002). Especially in Germany this development has raised fears of a decline of the national team. Due to the special role of the national team for the national consciousness of post-war Germany the public debate about the reintroduction of expatriate clauses in professional sport was very intense (Büch 2001).

5. Between liberalisation and re-regulation

After the Bosman judgment the institutional parameters of the regulatory game between Commission and sports association changed because the ECJ had accommodated the liberalisation policy of the Commission to a solid legal basement. The policy of the Commission toward the sports association bodies now started to follow the well-known pattern of negative integration. The Commission uses the

3 At that point, in the professional leagues of France and Italy transfer sums after the expiration of contracts were no longer paid (with the exception of standardised training compensations). In 1978 the transfer regulations of the English league had been reformed in way that a player could change his club even when the involved clubs did not agree about the transfer payment. In that case the transfer sum was determined in an arbitration proceeding. The same did apply to the German professional league (Malatos 1988).

4 Because of the low publicity of the financial statements of the German clubs the available data have to be handled with care. The data primarily reflect a general trend. According to the data from the licensing procedure of the German league which were available to

Kern et al. (2002, p. 415) the turnovers of the German professional clubs quintupled from the season of 1991/92 until the season of 2000/01. TV revenues increased disproportionate at an annual rate of 36.7 per cent. According to this data, salary payments of the clubs only doubled and accounted in the season of 1999/00 for 50 per cent of the turnovers of the clubs.

5 Data to determine the amount of that presumed redistribution are primarily available from the Premier League. According to Deloitte & Touche the operating margin of Premier League clubs dropped after the Bosman judgment from 18.5 per cent in 1996/97 to 6.9 per cent in 1999/00. At the same time, the turnovers doubled (Kern et al. 2002, p. 409).

judgments of the ECJ, favouring more integration, and its own comprehensive anti-trust competencies to further liberalise the sector in question (Scharpf 1999). The institutionalised liberalisation bias of the supranational polity turned against the sports associations which had employed a series of regulations which were not compatible with European anti-trust law (Meier 2004).

Although a return to the status quo ante Bosman would have required a revision of the European treaties by a unanimous decision of the member states, the soccer associations obviously believed they would succeed in mobilising their national governments for such a move and thus delayed the implementation of the Bosman judgment (Flory 1997). However, the exact opposite happened: the high requirements for a revision of the European treaties turned out to work as an institutional veto point in favour of the liberalisation approach of the Commission. The failure to revise the treaties was primarily caused by member states' institutional self-interest. In particular the British government feared that the supranational institutions would use any mentioning of sports in the treaties as a means of competence creeping (Schneider 2002). That sports policy has limited bargaining power on the European level was well demonstrated by the fact that no member state tried to overcome the British veto by offering the British government a complex package deal in order to exchange the veto for concessions in other policy domains. The German federal government responded to the pressure from the German sports associations to have the Bosman judgment revised only by bringing forward a common declaration of the member states. This soft law declaration which was adopted at the Amsterdam summit on 2 October 1997 stressed the social importance of sport but did not exempt the professional sport from the application of European anti-trust law (Trommer 1999).

The declaration had little impact on the policy of the Commission. Instead, the Commission adopted the legal standpoint that the complete transfer system fell under the ban of anti-trust law (FAZ 03.02.96). The Commission considered all regulations of the players' market to be part of a complex cartel agreement which restrained the freedom of the clubs to recruit players (Egger/Stix-Hackl 2002). Soon after the Bosman judgment the Commission started to criticise the practice of long-enduring labour contracts in soccer for preventing players from moving to another club. The Commission found that soccer players were denied their right to free movement even when they had cancelled their contracts according to the terms of the relevant national labour law. The Commission complained also that the soccer clubs and associations preserved the old transfer system when a player moved from a non-member state into the territory of EC law. The European Commission was of the opinion that the post-Bosman transfer system resulted in transfer sums which lacked any relationship to the effective training costs (Pons 1999). Yet, the Commission initially only succeeded in coercing the soccer associations to abolish discrimination on grounds of nationality and transfer payments after the expiration of contracts. The soccer representatives refused to make further revisions of the labour market regulations in soccer - primarily because long-enduring player contracts had enabled the professional clubs to successfully adopt to the changed legal framework in the players' market. Thus, the negotiations with FIFPro about the approval of training contracts, into which the soccer associations had entered after the Bosman judgement, fizzled in the first instance (Trommer 1999).

When, after the expiration of a contract for the move of a Swiss player into the Italian league, the question of the legality of transfer payment reached the Commission, it issued a formal statement of objection to FIFA in December 1998. The statement claimed that the transfer system of the international soccer association continued to violate European law (Pons 1999; Egger/Stix-Hackl 2002). Once again, the soccer associations aimed at a political solution of the conflict. They tried to capitalise on the debate on the regulatory approach of the European Commission in sports which hit a new peak because increasing engagement of anti-trust authorities in professional sports endangered the traditional monopoly of the sports associations to organise sporting competitions. This development made the estab-

lishment of purely commercial leagues likely and posed a serious threat to European model of sports (Meier 2004).⁶ Therefore, the European Council of Vienna demanded the Commission in December 1998 to present to the European Council of Helsinki in 1999 a report on the preservation of the current sports structures. The responsibility of drafting of the report was given to the Directorate-General for Education and Culture (GD 10) which belonged to the supranational actors advocating preservation of the European sports model due to the cohesive potential of sport to bring about European integration (Parrish 2003). However, the GD 10 was not able to wrest substantial concession from the Directorate-General for Competition (GD 4) regarding the application of European anti-trust law to sports. The GD 4 merely announced that an exemption from anti-competitive arrangements in sports would be considered possible only if such arrangements served to ensure competitive balance or vocational training. The GD 4 expressively objected to restrictions on free movement of athletes in the European Union and declared that any misuse of monopoly positions by sports associations would not be accepted (IP/99/133; European Commission 1999).

The soccer associations objected to the GD 4 position, and took no initiative towards a reform of their labour market regulations. In spring 2000 the European Competition Commissioner, Mario Monti, threatened to prohibit the whole international transfer system, arguing that it was based on arbitrarily calculated payments of compensation with no relation to the real costs of training investments. Transfer payment violated Community law and was not mandated by the peculiar features of sports. Moreover, the transfer system failed to protect European sports against over-commercialisation and the dispersion of revenues between the clubs. Monti also found that the transfer system had degraded young athletes into objects of speculation. A prohibition of the complete transfer system would have implied that as from 2001 all professional soccer players must be treated as normal employers subject to national labour laws. Since labour laws in several member states allow for the cancellation of a labour contract within a period of only one month, past club investments in the players would devalue completely. On the other hand, a ban would also have put an end to the payments for training compensation.

When, after the first official meeting in May 2000, it became obvious that the soccer associations were not willing to make further concessions, the European Commission initiated preliminary proceedings and set a deadline for the soccer associations to comment by 20 September, 2000 (SZ 31.08.00). Yet, the Commission assured the soccer associations that a reformed transfer system would concern only new player contracts. According to the Commission's position players would be entitled to terminate their labour contracts unilaterally. From the outset, the Commission thought of a "right to buy off". The Commission had considered the practice in Spanish soccer according to which the player's contract mandated compensation payments if cancelled before expiration. The Commission intended to establish some objective criteria for the calculation of transfer sums. The Commission stated also that compensation for training was only acceptable if such payments mirrored actual training costs. The soccer associations had primarily pressed for the acknowledgment of training contracts for young players with a duration of at least three years. For the abolition of these contracts compensation payments should be made obligatory even after the end of the contract (FAZ 31.08.00). Moreover, the Commission declared any FIFA proposal to reform the transfer system had "acceptable" to FIFPro, even if the organisation had issued no official confirmation. Therefore, FIFA invited FIFPro in a task force set up by FIFA and UEFA intended to come up with a proposal for reform of the transfer system (Dabscheck 2003).

At the same time the soccer associations tried to use the revision of the long-awaited European treaty in the December of 2001 to lobby for a special status of sports (SZ 09.09.00). As the Commission's position also seemed to ban compensation payments for training costs, the tough stance of the Commission caused resistance among important member states. After the French President Jacques Chirac

expressed his concerns about the imminent abolition of the transfer system, the German Chancellor Gerhard Schröder and the British Prime Minister Tony Blair jointly intervened by releasing a declaration in which they expressed a critical attitude towards the Commission's position, albeit without fully supporting every aspect of the soccer associations' position. According to the two heads of government the current transfer system was not perfect, but Schröder and Blair predicted that a radical reform of the transfer system would put an end to many small, i.e. grassroot clubs. Unlike the soccer associations they did not support the idea of giving special status to sports but encouraged the sports associations to find a solution to the regulation problems in soccer through a social dialogue with player representatives. Schröder and Blair embraced the cooperative attempt by the European Commission and claimed that proposals by the soccer associations to reform the transfer system had to pay sufficient attention to the justified interests of the players, the clubs and the associations. New transfer regulations, however, should give the clubs sufficient opportunity to train young players, build up their teams and keep the game healthy at all levels (Federal Government Press Release 425/00).

The intergovernmental demand for a cooperative solution was hindered by the limited strategic capacity of participants - the players' unions as well as the employers in professional soccer. At first, it was part of the traditional self-image of the players' associations to represent the interests of everyone involved in soccer, i.e. also the interests of the players, and so did FIFA. However, this claim for comprehensive representation was not only denied by the Commission but also by the professional clubs. They feared that the soccer associations would agree to excessive concession toward the players because neither FIFA nor UEFA acted as employers, i.e. would not have to bear any economic risks resulting from a new transfer system. The inactiveness of FIFA had only make matters worse in the eyes of the G-14 - the organization of European professional top clubs. The G-14 struggled for access to the negotiations to act as the international representative of the actual employers in soccer, i.e. the professional clubs (FAZ 31.08.00). This provoked resistance from UEFA, which regarded the G-14 as a conglomerate of clubs aiming at secession. UEFA feared that professional soccer might more and more defy its control. In addition there was some "bad blood" between the two soccer associations, because UEFA, as organizer of profitable club-tournaments, felt much more obliged to the economic interests of the European professional clubs than FIFA. Due to that lacking consensus among the soccer associations, the G-14 managed to get access to the negotiations in the beginning of 2001 (FAZ 22.01.01).

The employer actors set their bargaining priorities quite differently. The central concern of the soccer associations was to persuade the Commission into approving compensation payments for training payable even after the expiration of contracts. This served the self-interest of the soccer associations as organisers of national team competition but would also help to maintain the "grass roots of the game" by subventing small clubs (UEFA 2002). The professional clubs, by contrast, intended to continue the post Bosman system und to prevent any further liberalisation of the players market resulting in a devaluation of their investments in playing talent.

FIFPro also turned out to possess only limited strategic capacity. Moreover, conflicts over the FIFPro's position in the negotiations almost lead to a split of the international union. At first, the position of FIFPro was dominated by the English players' union - the Professional Footballers' Association (PFA) whose President Gordon Taylor also served as head of FIFPro. After the Bosman judgment the PFA had tried to convert the increased player mobility into improved social security for the players (Greenfield/Osborne 2001). The English union found the increased immigration of foreign players to harm national soccer and had pled for the preservation of training incentives. This critical stance toward the liberalisation of the players market was no longer approved by the majority of FIFPro members. As FIFPro consultant Braham Dabscheck (2003) has revealed, inside FIFPro a clash occurred between the players' unions of the small and the big European leagues. The union of the prosperous leagues sup-

ported the standpoint of Taylor and even supported a reintroduction of restrictions on the fielding of foreign players. In contrast, the unions of the small European leagues pressed for further liberalisation of the players' market. Players from the small European soccer nations seem to be more prepared to work abroad since they can hardly achieve top salaries in their national leagues (Giulianotti 1999). Thus, the unions of the small states argued training of young players should rather be financed from a redistribution of the clubs' television revenues rather than from restrictions on player mobility. When FIFPro President Gordon Taylor continued to insist on his critical stance toward further liberalisation, player representations from Norway, Denmark, Germany, Austria, Ireland, Scotland and Greece on 19 September, 2000 demanded, in a letter to the FIFPro executive, the calling of special session of FIFPro since they felt no longer represented by the FIFPro executive. Taylor backed down and announced that he would make no concessions to the soccer association not accepted by the majority of the players' unions (Dabscheck 2003). After that, FIFPro seemed determined to a strict liberalisation strategy. The negotiators of FIFPro repeatedly had to depart from concessions to which they had previously agreed at the bargaining table.

On 31 August, 2000 FIFA, UEFA, FIFPro and representatives of the national leagues meet for a first workshop. The Commission had requested that the soccer associations present proposals for a revision of the transfer regulations before 31 October, 2000. The task force of FIFA/UEFA and FIFPro agreed that transfer periods had to be restricted and that labour contracts should have a minimum duration to preserve the integrity of sports competition. To protect young players, the transfer of players under the age of 18 should not be allowed. FIFPro even agreed that soccer players below the age 24 should be treated as apprentices for which training compensation could be claimed after the expiration of their contract, but FIFPro committed itself to promote free movement for all professional players over the age of 24 - including a unilateral right for the termination of contracts (FIFA News 09/00). Despite FIFA accepted this claim, UEFA was vehemently opposed to it. Eventually, UEFA succeeded in the determination of the position of the soccer task force. In result, the task force demanded also restrictions on free movement of players over the age of 24. This claim was not acceptable to FIFPro. Therefore, the soccer association could only present proposals to the Commission on 31 October, 2000 which were not approved by FIFPro. This negotiation document proposed to prohibit international transfers of players under 18 and to allow for training compensation in case of the transfer of a player under 24. Training compensation were to be financed by the acquiring clubs as well as by a solidarity mechanism not specified. While the document made no allowance for a unilateral right of players to terminate a labour contract, the task force requested that a stabile contract system to be implemented according to which players were to be bound to a club for a period of at least three and a maximum of five years. Players would be entitled to only one transfer per season. Eventually, the document made no detailed account on how to calculate compensation payments (FIFA 2000). The task force presumed that unilateral contract termination by players had to be dealt with only under national labour law. The national soccer associations should enter into negotiations with their national governments to convince them to adopt for professional soccer players the status of employees *sui generis* in national labour law (FAZ 20.10.00).

In November the Competition Directorate again called on FIFA to present generally acceptable proposals for a revision of the transfer system. After talks with FIFPro the DG 4 insisted that players should have a right to terminate a contract once a year. The DG 4 announced that it would only tolerate training and advancement compensations if these payments did not exceed the actual cost of training the individual player. Furthermore, compensation payments for the transfer of a player before expiration of his contract should be calculated on objective criteria and specified in the players' contract (FAZ 30.11.09; 12.12.00).

Up to this point, the British government maintained its critical attitude toward a Treaty revision. Yet, due to the ongoing controversies over the application of Community law to sports, the EU mem-

ber states tried to enforce their policy convictions about the proper regulation of sport without the “nuclear option” of a treaty revision. Thus, the European Council of Nice on 8 December, 2000 unanimously adopted a declaration specifying the expectations of the member states toward the regulatory approach of the Commission. The member states accentuated the autonomy of the sports associations and requested the Community to protect the social, educational and cultural functions of sport. At the same time, they tried to bring about negotiations between Commission, soccer bodies and players union:

“The European Council is keenly supportive of dialogue on the transfer system between the sports movement, in particular the football authorities, organisations representing professional sportsmen and -women, the Community and the Member States, with due regard for the specific requirements of sport, subject to compliance with Community law.”

Indeed, the resistance of the member states to a complete liberalisation of the player market increased the willingness of the Commission to take a more cooperative stance. Thus, the Commission agreed that transfer of players under the age of 23 was to be subject to a standardised compensation, not one calculated on the basis of individual training costs. At the same time, the Commission accepted that international transfers should only be possible in a uniform transfer period from May until August to prevent the strong drawing clubs from buying-off the best players from the small clubs during a season. Eventually, the Commission acknowledged that contract stability was a legitimate interest of the professional clubs, though the Commission claimed that this interest had to be brought into agreement with the principle of free movement. The Commission no longer insisted on objectified and bindingly specified compensation payments but declared that such payments were to be determined under national law (IP/00/1417).

Yet, the central questions of contract duration and unilateral contract termination remained to be solved. When FIFA in January 2001, responding to the interests of the players, argued that players have the right to terminate a contract and resign three months later, it provoked fierce disagreement with UEFA. The European soccer association identified itself much more with the economic interests of the professional clubs. UEFA threatened to leave FIFA and thus succeeded in coercing FIFA to withdraw its proposal (FAZ 18.01.01).

This deadlock resulted in further efforts by the German Federal Government to bring forward a compromise. Chancellor Schröder called on FIFA and UEFA to come to terms with FIFPro in order for the heads of government to come up with a political solution to the transfer conflict (SZ 26.01.01). The Federal Chancellery debated with the responsible ministries about the prospects of a transfer system compatible to Community law. The Chancellery also initiated talks with the German players association Vereinigung der Vertragsfußballer (VdV). The VdV took a moderate stance on the revision of the transfer system because the VdV executive believed that a completely deregulated player market would increase the economic and sporting uncertainty of the players too much. On the FIFPro meeting in Rome on 25 January, 2001, the VdV presented the delegates of the national unions with a compromise proposal which was adopted by the majority of the player unions despite resistance from the hardliners. The proposal abstained from advocating a right by players to unilaterally terminate a contract. It even argued that player contracts should principally not be allowed to be terminated within the first two years of their duration. The proposal did not acknowledge apprentice contracts and tried to establish sports reasons for an extraordinary termination by a player without compensation payment, for instance if a player had been fielded in less than 15 per cent of his club's regularly matches (SZ 27.01.01).

The top clubs of the G-14 insisted on triannual minimum duration of player contracts and were not willing to accept any sports reasons for contract termination. At the same time, they demanded drastic sanction in case a player terminated a contract without paying a compensation (FAZ 12.02.01). This confrontational course provoked FIFPro to withdraw from its concessions. The European Commission on its part held on to its claim for a right for contract termination and

was opposed to the idea of sports sanctions (NZZ 02.02.01). UEFA now appealed to Swedish Prime Minister Göran Persson, then President of the European Council. Previous to its taking over the presidency, the Swedish government had set itself the target to strengthen the social, cultural and democratic functions of sports in the European Union. The Swedish presidency organised a meeting on 14 February, 2001. Besides the presidents of FIFA and UEFA, the participants in the meeting were the four responsible European Commissioners and representatives of the troika (Swedish Presidency 24.02.01). The Commissioners still objected to the idea of sports sanctions which, according to the clubs, were to consist of a one year ban for a player who unilaterally had terminated his contract prior to its expiration. The Commissioners considered the sanction to be disproportional. They also turned against the UEFA plan to calculate training compensation on the basis of the financial power of the acquiring club. This had created a mechanism for redistribution between big and small clubs but had violated the principle that training compensations should only be based on real training costs (IP/01/209). On 16 February, 2001 a second meeting between the representative of EU, FIFA, UEFA, G-14 and FIFPro failed because FIFPro insisted that players have a right to unilateral contract termination and that contracts should run for a maximum of two years (FAZ 19.02.01). The uncompromising course of the FIFPro executive nearly resulted in a split of the players' unions. At that time, FIFPro held only bilateral conversations with the Commission (IP/01/225). On 28 February, 2001 UEFA once again contacted Persson and accused the Commission - because of its failing commitment to concessions - to infringe the declaration of Nice (Independent 03.05.01). In his answer, Persson called upon all parties involved to engage in compromise. Persson announced that he would respect the prerogative of the Commission to deal with the transfer question, but he pointed to the political importance of soccer (Statsrådsberedningen 05.03.01).

The implicit threat of an intergovernmental solution to the transfer conflict forced the Commission to further concessions regarding the stability of player contracts. At the same time, the soccer associations gave in on their tough stance regarding the calculation of training compensations and sports sanctions for unilateral contract termination. Thus, in a final summit meeting on 5 March, 2001 the participants reached an agreement on a new transfer system (IP/01/314; FIFA 2001).

With the new transfer regulation of FIFA the soccer associations succeeded to obtain acceptance for the creation of a binding compensation system for apprentices. Under the new regulation the payment of a training compensation is required for every transfer of a player under the age 23 even when the contract of the player has expired (Art. 13, 15 FIFA-TrR). Every club having educated a player should profit from this compensation scheme. The soccer associations also achieved that such compensation payments were not to be individually calculated, but would also include the costs of training players who failed to make it to the professional leagues (Art. 16 FIFA-TrR; Art. 6 Implementation Rules). However, a peak value for training compensation is specified (FIFA 2001).

For buying a player above the age of 23 out of a valid contract a solution continuing the post Bosman system was found. The buying off of players is considered to be a unilateral termination of contract that is bound to the payment of compensation. With that regulation, the free movement of professional players continues to be restricted because their job mobility depends on the willingness of the acquiring club to bear the compensation payment (Oberthür 2001). Furthermore, for transnational player transfers the requirement of an international transfer certificate has been re-introduced (Art. 5 Sect. 3 FIFA-TrR). The Commission also failed with its demand for objectified compensation payments. The transfer regulations contain some criteria for the determination of compensation sums, yet these crite-

6 By means of anti-trust treats the European top clubs successfully pressed in 1998 for a reform of the UEFA Champions League. Before, the market-

ing agency Media Partners International Limited (MPI) had offered the clubs the creation of a closed European super league.

ria remained vague (Art. 22 FIFA-TrR).⁷ In addition, the compensation payment can be specified in the players' contract - leaving further room for exorbitant payments. However, five per cent of the compensation payments have to flow to the training clubs (Art. 10 Implementation Rules).

To limit transfer activities the new transfer regulations allowed for only one transfer of a player within a season (Art. 5 FIFA-TrR). Concerning the highly controversial question of contract stability the new FIFA regulations determine that player contracts should have a duration of at least one and a maximum of five years (Art. 4 Sect. 2 Implementation Rules). Yet, the transfer regulations introduce opportunities for a unilateral contract termination by the players that restrict the effective term of a contract. The argument between the Commission and the soccer representatives about the duration of contracts has been solved by dividing the players into two categories based on their age. The regulations stipulate that contracts with players under the age of 28 can be terminated without cause at the earliest after three years of duration. Contracts with players above the age of 28 can be terminated already after two years (Art. 21 Sect. 1 FIFA-TrR). In this way, the clubs' opportunities to extract transfer revenues have been severely limited in comparison to the post Bosman system. This will probably prevent a further "overheating" of the players' market. In case a player terminates a contract without paying compensation fees he can be banned from playing for four, and under specific circumstances six months. The clubs consider these sports sanctions to be too soft-gloved. Yet, compliance with the new transfer regulations will be enforced primarily by threatening the clubs with severe punishments (Schamberger 2003). As far as evidence of malfeasance is established, a club may face fines, score deductions or even the disqualification from national or international competitions (Art. 23 FIFA-TrR).

Eventually, the clubs had to accept that players are entitled to terminate a contract in case of just sports reasons (Art. 24. Sect.1 FIFA-TrR). The conditions for just sports reasons are fulfilled when a player has been fielded in less than ten per cent of the official matches of his club. The transfer compromise also lay down the creation of an independent fast acting arbitration board that is evenly composed of club and player representatives (IP/01/314).

This compromise was adopted on 5 March, 2001 on a summit meeting between European Commissioners Mario Monti, Anna Diamantopoulou and Viviane Reding as well as FIFA president Sepp Blatter and UEFA president Lennart Johansson. Monti and Blatter exchanged letters in which the Competition Commissioner assured FIFA that he intended to no longer suggest to the Commission a negative decision on the transfer regulations of FIFA. According to the Commission, with these letters the agreement has been formally approved (Weatherill 2003).⁸ On its part FIFA assured the Commission that the achieved compromise would be incorporated into the regulations of FIFA at the meeting of FIFA executive committee in Buenos Aires on 5. July 2001 (FAZ 07.03.01). Regardless of these mutual assertions the transfer compromise was also signed by the presidents of FIFA and UEFA, the Commission Presidents as well as the Swedish Prime Minister as representative of the member states at the European Summit on 24 March, 2001 in Stockholm.

Despite the Commission has been coerced by the member states to back down, the Commission denied the transfer compromise the formal approval of a declaration of exemption. By doing so it preserved to itself the opportunity to supervise the implementation of and the adherence to the agreement (Egger/Stix-Hackl 2002). At the same time the Commission's behaviour increased legal doubts about the legality of the new transfer regulations (Fritz/Düll 2002; Schäfer 2002; Oberthür 2002). Beyond doubt, the new transfer regulations interfere with the freedom of contract of clubs and players and contradict national labour laws concerning the duration of labour contracts (Ravenscroft 2001). For instance, German labour law does not know the construction of unilateral termination as a right to buy-off (Oberthür 2002).

The absence of a formal approval by the Commission of the transfer compromise served for FIFPro as a vehicle to force FIFA to further

concessions. In May 2001, FIFPro initiated legal proceedings at the European Court of First Instance in Luxembourg to disturb the adoption of the transfer regulations by the FIFA executive committee. FIFPro characterised the FIFA regulations as a grossly illegal agreement that satisfied disproportionately the interests of the employers in soccer who intended to continue the profitable trade in players. Therefore, the application of the regulations should be prohibited at least in European Union (FAZ 15.06.01). In reaction to this the Commission informed FIFA that further concessions to FIFPro would be desirable to prevent the risks of judicial dispute. Therefore, FIFA offered FIFPro even representation to players' union not only in the arbitration board but also in the new, yet to be found arbitral court of soccer so that FIFPro would be enabled to exert effective influence on the court decisions. FIFA also agreed that the arbitration board could be replaced by alternative arrangement like collective bargaining agreements. In addition it was agreed that FIFA would evaluate the new transfer regulations two years after their introduction and that in order to revise the transfer regulations FIFA had to consult FIFPro and other parties involved. Eventually, compensation payments for the transnational transfer of young players were reduced (FIFA News 10/01; 11/01). FIFPro then decided to abandon the lawsuit. After the argument was settled, the European Commission closed in June 2002 the proceedings against the transfer regulations and announced that it would no longer engage in arguments between players, clubs and associations (IP/02/824).

6. Collective bargaining agreements as future players' market regulations?

With this, the transfer regulations now include procedural stipulations that seem to support Dabscheck's (2003) prediction that international collective bargaining agreements in soccer may be signed. The prediction is also supported by the fact that the new transfer regulations neither satisfy the professional clubs nor the players' union fully. Some development hints to the need for new regulatory efforts. The new transfer regulations treat professional soccer players as employees *sui generis* eligible only to restricted free movement (Oberthür 2002; Weatherill 2003). On the other hand, in order to avoid salary escalation in the player market the professional clubs had to accept a further liberalisation of the player market without being compensated. The new transfer regulations contain no instruments to avoid salary escalation in the players' market. From the standpoint of the players' unions the new transfer regulations maintain considerable restrictions on free player movement. In contrast to the US experience these concessions were not made in exchange for improved social security for average professional players. Quite contrary, average players are expected to be the losers of the new system because the clubs will reduce starting salaries. Furthermore, reduced opportunities of the clubs to pool sporting risks will probably work against the interests of average players (Feess/Muehlheuser 2003).

In connection with the crisis of TV revenues, the adoption of the new transfer regulations immediately inspired UEFA as well as G-14 to search for opportunities to limit the danger of further hyper investments in playing talent. To prevent hyper investment is much more difficult in European than in American leagues because the European soccer leagues are not closed shops able to monitor their total revenues and to determine salary caps for their members. According to G-14 European top clubs should dedicate only 70 per cent of their turnover to salaries. Due to the missing sanctions and the financial situation of some of the G-14 members it is doubtful whether the top clubs will succeed in this (Economist 07.11.02).

On its side, UEFA plans to implement a European licensing procedure with the beginning of the 2004/05 season. This licensing procedure aims at improving the economic efficiency, the transparency

⁷ Reference is made to the players' salary including bonuses, the duration of the running contract and the amount of transfer payments that the ceding club had possibly paid.

⁸ The letters are available at the following addresses: <http://images.fifa.com/download/BlatterLetter.pdf> and <http://images.fifa.com/download/MontiLetter.pdf>.

and the credibility of the clubs. It is also intended to guarantee financial fair play in European club competition. The last goal in particular aims at preventing hyper investments that endanger economic stability. In the beginning, the UEFA licensing procedure will only apply to clubs that participate in one of the European club competitions. However, UEFA plans to implement the licensing procedure in all first divisions of the national soccer leagues (Galli 2003). It is to be seen whether UEFA will be able to enforce compliance to this procedure in case a European top club does not adhere to the procedure. Furthermore, because its damping effects on hyper investments will primarily result from restrictions on the freedom of the clubs to hire players the licensing procedure may be subjected to scrutiny by EU competition law authorities. This could be seen to further enhance the chances for CBAs in soccer. The incorporation of the UEFA licensing procedure into a CBA could possibly serve as a safeguard against antitrust suits (Bahners 2003).

Yet it seems that the adoption of CBAs in European soccer has been made harder by the political solution of the transfer conflict, at least in the near future. The political interference has prevented the social partners to build up the necessary institutional capacities for a social dialogue. In addition, the transfer regulations are very detailed and seem to leave little scope for collective bargaining. Nonetheless, the Commission has made efforts to intensify a social dialogue in sports and initiated, in cooperation with the European Observatoire of Sport Employment (EOSE), a project on social dialogue in sports. Yet, the results of the EOSE pilot study were disappointing. The study pointed to the institutional weakness of the social partners, especially on the employers' side. The situation in some countries was not evaluated that critically because the professional leagues there act as representatives of the employers. This, however, creates another difficulty for the project of a social dialogue in sport because the Commission as well as the EOSE pursue an integrated approach in order to prevent the gap between professional and amateur sector from widening further (EOSE 2002).

Despite comparatively favourable premises the social dialogue in soccer has only advanced slowly. On 3 April, 2003 FIFPro and the European Commission hosted a conference on social dialogue. The

conference once again made it clear that the question of the representation of the employers' side remains to be solved. Obviously, the soccer associations tried to continue to exert influence on the recruiting policy of the clubs. In the beginning of 2004 UEFA, FIFPro and the by-then hardly known European Professional Football Leagues (EPFL) agreed to acknowledge one another as parties of a tripartite social dialogue in professional soccer. Yet, they failed to set up a concrete agenda for the social dialogue and characterised their efforts as an important "symbolic step". Therefore, the conclusion seems to be justified that by entering into that agreement UEFA primarily aimed at preserving its influence on professional soccer. In contrast to G-14 that likes to view itself as representative of soccer employers, the EPFL is incorporated into the traditional structure of the soccer associations via the standing Professional Football Committee of UEFA (UEFA 27.01.04).

On the other hand doubts can be raised as to whether the new transfer regulations leave enough scope for a social dialogue. According to the clubs and the leagues the liberalisation of the player market has already proceeded so far that further concessions to the players' unions are hardly imaginable. In addition, the new transfer regulations enable the clubs to continue the transfer system - including trade in players. Yet, the abolition of the transfer system has been the main goal of FIFPro since its founding. On the first conference on sectoral dialogue the General Secretary of the French Professional League, Philippe Diallo, made quite clear that from the employers' point of view the social dialogue should take into account the key elements of the transfer agreement since the employers in professional soccer were not interested in a "remake" of the transfer negotiations (FIFPro 11.04.03). Yet, as long as the social dialogue in soccer is still in its infancy, FIFPro will not face the question of strategic adjustments. In contrast to the US player unions that are confronted with the diminishing solidarity of top players, FIFPro is a much more open and heterogeneous coalition of competing interests. Therefore, the international player union will probably only be able to achieve an internal agreement on minimum standards concerning restrictions on player mobility. In case the social dialogue will quicken its pace FIFPro would have to clarify its strategy.

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THE HAGUE — THE NETHERLANDS

The European Union and Sport

Legal and Policy Documents

Editors:

Robert C.R. Siekmann and Janwillem Soek

With a Foreword by

Viviane Reding, EU Commissioner for Education and Culture

The European Union and Sport: Legal and Policy Documents is the first volume in the T.M.C. Asser Institute series of collections of documents on international sports law containing material on the intergovernmental (interstate) element of international sports law. Previous volumes have dealt with the Statutes and Constitutions of universal sports organizations, their Doping as well as their Arbitral and Disciplinary Rules. The legal and policy texts in the present book are arranged in thematical, alphabetical order and are chronologically subordinated per theme. They cover the period since the *Walrave* judgement in 1974 when the European Court of Justice established that sport is subject to Community law to the extent that it constitutes an economic activity. The book in fact gives a detailed insight into what could be called the '*EU Sport Acquis*' for the present and future (candidate) Member States. This *acquis* has been developed over the years in numerous decisions and policy documents by, in particular, the Council, Commission, European Parliament and Court of Justice.

The contents of this book are divided into three parts totalling twenty chapters and covering all themes which the EC/EU has dealt with so far. The *General* part contains general policy documents such as, for example, the European Model of Sport and the so-called Helsinki Report on Sport. *Specific Subjects* concern Boycott, Broadcasting (in particular the Television without Frontiers Directive), Community Aid and Sport Funding (for example, the Eurathlon Programme), Competition (central selling of tv rights re-

garding the UEFA Champions League, the German Bundesliga, the English Premier League, etc., Formula One, World Cup ticketing arrangements, players' agents), Customs, Diplomas (Heylens), Discrimination (Walrave, Dona, Kolpak, and including Women in sport), Doping (Community Support Plan and Pilot Project for Campaigns to Combat Doping in Sport), Education / Youth (European Year of Education through Sport 2004, and documents concerning child protection in sport and trafficking in young footballers), the freedom of establishment to provide services (Deliege) and of movement of workers (Bosman, Lehtonen), the Olympic Games, State Aid, Tax, Tobacco Advertising, Trade Marks (Arsenal/Reed), Vandalism and Violence (football hooliganism) and Miscellanea (Fishing, Horses, Hunting, etc.).

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

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Legal Framework for Collective Labour Agreements in Sport in Germany

by Oliver Klose*

1. Introduction

Germany has a long tradition of trade unions and collective labour agreements. In 1873 the printers' union concluded the first major collective wage agreement in Germany.¹ The world's largest single trade union today - *Vereinte Dienstleistungsgewerkschaft (ver.di)*, numbering some 2.6 million members - is German. But when it comes to collective bargaining in sports, Germany can still be considered a developing country. Both contrary to other legal systems in the world - e.g. the USA - and to other European countries, it has so far failed to develop a tradition of collective labour agreements in sports. This may be partially due to the existence of other means of representing athletes' interests within their clubs and federations.² In addition, organisations with the primary objective of representing athletes as employees and concluding collective labour agreements on their behalf have been lacking. But circumstances have changed and German sport is increasingly commercialised. Eventually, a legal framework for binding collective agreements between athletes and their employers will shift into focus as a consequence of these changed circumstances.

2. Two levels of collective bargaining

Under German labour law, collective labour agreements exist on two different levels:³ as a contract between a works council and the employer (known as the *Betriebsvereinbarung*) or as a contract between a trade union and an employers' organisation or a single employer (called a *Tarifvertrag*).

2.1. Works agreements (*Betriebsvereinbarungen*)

According to the rules of the Works Constitution Act (*Betriebsverfassungsgesetz - BetrVG*), employees may elect works councils in any undertaking employing more than 5 persons. The works council and the employer may negotiate agreements concerning topics that are mostly defined in the *BetrVG*. Interesting examples for possible agreements in sport are agreements on disciplinary sanctions (Section 87(1)(1) *BetrVG*)⁴ or on bonus schemes (Section 87(1)(11) *BetrVG*). The employer must inform and consult the works council before taking action in most fields (e.g. termination of contract, according to Section 102 *BetrVG*).

It is important to note that neither party can force the other party to sign a works agreement. The works council by law represents all employees, and therefore agreements signed by the works council impact every single employment contract. Legally, the works council acts independently from trade unions, although in practice many works councils are influenced by certain unions.⁵ If negotiations between the works council and the employer remain without success, neither party is allowed to take industrial action. Strikes and lockouts are prohibited under the terms of Section 74 *BetrVG* concerning the principles of collaboration. There will either be no agreement, or - in the cases enumerated by law - a panel of arbitrators can be established. Most importantly, works agreements are considered subsidiary to collective bargaining agreements between trade unions and employers or employers' organisations. Where collective bargaining agreements contain provisions concerning certain questions or where such agreements apply to the sector in question, the works council and the employer are no longer allowed to settle such questions by an agreement of their own (Section 77(1) and Section 87(1) 1 *BetrVG*).

For a long time sport did not make any use of the competences provided by the *Betriebsverfassungsgesetz*, even though it was not questioned that the rules concerning works constitution equally applied to athletes, who have to be considered employees of their clubs.⁶ In many sports a different system of representation developed in which,

for example, athletes elected spokesmen or informal players' councils which had to represent their interests with the club's management.⁷ One reason for the apparent dislike of the institution of the works council might have been that - as mentioned above - the council represented all employees, i.e. not only the athletes, but also the administrative staff. Usually, it would also represent the coach, provided he or she did not have powers to the extent that he or she would have to be considered a member of management.⁸ Such mixed interests might make it difficult to adopt a common position.⁹ But with the commercialisation of sport, this situation might change. Just recently, in April 2004, the first works council in professional team sports was elected. The employees of the first division basketball club MBC from Weissenfels, Saxony, elected forward Sebastian Machowski as chairman of their works council. However, it must be added that this occurred in exceptional circumstances, where the club had filed for bankruptcy just prior to the election. Nevertheless, it may be considered as a sign that German athletes have become aware of their legal rights as employees and have begun to use these rights not only individually, but also collectively.

2.2. Collective bargaining agreements (*Tarifverträge*)

An even stronger sign of this is the gradual development of players' organisations into trade unions which, surprisingly, is not accompanied by a similar establishment of sports employers' organisations. According to the case law of the Federal Labour Court, Section 9(3) of the German Constitution (*Grundgesetz - GG*) guarantees to every individual the right to form associations (trade unions and employers' organisations), to participate in the formation of associations, to join existing associations as a member, to choose between a number of associations before joining one, to remain in an association, to leave it again, and not to join it at all. The *Grundgesetz* not only protects the individual's right to join others in forming or becoming a member of an association, but also guarantees the right to form associations to safeguard and improve working and economic conditions. In order to qualify as this kind of association under the Constitution, a number of requirements must be fulfilled.¹⁰ The association has to be voluntary and permanent, i.e. joining together a large number of members in a corporate organisation. The association and its objectives must meet democratic requirements and it must remain independent from the state and from political parties. It also has to oper-

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1 For a short history of the trade unions see *Halbach/Palandt/Schwedes/Wlotzke*, Labour Law in Germany, 5th ed. 1994, p. 301 et seq.

2 See A. Fikentscher, *Mitbestimmung im Sport*, 2002, part 3, p. 175 et seq.

3 *Walker in Walker*, *Mitbestimmung im Sport*, 2001, p. 11.

4 This could include doping sanctions, *Petri*, *Die Dopingsanktion*, 2004, p. 91.

5 For the role of trade unions within the *BetrVG* see *Weiss/Schmidt* in: *International Labour Law - Germany*, Suppl. May 2000, no. 193.

6 For professional football players see: Federal Labour Court, judgment of 24 February 1972 - 5 AZR 414/71, in: *EZA* Section 611 BGB Berufssport no. 1; *Bepler in Bepler*, *Sportler, Arbeit und Statuten* - Herbert Fenn zum 65.

Geburtstag, 2000, p. 43, at 44 et seq.; *Fikentscher*, *Mitbestimmung im Sport*, 2002, p. 122 et seq.

7 For German professional football see *Fikentscher*, *Mitbestimmung im Sport*, 2002, p. 175 et seq.

8 For the position of management, which is defined in Section 5 *BetrVG*, see *Weiss/Schmidt* in *International Labour Law - Germany*, suppl. May 2000, para. 192.

9 Further problems are described by *Fikentscher*, *Mitbestimmung im Sport*, 2002, p. 333 et seq.

10 www.eurofond.eu.int/emire/germany/CAPACITYTOCONCLUDECOLLECTIVEAGREEMENTS-DE.htm; *Halbach/Palandt/Schwedes/Wlotzke*, Labour Law in Germany, 5th ed. 1994, p. 304 et seq.; *Weiss/Schmidt* in *International Labour Law - Germany*, suppl. May 2000, para. 357.

ate independently from its counterpart, whereby unions may only consist of employees and employers' organisations may only consist of employers. In order to be accepted as a party to collective bargaining agreements, the association in question must recognise that collective bargaining law in force applies to it, and must consider it its task to conclude collective agreements for the improvement of its members' economic and social situation. The Federal Labour Court in its case law and labour law scholars in the literature have added that a trade union must have the power to exert pressure and counterpressure on its counterpart in collective bargaining.¹¹ Given that the Collective Bargaining Agreements Act (*Tarifvertragsgesetz* - TVG) considers a single employer powerful enough to be a party to collective bargaining, this necessarily also applies to employers' organisations, which therefore do not have to prove their powerfulness. The requirement that associations must possess the power to exert pressure on their counterpart is based on the assumption that the proper functioning of the autonomous system of collective bargaining would be undermined if powerless associations were able to participate in collective bargaining.¹²

These prerequisites lead to a number of problems for German sports organisations that want to play a part in collective bargaining.¹³ On the employees' side two different models are to be found. On the one hand, there is the *Vereinigung der Vertragsspieler (VdV)*,¹⁴ the German association of professional football players, which is a genuine athletes' association. For many years after its establishment in 1987 it could not be regarded as a trade union. Although it was a permanent organisation with a democratic structure formed to represent the interests of professional football players, it did not accept collective bargaining as a tool to do so. Only in June 2001 the members of the VdV decided to change the association's articles by adding "the conclusion of collective bargaining agreements using all means available to trade unions" to the list of tasks. Since that time, the association can be considered a trade union which is competent to negotiate collective bargaining agreements.¹⁵ It has sufficient power in its particular sector to exert significant pressure on the employers' side. In the year 2002, some 923 of the approximately 1700 registered football players in Germany were members of the VdV.¹⁶ This means that union membership in professional football is much higher than that among the general workforce in Germany, which only comes to about 30%.¹⁷

On the other hand, there is the *Sports-Union*¹⁸ which is a part of the trade union *Vereinigte Dienstleistungsgewerkschaft (ver.di)*. Formed by the merger of a number of trade unions which all represented employees in service-orientated professions, *ver.di* is now Germany's largest single trade union. The *Sports-Union* was established in 2001, but its history goes back further. Originally, the German professional basketball players formed the *Vereinigung der Basketball Vertragsspieler (VBV)* in 1999. From the beginning, this athletes' association has declared its desire for collective bargaining agreements (as laid down in Section 2(2) of its articles). However, in 2001 all the members of the VBV collectively joined the *Sports-Union* in *ver.di*, and the general manager of the VBV became the spokesman for the *Sports-Union*. By that time, the VBV represented 70 professional basketball players and all of the members of the national team.¹⁹ The *Sports-Union* aims to represent athletes and coaches in professional sports in general - except football. Recently, the *Sports-Union* has been striving to build up a strong position in professional ice hockey. In this branch of

sport, players had formed the *Vereinigung der Eishockeyspieler (vde)*. This was regarded as a trade union, as it had declared its preparedness to take industrial action if necessary.²⁰ In its heyday, the *vde* organised up to 600 players, but by the end of the last century the association ceased its activities after a number of changes within the management. Now the *Sports-Union* has stepped up to represent the German ice hockey players. So far only 24 professional players have become members of the *Sports-Union*, but the association hopes to win at least 275 more within the next 18 months. The former president of *vde*, Jörg Hiemer, has publicly announced that he sees good opportunities for the *Sports-Union* in German ice hockey.²¹ Being a part of *ver.di* the overall power of the *Sports-Union* is not in any doubt. In addition, over 55% of professional basketball players are members of the trade union at present, according to the *Sports-Union*.

A major problem for trade unions in sport today seems to be the lack of partners to conclude collective bargaining agreements with, now that a specific employers' organisation does not exist in German sports. The obvious organisations, such as the *Deutscher Sport-Bund (DSB)* or the *Deutscher Fußball-Bund (DFB)* and the *Deutscher Basketball-Bund (DBB)* cannot act as social partners, because they have to represent the athletes and the clubs at the same time. This is contrary to the requirement that forbids one association to act for both employers and employees. Furthermore, there are no regulations in the organisations' articles that provide that they can act as parties to collective bargaining agreements. This is also true for individual league organisations such as the *Ligaverband e.V.* with the *Deutsche Fußball-Liga GmbH (DFL)* in German professional football²² and the *DEL-Betriebsgesellschaft mbH* in German professional ice hockey.²³ Still, this is not to say that collective bargaining is impossible for the trade unions. According to Section 2(1) of the *Tarifvertragsgesetz* every single employer may conclude a collective bargaining agreement with a trade union. This means that every single club which employs athletes may be invited to take part in collective bargaining by the trade union. Evidently, it would be quite impractical if every club within a single league had to sign a separate agreement with the trade union. One of the characteristics - and requirements - of sports is that everybody plays by the same rules. On the other hand, if trade unions would start to force single clubs into collective bargaining agreements by means of industrial action, it would probably only be a question of time until the clubs would get together to form an employers' organisation to act as a counterpart to the trade unions. Very complex legal questions arise when a league uses a licensing system for professional players. This might give the licensing body the status of employer and therefore the capacity to conclude collective bargaining agreements.²⁴

When a collective bargaining agreement has been concluded, its contents are binding in two different ways. Like any contract, it is binding upon the trade union and the employers' organisation or the single employer. In addition, however, its provisions are also binding for the relationship between the athlete and the club, if they are members of the contracting organisations. The scope of application of the collective agreement can be extended to include employees and employers not bound by it if the government declares the agreement generally applicable (Section 5 TVG).

In the standard-setting part of any collective agreement, two types of normative provisions may be distinguished, namely provisions relating to the individual employment relationship in the strict sense (individual normative provisions) on the one hand, and provisions

11 Federal Labour Court judgement of 15 March 1977 in BAGE 29, 72 et seq.; Söllner/Waltermann, Grundriss des Arbeitsrechts, 13th ed. 2003, p. 142.

12 A different approach is taken in the context of the European Social Dialogue. There it is required that an organisation is representative, see Hendricks, International Sports Law Journal 2003, No. 2, p. 18, at 19 et seq. For the problems this poses for sports organisations see Klose in: Vieweg, Spektrum des

Sportrechts, 2003, p. 207, 212/222.

13 Klose/Zimmermann in Bepler, Sportler, Arbeit und Statuten - Herbert Fenn zum 65. Geburtstag, 2000, p. 137, 144 et seq.

14 For further information see www.spielergewerkschaft.de.

15 Pröpper, NZA 2001, p. 1346, 1349.

16 Frankfurter Allgemeine Zeitung of August 23, 2002.

17 Weiss/Schmidt in International Labour Law - Germany, suppl. May 2000, para. 331.

18 For further information see www.sports-union.de.

19 Frankfurter Allgemeine Zeitung of 8 November 2001.

20 Schneider, SpuRt 1996, p. 118, 119; Walker in Walker, Mitbestimmung im Sport, 2001, p. 14 et seq.

21 See www.sports-union.de/news/index.php?ueberschrift=EL SHOCKEY-NEWS15062004.html

22 Branco Martins, European Sports' s First

Collective Labour Agreement, 2002, p. 26.

23 Walker in Walker, Mitbestimmung im Sport, 2001, p. 20.

24 See for the DFB prior to the formation of the DFL: Kania in Fußballspieler als Arbeitnehmer, Heft 32 der Schriftenreihe des Württembergischen Fußballverbandes, 1994, p. 98; Walker in Walker, Mitbestimmung im Sport, 2001, p. 22; opposing: Meyer-Cording, RdA 1982, p. 13.14.

relating to the establishment and regulation of works councils and normative provisions concerning joint institutions set up by the parties to the collective agreement (collective normative provisions) on the other hand.²⁵ In the field of sports it could be particularly important to the partners in the social dialogue to conclude agreements that are better able to respond to the needs of professional sports than existing German labour law. This is especially the case now that a new problem has arisen for sports in which a standard contract is used after the implementation of Directive 93/13/EC into German law. Due to this implementation, Sections 305 and following of the German Civil Code (*Bürgerliches Gesetzbuch* - *BGB*), apply to labour contracts as of 1 January 2002. This means that judicial control of employment contracts is tightened. However, according to Section 310(4) *BGB* provisions in *Tarifverträgen* und *Betriebsvereinbarungen* do not need to fulfil the strict rules of Sections 305 and following of the *BGB* and are thus not subject to judicial control.

In addition, Germany has several provisions under statute law which can only be altered by collective agreement. According to Section 14 of the *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge* - *TzBfG* a fixed-term employment contract may only be concluded validly if its conclusion is justified by objective reasons. Justification is not necessary if the employment contract is entered into for a period of two years at the most. During these two years, the contract may be extended for a maximum of three times. After the two-year period, objective justification is necessary for its renewal. The maximum period of two years and the maximum of three extensions may only be extended further by collective agreement (Section 14(2), third sentence, *TzBfG*). The valid conclusion of fixed-term contracts is important for clubs in order to ensure the payment of transfer fees.²⁶ Voidness of the provisions concerning the term for which the contract has been concluded would result in a contract of indefinite duration which the employee would be able to terminate without specific grounds (Section 16 *TzBfG*) - and without the payment of a redemption fee by his new club! Wider possibilities under collective agreements to apply fixed-term contracts without prior justification would be a safe method to avoid this problem, now that the Federal Labour Court has not yet decided whether the special situation of employment in professional sports constitutes an objective reason under Section 14(1)(4) *TzBfG*.²⁷

It is not permitted to conclude arbitration clauses to deal with the employment relationship. However, Section 101(2) of the *Arbeitsgerichtsgesetz* (*ArbGG*) allows arbitration clauses in collective agreements for certain sectors. Although sports are not specifically mentioned, this provision should also apply to professional sports by

analogy.²⁸ A collective labour agreement could therefore provide for a special sports tribunal to solve disputes between athletes and clubs. In the past, one source of disputes has been the regulation of paid leave for players. The Federal Labour Court has pointed out that the remuneration payable during holidays can only be determined in derogation of the Federal Paid Leave Act (*Bundesurlaubsgesetz* - *BUrlG*) if it is determined by collective agreement (Section 13(1) *BUrlG*).²⁹

There are several specific problems in professional sports that could also be tackled in collective bargaining agreements. One example is doping.³⁰ Another example might be the increase in salaries following the Bosman case in Europe. Clubs may be interested in including salary caps in collective agreements, which is already common practice sport in the US. However, most types of salary caps could not be validly concluded, now that the *Tarifvertragsgesetz* is interpreted to provide that collective bargaining agreements may only set minimum standards, not maximum standards (see Section 4(3) *TVG*).³¹

3. Outlook

Section 9(3) *GG* also guarantees the right to take industrial action. Of course, this also applies for trade unions and employers' organisations in sport. However, in spite of several new problems that may arise in connection with the conclusion of collective agreements in sports, considering the opportunities they bring it seems likely that collective agreements will be introduced in German sports quite soon - without the need for prior strikes and lockouts.

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25 Weiss/Schmidt in International Labour Law - Germany, suppl. May 2000, para. 361/362.

26 Branco Martins, European Sport's First Collective Labour Agreement, 2002, p. 25.

27 This is a problem for contracts with athletes and coaches, see for further details Müller-Glöge in Erfurter Kommentar zum Arbeitsrecht, 4th ed. 2004, Section 14 *TzBfG* no. 63; especially concerning contracts with coaches: Beathalter in Bepler, Sportler, Arbeit und Statuten - Herbert Fenn zum 65. Geburtstag, 2000, p. 27 et seq. for the situation before the entry into force of the *TzBfG*.

28 Klose/Zimmermann in Bepler, Sportler, Arbeit und Statuten - Herbert Fenn zum 65. Geburtstag, 2000, p. 137, 166 et seq.

29 Judgment of 23 April 1996 in AP no. 40 at Section 11 *BUrlG*; for details Klose/Zimmermann in Bepler, Sportler, Arbeit und Statuten - Herbert Fenn zum 65. Geburtstag, 2000, p. 137, at 168 et seq.

30 Perri, Die Dopingsanktion, 2004, p. 87; Klose/Zimmermann in Bepler, Sportler, Arbeit und Statuten - Herbert Fenn zum 65. Geburtstag, 2000, p. 137, 173.

31 Klose/Zimmermann in: Bepler, Sportler, Arbeit und Statuten - Herbert Fenn zum 65. Geburtstag, 2000, p. 137, at 169 et seq.; see also Fikentscher in Vieweg, Spektrum des Sportrechts, 2003, p. 188 et seq. according to whom a wider range of salary caps is possible.



Social Dialogue in the European Professional Football Sector

A European Legal Football Match Heading for Extra Time

by Roberto Branco Martins*

1. Introduction

In the 1999 Helsinki Report on Sport,¹ the EU introduced a new approach to sport: "[...] this new approach involves preserving the traditional values of sport, while at the same time assimilating a changing economic and legal environment".² This changing economic and legal environment has caused sports - in the case of this article: professional sports - to become subject to Community law. The fact that Community law is applicable to sport does not mean that sport

should simply resign itself to this fact and only familiarise itself with the framework in which it must operate, so as to be able to identify

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and recognise the limits imposed on it by "Brussels". On the contrary, the sporting world should also be aware that Community law can be a tool that may bring harmony and efficient regulation and that it may assist in avoiding legal conflict in professional sport sectors.

At least, that is what can be concluded from the exchange of letters between Commissioner Monti and President Blatter from FIFA,³ in which the Commissioners Reding, Diamantopoulou and Monti jointly invite FIFA and UEFA "...to encourage clubs to start or pursue the Social Dialogue with the representative bodies of football players....". As regards the Social Dialogue, the European Commission has offered its assistance to the football world in establishing an "...effective method to manage the impact of the different European policies in a pro-active way. These policies do not only affect the regulatory framework of football but also employment relations and the social situation in the sector..."⁴

What does Social Dialogue mean? What is the basis for EU support and what does the assistance offered by the European Commission in promoting the Social Dialogue in football entail?

What were the results of the efforts that have been made to raise awareness concerning the possible introduction of a Social Dialogue in the European professional football sector? Is the introduction of the Social Dialogue in European professional football desirable, given the outcome of these initiatives?

If so, is it feasible to apply the concept of the Social Dialogue to the football sector and what aspects need to be taken into account by the European Commission in their considerations preceding the decision to hand over major (legislative) powers to the football sector?

This article aims to answer these questions in chronological order. In the conclusion, suggestions are made concerning the EC's planned approach to football.

2. The European Social Dialogue

The European Social Dialogue can be defined as a consultation mechanism for management and labour - the social partners - at European Union level. The objectives of the Social Dialogue can be twofold. On the one hand, it can serve as the basis for European-level unions and employers' organisations to negotiate and conclude agreements. On the other hand, the Social Dialogue can provide a basis for cooperation between the Community institutions and the European social partners.⁵

The Social Dialogue has been laid down in Articles 138 and 139 of the Treaty. There are three different types of Social Dialogue: cross-industry, sector level and enterprise level. This article will focus on the sector-level Social Dialogue.⁶

Negotiations in a specific sector between the social partners at EU level may result in the conclusion of an agreement. The European Commission may submit such an agreement to the Council with the aim of the eventual adoption of a directive which will be binding on every Member State.

Another way of making the EU-level agreement "trickle down" to the national level is to implement the agreement according to national practice.⁷ This last option means that implementation of the agreement is not obligatory.

Article 137 EU lists the topics of negotiation which may be formalised through a Council decision. In the implementation of EU-

level agreements according to national practice, conditions and agreements may be included concerning any topic that the social partners consider relevant for their sector.

The Social Dialogue referred to in the Treaty can only take place after the creation of a Social Dialogue committee.⁸ Although the European Commission has only limited competence when it comes to labour aspects in the European Union,⁹ it does have the power to approve the creation of a Social Dialogue committee upon the joint request of the social partners.¹⁰ The initiation of a Social Dialogue therefore depends on the European Commission's approval, which in turn depends on whether the requesting social partner organisations can be considered *representative*.

The European Commission has defined three criteria that social partner organisations need to fulfil before they can be admitted to collective bargaining.¹¹ The organisations in question must:

- be cross-industry or relate to specific sectors or categories and be organised at European level;
- 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;
- have adequate structures to ensure their effective participation in the consultation process.

Below, I will first describe the basis for initiatives to promote the concept of social dialogue. Then I will indicate what type of activities have so far been carried out in the football sector.

I will apply the three criteria mentioned to the football sector in order to examine whether it is possible to create a Social Dialogue committee for European football.

2.1. Budget Heading B3-4000

The European Commission has established budget heading B3-4000 to cover grants for promoting Social Dialogue at cross-industry and sector level in accordance with Articles 138 and 139 of the EC Treaty. The appropriations are used to finance consultations, meetings, negotiations and other operations designed to achieve these objectives and to promote actions outlined in the European Commission's Communication on *The European Social Dialogue, a force for innovation and change* (COM(2002) 341 final).¹²

Under this budget heading the European Commission has financed three projects dealing with the promotion of the Social Dialogue in the European professional football sector.

Two grants have been issued to the FIFPro,¹³ the global trade union in professional football, which has been implicitly recognised as such by the European Commission.¹⁴

The FIFPro wishes to establish a Social Dialogue committee and to conclude a collective bargaining agreement at EU level.¹⁵ The first grant issued to the FIFPro by the European Commission served this aim.

As a result of this project, an informal tripartite football dialogue was set up between representative bodies in football. I will elaborate on this dialogue further below.¹⁶ The second grant issued to the FIFPro is to be used to identify which organisation would be the right partner in the Social Dialogue.¹⁷

1 Commission of the European Communities, *Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework* (The Helsinki Report on Sport), Com (1999) 644.

2 See also Richard Parrish, *Reconciling conflicting approaches to sport in the EU*, Professional sport in the EU: Regulation and re-regulation, T.M.C. Asser Press, The Hague 2000, editors A. Caiger and S. Gardiner, pp.21-43.

3 <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/01/314&>

format=HTML&aged=0&language=EN&guiLanguage=en

4 From a letter from Commissioner Anna Diamantopoulou to the Chairman of the EFFC-Project on 4 February 2003.

5 E. Franssen, *Legal aspects of the European Social Dialogue*, Intersentia, Antwerp, 2002, p. 3.

6 For a detailed description of the various types of Social Dialogue see footnote 5 and also Roger Blanpain, *Europees Arbeidsrecht*, Peeters, Leuven 1994.

7 Article 139(2) EC Treaty.

8 According to the report *Industrial relations in Europe 2002* of the European Commission, Directorate General for

Employment and Social Affairs, 27 sectoral Social Dialogue committees have so far been established.

9 Peterson, Shackleton (ed.), *The institutions of the European Union*, Oxford, 2001.

10 See footnote 5.

11 COM (93)600 final of 14 December 1993; COM (98) of 20 May 1998.

12 http://forum.europa.eu.int/irc/Download/kle_ANJSmuG7c43THC5UKd2wPb2Df3e7fco_SwGogivpBUKcGmPz41erYqSpi_SRurNQul2/04.03.03.01%20EN%20ORIG.pdf

13 Fédération Internationale des Footballeurs Professionnels, further infor-

mation at www.fifpro.org.

14 Inter alia in the letter mentioned in footnote 3 and through FIFPro's membership of ETUC, the European umbrella trade union, which is recognised by the Commission as a social partner within the meaning of the EU Treaty. ETUC has been a party to the negotiation of various EU directives based on Articles 138 and 139 EC.

15 <http://www.fifpro.org/index.php?mod=one&id=10529>

16 <http://www.fifpro.org/index.php?mod=one&id=12454>

On the employers' side one initiative was launched. In 2002 the Dutch employers' organisation in professional football, the FBO,¹⁸ established the EFFC¹⁹ in order to be able to form an objective perspective in carrying out the project: "*Promoting the Social Dialogue in the European Professional football sector*".²⁰

The EFFC can be characterised as an academic research platform that was set up to promote the concept of Social Dialogue among employers in professional football. The EFFC carried out this project with European Commission support. It consisted of organising workshops and round table sessions for the "football world at large" in the 15 "old" Member States²¹ of the EU.²²

The information received during these events will be used in this article to answer the question of whether the Social Dialogue should also be introduced in football. Secondly, it will be examined whether introducing the Social Dialogue in football is actually feasible.

For this reason, the analysis below takes a dual approach. It will provide a broad outline of the practice in football in addition to a more legal analysis of various structures in sport and/or football.

3. Outcome of the project "Promoting the Social Dialogue in the EU Professional Football Sector"

In order to be able to answer the question of whether it is desirable to introduce the Social Dialogue in the professional football sector, I will first describe the issues which emerged during the abovementioned events as current topics for discussion in European football and which could influence the desire to establish a Social Dialogue. After a brief summary of the issues involved, I will examine whether these could form part of the negotiations referred to in Articles 137 and 138 EC, in other words, whether it is possible to conclude agreements on these points.

The issues which are being discussed among the "old 15" may be divided into different categories. For brevity's sake, I will use these categories for more efficient description.

3.1. Issues concerning contracts between players and clubs

The prevailing idea in the EU is that clubs are employers and players are employees, which means that both are subject to employment law and that employment law applies when players' contracts are at stake. However, a European-wide definition of professional sports is still lacking, which leaves room for discussion concerning the legal status of players or clubs and the role of employment law.

All the countries involved use a standard players' contract which consists of general terms and conditions and does not go into too much detail. The countries have in common that they use a fixed term in this standard contract as the basis for the relationship between player and club.

In nine out of the fifteen countries²³ some type of collective bar-

gaining agreement concerning the contract of the player is negotiated between the collective of clubs and the players' unions.

Issues that are at stake here at the moment of writing included: the use of unilateral clauses in the contracts,²⁴ methods of payment of the players' remuneration,²⁵ social welfare and social security payments, the participation of non-EU nationals in national competitions,²⁶ the issuing of work permits to workers from the new EU Member States²⁷ and participation in national team competitions of players under contract with club teams.²⁸

No common EU policy exists with respect to these issues, which leads to uncertainty concerning the consequences of the international movement of players.

3.2. Issues concerning the legal framework in which European football operates

Often practitioners in European football do not have a clear idea concerning the law or regulations that apply to a specific case.

At the level of the individual Member States, however, the legal framework is mostly clear, either due to the fact that professional sport is extensively legislated or because of the complete opposite, in which case professional sport enjoys relative freedom to organise itself.

The experience is that national football organisations organise the sector in their own national context and that difficulties arise when other regulations need to be applied. These other regulations are based on international association regulations and EU legislation and case law.

Association regulations are drafted by international bodies such as FIFA and are applicable to every club and player. The regulations which are most frequently applied from the perspective of club and player are the regulations on the status and transfer of players.²⁹

The basis for EU directives and regulations is the EC Treaty. With a lack of specific sports legislation in the Treaty, the EU has acted in the field of sport whenever sport affected a matter that did fall under EU competence. The influence of the EU on sport is therefore mostly based on sport as an economic activity (i.e. professional sport). Although the EU promotes the idea of a European Sport Model, the framework for sport can still be characterised as fragmented.

EU law must be complied with, as it ranks highest in the legal hierarchy. It has priority over national law, which in turn has priority over association rules and regulations. The fact that EU law is applicable to all economic activity,³⁰ the fact that clubs are undertakings³¹ and the fact that the movement of footballers falls within the free movement of workers³² all make that EU law must be respected over national law and association law, which both claim application in the football sector. This legal hierarchy leads to legal uncertainty and in some cases even to legal conflict.³³

17 According to a conversation with FIFPro Secretary General Mr Van Seggelen.

18 Federatie van Betaald voetbal Organisaties. The FBO consists of the clubs from the two divisions in professional football, 36 clubs in all. For further information see www.fbo.nl.

19 European Federation of professional Football Clubs. For further information concerning the reasons for establishing this organisation and for information concerning the first introduction of the Social Dialogue in professional football see R.C. Branco Martins, *European Sport's first collective labour agreement*, FBO, 2002.

20 For further information on the project see Asser International Sports Law Journal, *Promoting the Social Dialogue in European Professional Football*, T.M.C. Asser Press, The Hague, 2003/3, p.39-41.

21 Where this article refers to the EU, this should be understood to mean the Member States before the enlargement of

1 May 2004, unless it is stated otherwise.

22 Under the EFFC project, different types of events were organised with varying numbers of participants. Amongst the participants were organisations such as football associations, football clubs, players' unions, league organisations, lawyers, tax specialists, government representatives and professionals working within the field of sport. Details concerning the organisational aspects of and participants in the project have been included in a report for the European Commission's Directorate General for Employment and Social Affairs. More detailed information concerning the events can be obtained through the Asser International Sports Law Centre (www.sportslaw.nl).

23 Belgium, Denmark, France, Greece, Italy, the Netherlands, Portugal, Spain and Sweden.

24 For example, KNVB Arbitragecommissie, *Trabelsi v. Ajax*, 4 June 2004 and Article 90(5) of the Greek sports law, Law

2725/1999, in relation with D. Panagiotopoulos, *Field of application and effects of the European Community Law on sports activities*, in Proceedings of the 5th IASL Congress, Nafplio, 10-12 July 1997, Hellin p. 67.

25 Many different methods exist in the EU Member States. For example, in Spain and Portugal, players can receive part of their salary as payment for the use of their image rights. When this is the case, the image rights are made part of a special licensing companies, which is known as the phenomenon of the salary split. In France, a discussion is currently taking place concerning a possible salary split whereby a certain percentage would not be subject to social security provisions as the player is also part of the spectacle and is indirectly paid from the income earned from the sale of broadcasting rights.

26 Mainly as a result of case C-438/00, *Deutscher Handballbund v. Maros Kolpak*, ECJ 8 May 2003.

27 For further information see R. Branco Martins, *The Kolpak Case: Bosman times 10? Football Fears the Arrival of Bosman, Bosmanovic and Osman*, in International Sports Law Journal, 2004 1-2.

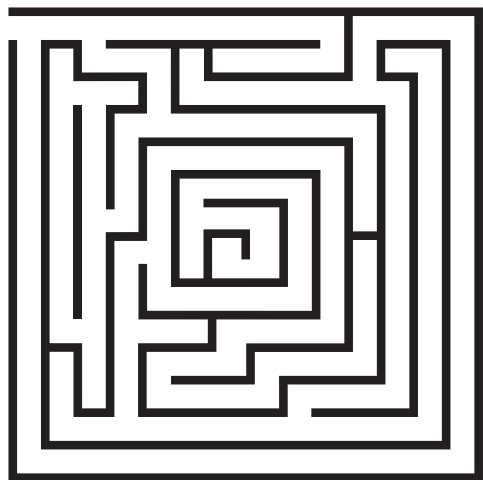
28 This issue has especially been raised by the G-14. An interesting article in this respect can be found at <http://emagazine.credit-suisse.com/article/index.cfm?fuseaction=OpenArticle&aid=66524&lang=en>.

29 To be found at <http://www.fifa.com/en/regulations/regulationlegal/0,1577,2,00.html>.

30 Cases 56&58/64, *Establissemments Consten SA & Grundig-Verkaufs-GmbH v. Commission*, (1966) E.C.R. 299.

31 C-41/90, *Höfner and Elser v. Macroton GmbH*, 1991, ECR-I-1997, 1993 4 CMLR 306.

32 C-415/93 *ASBL Union Royale Belge des Societes de Football Association and Others v Jean Marc Bosman*, (1996), 1 CMLR 645.



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3.3. Issues concerning the representation of football partners

In the course of the project it became increasingly clear that the representation of the employers, i.e. the clubs, is fragmented in the EU.

There is a lack of transparency when it comes to representative organisations. In some cases the clubs are represented by leagues, in other cases the clubs have formed their own organisations at the national level. The type of organisation which represents the collective also depends on the type of issue at stake. I will elaborate on this further below.

On the international level there is also a lack of clarity when it comes to the role of an organisation such as the G-14. The objectives of the G-14 will also be described further below.

There is a certain amount of clarity deriving from the Nice Declaration³⁴ concerning the role of associations in the EU, which therefore also applies to UEFA. Many clubs in Europe apparently assume that UEFA is in charge of more aspects than it actually is and this seems to lead to a lack of initiative among individual clubs or collective bodies of clubs to organise and group themselves. In addition, whenever there is some development towards the possible

autonomy of clubs, UEFA seems quick to put a stop to it.³⁵

The situation is much clearer on the players' side. The majority of players are associated in players' unions which operate in the territory of the individual Member States. The national players' unions are organised in FIFPro.³⁶

3.4. Other issues

Some issues do not fall into the categories mentioned above. I mention them here because in many cases they were topics of discussion during the events organised under the project.

Of the remaining issues some mainly concern competition law, such as state aid³⁷ and the collective selling of TV-rights and other media rights,³⁸ while others concern taxation, licensing systems³⁹ and the format of competitions.⁴⁰

4. Desirability of a Social Dialogue in the European professional football sector

Based on the outcome of the project "Promoting the Social Dialogue in the European professional football sector", it can be substantiated that a European Union Social Dialogue can serve as a framework for discussion and agreements. In addition, a Social Dialogue could create clarity in identifying the legal framework that is applicable to the football sector.

The issues that have been mentioned under 2.1 may be characterised as issues falling within the scope of Article 137(1) or (3) EC:

As regards Article 137(1) EC these issues are:

- Improving the working environment to protect employee health and safety;
- Working conditions;
- Information and consultation of employees;
- Integration of those excluded from the labour market;
- Equality between men and women with regard to labour market opportunities and treatment at work.

As regards Article 137(3) the relevant issues are:

- Social security and social protection of employees;
- Protection of employees upon termination of the employment contract;
- Representation and collective defence of the interests of employees and employers, including employee participation;
- Employment conditions for third-country nationals who legally reside in Community territory;
- Financial contributions for promoting employment and creating jobs.

The lack of legal certainty referred to in 2.2 could be obviated by the conclusion of an agreement at EU level. Legal certainty could be guaranteed if the agreement was based on the EU Treaty and concluded "under the benevolent gaze" of the European Commission⁴¹ and would derive from the fact that a binding EU agreement would have priority over national and association law, thus making it impossible for legal conflict to arise any longer.

Taking these matters into account, it would seem highly desirable to conclude a basic EU collective bargaining agreement in football which would include provisions on the following points:

- The basic contract would be a fixed-term employment contract⁴² including a minimum and maximum duration;
- The duration and nature of the work, including a definition of "professional football player";
- Minimum harmonisation of the conditions of employment of third-country nationals, including a code of conduct for employment and recruitment of third-country players;
- A social security scheme for players, for example, including a "bridging pension";⁴³
- Post-career education for players;
- Contract stability, including the final introduction of a system which is binding upon all parties in football;⁴⁴
- Creating and formalising a code of conduct for the preliminary breach and termination of contracts, ensuring full applicability of the outcome of the Bosman case.

The agreement could be submitted to the European Council by the European Commission upon the joint request of the social partners and could be made to apply *erga omnes* if the European Council would give it the status of law by turning it into a directive. This is no doubt more complicated than it seems, but I am convinced that it is still less complicated than the efforts undertaken by the umbrella sporting associations to create special sports regulations for the EU.⁴⁵

A specific agreement for professional football contracts had, in preparation of the conferral of directive status, best be drafted along the lines of a directive, containing general aspects, background and reasons in a preamble.

Just like any other directive, the directive in question would ensure minimum harmonisation and Member States would be allowed to introduce more far-reaching rules in national agreements.⁴⁶

Issues that the social partners would wish to discuss and negotiate,

33 An overview of possible legal conflicts can be found in among others Roger Blanpain, *Het statuut van de sportbeoefenaar, naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, Larcier, 2002, p.70-74.

34 Nice Declaration.

35 Examples are the fact that an organisation such as the G-14 is not recognised by UEFA

<http://www.g14.com/G14pointofview/detailnews.asp?newsid=5158>, and that club talks concerning the creation of a separate "Atlantic League" have broken off.

36 The representativeness of FIFPro has been made clear in the report *Representation and Members in 2003 (analysis of the FIFPro representation for the conference on Social Dialogue in*

Football) April 2003.

37 The developments concerning Salva Calcio were taking place at the time the project was being carried out, see <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/03/1529&format=HTML&aged=0&language=EN&guiLanguage=en> and in the Netherlands see the KPMG report *De gemeente als twaalfde man*, to be found at http://www.kpmg.nl/Docs/Bureau_Economische_Argumentatie/eindrapport%20BZK120303%20def.pdf.

38 There have been cases involving UEFA, Bundesliga, the Premier League and ENV. All resulted in some kind of arrangement from which certain rules can be derived, but there is still no complete clarity. More info at

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/01/1043&format=HTML&aged=0&language=EN&guiLanguage=en>.

39 A licensing system now applies to clubs playing in the UEFA competitions. <http://www.uefa.com/uefa/MediaServices/Regulations/index.page=1.htm>.

40 The format of the Champions League has been discussed many times and in Scandinavia a special Royal League was established.

41 By this I mean that the EC has a role as facilitator of the Social Dialogue and as such should be present during the negotiations.

42 I mention the employment contract as a basis for three reasons mainly: it is the most common type of contract between

players and clubs in the EU, it provides a basis for sound social security/insurance/welfare schemes and a basic contract will permit the use of mixed-type contracts in individual Member States, such as the "salary split" principle in Spain.

43 Dutch players participate in a special pension fund, see www.cfk.nl.

44 Contrary to the provisions in the FIFA transfer system which lead to legal uncertainty, given that they are based on association law over which national law has priority.

45 <http://www.uefa.com/uefa/News/Kind=128/newsId=69575.html>.

46 E. Bomberg and A. Stubbs, *The European Union: How does it work?*, Oxford University Press, Oxford, 2003.

but which do not fall within the scope of Article 137, could lead to agreements which could be implemented in accordance with national practice.

The “other issues” mentioned above in 2.4 cannot be regulated under a European agreement deriving from Social Dialogue. Exceptions can be made for agreements that deal with competition law, but are based on collective bargaining, but only if they pursue a social goal, such as the establishment of a pension fund.⁴⁷

As regards these issues, the Social Dialogue Committee could issue joint statements and opinions creating a strong lobbying tool at EU level.

The outcome of the project concerning the promotion of the Social Dialogue project points to the fact that the introduction of the Social Dialogue in the professional football sector is desirable. The question that remains is whether it is also possible to introduce the Social Dialogue in football, in other words, would this be a feasible undertaking? The feasibility depends on whether the football world can fulfil the criteria set out by the European Commission in its definition of representative social partner organisations.

This is in fact the most important aspect of the matter, as without the existence of two representative organisations the Social Dialogue cannot take place at all and legal certainty in football at EU level will remain academic.

On the players’ side the situation is clear: FIFPro is the acknowledged trade union.

For the employers’ side, however, an analysis must first be made of the existing organisations which represent the collective clubs, using the abovementioned approach of assessing the fulfilment of the requirements set out by the European Commission, before any conclusions can be drawn.

5. The question of representativeness in European football from the employers’ perspective

There are several organisations operating in Europe who act for a collective of clubs. I will first identify these organisations and then examine whether they could act as a social partner organisation based on the criteria formulated by the European Commission.

The relevant organisations are FIFA, UEFA, G-14, European Club Forum and European Union of Premier Professional Football Leagues (EPFL). I will only describe these organisations according to the requirements defined by the European Commission.

Applicant organisations must fulfil the following requirements.

5.1. Relate to specific sectors or categories and be organised at European level

FIFA is a worldwide governing body for football, while UEFA is the governing body in Europe. This means that FIFA does not meet the requirement of being organised at European level. The remaining organisations all relate to the sector of football and are organised at European level.

5.2. 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

UEFA is an association of national football associations.⁴⁸ An association at the national level does bring together a collective of clubs, but has no competence to represent the clubs in their capacity as employers. The role of an association lies in the promotion of football in the broad sense of the word; it is not connected to professional football

only but to all layers of football. An association is not competent to negotiate agreements for only the employers because the players are also members of these associations through the membership of their clubs.

Moreover, in the pyramidal model of European sport, UEFA ranks above players and clubs. In the framework of EU sports, the role of the associations will also be to organise and promote their particular sport, particularly with respect to the applicable sporting rules and the selection of national teams, in a way which they consider best reflects their objectives.⁴⁹

The European Club Forum⁵⁰ is a collective of 102 clubs, brought together under the UEFA structures. More specifically, it can be characterised as an expert panel or working group within the meaning of Article 38 of the UEFA statutes. The main reason that the European Club Forum cannot represent clubs as a social partner organisation is because it consists of individual clubs instead of organisations representing a group of clubs/employers.

The same is true for the G-14 European Economic Interest Grouping. Although the G-14 has dealt with certain aspects in the past in such a way that it could be interpreted as protecting the rights of their member clubs as employers, and although the objectives set out in their statutes may be characterised as the objectives of an employers’ organisation,⁵¹ the G-14 only represents 18 individual clubs and does not consist of organisations which are an integral part of Member States’ collective bargaining structures.

This leaves only the EPFL.

5.3. The European Union of Premier Professional Football Leagues (EPFL)

The EPFL brings together fifteen league organisations in Europe.⁵² There is no general European definition of a league organisation.

There is, however, a “football” definition of a league, which can be found in the UEFA Statutes: *a league is a combination of clubs within the territory of a Member Association and which is subordinate to and under the authority of that Member Association*. The level of authority of the association which runs the league differs from country to country. The league can be a direct member of the association or it can be incorporated into the association structures in some other way.

The main objectives of the EPFL are fostering cooperation, friendly relations and unity between Member Leagues, working with UEFA for the good of professional association football in Europe, promoting the game of professional association football in every way it deems fit and safeguarding the overall interests of Member Leagues, facilitating the collection and exchange of information between Member Leagues, promoting the interests of Member Leagues, fostering friendly relations between the Group and other European professional football leagues not members of the Group and between the Group and the Players’ Unions operating within the territory of Member Leagues, and establishing a unified system with respect to the movement of players between Member Leagues.⁵³

Six of the leagues in the organisation are a direct party to a national collective bargaining agreement concluded with the players’ union.⁵⁴ At first glance, the EPFL therefore seems to fulfil the criteria of the European Commission’s definition. However, a further analysis of the member organisations of the EPFL is needed to find out whether this umbrella organisation can truly act as a social partner organisation.

In the European Union, several patterns have emerged with respect to the leagues which are members of the EPFL and their operational context.

47 Brentjens Case, C-115/97, C117/97.

48 According to Article 5 of the Statutes of UEFA, <http://www.uefa.com/news-files/19081.pdf>

49 Nice Declaration.

50 Further information at <http://www.uefa.com/uefa/FootballFamily/Committees/Panels/index.newsId=61315.html>.

51 <http://www.g14.com/Multimedia/Download/D2.pdf>.

52 Österreichische Fußball Bundesliga (Austria); Ligue Professionnelle de Football (France); Divisionsforeningen (Denmark); Ligue de Football Professionnel (Belgium); Deutsche Fußball Liga (Germany); Hellenic

Football League (Greece); The F.A. Premier League (England); Lega Nazionale Professionisti (Italy); Eredivisie NV (Netherlands); Liga Portuguesa de Futebol Profissional (Portugal); Scottish Premier League (Scotland); Liga Nacional de Fútbol Profesional (Spain); Foreningen Svensk Elitfotboll (Sweden); Swiss Football

League (observer Switzerland); Veikkausliiga (Finland).

53 According to Article 2 of the EPFL Statutes.

54 Portugal, Spain, Belgium, Italy, Denmark and Greece.

For the purpose of providing a broad outline, I will distinguish between Member States with an interventionist system to regulate sports and Member States with a non-interventionist system to regulate sports.⁵⁵

This distinction is useful, as in most cases the basis for the differences between the leagues and their powers and objectives derives from the jurisdictional framework in which they operate.

The notion of interventionist system is used to refer to countries that have created a basis for the regulation of their sport sector through the introduction of one or more sport laws. The sport-governing bodies are autonomous in these countries, but their autonomy is based on these laws.

There are several degrees of interventionist systems. I will broadly outline the underlying reasons for these differences which are based on the level of jurisdiction, more specifically, the amount of "layers" in the legislation.

A non-interventionist system is characterised by a high degree of self-regulation by sports NGOs. In football, these are the associations, who are responsible for the overall organisation of the game of football. It is further characterised by a lack of legislation in the field of sport. In non-interventionist systems the position of the leagues may differ, as will be explained below.

5.3.1. Leagues in non-interventionist legal systems

Within non-interventionist systems, there are different types of leagues of which I will only describe the main characteristics here.

First of all, there are many similarities between the leagues in the Netherlands and in Finland.

The main reason for the existence of these leagues is to maximise the league's income. This objective is in fact the main objective of the league in the Netherlands (the Eredivisie NV) and of that in Finland (Veikkausliiga).

These two EPFL member leagues have the most limited powers. They assist in the organisation of the competition and conclude commercial contracts for the clubs. In addition, as is the case for all other leagues, their articles of association grant them the necessary powers to keep the organisation in business.⁵⁶

Funds are mainly acquired through the conclusion of sponsoring contracts and broadcasting contracts.

To the second type of league that can be included under this heading belong the leagues of Scotland and England. In fact, from a European Union perspective one could group these leagues together, as Scotland is not an independent European Union Member State.

In addition to the powers mentioned above, these leagues also play a role in organising the fixtures and registering the contracts of the players. The rules and regulations of the league include disciplinary rules, transfer regulations, various codes of conduct, medical arrangements, etc. The rules and regulations also contain various standard forms, such as a standard players' contract complementing the provisions of English employment law.⁵⁷

The FA Premier League may therefore be characterised as a limited company with the 20 premier league clubs as its shareholders and with the main objective of providing complete regulation of the competition in which its shareholders operate. Part of the business of the shareholders are the players, and these players also fall under the "jurisdiction" of the league.

The leagues of England, Scotland, Finland and the Netherlands cannot be regarded as social partner organisations, as they are not party to collective bargaining agreements and have not laid down the representation of clubs as employers as an objective in their articles of association. They therefore fail to fulfil the second requirement under the definition of the European Commission.

The Austrian league also has the authority to organise the competition and also pursues the maximisation of revenues for the collective clubs through the conclusion of commercial contracts. Also worth mentioning are the league's disciplinary powers.⁵⁸ The Austrian league shares a unique power with the German league: both these organisations have a firm say in the mandatory licensing of clubs.⁵⁹ This aspect will be discussed further when examining Germany.

The members of the Austrian league are the clubs operating in the two highest divisions. The articles of association of the Austrian league mention that the league is authorised to play a role in the conclusion of employment contracts on behalf of their members, including the negotiation of collective bargaining agreements.⁶⁰

This is interesting, because Austria does not have a collective bargaining agreement based on employment law in professional football,⁶¹ despite the willingness of the Austrian players' union to conclude such an agreement.⁶² It was moreover commonly accepted that the relationship between a professional player and his club was based on employment law.⁶³ The use of the past tense is intentional, because the Austrian government has since passed a Professional Athletes Act ('Berufssportlergesetz'), which will have far-reaching consequences for sport. As a result of this law, athletes - including football players - will cease to be employees of a club and become sole traders instead.⁶⁴ In that case, a Social Dialogue at EU level can have no effect whatsoever, as industrial relations cease to be part of the equation when players no longer qualify as employees. In any case, the definition of the European Commission cannot be fulfilled in Austria, as there is no history of collective bargaining in football there.

The German member league of the EPFL is the Bundesliga. The Bundesliga is divided into two parts: The Deutsche Fußball GmbH and the Ligaverband. The first organisation was created purely to handle commercial matters⁶⁵ and in this respect is comparable to the Dutch and Finnish leagues. The Ligaverband has a more regulatory function. The overall competences of the Ligaverband are comparable to those of the leagues mentioned above.

The unique aspect which the German league shares with the Austrian league is that both have the authority to grant licenses.⁶⁶ Without a license, the clubs are unable to carry out economic activities in the market. This means that the League in fact regulates and/or creates the market for the clubs. The Ligaverband has far-reaching powers and operates as the regulatory body for the competition. Due to the mandatory membership of the clubs, the condition of membership for the carrying out of the economic activity of football and the fact that the Ligaverband grants the licenses, the Ligaverband could be characterised as an "association within an association". It is not entirely clear whether the Ligaverband could act as a social partner organisation at the national German level, as Germany does not have a collective bargaining agreement for professional football. The question of whether the DFL could act as a social partner has been raised several times,^{67 68} but has never been answered satisfactorily.

Especially considering the lack of a collective bargaining agreement

55 Parrish, R. (2003), The Birth of European Union Sports Law, Entertainment Law, Volume 2, Summer 2003, No.2, p.29. I agree with Parrish that this definition cannot be applied unimpaired, as nowhere in Europe is there a complete laissez-faire structure, nor a completely State-regulated system in sport. Also see André-Noël Chaker, Study on national sports legislation in Europe, Council of Europe Publishing, Strasbourg, 1999.
56 Statuten Naamloze Vennootschap

Eredivisie NV as far as the Netherlands is concerned. Information pertaining to Finland was received at a workshop meeting in Helsinki, Finland on 18 September 2003.
57 Employment Rights Act 1996.
58 <http://www.bundesliga.at/blinfo/index.php?&sub1=4&sub2=4.3&nsng=1>.
59 <http://www.bundesliga.at/blinfo/index.php?&sub1=4&sub2=4.7>.
60 Article 1 (4) Satzungen der Österreichischen Fussball-Bundesliga.
61 Interesting to mention is the fact that

there exists a Mustervertrag (standard contract) in football, which was unilaterally drafted by the Bundesliga; Thomas Hollerer, Der Berufsfussballer im Arbeitsrecht, Dissertationen der Universität Wien, Wien 2003, p.93-174.
62 This is one of the goals mentioned on the Austrian players' union website <http://www.vdf.at/Main.html?/>.
63 Thomas Hollerer, Der Berufsfussballer im Arbeitsrecht, Dissertationen der Universität Wien, Wien 2003.
64 [http://www.fifpro.org/index.php?mod=](http://www.fifpro.org/index.php?mod=one&id=12342)

[one&id=12342](http://www.fifpro.org/index.php?mod=one&id=12342).
65 Satzung DFL Deutsche Fußball Liga GmbH, Article 2.
66 In the Netherlands there is also a licensing system for clubs, but there the association is the competent organisation to administer and manage matters concerning the issuing of licences.
67 Dr. Martin Pröpper, Die Vereinigung der Vertragsspieler als Gewerkschaft - Ist der Schritt zum Tarifvertragsrecht im deutschen Profifußball vollzogen?, Berlin, in NZA 12/2001, p.1346 -1351.

and of express powers conferred by the articles of association to represent clubs as employers, the Ligaverband does not fall under the definition of the European Commission.

Sweden also has a non-interventionist system. The clubs from the highest leagues have united in the Foreningen Svensk Elitfotboll (SEF). The membership of this organisation is non-mandatory and is open to clubs from the two highest divisions in Swedish professional football (30 clubs in all).

The SEF is a member of the Swedish football association, but according to its articles also represents the clubs in the promotion of the interests of both the players and the football association.⁶⁹ The articles of association of the SEF specifically mention this task. This means that the SEF can be regarded as an employers' organisation, especially considering the fact that the SEF is the authority to deal directly with the players' union in the negotiating process for the collective bargaining agreement.

An additional factor confirming this is that the SEF is also a member of the Arbetsgivaralliansen.⁷⁰ This is the umbrella employers' alliance for employers in the sectors of sport, culture, religion and education. The sports division of the Arbetsgivaralliansen constitutes the committees which facilitate and conduct negotiations with the players' union.

However, the extent of the relationship between the SEF and the Swedish football association must also be taken into account, as it may create uncertainty as to who is competent to take part in negotiations at EU level.

The Danish system is similar to the Swedish system, but the difference is that the Danish league, the Divisionsforeningen, has more powers than the SEF.

The Divisionsforeningen represents 48 clubs from 3 leagues and is a full member of the Danish Football Association (DBU).⁷¹ The Divisionsforeningen represents the clubs in the conclusion of sponsoring contracts, broadcasting contracts and collective bargaining agreements. For this latter task, the Divisionsforeningen appoints a five-member committee to conduct negotiations with the players' union.⁷² In addition, the Divisionsforeningen has disciplinary powers.

The relationship between the Divisionsforeningen and the DBU is as follows. The Divisionsforeningen is a member of the DBU. It cooperates with the DBU in the organisation of the competitions and in the carrying out of certain disciplinary tasks.⁷³ It also represents the clubs in grievances directed against the DBU⁷⁴ and is itself represented in various committees and on the board of the DBU.⁷⁵

The same caveat therefore applies to the Divisionsforeningen as to the Swedish SEF. The extent of the relationship of the Divisionsforeningen with the DBU must be taken into account as it may create uncertainty as to who is competent to take part in EU-level negotiations.

It is worth noting that the Divisionsforeningen is currently involved in a dispute with the Danish players' union over the priority of the collective bargaining agreement over FIFA regulations. The Divisionsforeningen wants to set the agreement aside and directly apply FIFA regulations.⁷⁶

The last country with a non-interventionist system is Belgium. Belgium could more correctly be considered to have a semi-non-interventionist system, as it has no specific sports law to create a basis for the regulation of relations in the sports sector, but it does have laws regulating both professional⁷⁷ and amateur⁷⁸ athletes' contracts.

The Belgian Ligue Professionnelle de Football (LPF), the Belgian member of the EPFL, is the only representative of the highest division professional football clubs in Belgium (18 clubs in all) which is recognised by the Royal Belgian Football federation (KBVB). It is therefore an exclusive organisation. Membership of this organisation is voluntary, although a club that does not become or ceases to be a member can no longer participate in the competitions which are organised by the LPF.⁷⁹

This can be said to amount to indirect mandatory membership, as clubs will not readily forego membership if it means that they will not be allowed to carry out their economic activity, namely participating in professional football, and that they are unable to establish any other organisation to represent the collective of clubs, due to the fact that this organisation will not be recognised.

The LPF represents the clubs in matters that benefit the collective economically, such as the conclusion of commercial contracts. This includes contracts concerning broadcasting and marketing rights. In addition, the LPF has a say in the objectives laid down in the KBVB's articles of association and is a co-organiser of the competition. The LPF also has a specific role in the conclusion of the collective bargaining agreement in Belgian football. The Belgian process of collective bargaining is unique in the EU.

Belgium has a committee that has as its specific goal the negotiation and conclusion of collective bargaining agreements. This committee is called the Nationaal Paritair Comité (NPC). There is an NPC for every sector, including sport. The representatives on the NPC for sport on the employers' side are the LFP, the Nationale Voetballiga,⁸⁰ the Royal Cycling Union, the Royal Basketball Union and the Royal Volleyball Union. Labour is represented by the national trade unions of which the AVC has the football players' union as a member.

5.3.2. Leagues in interventionist systems

An interventionist system can be described as a jurisdiction in which the position and regulation of sport is based on an Act of Parliament. This is the case in France, Greece, Italy, Spain and Portugal, where the EPFL member leagues base their authority directly on such Acts.

The role of these leagues is more easily described compared to that of the other leagues, as their objectives and powers are largely comparable.

Membership of the leagues in these countries is mandatory. The members are under the financial and administrative control of the leagues, which also ensure that the clubs are based on the prescribed legal basis. The leagues further have a say in the organisation of the game, register the players' contracts and have a cooperation agreement with the federation whose rules they must comply with.

These leagues can be characterised as special departments within the sport structure of a country. The leagues are the bodies to deal with the all-round regulation of professional football, and in some cases they share these powers with the football association.

The structure of the special sport laws in these countries is comparable. The laws all include a provision defining the role of the federations as the overall and autonomous organisers of their specific sport. They also all provide that every federation regulating a sport is under the obligation to establish a league to regulate the professional side of the sport.

Some of the Member States in question have also enacted special

68 H.Rüth, *Tarifvertragliche Gehaltsobergrenze ("Salary-Cap") bei Gehältern von Lizenzsportlern?*, München, in *Spurt Zeitschrift für Sport und Recht*, p. 137-142.

69 Articles 1 and 2 of the articles of association of the Föreningen Svensk Elitfotboll.

70 Further information at www.arbetsgivaralliansen.se. The Arbetsgivaralliansen was an official partner in the project "Promoting the Social Dialogue in the European Professional Football Sector".

71 Article 2 of the articles of association of the Divisionsforeningen.

72 Article 18 and 18(1) of the articles of association of the Divisionsforeningen.

73 Article 2(2) of the articles of association of the Divisionsforeningen.

74 <http://www.divisionsforeningen.dk/>

75 Article 19 of the articles of association of the Divisionsforeningen.

76 The three issues under discussion in Denmark are: the players' demand that any new rules from the DBU, UEFA or

FIFA during the term of the bargaining agreement cannot affect the rights of the players or the clubs as set out in the collective bargaining agreement unless the parties so agree, the demand that a reasonable implementation in Denmark of the FIFA training compensation rules is agreed upon and the fact that the Divisionsforeningen has repeatedly refused to even discuss other matter in the collective bargaining agreement.

77 Statuut voor de betaalde sportbeoefenaar Wet van 24 februari 1978.

78 Decreet van 24 juli 1996 van de Vlaamse gemeenschap, het statuut van de niet-betaalde sportbeoefenaar.

79 Article 10 of the articles of association of the LPF.

80 Representing the professional clubs from the second division.

81 This regulation may be found at <http://www.footpro.fr/reglements/index.asp>.

laws regulating the employment contract in professional sport. These Member States all have a collective bargaining agreement for professional football that specifies the relationship between player and club.

In order to be able to arrive at a clear comparative overview, I will first describe the situation in the Member States involved.

In France, the basic sports law is the *Loi nr. 84-610 du 16 Juillet 1984 Loi relative à l'organisation et à la promotion des activités physiques et sportives*. Article 16 of this law defines the federations as the overall governing bodies with the autonomous power to regulate the sector. Article 17 provides that every federation must establish a professional league to regulate the professional side of the sport. In French football, this is the Ligue du Football Professionnel (LFP). The relationship between the LFP and the football federation is further specified in an agreement between the two.⁸¹

In France, general employment law applies to the contract between player and club. The relationship is further specified in a Charte du Football.⁸² This "collective bargaining agreement" for football is concluded between the LFP, the federation, the players' union, representative organisations of coaches and trainers, and the Union des Clubs Professionnels de Football, the UCPF.

The UCPF can be regarded as the true representative of the clubs, as it was directly established by the club presidents and does not merely derive from the mandatory format of the law, i.e. indirectly from the league. The UCPF protects the rights of the clubs in their capacity as employers.⁸³

The LFP is really a direct descendent of the federation, as the federation has to initiate its creation.⁸⁴

The Portuguese member of the EPFL is the Liga Portuguesa de Futebol Profissional (LPFP). Portugal has created an extensive legal basis for sport. The basic sports law is the *Lei de Bases do Sistema Desportivo* (LBSD). Article 21 of the LBSD defines the role of the federation as that of the overall organiser of a specific discipline of sport.⁸⁵ Article 24 provides that a league must be established for matters concerning professional sport.⁸⁶

The establishment of a league is mandatory, as is the membership of the clubs performing in the two professional competitions in Portugal (36 clubs in all). The LPFP has far-reaching powers and can be characterised as the governing body for professional football in Portugal: it exercises financial and administrative control over the member clubs, organises the competition, acts as the marketing instrument for the collective clubs, fixes the number of players per club, including the number of non-EU nationals that may participate in a club competition and it has disciplinary powers in matters between clubs and players, including labour disputes.⁸⁷

In addition to these powers the LPFP's articles of association also provide that the LPFP shall represent the member clubs in socio-economic matters, such as the conclusion of collective bargaining agreements with the various parties involved in professional football, for instance, the players.⁸⁸

The LPFP is a party to the Contrato Colectivo de Trabalho dos Jogadores Profissionais de Futebol,⁸⁹ the collective bargaining agree-

ment which is concluded with the players' union. The collective bargaining agreement further specifies the statutory rules regulating the employment contracts of professional athletes.⁹⁰

The LPFP falls under the jurisdiction of the federation, but nevertheless has far-reaching powers. It is more an association within an association than an independent body of clubs. The fact that membership is mandatory and exclusive and that the LPFP is the overall governing organisation reinforces this image: without the consent of the LPFP, the clubs are unable to perform economic activities.⁹¹ The LPFP is in fact all of the following: an association of clubs, an employers' association, a member of the sports federation, a body of the sports federation and the regulatory entity for the market of professional football competitions.

The situation in Spain is to a large extent comparable to that in Portugal. The Spanish basic sports law is the *Ley 10/1990 de 15 Octubre, Ley del deporte* (Ley 10/1990).⁹² Articles 30 to 40 specify the position of the federation as the overall organiser of the sport and Articles 40 to 45 provide the mandatory establishment of leagues and the exclusive and mandatory membership of these leagues.

The relationship between the leagues and the federation and their respective positions are detailed further in the *Real Decreto 1835/1991, de 20 Diciembre, sobre Federaciones Españolas y Registro de Asociaciones Deportivas*.⁹³

The following powers have been assigned to the league (for football, this is the LFP) by law: representing the interests of the associated clubs (40 clubs in all from both the first and the second division), exercising administrative and financial control over the clubs and organising the competitions.

Based on an agreement signed between the league and the federation, the two organisations share disciplinary powers and other organisational aspects of football, including determining the number of non-EU nationals that may play on a team.

In Spain, as in Portugal, a special sports law regulates the employment contract of professional athletes. This law is the *Real Decreto 1006/1985, de Junio, por el que se regula la relación laboral de los deportistas profesionales*.⁹⁴ Employment relations in professional football are further specified in the collective bargaining agreement between the LFP and the players' union.⁹⁵

The same conclusions can be drawn for the LFP as for the LPFP: the LFP is in fact an association of clubs, an employers' association, a member of the sports federation, a body of the sports federation and the regulatory entity for the market of professional football competitions.⁹⁶

The basic sports law in Italy is the *legge 23 marzo 1981, n.91 Norme in materia di rapporti tra società e sportivi professionisti*.⁹⁷ This law regulates the sport sector and forms the basis for the legal status of professional athletes.

The law provides the basic elements of the employment contract, which is further specified in a collective bargaining agreement between the Italian Lega Calcio Professionisti and the players' union.⁹⁸ The Lega Calcio's power to negotiate with the players' union concerning employment matters is based on both its own articles of

82 See footnote 31.

83 Interesting in this context is the speech delivered by UCPF director Philippe Diallo during a Social Dialogue conference in football, organised by FIFPRO on 3 April 2002, which can be found at <http://www.fifpro.org/index.php?mod=one&id=10903>.

84 The relationship between the league and the federation and how they are interdependent is explained in Jean-Pierre Karaquillo, *Le droit du sport 2e édition*, Dalloz, Paris, 1997 p. 26-27.

85 The LBSD was the starting point in Portugal for a whole host of legislation in the field of sports. The role of the federations was further specified in Law 144/93 of 26 April. This law regulates all aspects

of the federation and its operation, such as organisational aspects, tax aspects, general objectives, general assembly, etc.

86 Law 144/93 of 26 April was the basis for Law 303/99 of 6 August which specifies the conditions that must be fulfilled before a branch of sport discipline can be considered a professional discipline.

87 Articles 5 and 6 of the articles of association of the LPFP.

88 Article 6(2)(a) of the articles of association of the LPFP.

89 The collective bargaining agreement may be found at <http://www.sjpf.pt/Contrato%20Colectivo%20trab.htm>.

90 Law 28/98 of 26 June regulating professional athletes' employment contracts, to

be found at <http://www.sjpf.pt/Lei%20n28%2098.htm>.

91 For further information concerning the legal regulation of sport in Portugal and the position of the leagues, see José Manuel Meirim, *The professional club leagues in Portugal, what legislative reform?*, The Asser International sports law journal, 2003/3, The Hague.

92 The law may be found at <http://www.deportdigital.galeon.com/legislacion/indiceley90.htm>.

93 The decree may be found at http://noticias.juridicas.com/base_datos/Admin/rd1835-1991.html.

94 The decree may be found at http://noticias.juridicas.com/base_datos/Laboral/rd1006-1985.html.

95 The collective bargaining agreement may be found at http://www.lfp.es/infoinstitucional/convenios/convenio_colectivo.pdf.

96 For further information on the Spanish sports organisation, more specifically the relationship between the leagues and the federation, see Ramón Terol Gómez, *Las Ligas Profesionales*, Editoria Aranz, Alicante, 1998.

97 The law may be found at http://www.figc.it/italiano/norme/APPENDICE/coni/legge91_art_datar8bis.pdf.

98 The collective bargaining agreement may be found at [http://www.assocalciatori.it/aic/aic.nsf/NT000017EE/\\$file/accordocollettivo.PDF](http://www.assocalciatori.it/aic/aic.nsf/NT000017EE/$file/accordocollettivo.PDF).

association⁹⁹ and on the *legge 23 marzo 1981, n.91 Norme in materia di rapporti tra società e sportivi professionisti*.¹⁰⁰

Other than in Spain and Portugal, the powers of the Lega Calcio, which are similar to those of the LFP and the LPFP, are not based on a direct mandate granted by an Act of Parliament, but instead are based on the articles of association of the Italian football federation.¹⁰¹ In this respect, the Italian system of regulating sports differs slightly from the Portuguese and Spanish systems.¹⁰²

Finally, it should be noted that the Lega Calcio falls under the jurisdiction of the federation and that membership is mandatory for the clubs.

The Greek member of the EPFL is the Hellenic Football League (HFL). The HFL is a full member of the Hellenic football federation (HFF) and must comply unconditionally with its articles of association, its regulations and the decisions of the HFF Board of Directors.¹⁰³ The HFL can appoint 5 members of this Board.¹⁰⁴

The HFL administrates and manages professional football in Greece, including the business and economic dealings of the football clubs. Clubs must submit documents of registration, information concerning shares and capital stock and information concerning the ownership of the club. If clubs fail to submit this information in due time the HFL is not allowed to allot any revenues to the club not complying with the rules.¹⁰⁵

The clubs in turn must comply unconditionally with both HFF and HFL rules and regulations and must include a provision to that effect in their articles of association.¹⁰⁶

The HFL organises the competitions in which the member clubs from three divisions participate (52 clubs in all). The HFL is also competent to market the collective clubs, including the selling of broadcasting rights.

The HFL represents the clubs in any disputes with the HFF or individual players. It participates in determining the general terms of contract for the services of professional football players. The HFF is also competent to register the players' contracts.¹⁰⁷

There are several dispute settlement committees within the HFL structure. One of these is the Financial Disputes Settlement Committee for Football. One of the tasks of this committee is to settle financial disputes between football companies and football players and dealing with cases concerning the suspension or termination of contracts between football players and football companies.¹⁰⁸

The powers of the HFF and the HFL are based on the Greek sports law, the *Law 2725/1999 Amateur and Professional Sports and other provisions* which regulates nearly all matters relating to sport, including the legal position of professional athletes and their contracts,¹⁰⁹ the "internal transfer system",¹¹⁰ the structure of the league and the league's relationship with the federation.¹¹²

There is no collective bargaining agreement as such in Greece. The signatory parties to a further specification of the employment contract based on the abovementioned law and general employment law are the HFF, the HFL and the players' union.

These parties draft an agreement which is submitted to the Minister of Culture for a pro forma check in order to obtain the status of ministerial decree.¹¹³

6. Summary

As regards the second requirement established by the European Commission, namely that an EU-level umbrella employers' organisation

wishing to participate in a Social Dialogue must consist of national organisations that are an integral and recognised part of Member States' collective bargaining structures, it is impossible to provide a clear answer to the question of whether the EPFL fulfils this requirement.

For this reason, I will highlight certain aspects which the European Commission should consider when faced with a possible joint request from the EPFL and the FIFPro for participation in a Social Dialogue.

6.1. Aspects that should be taken into consideration by the European Commission when deciding on the second aspect of the requirements for representativeness

From the 14 member organisations of the EPFL, 7 play a role in a collective bargaining agreement at the national level. The EPFL members from France and the Netherlands, which both have a collective bargaining agreement, do not represent the employers.¹¹⁴ For this reason, only the organisations listed below can be part of the national collective bargaining structures.

The seven remaining leagues are the ones in Denmark, Sweden, Belgium, Italy, Spain, Portugal and Greece.

For various reasons, it is not clear whether these organisations can qualify as employers' organisations. First of all, they all fall under the direct jurisdiction of the associations and are all members or bodies of the associations.

Further below, I will explain the difficulty deriving from this aspect when I discuss the third aspect of the European Commission's criteria for representativeness.

Another aspect which needs to be taken into consideration is the fact that representative organisations normally represent a collective of individual organisations in an industrial sector and in the market in which these individuals operate. In many of the countries analysed the leagues in fact create the market and regulate it to a certain extent. This creates a basis for possible conflicts of interest.

It is also interesting to note that the leagues in Portugal, Greece and Denmark have disciplinary powers with respect to clubs and players. Committees of these leagues have first instance jurisdiction to decide cases arising from the employment contract between player and club. This creates a direct conflict of interest, as the league also represents the clubs in the negotiation of the collective bargaining agreement.¹¹⁵

Membership of most of the leagues is mandatory, either directly or indirectly. Direct membership is based on the law, as is the case in Spain, Portugal, Greece and France. Indirect membership in fact exists in all the other countries, now that the only way to participate in the competition is through membership of the league. Apparently, only Sweden does not have direct or indirect mandatory membership.

This has implications for the concept of employers' organisation. In the absence of legislation at the level of the EU Treaty with respect to the formation and operation of unions and employers' associations, one must seek sources of reasoning which are on a shared level with the EU. For employment matters, one could refer to the ILO conventions and the European Social Charter. The European Social Charter bases the freedom of association on Article 5, while ILO Convention no. 87 has Articles 3 and 5 which can be used in this respect.

In addition, Article 11 of the European Convention of Human Rights protects the freedom of association, including the freedom not to join a trade union.¹¹⁶

99 Article 1(c) of the articles of association of the Lega Calcio.

100 Article 4 of this law provides that the FIGC, the Lega Calcio, but also the other leagues in Italy (i.e. the C1 and C2 series) must conclude the collective bargaining agreement or a standard contract.

101 Article 3 of the articles of association of the Federazione Italiana Giuoco Calcio (FIGC).

102 The main difference is that in Italy the National Olympic Committee (CONI)

is authorised to regulate and organise all branches of sport. The CONI, as a federation of federations, in practice delegates this power to the specific federations. This is why the FIGC has more direct powers. The CONI's power is based on the *Decreto Legislativo 23 Luglio 1999, n. 242*.

103 Article 27(3) of the articles of association of the HFL.

104 Article 27(2) of the articles of association of the HFL.

105 Article 33 of the articles of association of the HFL.

106 Article 3(5) of the articles of association of the HFL.

107 Article 2 of the articles of association of the HFL.

108 Article 32 of the articles of association of the HFL.

109 Article 87 of Law 2725/1999.

110 Article 88 of Law 2725/1999.

111 See also D. Panagiotopoulos, *The Greek transfer system for athletes*, International Sports Law Journal, 2004 1-2, p. 37-44.

112 Articles 96-112 of Law 2725/1999.

113 For further information concerning Greek sports law and the position of the athlete see D. Panagiotopoulos and G. Ioannidis, *Sports Activities in Greece*, Professional sport in the EU: Regulation and Re-regulation, Ed. Gardiner, Caiger, Asser press, The Hague, 2000.

114 In France, the UCPF does and in the Netherlands, the FBO. These organisations are part of national collective bargaining structures. The FBO is a "real" employers' organisation.

The Community Charter also provides a clear right in Article 11: *"Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests. Every employer and worker shall have the freedom to join or not to join such organisations without any personal or occupational damage being thereby suffered by him".*¹¹⁷

The conclusion that can be drawn here is that the participation of league organisations in a Social Dialogue and the legality of such participation cannot be judged from the perspective of national collective bargaining structures as referred to in the EU definition, but must be derived from *national sporting structures*.

The national sporting structure enables leagues to participate in various types of collective bargaining agreements. It is therefore difficult, not to say impossible, to apply the second criterion for representativeness to an employers' organisation in the professional football sector. The reason is that the criteria were drafted for "regular" industries, not for "complex" industries like the professional sport sector: at present, there is no official legislation or regulation for sport in the European Union.

6.2. Have adequate structures to ensure their effective participation in the work of the Committees

This is the third aspect of the requirements defined by the European Commission. As it can give rise to multiple interpretations, the Commission has done some fine-tuning.¹¹⁸ In order to decide whether this criterion has been met the Commission examines the internal balance of power, the institutional procedures for taking decisions or deciding on an official position, the process for selecting representatives and delegates, etc. In general terms, these requirements relate to the operation and functioning of the organisations in a democratic and transparent manner.

In order to test this last requirement for social partner organisations, a double examination must take place. First, an internal analysis must be made of the EPFL, or rather of the link between the EPFL and UEFA and the consequences of the close ties between the national leagues and the national football associations/federations. Secondly, the position of the clubs and the communication with the clubs on the part of the leagues when it comes to international developments, such as the Social Dialogue, must be analysed.

6.3. The link between the national leagues and the national football federations and the consequences this has for the position of sport within the EU

In all countries that have a representative in the EPFL there is a strong connection between the league and the national football association, which is the governing body for football. In some cases, the only connection with the association is the fact that the league must comply with the rules and regulations of the association. In all cases, however, the league is part of the federation.

In the majority of countries the position of the league can therefore be characterised as that of a specific department within the associa-

tion.¹¹⁹ If the league is a member of the association and is incorporated in its structures and comes under its control, it can in fact be characterised as an association in its own right. The definition *national governing body for professional football* would best suit these leagues, in essence describing the objectives of a league.

The next step in this line of reasoning is to examine the position and duties of the governing bodies in European sports from the perspective of the European Commission, which is the institution to decide on the status of European employers' organisations for the purpose of establishing a Social Dialogue committee.

The role of the federations has been clarified in the Helsinki Report and in the Nice Declaration. These documents do not constitute Community legislation or guidelines, but they do express the status quo and the position of the European Union institutions in respect of sport.

The Nice Declaration¹²⁰ states that the European Council *recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objectives*. The social function of sport is stressed and deriving from this social function the governing bodies have special responsibilities, including the recognition of their competence in organising competitions.

The pivotal point of the possible conflict is that the European Union's definition of the role of governing bodies in sport runs contrary to the powers that are indirectly attributed to a social partner organisation, namely drafting concepts for legislation which the European Commission submits to the Council. If an association were to become involved in the Social Dialogue through its department - the league - the process could fall prey to conflicting positions when the sports-governing body - the competition organiser - were at the same time to act as a legislative authority at European Union level.¹²¹ This could lead to a review of the European Model of Sport.

6.4. Informing the member clubs on the European Social Dialogue

The clubs are the employers of the professional football players. It is therefore evident that there must be willingness on the part of the clubs to initiate a Social Dialogue.¹²² As the discussion concerning the possible participation of the EPFL in a Social Dialogue mainly took place at the European level, the individual clubs were almost completely dependent for their information on the communications of the league representatives in the EPFL meetings.

During the EFFC project it became clear that in some cases league organisations had advised their members not to participate in events that intended to create awareness concerning the European Social Dialogue. In other cases the information that was disseminated to clubs clearly lacked understanding of the Social Dialogue as a framework for negotiation at European level.¹²³ The underlying reasons for this attitude remain unclear.

The conclusion that can be drawn from this process is that clubs

¹¹⁵ This aspect can be regarded as contrary to ILO Convention 98 on the Right to Organise and Collective Bargaining, 1949 Article 2(1): *Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other's agents or members in their establishment, functioning or administration*.

¹¹⁶ E.Franssen, *Legal aspects of the European Social Dialogue*, Intersentia 2002, p.17.

¹¹⁷ See footnote 117.

¹¹⁸ Report coordinated by the Institut des Sciences du Travail- Université Catholique de Louvain, at the request of the European Commission, Directorate-General for Employment, Industrial

Relations and Social Affairs, *Report on the representativeness of European Social Partner organisations*, September 1999

¹¹⁹ An example to clarify this is the situation in the Netherlands. The ENV, which is the Dutch league and a member of the EPFL, has as its main objective the commercial exploitation of the collective of clubs. Organisational and administrative aspects in relation to the competition fall under the authority of the Royal Dutch football federation's department for professional football (KNVB sectie betaald voetbal). This department is a subsidiary organ of the KNVB, but carries out tasks that are comparable to those carried out by the leagues in for example Spain, Portugal,

Italy, Greece, Belgium, etc. The idea that in European football the leagues and the national associations are comparable organisations is further supported by the fact that the Dutch director of the KNVB organ dealing with professional football represents the Netherlands on the UEFA professional football committee, while other representatives are all delegates from national leagues, see <http://www.uefa.com/uefa/FootballFamily/CommitteesPanels/index.newsId=76216.html>.

¹²⁰ Conclusions of the Presidency of the Council of 8 December 2000 in Nice, *Declaration on the specific characteristics of sport and its social function in Europe*, which must be taken into account in the

implementation of common policies.

¹²¹ This is a very interesting aspect considering the current discussion about the new Treaty Article on sport. If this process becomes concrete, the European Commission will be taking the first step towards clarifying what is meant by "...taking the specific nature of sport into consideration...". This topic would justify more thorough analysis, but unfortunately this article is not the place for that.

¹²² See also the letter of the Commissioners referred to in footnote 3.

need to be made more aware of developments occurring at EU level which may directly affect their business.

Clubs need to be made aware of their role as employer and the corresponding rights and duties of employer status at EU level.

It has clearly emerged that the top-down dissemination of information, which is inherent to the pyramidal European Model of Sport, does not always result in objective information.

6.5. The EPFL structure and operational framework

The EPFL objectives have already been mentioned under 4.2. The EPFL Accord starts by mentioning that the leagues and UEFA have expressed a desire for official cooperation. To implement such cooperation, the UEFA subsequently agreed to establish a Professional Football Committee as part of its structure, soon followed by the recognition of cooperation between the leagues and UEFA.¹²⁴

One of the tasks of the EPFL is to appoint members to the Professional Football Committee. The leagues may appoint 5 members by democratic voting, while 4 members are appointed by UEFA. This means that 9 out of the 14 league representatives of the EPFL are members of the UEFA Professional Football Committee which itself consists of 11 members. There is therefore a strong link between the EPFL and the Professional Football Committee of UEFA, whose memberships are almost identical.

In accordance with the UEFA Statutes (Article 37(3)), the Professional Football Committee's duties involve supporting the Chief Executive in an advisory capacity and informing him of the viewpoints and experiences of the leagues/associations represented.

The members of the professional football committee, in their capacity as representatives of their leagues and clubs, are responsible for presenting solutions and proposals for the attention of the Chief Executive, and may submit suggestions or issue recommendations in the following areas:

1. Drawing up of bases for decisions for the attention of the Chief Executive:
 - contractual relationship between club and player;
 - principles for compensation for training/education of players;
 - common periods in which a player can be registered to play national and international club competitions;
 - impact of new formats of European club competitions for domestic competitions;
 - coordination between UEFA club competitions and domestic competitions;
 - code of conduct for European professional football;
 - club licensing system;
 - international fixture list.
2. Exchange of views on current professional football topics:
 - release of players for national team;
 - arbitration in European professional football;
 - solidarity system, including ownership of commercial rights.
3. Discussion of and statements by the Professional Football Committee on topics dealt with by other committees, which also concern the professional football sector (case by case).

It is clear that the EPFL cannot be considered a truly independent organisation. At the national level there is in most cases a strong link with the federation, justifying the statement that it is really the federation which acts as the league for professional football. Conflicts of interest may arise when both clubs and players fall under the jurisdiction of the league.

There is a definite need for improved communication with clubs when it comes to informing them about European Union policy issues, such as the Social Dialogue, which may have considerable impact on the sector and particularly on the individual clubs. This is an aspect that should be taken into consideration by the EPFL.

Another aspect that deserves the attention of the EPFL is the relationship with UEFA's Professional Football Committee. The sole object of the PFC is to make suggestions to the CEO of UEFA.

A power that is delegated by the CEO of UEFA to the Professional Football Committee is the distribution of Champions League revenues among the participating leagues.

7. Conclusion

In the likely event that the European Commission will receive a joint request from the FIFPro and the EPFL, the Commission has to take the above into consideration. It would be the first time that such a request is made by the sporting world and a concrete basis for a decision is as yet lacking.

However, the aspects mentioned are not the only ones which need to be considered. The European Commission usually also examines the basis for collective bargaining agreements and to a certain extent respects their form. It further considers the rate of membership, existing structures in economic sectors and the willingness of the sector to enter into negotiations.

Although the collective bargaining agreements at the national level are not entirely mutually comparable and are not the collective bargaining agreements referred to in the language and definitions of the European Commission, they nevertheless cannot be ignored. In 9 countries of the European Union, there is an apparent basis for industrial relations.

In addition, even though the clubs are compulsory members, there is a high degree of representativeness from a marginal perspective. The EPFL consists of the premier leagues, and when one considers all the clubs playing in these leagues and thus gathered in the EPFL, at least at the level of the "old" EU Member States a representative majority can easily be achieved.¹²⁵

The ideal situation would be if an FBO or UCPF were to be established in every EU country. However, the paradox would then be that these in most cases truly independent organisations would have the same membership as the league. For a more efficiently achieved result one must seek to respect existing structures in European football.

The relatively easiest way is that the leagues use their general assemblies and other meetings of clubs to deal specifically with the Social Dialogue and that they receive a specific mandate from the clubs to this end. In return, the leagues must guarantee impartiality and transparency.

The difficulty is that this would call for a review of the European Model of Sport, as I mentioned above when describing the role of the federations and their link with the leagues.

Perhaps the European Commission in its considerations should place special emphasis on the fact that European football authorities have shown their willingness to enter into negotiations with each other. On the initiative of FIFPro, and as a result of their initial activities in the promotion of the Social Dialogue, the EPFL, FIFPro and UEFA have already created a "football dialogue".¹²⁶

In this football dialogue, which has been incorporated in the UEFA structures as an expert panel,¹²⁷ matters of mutual interest can be discussed. One of these is the Social Dialogue in football. By initiating the football dialogue, UEFA has shown its willingness to create clarity

¹²³ Three situations are worth mentioning.

In Denmark, clubs had agreed to participate in a meeting concerning the Social Dialogue and had expressed their interest in the topic and indicated their possible position. The Danish league informed the clubs not to attend the meeting. The same occurred in Italy, although there the event was successfully organised. In the Netherlands the ENV

sent a letter to their member clubs on 23 September, in which it informed them about the Social Dialogue and the developments. The letter stated that at the national level the social partner was the FBO, but that at EU level, the social partner for the Netherlands was the ENV.

¹²⁴ Preamble of the Accord of the EPFL.

¹²⁵ The fact that the EPFL only consists of

premier leagues means that a certain number of clubs is not represented, such as for example clubs in Ireland. In the UK, the national leagues are not represented which means a number of around 100 clubs. The same is true for the German regionalliga and the Dutch eerste divisie, among others. During our meetings it was discussed that there are various types of football clubs and that

the clubs lacking representation as mentioned in this footnote could qualify as small and medium-sized (SME) enterprises involved in other matters at EU level than the "multinationals". In this context, a connection can be made with the UAPME case (Case T-135/96 Judgement of 17/06/96, UAPME/Council.

ty and has formalised its role as an observer. The EPFL and FIFPro have shown their willingness to explore their role in a future Social Dialogue, which is an important factor in achieving fruitful negotiations.

Despite all these positive developments, formulating an answer to a joint request by FIFPro and the EPFL will probably prove difficult, especially after the enlargement of the European Union with ten new Member States. The enlargement has created an extra hurdle for the football sector when it comes to representativeness, as the threshold for representativeness has gone up.¹²⁸ In the majority of the new Member States there are (as yet) no industrial relations in the professional football sector.¹²⁹

A final aspect to be mentioned is the current trend in the European Union for clubs to create truly independent organisations. The initiative is usually taken by a small number of clubs, but the resulting organisations are quickly expanding.

In Spain the G-12¹³⁰ was established in this way and in Belgium the G-5.¹³¹ In Italy, clubs have already been known to form groups to negotiate broadcasting agreements.¹³² It seems as if the example of the G-14 at the European level has set a precedent for the establishment of independent organisations at the national level. Granting the status of EU social partner to organisations like the leagues might impede the development and establishment of these new organisations which are the consequence of a functioning economic sector in a free market.

Taking all these aspects into consideration and given the desire to promote the positive developments that have taken place to date, a temporary solution could be to introduce another stage in the process, prior to the initiation of the actual Social Dialogue referred to in the EU Treaty.

The European Commission could introduce a step where an informal Social Dialogue is established, which continues until all the aspects mentioned above have been clarified. This has in fact been done before in other sectors and could prove perfect for paving the way for a comprehensive Social Dialogue and negotiation result.¹³³

All the parties involved in the European football sector would have to be represented in the temporary Committee and given the opportunity to express their views and ideas and receive feedback from the European Commission and Social Dialogue experts.

The participants in Committee meetings should be all parties who are stakeholders in football, i.e. UEFA, FIFPro, the Sport Unit of the European Commission's Directorate-General for Education and Culture, the Directorate-General for Employment and Social Affairs,

the Directorate-General for Competition, the G-14, the EPFL including other leagues and an organisation representing initiatives like the G-12 and G-5.

In this way, the gap between the legal language of the Social Dialogue and the European Union in general and the practice of the football world could truly be bridged to create a better understanding between the two.

The meetings would of course have to be well documented and the proceedings and developments would have to be safeguarded. The best way to achieve this result would be to create an international network of experts who are familiar with the Social Dialogue and issues concerning the European Union and sport and are able to filter the policy documents and statements from "Brussels" and translate them into football language. This information would subsequently have to be distributed efficiently to the stakeholders in football.

The Social Dialogue can truly have a positive impact on the professional football sector. If all the stakeholders could be made to understand what the Social Dialogue is and how it functions and that every organisation has its own specific task, it would not be impossible to create unanimous support for the process throughout the football world. What needs to be avoided is opportunism in choosing the right partners. After all, what is to be gained by winning the match, but losing the championship?

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¹²⁶ <http://www.fifpro.org/index.php?mod=one&id=12454>.

¹²⁷ <http://www.uefa.com/uefa/FootballFamily/CommitteesPanels/index,newsid=214043.html>

¹²⁸ In talks with the European Commission it has been made clear that in the case of the 15 Member States a number of 7 Member States present during the negotiation would be enough to create representativeness.

¹²⁹ I base this information on the second project in which the EFFF was a partner and that had as its objective the promotion of the Social Dialogue in the Candidate Countries. A first report concerning this project can be found in: Dovile Vaigauskaite and R. Jurevicius, *Social Dialogue in Lithuanian football*, Asser International Sports Law Journal, 2004/ 1-2.

¹³⁰ Information concerning the establishment of the G-12 was received during the event *Promoting the Social Dialogue in the EU Professional Football Sector*, in Madrid on 13 May 2004, from Mr Fernando Ochoa, coordinator of the G-12.

¹³¹ Information concerning the establishment of the G-5 in Belgium was received during the event *Promoting the Social Dialogue in the EU Professional Football Sector*, in Brussels on 13 February 2004, from Mr Ivan de Witte, president of AA Gent.

¹³² E. Lubrano, *Regolazione di Calcio*, Luiss University, Rome, 2004.

¹³³ E. Franssen, *Legal aspects of the European Social Dialogue*, Intersentia, Antwerp, 2002.

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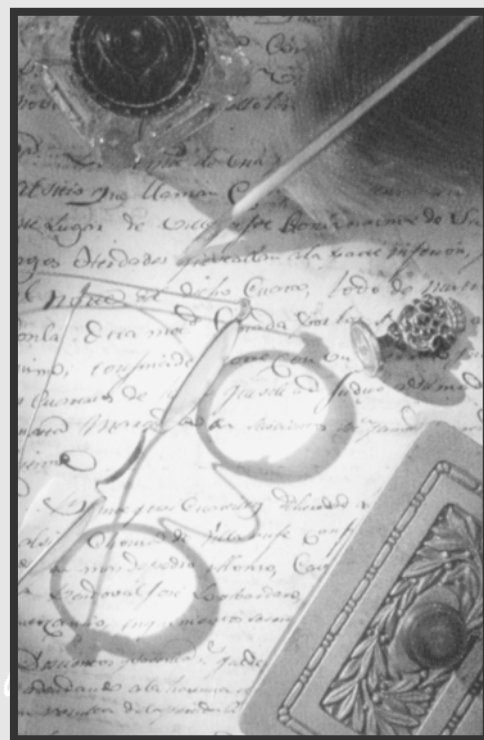
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Promoting the Social Dialogue in Professional Football in the New EU Member States

by Robert C.R. Siekmann*

In November 2004 the Final Report on the above-mentioned project was presented by the ASSER International Sports Law Centre to the European Commission (Project under Budget Heading B3-4000). Part of the project, which was carried out in conjunction with the EFFC Project, was a comparative legal "pilot" study on the basis of country studies regarding the above-mentioned subject. In addition to the "pilot" study, in the first half of 2004 regional seminars were organised in Nicosia (Cyprus and Malta), Vilnius (Estonia, Latvia and Lithuania), Ljubljana (Hungary and Slovenia), Warsaw (Poland), Prague (Czech Republic and Slovakia), and Bucharest (for the 2007 candidate Member States Bulgaria and Romania).

1. Questions

In this report, three key questions which are relevant in a Social Dialogue context have been examined. Here, the conclusions and recommendations will be given per country, per question. The questions were:

1. What is the legal basis for the relationship between a player and the club (comprising aspects concerning the regulation of sport in the country concerned, termination of contracts, compensation for training and education)?
2. What has the candidate country (now EU Member State plus Bulgaria and Romania) already done to implement Council Directive 1990/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC (European Trade Union Confederation), UNICE (Union of Industrial Employers' Confederation of Europe) and CEEP (Centre of Enterprises with Public Participation and Enterprises of General Economic Interest)?
3. Please discuss the possibilities for entering into a social dialogue in professional football.

2. Conclusions

Ad 1: In *Cyprus* the basis for the relationship between the football club and a professional player is an employment contract. Bearing in mind, however, that Cypriot courts have refused to accept that professional basketball players are employees under the terms of general labour law, the status of professional football players is in fact still ambiguous. Regarding *Malta* no information could unfortunately be obtained concerning the situation there. In *Estonia* it is undisputedly accepted that professional football players are employees, whose rights are established under general labour law. In *Latvia* a professional football player is an employee, whose relationship with his club is mainly governed by general labour law, and only to a limited extent by civil law provisions. Despite all the employment relationship elements present, the club/player relationship is not regulated by the Labour Code in *Lithuania*. Professional football players in *Hungary* in practice do not enter into an employment contract and consequently the Labour Code does not apply to their relationship with the clubs. Professional football players enter into commission contracts ("contracts of agency") governed by the Civil Code. In *Slovenia* the relationship between the player and the club can be of two different types. If it is established under the Labour Code it has the nature of an employment contract. The other way of establishing a relationship between a player and a club is under the Civil Code, as a contract for the performance of services. However, in practice clubs are unwilling to offer employment contracts and are thus forcing players to sign civil law contracts. As employers, clubs would have to accept the con-

sequences of the employment relationship, i.e. paying social security contributions. Players are thus responsible for organising social security themselves. In *Poland* professional football players can enter into a relationship with a club either on the basis of an employment contract (governed by labour law) or based on a commission contract (governed by civil law). However, it is common practice amongst employers to replace contracts of employment with "sporting contracts", i.e., contracts for providing sporting services. An accepted practice in Poland is to sign two types of contracts with a player: a contract, which provides only for basic remuneration, and a second, civil law, contract governing the commission for the usage of personal player rights (advertising, etc.). The monetary value of the latter is significantly higher than that of the former. In the *Czech Republic* professional football players do not enter into an employment relationship and therefore do not enjoy the social rights derived from a contract under labour law. They have self-employed status which inter alia implies that they must pay their own contributions for health insurance, pension schemes, etc. In *Slovakia* contracts between players and clubs are in practice regulated by the Civil Code. The player and the club enter into a "contract for the performance of sporting activity" which implies that the legal status of the player is that of a self-employed person who has no social and economic rights under the contract. In *Bulgaria* a professional football player is allowed to conclude two types of contract: a contract which outlines the relationship with the club (some aspects of the club/player relationship are governed by general labour law), and a license agreement with the Bulgarian Football Union which establishes his professional status. In *Romania* professional football players sign individual employment contracts governed by the Labour Code.

Conclusions: Other than the commission contract (a contract for providing football services), the employment contract provides professional football players with full protection as regards social rights. Self-employment makes professional football players responsible for the occupational risk connected with practising sport, although their salary is usually considerably higher. As a result of the Bosman case, the European Commission now requires that the status of professional football players is adapted to the standards of labour law. Generally speaking, in many new Member States the relationship of professional football players with their clubs is still not undisputedly based on labour law. This fact also negatively affects the conditions for starting a social dialogue and the subsequent conclusion of collective bargaining agreements in the respective national professional football sectors. The use of "self-employment" contracts is contradictory, since professional football players operate (train and play) under the authority of a trainer/coach, who can give them instructions, so that in fact we are dealing with an employment relationship. Professional football players are not independently operating "entrepreneurs"; they are not individual service providers like professional tennis players!

Ad 2: In *Cyprus* the employment contract is concluded for a fixed term, which cannot exceed five years according to the regulations of the Cypriot Football Federation. Nevertheless, since sport is in no way excluded from the application of general labour law, any fixed-term contract may not exceed the term of 30 months according to the national law implementing Council Directive 1999/70/EC. Regarding *Malta* no information could be obtained. *Estonian* law imposes a requirement of objective justification for the conclusion of a fixed-term contract, but not for its extension. Extending a fixed-term contract can be considered as concluding a new agreement. In that case, the requirement of objective justification also applies. Therefore, it

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can be argued that Estonian labour legislation is in accordance with Directive 1990/70/EC. *Latvian* Labour Law limits the use of fixed-term employment contracts by imposing the requirements of both objective justification and a maximum total duration of successive contracts. Hereby Latvia complies with the requirements of the Directive.

In *Lithuania* the new Labour Code does not contain any provisions limiting the use of fixed-term employment contracts. The Lithuanian Labour Code only provides that an employee may request that his/her fixed-term contract be transformed into a contract for an indefinite period of time if the interlude between the expiry of the previous contract and the conclusion of the current contract was a month at most. This provision is clearly insufficient to meet the requirements of the Directive. The *Hungarian* legislator has opted for implementation in the Labour Code of the maximum total duration of successive fixed-term employment contracts in order to comply with the Directive and achieve its objectives. In *Slovenia* the new Labour Code is in accordance with the Directive, now that the legislator has introduced specific measures in the Code to prevent abuses arising from the use of successive fixed-term contracts. The same is true in *Poland*. The *Czech Republic* has also implemented the Directive correctly and included all its requirements in the Labour Code. *Slovakia* has transposed the Directive into its Labour Code. In *Bulgaria* the acquis on the use on fixed-term contracts has not yet been implemented in the national legal system. In *Romania* the legislator had already introduced measures in order to prevent the use of successive fixed-term contracts.

Conclusions: It may be observed that most of the new EU Member States have implemented Council Directive 1990/70/EC to the full extent in order that abuses arising from the use of successive fixed-term contracts be prevented in the professional football sector. The Directive aims to counter the use of fixed-term contracts which employers conclude in order to avoid the burdensome regulations applying to firm employment contracts, which affects employees' social rights. Evidently, where no employment contracts are concluded between clubs and players (see ad 1 above), the Directive is not applicable and thus not relevant for the professional football sector.

Ad 3: *Cyprus* has a players' union: the Pancyriot Footballers Association. It has been suggested that the Cypriot football league could act as a social partner in collective bargaining. Regarding *Malta* no information could be obtained. In *Estonia* there is no organisation representing clubs or players in respect of social matters. Since it is undisputedly accepted in the football sector that professional football players are employees whose rights are established under general labour law, footballers are entitled to establish a union and the clubs are entitled to form an employers' association. However, no initiatives have as yet been taken. There is no organisation representing football clubs in social matters in *Latvia*. Recently, an Association of Latvian Football Clubs has been established, but it is not yet clear whether it could represent the clubs in collective bargaining. Latvia currently does not have an organisation for the representation of football players either. An attempt was made to establish a trade union, but it failed due to lack of interest. For the time being no collective bargaining agreements are concluded in *Lithuanian* professional football, which is probably due to the absence of formal social partners in the sector. The clubs have only recently established a body representing their collective interests (the Association of National Football Clubs (NFKA)), which is mainly directed at establishing a well-functioning and financially feasible football league. However, absent a players' union, a social dialogue in Lithuanian football seems to be a long way off. In *Hungary* there is a Trade Union of Professional Footballers and a Hungarian Professional League. The players' union is a member of F.I.F.Pro. However, the Hungarian Professional League does not act as an employers' organisation due to the fact that the clubs (members of the League) do not act as employers. An organisation representing the collective of professional football clubs regarding labour issues and social dialogue in *Slovenia* is the Association of football clubs of the

First Slovenian Football League. This employers' association is officially independent from the national football association. Clubs of the First Slovenian Football League are not members of the football association. The Association of football clubs of the First Slovenian Football League is an independent entity that could become the social partner representing clubs in a social dialogue and entering into collective bargaining agreements. However, the Association's articles of association do not actually contain any specific provisions which would allow the organisation to enter into a collective agreement. Therefore, it is not clear whether the Association is empowered to represent the clubs as employers in Slovenian professional football. On the employee side, there is the recently (October 2003) established Union of Professional Football Players of Slovenia (SPINS) which now only represents the First League players. SPINS is now a full member of F.I.F.Pro. This makes SPINS a potential partner for possible social dialogue in the professional football sector. In *Poland* the Polish Independent Football League (PALP) represented all professional football clubs until March 2003, when a new body, the Polish Football League (PLP), was established. PLP will organise the League as from June 2005. It will remain independent from the national football association. On the employee side there is the Nationwide Polish Trade Union of Professional Football Players (OZZP). The newly formed PLP could represent the clubs' interest in a possible collective bargaining agreement with OZZP. Those two organisations could potentially be the partners in a social dialogue. However, the OZZP's articles of association would have to be revised to enable it to become an official partner in a social dialogue. In the *Czech Republic* there is no trade-union-type organisation and no legal entity representing the clubs either. In *Slovakia* this is the same. There is neither an independent organisation representing professional football players nor an independent organisation representing the clubs. In *Bulgaria* there are no social partners in the professional football sector. In *Romania* the Professional Football League (LPF) could be an employers' organisation representing the social and economic interests of the clubs and playing the role of counterpart to the Players' Union (A.F.A.N.) which is a member of F.I.F.Pro. Between 1999-2003 a collective bargaining agreement existed between LPF and A.F.A.N., but it was not applied in practice. In 2003 the Romanian Football Association (FRF) and LPF established a new, but illegal players' union. Given these circumstances, there is currently no social dialogue in Romanian professional football.

Conclusions: Generally speaking, it may be observed that a social dialogue is still absent or almost absent in most of the former socialist states, i.e., eight out of the ten new EU Member States (apart from Cyprus and Malta). The main reason for this is the absence of social partners, and even if they do exist, they are still new and inexperienced. Players have not established representative organisations and the same applies to clubs.

All in all, it can be said that considering all the odds that are stacked against national collective bargaining agreements in the professional football sector, the alternative of a social dialogue at European level becomes more and more appealing. This is also recognised by the local football sector representatives who have participated in the project's conferences. However, in order to realise this opportunity we need formally recognised and well-functioning social partners. The possible establishment and functioning of trade unions in a social dialogue is further complicated by the fact that in many of the ten new EU Member States the players do not have clear employee status under labour law. Professional football in the formerly socialist new Member States is still making the transition from a centrally controlled and state-funded sector to a liberal and commercial industry.

3. Recommendations

Based on the above conclusions, the following *general recommendations* are made:

- 1 under the rules and regulations of national football associations, professional football players should be given employee status (i.e.

employment contracts) which would considerably strengthen their position towards their clubs by improving their legal position and affording better financial protection;

- 2 where this is not already the case, existing and/or future players' unions should be based upon the membership of professional football players as employees;
- 3 in all new Member States national organisations of management on the one hand and labour on the other should be established in order to create a basis for starting a social dialogue at the national level in the professional football sector. League organisations of clubs should be empowered to operate also in employment matters for this purpose;
- 4 existing and/or future employers' organisations and unions should participate in possible, future efforts at European level to initiate a social dialogue in the EU framework (cf., the proposals made to the European Commission for the reasoning it could adopt when dealing with a joint request from organisations who wish to establish a Social Dialogue Committee in European professional football in Chapter 5 of the Final report on the 2003-2004 EFFC Project regarding the 15 "old" Member States). It is of utmost importance that a serious initiative for a social dialogue at European level is taken in the "old" Member States as soon as possible, since this is expected to have a positive influence on the situation in the "new"

Member States. If for example, club representatives from a sufficient number of countries would decide to come to an agreement with F.I.F.Pro, there is the possibility that this partial agreement may eventually be applied in all 25 EU Member States to impact employment relations between clubs and professional football players.

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Table

	employment contract	commission contract	Management	Labour
Cyprus	x		x	x
Malta	- no information available -			
Estonia	x			
Latvia	x		x	
Lithuania		x	x	
Hungary		x	x	x
Slovenia	x	x	x	x
Poland	x	x	x	x
Czech Rep.		x		
Slovakia		x		
Bulgaria	x	x		
Romania	x		x	x



Football Hooliganism - National and International/Transnational Aspects

by José M. Rey and Diego Pérez Grijelmo*

1. Introduction

The repercussions of incidents that have occurred in several European football stadiums, such as at Bradford, Heysel and Sheffield, and in which many supporters died or were injured, have changed the prevailing perceptions concerning safety at sport events.

On 19 May 1985 at the Heysel stadium (Brussels) hooligans attacked and threw objects at Italian supporters during the European Championship final between Liverpool and Juventus. The Italian supporters scattered in all directions and some 39 died while approximately 500 people were injured. This was not the biggest tragedy in sport's history, but it was the one that made the most headlines. At the time, Margaret Thatcher declared that hooligans were "the country's main misfortune and shame".

Football has almost caused wars. A match in the semi-finals of the African Champions League in Ivory Coast ended in the deaths of at least 25 persons and in violent altercations that lasted for several days. It is difficult to pinpoint the exact number of victims since, according to the testimony of some witnesses, the bodies were thrown into the sea. The figure could therefore be much higher.

Sports is thus capable of giving rise to news items which could easily appear in the accidents and crime section of the newspapers. The defeat of Colombia's national team in the World Cup which was widely celebrated in the USA and the murder of football player Andrés Escobar after he scored a goal against his own team revived the controversy concerning the alleged infiltration of drug trafficking organisations in football, which had been rumoured since the 1970s.

In Spain there have been isolated cases. Since 1943, when an incident involving Barcelona supporters took place at the Chamartin Stadium, several acts of violence have occurred. The killing of Manuel

Rios added to the eight deaths registered in Spain during the last twenty years as a result of violence in football, the most recent one being the case of Aitor Zabaleta, who was a Real Sociedad supporter who was stabbed to death in 1998 by a member of Grupo Bastion (Frente Atlético).

During the 1980s, three persons died because of violence in football, and during the 1990s another five mortal victims were registered, one of them a 13-year-old boy who attended his first football match when a flare hit him in the chest.

But not all examples of violence in sports are related to football. For example, on 30 April 1993, the Rothenbaum complex (Hamburg) witnessed one of the greatest tragedies in sport, which occurred at a tennis court. Günter Parche, who was a fan of Stefi Graff and desperately wanted her to remain number one in the ranking, threw a knife during the match between Bulgarian player Magdalena Maleeva and US player Monica Seles, severely wounding Seles in the back. In a split second, he had destroyed the career of the woman who was beating all the records.

However, we have to bow before the evidence: although football is not the only source of violence in sports, it has become home to the majority of organised violent groups who use sports as an excuse to give free rein to their deepest instincts of violence.

In the 1960s, after the success achieved by England's national team at the 1966 World Cup, groups of supporters began to appear together and engaged in violent confrontations with each other. They were comparable to what were known as bootboys: "Urban tribes who ritualise alcohol, national confrontations, social claims and among whom low human passions find accommodation above all inside a football field".

As of the 1970s, gradually more and more younger supporters began to visit Europe's stadiums. Many of them can be grouped into two different categories: those following the English hooligan model

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(prevalent in Germany, Belgium, Greece and Eastern Europe) and those operating in accordance with the Italian *ultra* model (supporters in Spain, France and Portugal). Both models are organised differently, but act as socialisation agents for a large number of European young people.

The English model is a sort of prolongation of the traditional rough working class behaviour scheme: the hooligan group is formed by a group of male peers of common territorial background, who tend to gather to take part in confrontations and support their team during the matches. Violence is their main tool; it is the clear symbol of their subordinate position in society to which they reply with a violent and apolitical attitude. The hooligan group shows its subcultural nature in the lack of evolved forms of coordination, organisation and promotion of collective activities. In the stands, the English model is characterised by carrying out a series of activities exalting the group feeling (chorus, shaking of scarves, etc.) that do not entail a commitment beyond the match.

By contrast, the Italian ultra group brings together people from different social classes (militants) marked by the *stile maschile* that impregnates football and by the political conflict that marked its origins and that often turns into a strong inclination toward street confrontations. The ultra group uses aggressive acts as one of the group options (according to the political vision of “using violence as a tool”) and tends to establish organisational structures for both internal activities (preparation of choreographies, banners, flags, etc.) and external activities (registration of members, devising and selling material, publishing fanzines, maintaining relations with clubs and authorities).

In the Italian model, women are more present than in the English model (where you hardly see any women) although they play a secondary role as compared to their male partners (selling material, collecting contributions, etc.)

During the 1980s, the ultra subculture began to appear in the rest of Europe due to the double influence of the hooligan and ultra models. However, despite the differences between the English and Italian models of football supporting, they also have common features that make the ultra scene a specific juvenile subculture. Although it is not possible at the European level to speak of a single, specific ultra subculture, all ultra supporters in Europe have a set of characteristics in common. These characteristics can be found in the more general “supporters’ culture”, but their peculiarities are transformed and amplified in the ultra movement. Ultra supporters typically:

- adhere to a “friend-enemy” model, induced by the essence of the game itself, according to which the mass of supporters becomes a “community” based on fraternity;
- have an aggressive and exaggerated sense of territory, which they extend not only to the stands and the stadium but also to the means of transportation that take them there, the stadium’s surroundings and, even, the whole city;
- search for status and “social visibility” regardless of the negative image that is ultimately the result;
- belong to a “do-it-yourself” or “accumulative technique” culture which consists of different elements from youth subcultures (e.g. mod, skinhead), politics, etc.;
- adopt “virile” values of the warrior archetype or a “violent masculine style”, resulting in aggression, the exaltation of physical strength, sexism and a strong sense of group;
- reject any kind of control by the “others” (football clubs and authorities).

When we look at the data supplied by Sports Press in Spain between 1975 and 1985, we can appreciate a significant increase of violent demonstrations taking place both inside and outside football stadiums. Figures show an increase in the number of violent conflicts among spectators and acts of aggressions against means of transport of both players and supporters. This increase coincided with the visible appearance of ultra groups at the beginning of the 1980s (the process of their formation had started some time before).

Between the mid-1970s and the end of the 70s, there were no groups of young fanatic supporters in Spain (unlike in Italy and Great

Britain), but there were “*peñas*” (supporters’ clubs) that were the result of a campaign launched by sport clubs to counter decreased attendance at stadiums. These noisy *peñas* were the origin of the ultra movement, e.g. Las Banderas is the origin of Ultras Sur (Real Madrid), Fondo Sur of Frente Atlético (Atlético de Madrid), Los Morenos of Boixos Nois (Barcelona), Biri-Biri of Biris Norte (Sevilla), etc. They were aware of the colourist movement that was taking place in Italy at the time. Some of these supporters had direct contact with Italian ultras (through correspondence, trips to Italy, etc.) while others followed their movements on TV.

The “renewed” *peñas* whose members were mainly young people, although they were mostly managed by adults, differed from the traditional supporters’ groups in their composition, their location inside the stadium (just behind the goals) and the intense, colourful and particular way in which they cheered on their teams.

The transformation was not easy: the new way of supporting entailed an important role for choreographies and chants and involved travelling to stadiums. The ultra groups may have had plenty of ideas, but as yet they lacked members. One of the first tasks of the Spanish ultras was to attract fans who could identify with the objectives of the group. For this reason, Frente Atlético distributed pamphlets with the following slogan: “Would you like to experience the colouring of San Siro and uproar at Anfield Road?” The first step was that the group promoters explained the group’s needs and objectives to the new members. Then the first membership cards were issued, the first contributions were paid, flags and placards were waved for the first time, and materials were sold. Initially the groups were composed mostly of young people who were open to new ideas. At the beginning of the 1980s, groups of approximately 100 young people whose average age was 16, and who proclaimed they loved “making a racket” (which is how they defined their “deviant” behaviour inside the stadiums consisting of the exchange of insults, stealing scarves, starting fights, etc.) would gather in the stadiums’ *fondos* (the locations just behind the goals). There were hardly any police present and the press paid no attention either to these groups, that is, until the Heysel tragedy in 1985.

Although the first qualitative studies date from 1989, we know that the very first ultras had different origins. Groups were a mixture of different subcultural styles (rockers, mods, punks, heavies, etc; skinheads had not yet appeared), different ideologies and different social classes and occupations (spoilt rich kids and street kids, students, employed and unemployed, etc.) Despite these differences, comradeship reigned. The thing they had in common was the team they supported. Organisation was sketchy at first: there would be a leader or “*capo*” (sometimes an older “tutor”) who coordinated the group. Ultras had no economic resources and in order to subsist they had to ask the club or the players to lend them money. Given their lack of organisational experience, hardly any material existed, as they did not know where to order scarves, arrange trips to other stadiums, make placards that were not rudimentary or fanzines that were filled and informative. It was a spontaneous movement with hardly any order.

During the mid-1980s, the number of groups multiplied. Almost every team in the highest divisions was cheered on from the stands by one or several groups and the number of ultras increased considerably, as did their trips to watch their teams’ matches. During this period, groups increased due to two phenomena: imitation and feedback.

On the one hand, ultra groups multiplied as others imitated the pioneer groups. The magazine “Ultras”, conceived in Barcelona in 1985, began to be multiplied and distributed by post and ended up spreading the movement all over Spain. It promoted contact among Spanish ultras and contained news on the movement abroad. The magazine proclaimed itself the mouthpiece of the “*tifo*” organised in the Italian way. Following these guidelines, a certain bureaucracy was set up within the group and anarchy gave way to a certain order.

On the other hand, as a result of the Heysel tragedy, the press began to report on the hooligans’ actions. In the days after the disaster, one news item concerning Spanish ultras followed upon the other. Since 1985, violent actions in which ultra groups are involved have gone from being considered a sports-connected phenomenon to be reported in

the sports section of the papers to events considered worthy of mass media attention in their own right. Given the competition among the mass media, these violent acts were sometimes used to attract as much attention as possible. A fanzine at the time put it as follows: "The press has launched a furious attack against everyone occupying the *fondos* inside the football stadiums. It is poisoning football and converting Sunday's after-lunch pastime into the Vietnam War".

In 1988, the Senate, alarmed by this apparent increase in violence, created a Commission to study the roots of violence in sports. Case-law had just begun to appear and police measures in stadiums had already been intensified. During this period, certain common behaviour of the ultra groups was condemned which resulted in the prohibitions of pyrotechnic materials or scarves inside stadiums. Some clubs broke off their relations with the ultras while others forced their supporters to change their location. Ultras realised that they had to reform if they wanted to survive to the "prohibitionism" and "ethical panic" that was invading Spanish football. As a result of a report presented by the Senate Commission in 1990, several provisions were enacted and the Antiviolence Commission has started to function. Legal and police measures have forced groups to change (and become legal) or disappear.

2. Legislation

As already mentioned above, the proliferation of ultra groups inside stadiums in Spain and the increase of violence in sports, caused certain measures to be adopted at the beginning of the 1980s in order to mitigate the effects of what was already a problem all over Europe. Among other things, these measures consisted of prohibitions to introduce certain objects (which had been deemed harmless until then) into the stadiums, frisking at the gates, etc.

However, these measures failed to produce the desired results. For this reason, and because the situation was steadily deteriorating, the Senate in 1988 approved the establishment of a Special Investigations Commission which had to carry out an in-depth study of violence in sports. As of that moment, developments were set in motion that would lead to the adoption of the future Sports Act which was finally approved on 15 October 1990 and amended by Section 115 of Law no. 53/2000 of 30 December 2000 concerning Fiscal, Administrative and Social Measures which complemented the 2003 Budget.

However, measures to eradicate violence are also governed by other laws, given that the protection and exercise of civil liberties are requirements in a democratic society.

Thus, the Spanish Constitution of 1978, in Section 149(1)(29) provides that "without prejudice to the State's exclusive competence in the field of public safety, the Autonomous Communities may create police forces in the manner to be laid down in their respective by-laws and within the framework to be established by an organic law". The Constitution also provides that police forces under the control of the government shall protect the free exercise of rights and liberties and shall guarantee public safety.

In the same vein, Section 8 of Organic Law no. 1/1992 of 21 February 1992 concerning the Protection of Public Safety provides that:

"1. All recreational shows and activities of a public nature shall be subject to the administrative police measures issued by the government for the following purposes:

- to guarantee public safety against the risk of personal injury or damage to goods that could arise due to acts or omissions on the part of the event's organisers irrespective of whether the injury or damage is caused by spectators or participants.
- to guarantee the peace when this is in danger of being disturbed by the show, performance or event.
- to allow only licensed pubs and similar establishments and avoid any prohibited activities.
- to establish conditions concerning the organisation, sale of tickets and opening and closing hours of recreational shows and activities whenever necessary.

2. Sport events are subject to the measures to prevent violence provided in Title IX of Law no. 10/1990 of 15 October 1990 (the Sports Act)".

The Sports Act referred to regulates the prevention of acts which break the peace and lists the penalties for breaches of the peace and includes the recommendations under the 1985 European Convention on Spectator Violence and Misbehaviour (signed by Spain in 1987) and the recommendations adopted by the Senate in March 1990. One of the most important aspects of the Act is that it creates the National Commission against Violence at Sporting Events (further regulated under Royal Decree no. 75/92 of 31 January 1992) and that it regulates the prevention of violence at sports events (further regulated under Royal Decree no. 769/93 of 21 May 1993).

The establishment of the National Commission was the reflection of the Spanish commitment to countering violence in sport as demonstrated by Spain's signature on 1 September 1987 of the 1985 European Convention. The Convention which was approved in Strasbourg on 19 August 1985 in Article 2 requires the coordination at national level of the policies and actions of the government departments and other public agencies against violence and misbehaviour by spectators, where appropriate through setting up co-ordinating bodies, and the National Commission against Violence at Sporting Events serves as such a coordinating body for Spain.

According to the Sports Act, the National Commission is made up of 25 members representing public authorities, sports organisations and police forces. The Commission comes under the Ministry of Education, Culture and Sport (more specifically, under the *Consejo Superior de Deportes*) and has the following duties:

- to collect and publish annual data regarding violence at sports events and to carry out surveys;
- to issue reports and carry out research into the causes and effects of violence in sports;
- to promote preventive measures;
- to inform and make recommendations to the Spanish federations, clubs and professional leagues for the organisation of sporting events at which violence is expected to take place;
- to provide information upon request by the public authorities concerning proposed provisions in relation to sport events and, in particular, in relation to police presence at sports events, discipline in sports and technical requirements concerning the venues;
- to urge Spanish federations and professional leagues to modify their bye-laws in order to include rules regarding violence in sports;
- to promote the use of breathalyser tests for determining blood alcohol levels at high-risk sports events and prohibit the carrying of dangerous objects or objects that could be used as weapons;
- to promote campaigns informing about the rules for the prevention of violence in sport;
- to launch and coordinate public cooperation campaigns;
- to make proposals concerning the scope of competence of safety coordinators;
- to determine whether a sports event classifies as a high-risk event for the purposes of the Sports Act;
- to coordinate matters with subsidiary government bodies which are competent in the field of preventing violence in sports and to follow up their activities;
- to supply information concerning measures for sport events as issued by the Autonomous Communities insofar as these may affect the State's competences with regard to the prevention of violence at sports events;
- to annually propose candidates for the National Sportsmanship Award.

In order to be able to perform its duties, the National Commission has appointed the following sub-commissions to which it has delegated certain tasks. These are:

1. The Reports and Infrastructure Commission, whose main duties are to weekly study the complaints filed by the safety coordinators, classifying the misbehaviour in accordance with its severity and proposing, where necessary, that the competent authority take disciplinary action; to provide information for the purpose of the classification of events as high-risk events and to analyse possible incidents and complaints brought by the police forces in the field of amateur sports.

As to the classification of events as high-risk events, it is obvious

that such a classification would imply the taking of further preventive measures as compared to measures adopted for normal-risk events. To aid classification, Section 17 of Royal Decree no. 769/1993 approving the Regulations for the Prevention of Violence at Sporting Events provides that: "The sport federations and professional leagues shall notify the authorities at least eight days in advance of the programming of encounters deemed to be of high risk according to the scale set forth pursuant to Section 31 of the present Regulations". This provision is further proof of the main concern of all the relevant actions, namely cooperation among all the institutions involved;

cf., The Legal Commission, whose main duties are to prepare Bills corresponding to the legislative amendments proposed by the National Commission and to draft the legal opinions requested by the National Commission or any of the sub-commissions; and The Research and Prevention Commission, which analyses the causes of violence in sports, and proposes and undertakes initiatives to prevent it.

As regards procedure, a number of mechanisms have been devised to aid the National Commission in achieving its objectives. The Commission's Presidency alternates, for example, so as to ensure that the interest of sport and the interest of public safety are equally served. In addition, arrangements have been established for mutual assistance and cooperation between all the bodies involved, to ensure that they all work towards the same goal and with the necessary level of intensity in order to guarantee the solution of each particular issue. Further, all institutions involved in organising sports events have somehow been integrated in the National Commission's functions, which ensures their consideration of the aspect of the prevention of violence using all the means available to them.

The relevant provisions of the Sports Act are to be found in its Title IX dealing with the establishment of the Commission, the classification of different violations, the prevention of violence at sport events and misbehaviour that occurs during mass sports encounters resulting in violent conflicts.

The Act assigns the responsibility for the proper application of the adopted measures to the clubs, federations and professional leagues or any other natural or legal person organising a match, encounter or show. The Act promotes coordinated action among all the bodies involved in order to economise on effort and improve results.

The Act further establishes the institution of the safety coordinator at sports events. The safety coordinator is part of the police forces and manages, coordinates and organises safety at sports events.

The Act also contains express prohibitions concerning the introduction at sporting events of banners, symbols, etc., and concerning the introduction, possession, activation or hurling of all types of weapons or objects capable of being used as weapons. It further bans the sale of alcohol in stadiums.

The Act further regulates the modernisation of sports venues at which professional matches are played and access to and out of these places. It also includes provisions on the sale of tickets and imposes an obligation to use automated means for ticket controls.

Finally, the Sports Act classifies violations and the applicable sanctions in accordance with their seriousness and social repercussions. Violations may be classified as serious offences, summary offences or petty offences.

Serious offences are: a) non-compliance with the rules concerning sports events resulting in serious injury to either participants or spectators; b) repeatedly ignoring the instructions of the authorities for preventing the disruption of the event; c) altering the venue's seating capacity without regard to the applicable requirements; d) failure to apply safety measures when this entails a serious risk for spectators of the event; e) failing to take the necessary precautions or repairing detected defects or anomalies entailing a serious safety risk at stadiums; f) taking part in violent altercations, fights or public disturbances inside the sport premises or their surroundings and causing damage or serious risk to either persons or assets.

Further considered serious offences are g) the concurrence of particularly risky and dangerous circumstances or the violation of the following prohibitions: the introduction and exhibition during sports events of banners, symbols or legends that, given their content or the

way in which they are shown or used, could incite, foment or contribute to violent behaviour, or be considered xenophobic or racist, show support for or justify violence or terrorism, or seriously offend participants in the sports event. The organisers have a duty to remove these objects immediately. Further prohibited are the introduction and possession, activation or hurling inside the premises where a sports event is taking place, of all types of weapons or objects with a similar effect, such as flares, firecrackers, explosives or, generally speaking, any inflammable or corrosive products. The organisers must deny entry to all persons attempting to introduce such objects. Serious offences are also non-compliance with the prohibition to introduce, sell, consume or possess alcoholic beverages or drugs inside the premises, violation of the safety measures imposed for the prevention of violence in sports and unauthorised presence on the pitch when this seriously alters or disrupts the course of the sports event or causes serious harm or injury to people or things.

Summary offences are the acts mentioned above under a), c), e) and f) with lighter degrees of prejudice, risk or danger; ignoring the instructions of the authorities for preventing the disruption of the event; failure to apply the rules concerning access, presence and evacuation of the sports premises, the sale of alcoholic beverages, and the introduction and confiscation of forbidden objects; violation of the prohibitions described under g) above when no particular risk, danger or participation occurs; the introduction and sale inside the sport premises of any type of drink of which the container does not fulfil the requirements; unauthorised presence on the pitch.

Finally, *petty offences* are all acts or omissions not considered serious or summary in accordance with Title IX of the Sports Act and that go against the rules and regulations applicable to sports events.

The applicable penalties are fines and disqualifications to organise sports events or the provisional closing of the sports premises for two years at the most. Spectators may be removed from the premises or be given a stadium ban for a maximum of five months in case of summary offences or five years for serious offences. Stadium bans may also be imposed for the sale of alcohol. Fines range between 150 to 3,000 euros for petty offences, 3,000.01 to 60,100 euros for summary offences and 60,100.01 to 650,000 euros for serious offences.

The establishment of the safety coordinator is further regulated under the Regulations for the Prevention of Violence at Sporting Events. The Regulations are made up of three different parts containing provisions concerning the liability of organisers, the powers of the police forces, the organisation and duties of the safety coordinator and the necessary infrastructure for making the system operational. The contents of the Regulations fall within the scope of jurisdiction of the State from a double perspective: they concern public safety which is governed by Section 149(1)(29) of the Constitution and national and international sports competition pursuant to Section 46 of the Sports Act.

Section 56 of the Royal Decree approving the Regulations refers to the duties of the safety coordinator within the clubs or enterprises or at sports events and provides that he shall organise specific safety measures, maintain the necessary relations and communications with the club's management and the club's safety officer, coordinate the actions of all the services standby for the event, in particular, the local police, the fire brigade, the national police, the Red Cross, volunteer groups and health services, to which end he shall hold the necessary meetings. In particular, the safety coordinator exercises the following duties. Outside the premises he coordinates the services present, together with the police officers to which this duty has been assigned, instructs the club's safety officer and other personnel to supervise spectators accessing the premises at known trouble spots, to supervise the sale of tickets ensuring that the number of tickets sold does not exceed the premises' capacity, supervises the fulfilment by the organisers of the duties imposed upon them by Sections 24 and 25 of the Regulations, together with the police, supports the implementation of safety measures taken by the organisers and suggests measures for the ordered entry of supporters onto the premises.

Inside the premises, the safety coordinator supervises the safety measures from within the Organisational Control Unit, inspects the

premises paying particular attention to the location and separation of the different teams' supporters at sport events classified as moderate or high risk, together with the police, arranges adequate support inside the stadium and determines the necessary number of police (both plain-clothes and in uniform), supervises the actions of the club's management with respect to locating supporters in the previously determined areas, ensures that the sale of alcohol or drinks or food in hard containers is prohibited, order the organisers to confiscate banners and symbols which may incite violence, maintains permanent contact with the Intervention Units located outside the premises and informs them concerning any incidences occurring on the pitch which could affect safety, identifies violent groups and individuals aiming to provoke supporters of rival teams, urges the audience through the public address system to comply with safety measures and supervises the orderly exit of supporters from the premises.

Other functions of the safety coordinator include the submission of reports to the authorities after each sports event, mentioning the incidents registered, analysing the safety services rendered and where necessary suggesting modifications or new methods pursuant to Sections 32 and 33 of the Regulations, proposing the institution of disciplinary action against the owners of sport premises, clubs or organisers or against spectators for taking part in acts that are considered violations of the rules, without prejudice to the competences of the National Commission against Violence at Sporting Events, and, after consultations with the competent authorities, suspending or terminating the event when its normal course cannot be guaranteed due to a lack of organisation or safety or for public order reasons.

The Royal Decree approving the Regulations was later amended by Royal Decree no. 1247/1998 of 19 June 1998 which seeks to guarantee further the objective of preventing violence. The application of the Regulations to basketball revealed the need to reconsider certain measures for certain sports, as requested by the Association of Basketball Clubs. The data provided by the National Commission reflects the low number of incidents to occur in basketball and this, taken together with the fact that basketball premises are also used for other sports, make the application to basketball premises of certain measures contemplated in Royal Decree no. 769/1993 of 21 May 1993 inadvisable.

With respect to football, it must be recalled that the process for the adaptation of the premises under the Regulations was established in accordance with the rules provided by international sports organisations such as UEFA. UEFA has allowed that the definitive application of these rules is suspended under certain circumstances. In fact, we may conclude from reports from the safety coordinators to the National Commission that particular circumstances have indeed arisen with regard to the adaptation process, among other things because some of the new stadiums have not yet been completed. For these reasons, some organisations (the Real Federación Española de Fútbol and the Liga Nacional de Fútbol Profesional) have requested the Government to harmonise the Regulations as regards the final application dates with developments in the international and, in particular, European context. Royal Decree no. 1247/1998 of 19 June 1998 now attempts to reconcile the requirements of spectator safety with the needs of sports organisations in respect of the premises they use. The Royal Decree reflects the need to continue to adapt the rules to real life and to each particular sport, now that circumstances and risks may differ depending on the sport at issue.

Finally, mention must be made of the Order of 31 July 1997 regulating the functioning of the Central Registry of Sanctions which was imposed as a result of violations against public safety in sport events on the basis of Section 49 of the Regulations which provides that in order to guarantee compliance with disqualifications to organise sports events and stadium bans the Ministry of the Interior will order that these measures are registered at a Central Registry.

3. Case-law

As a result of the legislative measures for the prevention of violence in sports the number of violent incidents inside sport premises has indeed decreased. Further, the legislation has resulted in court deci-

sions. Some of these have had important social repercussions, such as the judgment delivered by the Provincial High Court of Madrid by which Ricardo Guerra, who killed Real Sociedad supporter Aitor Zabaleta by stabbing him with a knife just outside the Vicente Calderón stadium where Real Sociedad was going to play Atlético de Madrid, was sentenced to 17 years' imprisonment.

Another example is a Supreme Court decision (El Derecho no. 1999/35038) ordering the organisers and owners of sports premises to pay damages to spectators for the injuries they suffered when they attempted to climb a partition on the premises. The organisers and owners were held liable under the Sports Act.

Finally, another example is a judgment of the Provincial High Court of Madrid's Tenth Division (El Derecho no. 2000/68604) against a club which was ordered to pay part of the damages claimed by a spectator who suffered a broken leg as a result of attempts to defend his nephew from being attacked during a football match. The spectator claimed that the club, although it had been aware of the high-risk nature of the match, had failed to exercise the necessary supervision as required by the Sports Act.

4. Conclusion

In summary, since the 1980s when the problem of violence in sports was first acknowledged, a number of steps have been taken at different levels in order to eradicate this blot on sports that goes against all its inherent values.

As we have been able to appreciate during the European Football Championship in Portugal recently, the fight against violence in sport is beginning to bear fruits all over the continent. We have even been able to watch supporters of different teams comforting each other after the match. Unfortunately, however, we have also had to watch hooligans destroying cars whose owners may not even have been interested in football or had any relation to the match, and the press has had to report that people were killed simply for supporting a victorious team.

In order to assess the effectiveness of the Spanish measures adopted in the fight against violence in sport, we may consider the March 1998 evaluation of the Council of Europe concerning Spain's National Commission against Violence at Sporting Events, which gauges Spain's compliance with the agreements resulting from the European Convention against Violence in the period between 1987 and 1997. It was found that there was a high degree of compliance in Spain. The report highlighted the low number of violent incidents at matches despite high numbers of spectators and the spectators' enthusiastic support of their preferred teams and recommended that Spain continue its efforts in the fight against violence. It further noted that Spain had established an effective system to reduce violence at football matches and that the work of the National Commission had been efficient. It suggested that other States create a similar institution. The report also found that, apart from some exceptions, cooperation between the authorities and the clubs had been effective, as had the functioning of the safety coordinator and the prevention system applied. The safety system was found to have been up-to-date and advanced. The report generally considered that cooperation between authorities, police forces and organisers had been good. It praised the efforts made by sport organisers and clubs to improve the stadiums' infrastructures. It found that the police forces had played a major role in managing and protecting safety during football matches and positively considered the establishment in all sports premises of the Integrated Safety System.

The fine results of this evaluation should inspire us to continue with this battle, since the job is not yet done. On the contrary, a lot of action still needs to be taken to put an end to violence in sports once and for all. This fact has become patently clear from all the rules which were still approved after the Council's evaluation.

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“Rock of Gibraltar” Dispute

by Mark Edmondson*

1. Introduction

No, this is not an article about the British territory of Gibraltar, which has just celebrated its tercentenary, but about a racehorse of the same name!

The sport of international horseracing has recently witnessed an unseemly piece of litigation in Ireland concerning the ownership of the champion racehorse “Rock of Gibraltar”. The claimant, Sir Alex Ferguson, brought court proceedings against the former Irish Senator John Magnier of Coolmore Stud, one of the leading - perhaps *the* leading - horse-breeding operation in the world. Apart from the two high profile protagonists, the case attracted much international press interest, as Sir Alex Ferguson was at the time negotiating a further extension to his contract as Manager of Manchester United Football Club; whilst Mr Magnier, through his company British Virgin Islands based company, Cubic Expression, was steadily increasing his stake in the Club.

The parties became embroiled in litigation over the nature and terms of the ownership of Rock of Gibraltar once he had retired to stud. Obviously, the precise details of the litigation and the subsequent settlement must remain confidential between the parties, but this article concentrates on the potential legal areas with which it was concerned. Could and should litigation have been avoided if clear contractual documentation had been prepared, albeit that - at the time - the parties may have thought that a contract was not necessary.

2. General background

The Coolmore organisation is based in Ireland and consists of a number of farms centred upon their flagship Coolmore Stud, where they stand in excess of 40 stallions. For over 20 years, Irish breeders have enjoyed a fiscal advantage, whereby income from stallions is tax-free. Rock of Gibraltar (IRE) was foaled in 1999 and is by Danehill (USA) out of a mare called Offshore Boom (IRE), who in turn was by one of the Coolmore foundation stallions in Be My Guest (USA). Sir Alex Ferguson has had a longstanding interest in horseracing, and was apparently introduced to Mr Magnier by Mike Dillon, a Director of the Ladbrokes betting organisation and Manchester United supporter about 5 years before. Clearly, some form of arrangement was agreed whereby Ferguson became involved.

The horse entered into training under the care of Aidan O’Brien (who also bred the horse) at Ballydoyle in Ireland and was campaigned as a 2 and 3 year old. He was phenomenally successful and only finished out of the first two on one occasion, winning 10 of his 13 starts, including the 2000 Guineas at Newmarket and the Sussex

Stakes at Goodwood, amassing some £1,269,804 in prize money. Horse races are all categorised and Group or Grade 1 events are of the highest quality and include, for example, the Derby and the Prix de l’Arc de Triomphe. Rock of Gibraltar’s successes included a record 7 consecutive Group 1 events, beating the previous record held by Mill Reef of 6 in the 1970’s. Upon retirement, Mill Reef became a phenomenally successful sire based at the English National Stud. This level of success, in turn, secured the “Rock’s” right to retire to stud and command high fees in the breeding shed.

3. Ownership

The facts as to the nature of Ferguson’s involvement and, therefore, his ownership could potentially fall into a number of categories. He could either have been gifted (or purchased) 50% of the horse outright with this entitling him to 50% of any prize money earned (approximately £600,000), in addition to 50% of any increased value in the horse, which could be realised either on a sale or syndication (into shares) after the horse’s racing career, or by receiving half of the Nomination income (see later). A sale of this horse would always have been unlikely as the animal was always destined to return to Mr Magnier’s Coolmore Stud to begin his stud career. This would, of course, be subject to Ferguson paying his share of the horse’s expenses, such as training fees paid to Ballydoyle, travelling, jockeys, vets and the like, and then, following retirement, arrangements being made for the horse to be kept at stud throughout his stud career.

Alternatively, Ferguson could have been offered a share in the horse on a lease basis for the horse’s racing career only. This is now relatively common. At the end of his career, to be determined by the partners or, for example, upon veterinary advice, perhaps following an injury, the horse would then revert to the “freeholders”. A normal lease would provide for the animal to be insured (either by the lessor or lessee depending upon the arrangements) and specify the trainer. A typical leasing arrangement would specify who was to be responsible for all training fees, veterinary costs (provided they are incurred in the course of training), registration fees and other costs. Furthermore, that the horse should not run in any claiming or selling races (to avoid forced change of ownership which is a condition of those races subject to certain conditions); provision for allocation of the prize money; provision for decision making in terms of the animal’s race plans; and termination provisions (typically at the end of a stipulated racing season or in the event of injury). Provision is then often made for separate allocation of funds in the event that the horse wins either a Listed race or a Group race and thus becomes more valuable either as a potential stallion or a broodmare. As indicated, Group races are the more lucrative events for the more able horses, Group 3 being the lower and Group 1 the highest category of race. A Listed race is just

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below Group 3 level. There would then typically be an arbitration clause and a jurisdiction clause in addition to other miscellaneous contractual provisions.

Essentially, therefore, the usual arrangements are that the lessees race the horse and share the prize money whilst also sharing in the costs. There are some predetermined events which affect the contract, but, provided they are adhered to, then the lessees have conduct over the horse's racing career and the lease can provide for the lessees to benefit from the horse's career, perhaps by sharing - to some degree - in its fortunes at stud. The parties would clearly know their positions and, if carefully drafted, all eventualities would be covered. These matters could, of course, also be addressed in a Partnership Agreement. However, this appeared not to be the case in respect of Rock of Gibraltar.

There was speculation that Ferguson was invited to become involved on slightly different terms. One has to examine the likely benefits that each side was to receive from their association. Firstly, Ferguson would enjoy the opportunity of becoming involved with a choicely-bred 2 year old and would be able to further his interest in the sport in the company of some international players in the bloodstock world, and would enjoy the benefits of racehorse ownership. On the other hand, the owners of the horse would enjoy the benefits of being associated with Sir Alex Ferguson, one of the most successful and, therefore, high profile football managers of all time, which would no doubt have knock-on positive PR effects for the horse and, subsequently, for Coolmore. However, misunderstandings lead to litigation. What is clear is that Ferguson was registered as a 50% owner with Mr Magnier's wife registered as the other shareholder.

The procedure in Ireland is that a document known as a Form to Register a Partnership is lodged with Horse Racing Ireland, detailing the owners. The horse usually runs in the colours of the first-named partner. Rock of Gibraltar ran in the colours of Ferguson. This is subject to Rule 122 of the Irish Rules of Racing governed by the Turf Club. The proportions of ownership are clearly stated, namely, Ferguson was stated as owning 50%.

Those facts may be clear but upon what terms those arrangements were entered into later became contentious, once the horse had retired and Ferguson not apparently being registered as an owner. There would appear to have been a lack of any other documentation, such as a Lease or Partnership Agreement, governing allocation of prize money, Nomination income and so on. Apparently, Ferguson was given the option of either sharing in the prize money from the horse's racing career or of foregoing any prize money with a view to sharing in the horse's fortunes (or lack of them) at stud. Ferguson apparently declined prize money and opted to share in the horse's stud career. This was a risky strategy as, at the time of the decision having to be made, the horse was unproven, as it apparently came after the time that the horse had finished 6th in the Group 3 Coventry Stakes at Royal Ascot. Probably what the parties would have agreed upon was that nobody - at that point - would have anticipated the horse's improvement in form, which led to him subsequently registering his 7 consecutive Group 1 victories in England, Ireland and France. The horse eventually retired after finishing 2nd in a further Grade 1 Breeders' Cup race in the United States of America on 26 October 2002. At that point, the horse was European Champion Miler and, therefore, had earned the potential to earn millions in his second career as a sire.

4. Breeding career

When a successful Thoroughbred racehorse retires to stud, mare owners contract with the stallion owner to breed their mare to the stallion (known as "a covering"), subject to a fee being paid. This is called a "Nomination" and Nomination Agreements are sent out to each individual mare owner, typically one contract per mare. A Nomination Agreement contains terms governing payment, control of disease and injury rights of substitution, the unavailability of the stallion (frustrating the contract), and the provision of a Covering Certificate (proving when the mare was last covered) and so on.

5. Payment terms

The receipt of the Nomination income is dependent upon the nature of the Agreement. Typically, the Northern Hemisphere terms stipulate that payment is due on the 1 October of the year in which the mare was covered, provided the mare is in foal on that date. Veterinary evidence of the mare being barren is required. Alternatively, some contracts provide for Live Foal or Special Live Foal terms, which means that either the fee is due within 48 hours of foaling, provided the foal stands and nurses within that time, or that the fee is due on 1 October but is returned if the foal does not stand and nurse within 48 hours. Again, veterinary evidence is needed. Artificial insemination is not allowed in Thoroughbred breeding and, therefore, the mare actually has to visit the stallion to be covered. The Northern Hemisphere breeding season runs from 15 February to 14 July. The mare's normal gestation period is approximately 340 days and thus the mare can only produce one foal per year (twins are discouraged on health grounds). Stallions can cover many mares throughout that season and the economics are, therefore, fairly easy to calculate. Rock of Gibraltar retired with a European stud fee of £65,000. Therefore, if the horse covered 150 mares, the gross income would be 150 x £65,000, that is, £9.75 million per season. However, according to the records held at Weatherbys, Rock of Gibraltar actually covered 168 mares in his 1st season - a staggering £10.9 million. Moreover, a large breeding operation, such as Coolmore, shuttle their stallions between their farms in Ireland, America and Australia and, therefore, at the end of the Northern Hemisphere breeding season, the stallion is transferred to a farm in Australia, where he covers a further book of mares in the Southern Hemisphere season commencing on 1 September. Rock of Gibraltar's fee in Australia was set at Aus\$132,000. The revenue stream, therefore, from one successful horse can be huge and perhaps in the region of £15 - £20 million per annum. Rock of Gibraltar retired at three. He is young and could perhaps be expected to have 20 years at stud. Ferguson clearly thought he was entitled to a percentage of the horse's value. However, matters are not normally quite that simple. The total revenue earned from the horse at the end of its stud career will be dependent upon the horse's health (and fertility), well being and his longevity, coupled with the success of his progeny on the racecourse. Horseracing and breeding can be a fickle business and a horse's Nomination Fee can both decrease and increase, once the horse begins to have its first runners (after three years) and then subsequently varies throughout the horse's career. If he produces poor stock, the price drops, but if he produces Group winners then it can increase dramatically. There is no doubt, however, as has been proved in the past by Coolmore and others, that careful management of successful racehorses can prove very lucrative. Ferguson, it would appear, claimed that he was entitled to 50% of those earnings. Proceedings were, therefore, commenced in the High Court in Dublin by the Manchester United Manager against one of his employer's major shareholders. The Magnier camp issued a press release claiming that Ferguson's case was without merit. The matter was bitterly contested. The stage was set for a Trial in late 2004/early 2005. The Trial would have inevitably involved an examination of whatever paperwork existed between the parties, together with records of telephone calls, correspondence and so on, as the Court sought to decide the nature of the contractual terms. Both Sir Alex Ferguson and John Magnier would have been required to give oral evidence, as also would any number of intermediaries and assistants. The Court's intervention in terms of a Judgment would potentially have been damaging to the reputation of one or other of the litigants. However, what was no doubt meant to be a gentlemanly arrangement was nudged sideways by the potential of vast revenue and became a high profile piece of commercial (sporting) litigation. The Trial would have exposed any shortcomings in contractual documentation and would have led to an unseemly, if somewhat colourful, conclusion for the world of sport in general and racing in particular. Mercifully, a settlement was eventually agreed in March this year to avoid the unpleasantness of a Trial, with Ferguson reputedly being offered four Nominations a year, which was then capitalised into a lump sum.

The International Guide to the Taxation of

Sportsmen and

Sportswomen



The most important topics

Income taxation of athletes
Treatment of income from sponsoring
Exploitation of image rights
International tax issues
Tax treaty provisions
International tax planning possibilities

Authors and editor

The country chapters have been written by tax practitioners on the basis of their practical experience. The publication is edited by Rijkele Betten.

Target audience

- international tax attorneys
- lawyers representing athletes in contract negotiations
- international sports organisations
- sports management bureaus
- sports law specialists

Detailed description of country chapters

This loose-leaf service contains country chapters in which the income tax aspects of income from sports and related activities are described in detail. The chapters are between 30 and 75 printed pages. Each country chapter starts with an analysis of the income tax status of amateurs and professionals and describes the precise domestic tax rules on income from sports activities and related income (for example, income from the exploitation of image rights). The application of withholding taxes to non-resident athletes is an important topic.

The second part of each country chapter deals with international situations and covers:

- the taxation of foreign income earned by resident athletes
- the application of tax treaties to resident and non-resident athletes
- the content and interpretation of the applicable tax treaties
- avoidance of international double taxation
- case law (coverage will be further expanded)

International tax planning techniques are described in chapter three. This includes, for example, discussion of the tax treatment of rent-a-star companies, and of residents in tax havens like Monaco. The information is also of use for international tax planning with regard to high income individuals.

Countries currently covered

Argentina, Australia, Belgium, Canada, Germany, Greece, Ireland, Italy, Monaco, The Netherlands, The Netherlands Antilles, New Zealand, Spain, Switzerland.

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The publication is updated twice a year. Country chapters to be included in 2004 are, inter alia, France, the United Kingdom and the United States.

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Order now: the subscription price for 2004 includes the two updates.



6. Conclusion

The case clearly demonstrates the old saying, attributed to Sam Goldwyn of Metro Goldwyn fame, that “oral contracts are not worth the paper they are written on!” neither are so-called “gentlemen’s agreements” – even in the “Sport of Kings.”

And, understandably, the parties wished to reach an out of court settlement, and put the matter behind them. As times move on,

Ferguson, of course, signed his new one-year rolling contract – reputedly worth £4 million per annum. Cubic Expression still owns just less than 30% (at which point, under the London Stock Exchange rules, a takeover becomes obligatory) of Manchester United, and Coolmore continues its dominance in world breeding, spending millions of dollars at the recent Keeneland (Kentucky) Yearling Sales in their quest for the next Rock of Gibraltar!

The International Sports Law Journal



Implications of the Judgement of the ECJ in Adidas-Salomon AG and others vs. Fitnessworld Trading Ltd. and of the German Federal Court in Obermaier OHG vs. UEFA

The Missing Link: Problems of Trademark Protection for Famous Signs in Sports

by Michael Gerlinger*

1. Introduction

The 2006 FIFA World Cup in Germany is fast approaching and all the stakeholders involved are awaiting the starting sign for launching their advertising campaigns. The market is highly competitive and those being official partners of the World Cup try hard to defend their association with the event. However, many other big brands, too, will use the tournament for marketing activities. For this reason, in its *Guidelines for use of FIFA's trademarks* of September 2003, FIFA explicitly emphasises the trademark protection of its “Event Marks” for the 2006 World Cup and states that only authorised entities are entitled to commercially use these marks.

Trademark owners of famous sports trademarks, naturally, try to prevent any association of third advertising campaigns with their trademarks, the event, club or sport respectively. But not each single association with a sports event or club constitutes a trademark infringement. According to Article 5 para. 1 of the Directive 89/104/EEC, the proprietor of the registered trademark can prevent the use of an *identical* trademark in relation to identical goods or services. The trademark protection against *similar* trademarks under Article 5 para. 2 requires a likelihood of confusion on the part of the public, which includes the risk of association between the sign and the trademark.

Two recent judgements – one of the European Court of justice (ECJ) in *Adidas-Salomon AG and others vs. Fitnessworld Trading Ltd.* of 23 October 2003¹ and another of the German Federal Court [BGH] in *Obermaier OHG vs. UEFA* of 25 March 2004² – reveal specific problems with such risk of association for famous sports trademarks. In this article, we will identify these problems and assess the implications for famous sports trademarks in general.

2. The Adidas Case

This case concerns the attempt of Adidas-Salomon AG (Adidas-Salomon) to prevent Fitnessworld Trading Ltd. (Fitnessworld) from using two vertical stripes on sports clothing.

Fitnessworld, a UK clothing company, markets several products with a sign bearing two parallel and equally decorated stripes. Adidas-Salomon is owner of several 3-stripe trademarks, protected, amongst others, in the Netherlands, where Adidas-Salomon's licensee in the Benelux, Adidas Benelux BV (Adidas), brought action against the use of the two-stripe decoration. It argued that there was a likelihood of confusion by the general public between the two signs; Fitnessworld benefiting from such association.

Fitnessworld's defence was based on the argument that the two-stripe decoration was only viewed as a pure embellishment and not as a trademark. Thus, there was no trademark infringement.

In the course of the procedure, the Supreme Court of the

Netherlands [Hoge Raad der Nederlanden] referred several questions of interpretation to the ECJ for a preliminary ruling, in particular, with respect to the criteria for the analysis of similarity of signs under Article 5 (2) of the Directive 89/104/EEC (Directive) and to the question whether the use purely as a decoration or embellishment is caught within Article 5 (2) of the Directive.

Article 5 (2) of the Directive reads as follows:

Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

2.1. Judgement of the ECJ

The ECJ first refers to its decision in *Davidoff*³ and confirms that, where a Member State grants specific protection in cases of use in relation to goods or services which are not similar according to Article 5 (2) of the Directive, it has to grant such protection also in cases of use by a third party of a later mark or sign which is identical with or similar to the registered mark with a reputation in relation to goods or services which are *identical with or similar to* those covered by that mark.

The Court then turns to the criteria for the analysis of similarity of signs under Article 5 (2) of the Directive. According to Adidas' and the European Commission's submissions, no likelihood of confusion is necessary with respect to trademark protection within the meaning of Article 5 (2) of the Directive. A likelihood of association was sufficient.

Fitnessworld, on the other hand, argued that the similarity between the mark and the sign had to be such that it can create confusion on the part of the relevant section of the public.

The ECJ notes that, unlike Article 5 (1) (b) of the Directive, which requires a likelihood of confusion, Article 5 (2) of the Directive does not refer to such requirement. It rather concerns cases of use, which takes unfair advantage of, or is detrimental to, the character or repute of the trademark. Therefore, the court holds that Article 5 (2) of the Directive does not necessarily require a *confusion* on the part of the public, but only a certain degree of similarity, by virtue of which the relevant section of the public makes a connection between the sign

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¹ Case C-408/01, OJ C 304/7 of 23 October 2003.

² I ZR 130/01.

³ Case C-292/00, *Davidoff* [2003] ECR I-389.

and the mark, that is to say, establishes a *link* between them even though it does not confuse them.

The Court then turns to the question of what importance must be attached to a finding of fact by the national court to the effect that the sign in question is viewed purely as an embellishment by the relevant section of the public. In the opinion of the ECJ, the trademark owner is granted protection under Article 5 (2) of the Directive, if the public views the sign *not only* as an embellishment, but also establishes a link to the registered trademark. However, where the relevant section of the public views the sign *purely* as an embellishment, it necessarily does not establish any link with the registered mark. Thus, according to the ECJ, the requirements of Article 5 (2) of the Directive are not met in cases of a “pure embellishment”.

3. The Obermaier Case

The *Obermaier* case concerns the use of the sign “EURO 2000” on football balls produced by Gebr. Obermaier OHG (Obermaier). UEFA is owner of an International Trademark Registration of a graphical sign with trademark protection in Germany, showing the official “EURO 2000” logo. It is also owner of a German Trademark Registration with respect to another graphical sign portraying a different “EURO 2000” logo.

UEFA sought the destruction of balls produced by Obermaier and labelled with such sign, as well as damages, in the Regional Court of Munich I (LG München I). The court dismissed UEFA's claims, whereas the Higher Regional Court of Munich (OLG München) in the appeal ruled in favour of UEFA.

The German Federal Court, reviewing the latter judgement, first held that there was no risk of confusion between the sign used by Obermaier and UEFA's registered trademarks. As even UEFA explained, the relevant part of the public understands the wording “EURO 2000” as a reference to the European Football Championship organised by the UEFA in 2000 in The Netherlands and Belgium, the wording, according to the court, was descriptive in a way that it does not have determinant influence on the general impression of the trademark. Therefore, a risk of confusion depended on the similarity of the graphical design. In the case under review, however, the graphical design of the sign used by Obermaier was different to the one registered by UEFA.

In addition, the court remarked that, if the sign used by Obermaier was descriptive or viewed by the public as an additional embellishment for advertising purposes, the sign would not be used as a trademark as such, that is to say, for the purpose of distinguishing the football balls as originating from a particular undertaking. Consequently, there would be no use of a registered trademark within the meaning of Section 14 of the German Trademark Act (or Article 5 of the Directive respectively).

The court, therefore, set aside the decision of the Higher Regional Court of Munich and referred the case back to that court for further findings as to the view of the relevant part of the public regarding the sign “EURO 2000”. According to the German Federal Court, additional findings are particularly required with respect to the descriptive character of the sign - as to whether the sign is viewed as a reference to the European Football Championship as such without indicating UEFA as supplier of the balls, or as a reference not only to the event as such, but also to UEFA. If, on the basis of such findings, the sign “EURO 2000” was descriptive or used as an embellishment for advertising purposes, that is, if no substantial part of the public established a link to UEFA as originator of the balls, the case under review would lack a use of the sign as a trademark as such, required by Section 14 of the German Trademark Act. Consequently, UEFA would not be able to claim any trademark infringement.

4. Implications of these Judgements

Both parties that claimed trademark infringement in the above-mentioned cases were confronted with a quite broad or general perception of their signs by the public. In *Adidas vs Fitnessworld*, the ECJ denied trademark protection in case of the purely descriptive nature of the sign (three stripes); while in *UEFA vs Obermaier*, the German Federal

Court illustrated that, in its view, the pure title of an event without the indication of the originator (UEFA) might not be sufficient to grant trademark protection.

The courts, therefore, tended to restrict trademark protection, because they considered the link or indication to the originator or trademark as being too weak.

This is a particular problem not only for organisers of sports events, but also for sports clubs or clothing manufacturers, such as Adidas.

4.1. Event organisers

On the basis of the above-mentioned judgements, trademark protection with respect to sports events might be very difficult. Registered trademarks are often used for the prevention of ‘ambush marketing’. With respect to the World Cup 2006 in Germany, FIFA sanctioned the official titles, “2006 FIFA World Cup Germany”, “2006 FIFA World Cup” and “FIFA World Cup”⁴, always referring to FIFA as the originator of the event, thus preventing potential ‘ambush marketers’ from using the official title of the event.

UEFA's registered trademark claimed in *UEFA vs Obermaier*, on the other hand, was lacking such indication of the originator, in consequence of which the German Federal Court denied the distinctive character of the sign “EURO 2000” in the first place.

Consequently, any sports federation organising an event will have to secure trademark protection by choosing a rather distinctive title that indicates the federation itself as the originator. Some famous events have already become known as a particular event by the federation concerned, such as the “IAAF World Athletics Championship” or the above-mentioned “FIFA World Cup”. The more the titles of the events become associated with a sports organisation or international federation, the easier the protection of the title by trademark registration will be for such bodies. As a result, international federations organising famous sports events are well advised to expressly market the event as their “own” one.

4.2. Sports clubs and organisations

A similar problem appears for sports clubs and other sports organisations. In *Arsenal FC vs. Matthew Reed*⁵, the ECJ had to deal with non-official merchandising products with the logo of Arsenal FC that, according to Mr Reed, who sold these products, neither indicated the origin of the goods, nor was perceived as a badge of origin by the public, but as a badge of allegiance or support. The ECJ, however, decided in favour of Arsenal FC, since it held that - even though Mr Reed had a notice stating that the goods at issue in the main proceedings are not official Arsenal FC products on his stall - there was still the risk that the sign might be interpreted by people, not knowing this notice, as designating Arsenal FC as the undertaking of origin of the goods. According to the ECJ, this contravened the essential function of the trademark, which is why Arsenal should succeed. The court, however, did not answer the question of whether trademark infringement required trademark use, which, in the *Arsenal* case, was doubtful. For this reason, different interpretations of the case were possible.⁶ The *Arsenal* case shows the problem sports clubs might be confronted with, if their logos are used without any risk of association to the registered trademark of the club or without indicating the club itself as the originator of the goods or services. Since logos of football clubs and other sports organisations are not only meant to distinguish goods or services, but - as Matthew Reed claimed - also indicate an affiliation of the supporters buying products labelled with the logo, there is a potential risk that courts might deny trademark protection because of a lack of indication of the originator - as the German Federal Court remarked in *UEFA vs Obermaier*.

4.3. Clothing manufacturers

The problem of the perception of two parallel stripes, similar to Adidas' three stripes, by the public is not new to Adidas. In *Adidas vs. Marca Mode*⁷, the ECJ already ruled against Adidas and held that the

4 Guidelines for the use of FIFA's trademarks of August 2004.

5 Case C-206/01.

6 See further: Davis EuZW 2003, p. 164.

reputation of a mark does not give grounds for presuming the existence of a likelihood of confusion simply because of the existence of a likelihood of association in the strict sense. For this reason, the existence of a likelihood of association had to be established in every single case, so Adidas could not rely on a presumption of it. Adidas had great difficulties to establish such likelihood of confusion in a case in Germany, where the Higher Regional Court of Munich (OLG München) first held that the public was well aware of Adidas' three stripes, thus being able to distinguish between Adidas' three stripes and the defendant's two stripes. It was only after a further appeal to the German Federal Court, which held that a likelihood of confusion could not be excluded on the Higher Regional Court's findings and referred the case back to the court⁸, that it ruled in favour of Adidas.⁹ The reputation of Adidas' sign, therefore, nearly was even detrimental to the case according to the Higher Regional Court's first decision.

Consequently, any manufacturer of sports or other clothing that uses a certain sign of identification close to an embellishment runs the risk of not being able to protect such signs against non-authorised use by third parties. The closer the sign is to an embellishment, the more difficult it is to enforce trademark protection. The trademark owner will be confronted not only with the problem that the sign might be viewed purely as an embellishment, but - even if this was not the case - will have to deal with a potential lacking likelihood of confusion, maybe even on grounds of the sign's reputation. In consequence, the manufacturer ought to choose a distinctive sign, if possible avoiding any similarity with an embellishment.

5. Conclusions

The above cases both indicate the broad perception of the respective sign by the public as a major problem of trademark enforcement. Such problem might often occur to sports organisations or events, since their logos, badges or titles do not necessarily establish a link between the sign and the trademark or indicate the sports organisation as the originator of the goods or services in question.

Apart from trademark protection, however, sports organisations might seek to prevent the use of a sports event, club logo or other sign of identification by third parties with the law of unfair competition. In *UEFA vs Obermaier*, UEFA did not only claim trademark infringement, but also unfair competition according to Sections 1 and 3 of the German Act against Unfair Competition (UWG). UEFA argued that the use of the sign "EURO 2000" constituted not only an improper exploitation of UEFA's reputation as well as the unfair hindrance of UEFA, but also a deception of the general public with respect to Obermaier's affiliation with the event. The German Federal Court did not decide about the aspect of unfair competition, but referred the case to the Higher Regional Court of Munich for further findings, in particular, regarding the question whether the general public might consider Obermaier's football balls as the "official ball of the European football championship 2000" and a potential deception of the public in this respect. Thus, although UEFA was not able to enforce its trademark against Obermaier, it might be successful on grounds of the law of unfair competition.

A company trying to associate its brand with a sports organisation or a sports event might well be perceived by the general public as the "official sponsor" of such organisation or event. If this perception is, in addition, relevant to the consumer's buying decision, the trademark holder might indeed successfully prevent such association due to a deception of the public within the meaning of the law of unfair competition.¹⁰ For this reason, the law of unfair competition can be a considerable alternative when the trademark owner was not able to establish the required link between the sign and the trademark and trademark enforcement fails to be successful.

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⁷ Case C-425/98 EuZW 2000, 504.

⁸ GRUR 2001, 158.

⁹ GRUR-RR 2001, 303,

¹⁰ See: Higher Regional Court of Hamburg (OLG Hamburg), GRUR 1997, 297, p. 299.

Mobile Marketing - The New Legal Frontier

by Rikardt Kemp*

1. Introduction

Sport is a massive global industry and sports related infotainment¹, delivered *anywhere* via a mobile handset, is proving to be a very successful marketing mechanism for companies in the media and entertainment industry. Sports content can be provided to consumers as premium content², through permission-based advertising, promotion and sponsorship marketing via mobile phones. European law has, however, not adapted to the challenges of wireless technology and mobile marketing³ presents unique legal problems to organizations who wish to exploit this medium in Europe.

2. The technology landscape

Infotainment is flexible, easy to implement, and capitalises on consumers' growing appetite for ubiquitous information and entertainment. From a sports marketing perspective, recent technological advances in mobile telephony like Universal Mobile Telecommunications Services (UMTS) ("3G")⁴ enables the use of more appealing content through sophisticated technologies such as Multimedia Messaging Service ("MMS"), interactive video, quality imaging and sound. Existing mobile technology is already widely used for the provision of sports content but the increased speed that 3G offers

enhances the 'richness' and appeal of the medium because of the potential for multimedia applications.

3. The legal landscape

Consumer laws⁵, policies and practices limit fraudulent, misleading and unfair commercial conduct. Existing and prospective European Union ("EU") consumer protection rules are enshrined in, for exam-

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¹ Infotainment is the combination of customised information and entertainment services delivered to users' handsets while they are mobile.

² Content provided for a monetary consideration.

³ Mobile marketing involves the activities required to communicate with customers

to sell and promote their products and content via mobile devices.

⁴ 3G is the generic term used to describe the third generation of mobile communications systems, which will provide users with enhanced services such as streaming video, high speed multimedia transmission (up to 2 megabytes per second), and continuous mobile internet access. 3G networks will significantly improve the quality of existing data services, including enhanced data capacity, improved quality and rapid data transmission speeds.



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Sport is big business. For rights holders, the opportunities to make money are more numerous and diverse than ever before, especially in the fields of sponsorship, broadcasting and new media. In football, the Premier League, the Champions League and the World Cup are watched by a global audience of millions. Cricket and rugby are more popular than ever before. Athlete transfer fees can run into tens of millions and the athletes themselves have in many cases a status similar to that of film stars.

With success comes exposure, notoriety and responsibility. The FA's disciplinary rules and procedures have been placed under the media microscope. Race fixing allegations have rocked the horseracing world. Drugs too are hugely topical and have been for some time now - Adrian Mutu, Rio Ferdinand, Greg Rusedski and the 2004 Olympic scandals come to mind.

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ple, the Distance Selling Directive⁶, the e-commerce Directive⁷ and the Data Protection Directive⁸. For the provision of commercial services via a mobile phone, also the specific contract law provisions laid down in e.g. the Distance Selling Directive and the E-Commerce Directive have to be observed.

Data protection measures as contained in the Privacy Directive and the Spam Communication⁹ is also a key issue when it comes to direct marketing activities. With regard to the content delivered via the mobile phone and the technological measures applied to protect such content against unlawful copying¹⁰ or distribution, copyright issues and regulations concerning mobile digital rights management systems ("MDRM")¹¹ come into play. This article sets out a high level summary of the EU legal issues that need to be considered by organizations that wish to explore mobile marketing of sports content in the EU. It is also necessary to briefly describe the dynamics of mobile sports content.

4. Sport and mobile

Users of wireless devices already prioritise sports content, with 16% of users in the United States of America rating it as their most popular application, second only to e-mail¹². It is also clear that industry stakeholders are counting on sport to boost the global uptake of mobile data services:

- MMS integrates various media sources such as text, sound, images and video clips and sends these as one synchronised message. Japan's NTT DoCoMo used sports-related content to boost the uptake of MMS during the 2002 football World Cup;
- Although SMS presents marketers with limited potential in terms of visual creativity, it nevertheless offers the opportunity to activate an otherwise passive media campaign and to stimulate a two-way conversation. During the Portugal vs. Greece final in the Euro 2004 football tournament, traffic on the Vodafone in-stadium network increased by 600% and Short Messaging Services ("SMS")¹³ by 1500%. Over the course of the tournament, Vodafone Portugal recorded 680,000 foreign visitors on its network with visitors from the UK, Spain and The Netherlands generating the majority of the traffic¹⁴;
- Brand marketing companies like Nike are using mobile technologies to promote their event series "Panna K.O." in Germany.

5. Mobile marketing

Mobile phones with customisable features and interfaces that can display audiovisual content are powerful and personal marketing tools because they are intimate, immediate and localised. There is a great deal of hype surrounding mobile marketing at the moment, which is predominantly driven by the excitement regarding mobile technology and the high penetration level of wireless devices worldwide.

Mobile technology already has a proven track record with SMS and research¹⁵ suggests that SMS marketing not only has a strong net-positive influence on consumer's propensity to purchase the brand being promoted, but also that it is between 2 and 15 times as effective as direct mail and email at generating consumer response. MMS enabled handset penetration has the potential to reach 15-20% of mobile sub-

scribers as early as the end of 2004¹⁶. With the emergence of MMS as an enabler for the provision of sports content, the possibility exists to leverage and build on SMS' success in this field and especially so-called viral marketing where content is forwarded amongst peers, which is very popular amongst the youth market.

Mobile marketing enables two-way conversation, anytime and anywhere, which allows companies in the media and entertainment industry to start interactive relationships with consumers. Consumer data protection and general consumer protections is, however, increasingly attracting attention from regulatory authorities. This has led to a plethora of new legislation that is primarily focused on information disclosure and the protection of privacy.

6. Legal considerations

While national law and EU law are mutually dependent, EU law - where applicable - takes precedence over national law. The European Commission ("EC") has already established an elaborate set of rules with regard to the legal issues involved in mobile marketing activities and is therefore considered in this analysis as the primary source of legal guidance in Europe. This article has considered the EC Directives, Regulations and Communications that apply to privacy, MDRM and where applicable, general consumer protection.

6.1. Distance Selling Directive

Where contracts are being drawn up for mobile services, mandatory rules are laid down in *inter alia* the Distance Selling Directive, the Sales Regulation, the e-commerce Directive and by national law. The Distance Selling Directive is intended to provide protection to consumers by establishing a legal framework for e-commerce and other "distance" sales transactions in which the buyer and the seller are not physically present in the same location at the time of the transaction.

The ambit of the Distance Selling Directive¹⁷ is wide and includes the "exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded"¹⁸. Thus contracting by any means which, without the "simultaneous physical presence", includes mobile phones utilised for mobile marketing purposes would qualify.

If a contract for mobile services is entered into, the Distance Selling Directive requires companies to comply with a broad range of solicitation and sales practices that should be provided to the consumer in a "durable medium" at the time of performance of the contract. The obligation to provide consumer information guidelines must be communicated subject to the principles of good faith in commercial transactions and the principles governing the protection of minors.

6.2. The Sales Regulation¹⁹

The Sales Regulation applies with effect from 1 January 2005 and focuses on 'commercial communications', in any form that promote, directly or indirectly, the goods, services or image of a company. The ambit of the Sales Regulation is wide and 'promotion' for companies would include "the offer of a discount, a free gift, a premium or an opportunity to participate in a promotional contest or game" where the 'customer' purchases goods or service that are promoted. The Sales

5 For instance the EU Regulation concerning sales promotions in the Internal Market (2001/0227 (COD) (*Draft*) ("Sales Regulation") and the EU Fair Commercial Practices Communication (*Draft*) ("UCP Communication")

6 EU Directive on the protection of consumers in respect of distance contracts (97/7/EC) ("Distance Selling Directive").

7 EU e-commerce Directive (2000/31/EC) ("e-commerce Directive").

8 EU Directive on Data Protection (95/46/EC) ("Data Protection Directive").

9 EU Directive on the protection of privacy and the processing of personal data in the telecommunications sector (97/66/EC)

("Telecoms Privacy Directive"), EU Privacy and Electronic Communications Directive (2002/58/EC) ("Privacy Directive") and EC Communication on unsolicited commercial communications or 'spam' (COM(2004) 28) (the "Spam Communication").

10 EU Directive on the harmonization of certain aspects of copyright and related rights in the information society (2001/29/EC) ("Copyright Directive").

11 DRM protects content owners' rights when selling and distributing content in a digital form via mobile handsets. DRM technologies can control file access (number of views, length of views), altering, sharing, copying, printing, and saving.

These technologies may be contained within the operating system, program software, or in the actual hardware of a device (mobile handset).

12 Sport Business Research Report: Sport and Wireless 2004, p. 9.

13 SMS permits the transfer of text-based messages, with a maximum of 160 characters, "via a network operator's message center to a mobile phone, or from the Internet, using a so-called 'SMS gateway' website. If the phone is powered off or out of range, messages are stored in the network and are delivered at the next opportunity." <http://www.symbian.com>.

14 "Lots of roamers during Euro 2004". <http://www.cellular-news.com>.

15 Enpocket, see

«<http://www.enpocket.com>».

16 "Mobile Operators: Leaders Hit Back", Research Report by Arthur D. Little and Exane 2004, pp. 43 - 44.

17 Schulze, C., 2001 "Don't Panic! Do E-commerce - A Beginner's Guide to European Law Affecting E-commerce", p. 18.

18 Annexure 1 to the Directive.

19 See also Article 3(4) of Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, page 27).

Regulation sets information disclosure requirements²⁰ that must be communicated in a “*clear and unambiguous manner*”. There are, however, exceptions for direct access to for instance a domain name or an electronic-mail address and independent communications without financial consideration.

6.3. Industry codes of conduct

Although industry codes of conduct do not have any legislative power *per se*, they are often incorporated directly or by reference into European legislation²¹. In addition to domestic country guidelines, the Mobile Marketing Association has developed a Code of Conduct²² for *inter alia* content providers, advertisers and brands marketing companies.

6.4. E-commerce Directive

The e-commerce Directive explicitly links personal data protection and consumer protection in the electronic marketplace. The Directive²³ covers all forms of e-business, including business-to-consumer transactions (“B2C”)²⁴. The e-commerce Directive also applies to transactions over mobile phones (m-commerce), detailing the rights and obligations of content providers and consumers.

The e-commerce Directive²⁵ provides that, except for contracts concluded exclusively by exchange of e-mail messages, the service provider should communicate “*comprehensibly and unambiguously*” prior to the order being placed, information relating to *inter alia* the different technical steps needed to conclude the contract. The service provider must provide the consumer with the contract terms and general conditions in a way that allows storage and copying (e.g. by mobile mail/e-mail).

This creates problems in practice as it is difficult to display comprehensive information on a (small) mobile device display. Some countries like The Netherlands have specific practices whereby an explicit reference or hyperlink to the general terms can be made via the mobile phone for m-commerce transactions. However, this is not a uniform practice and other countries like Germany do not have similar provisions. In practice, incorporation by reference should thus suffice with regard to the information disclosure requirements but it should be confirmed on a case-by-case basis.

6.5. Privacy²⁶

Wireless spam is unwanted or unsolicited messages received on a mobile handset. Such spam can be sent through a SMS or MMS gateway to a mobile handset (mobile termination), or from handset to handset (mobile origination). However, ‘spam’ is not defined in the Spam Communication and it merely refers to the concepts of “unsolicited communications...for the purposes of direct marketing” which taken together, will in effect cover most types of ‘spam’. Importantly, the Spam Communication clearly indicates that ambit of the legislation is intended to cover not only traditional SMTP-based ‘e-mail’ but also SMS, MMS and any form of electronic communication for which the simultaneous participation of the sender and the recipient is not required.

Within Europe, the individual’s right to privacy is firmly embedded in the European Convention on Human Rights and Fundamental Freedoms of 1950. Direct advertising is, however,

acknowledged by the European legislature as an important means of promotion. Protection of data relating to communications is therefore one of the core issues of modern communications regulations.

6.6. Data Protection Directive²⁷

The Data Protection Directive establishes the basic principles for the collection, storage and use of personal data. The subsequent Telecoms Privacy Directive²⁸ translated the principles of the Data Protection Directive for a number of specific privacy issues related to public telecommunication networks and services.

The main principle of the Data Protection Directive is that personal data may, except under certain circumstances, not be processed without the consent of the consumer and requires disclosure of information practices by entities that collect information.

Privacy Directive²⁹

The EU recently adopted the Privacy Directive which addresses spam and other unsolicited electronic messaging solicitations including telephone, email and instant messaging (MMS and SMS)³⁰. The Privacy Directive regulates recent developments in the processing and collecting³¹ of personal data by adding regulations, rather than amending existing ones. The Privacy Directive therefore adds to the privacy requirements of the Data Protection Directive and supersedes the Telecoms Privacy Directive³².

Information or access to information stored on the user’s mobile device is allowed under the Privacy Directive³³ if the user is sufficiently informed about the purpose and has the right and ability to deny access. The main principles³⁴ can be summarised as follows:

- In terms of the “opt-in” (prior consent) system³⁵ (“opt-in”), which to date applied to faxes and automated calling machines, Member States are required to prohibit the sending of unsolicited commercial e-mail or other electronic messaging systems such as SMS and MMS *unless* the prior consent of the subscriber to such electronic communications services has been obtained (i.e. who have “opted-in”);
- There is a limited exception to this “opt-in” rule for existing customer relationships. Direct marketing is permitted³⁶ where electronic contact details are obtained directly from a customer in the context of the purchase of a product or a service. This is sometimes referred to as “soft opt-in”. Within such an *existing customer relationship* companies may use the data from its customers for the marketing of similar products or services to those it has already sold to the customer, provided that they are given the opportunity to object to such use (i.e. to “opt-out”) when data is collected, and with *each* subsequent message³⁷. The Privacy Directive is ambiguous with regard to the meaning of a “*customer relationship*” and therefore it is necessary to consider the domestic legislation in each target jurisdiction;
- The opt-in system is mandatory for any e-mail, SMS or MMS addressed to individuals (natural persons) for direct marketing; and
- The practical problem with regard to a valid declaration of consent is the information, which has to be given to the user in advance as it is difficult to display on a mobile device. A feasible solution might be to incorporate the necessary information into the framework contract with the consumer (user) - if such an agreement exists. The consumer (user) must, in any case, be given the opportunity

20 Annexure 1 to the Sales Regulation.

21 E.g. e-commerce Directive.

22 See also the Direct Marketing Association Draft Code of Practice for SMS Marketing.

23 Implemented January 17, 2002.

24 For example mobile entertainment services and direct marketing and advertising and services. Schulze 2001, p. 13.

25 Schulze, C., 2001 “Don’t Panic! Do E-commerce - A Beginner’s Guide to European Law Affecting E-commerce”, p. 19 (Available at http://europa.eu.int/information_society/topics/ebusiness/ecommerce/3informa-

[tion/keyissues/documents/pdf/dontpanic.pdf](http://europa.eu.int/information_society/topics/ebusiness/ecommerce/3informa-tion/keyissues/documents/pdf/dontpanic.pdf)).

26 http://europa.eu.int/information_society/topics/ecommerce/all_about/todays_framework/privacy_protection/index_en.htm#unsolicited. See also Directive concerning the processing of personal data and the protection of privacy in the telecommunications sector (97/66/EC).

27 Vitale, A., 2002 “The EU Privacy Directive and the Regulating Safe Harbor: the Negative Effects on U.S. Legislation concerning Privacy on the Internet, Vanderbilt Journal of Transnational Law, p. 325-327.

28 EU Directive on the protection of privacy and the processing of personal data in the telecommunications sector (97/66/EC) (“Telecoms Privacy Directive”).

29 Clifford Chance LLP and Direct Marketing Association “*Executive Summary of International Spam Laws*”.

30 EC Communication on unsolicited commercial communications or ‘spam’, pp. 10-12.

31 Article 6 of Privacy Directive generally requires the consent of the user to process such location data (traffic data).

32 Preamble to Privacy Directive (2002/58/EC).

33 Enacted on 12 July 2002, replacing and updating the EU Telecommunications Directive (97/66/EC). Member States were required to implement by 31 October 2003.

34 Clifford Chance LLP, see n. 29 *supra*.

35 Article 13(1) of the Directive.

36 Article 13 of the Privacy Directive and e.g. article 11.7 of the Telecommunications Act in The Netherlands.

37 This regime applies to subscribers who are natural persons, but Member States can choose to extend it to legal persons.

to access the information easily before declaring his consent with any kind of data protection. On a strict legal interpretation, a simple reference to the companies' (content provider) website via a hyperlink might not be sufficient if the user cannot access or display it via his mobile device. In the absence of case law or EC guidance such incorporation by reference could, however, be a practical solution to an area of law that is unclear because it has not kept pace with technology. It would thus be necessary to analyse this on a case-by-case basis as domestic legislation in target countries may differ.

6.7. Copyright Directive

The EC have indicated that the creation of a secure environment for content is crucial for the development of richer services³⁸. Companies' mobile marketing initiatives will involve the acquisition of rights (e.g. image right or other intellectual property ("IP") rights) and internal development of content for mobile services (e.g. MMS) to consumers.

The future of privacy is thus inextricably linked to the future of copyright enforcement³⁹ but the balance between these divergent rights is difficult. Mobile marketing enables completely new ways for peer- to-peer content distribution (so-called viral marketing), which he is a valuable mobile marketing tool for companies. However, the Copyright Directive provides exceptions to the exclusive rights of the copyright owners according to which users of the protected content are allowed to copy the content downloaded to their handsets, and eventually to distribute the content or the copies to another party ("private use exception").

The use of these exceptions might be challenged by the adoption of digital rights management systems and may thus actually hinder the user to copy or redistribute the protected content. Therefore, MDRM is the key to protect content owners' rights in general (including copyright) when such content is distributed to mobile handsets. The Copyright Directive⁴⁰ requires protection for digital rights management systems that protect copyright in digital form, including content that is downloaded to a mobile handset. The Copyright Directive also requires the Member States to provide "adequate legal protection against circumvention of any effective technological measures" designed to protect copyrighted work. The Copyright Directive also introduces a concept for the protection for "rights management information".

An interesting issue in this area relates to be the proper balance between the copyright holder's legitimate interest in the adequate protection of its content and DRM systems on one hand, and safeguarding the legitimate exceptions and limitations to the copyright on the other hand - in particular the right to private reproductions and the fair use exception. It will be interesting to see if and how various national legislatures try to adapt the remuneration schemes for these exceptions and limitations to the copyright⁴¹.

6.8. Fair commercial practices

The UCP Communication defines the conditions that determine

whether a commercial practice is "unfair". Notably, it does not impose any positive obligations, which a trader has to comply with to show whether fair trade is engaged in. However, it identifies two key types of unfair commercial practice; those which are 'misleading' and those which are 'aggressive'. The UCP Communication also contains a short blacklist of commercial practices, which will in all circumstances be unfair and "will always materially distort the decision-making of average consumers and are contrary to the requirements of professional diligence".

7. Conclusion

Wireless or mobile services have been heralded as the new marketing frontier but the legal challenges also present new frontiers for European regulators and content providers alike. As new mobile services are developed and offered by mobile operators, both proportionate regulation and legal certainty are required.

Protective measures are indispensable in building consumer confidence and establishing a more balanced relationship between content providers and mobile users in consumer transactions. To date, the supervisory authorities have rarely applied strict remedies and the enforcement of the sanctions has been lenient. It is foreseen that the domestic data protection agencies are going to take a more active role in the enforcement of privacy and consumer protection in future. Accordingly, the specific sanctions, penalties and procedures for mobile marketing would have to be determined on a case-by-case basis, which is an onerous exercise for content providers.

It is clear that the legal issues underlying mobile marketing are daunting and give rise to various practical problems. Given these complexities, the only viable approach to mobile marketing would be permission-based marketing. The management of mobile rights is also a key consideration. Ultimately, the promise of mobile marketing outweighs the compliance burden that is created by the plethora of legislation. It would be beneficial if specific rules governing mobile marketing is promulgated that take into consideration the challenges that the mobile medium poses.

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38 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Mobile Broadband Services (COM(2004) 447), p. 8.

39 Cohen, 2003, "DRM & Privacy", *Berkeley Technology Law Journal*, p. 575.

40 Article 6(2) requires Member States to provide legal protection against the "manufacture, import, distribution, sale, rental, advertisement for sale for rental, or possession for commercial purposes of devices, products or components of the

provision of services" for the purposes of circumventing technological measures, including encryption, scrambling or other copy control mechanisms. Legal support for DRM systems is also to be found in the WIPO Copyright Treaty ("WCT") "Anti-circumvention" provision, and is addressed in Article 11 of the WCT. Rights Management Information Article 12 of the WCT.

41 EYLaw 2004, The Regulation of Digital Rights Management Systems by Copyright Law A Comparative Study, p. 6.

THE 4th ANNUAL ASSER INTERNATIONAL SPORTS LAW LECTURE

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The Regulation of Sports Agents in the United States

by John T. Wolohan*

1. Introduction

Depending on whom you talk to, sports agents are either a pack of parasites¹, a den of vipers², just plain sleazy³ or the great equalizer that ensures the athlete receives a fair market salary.⁴ That there can be such a wide range of views concerning the same industry speaks volumes about the lack of control and regulation of the industry. In fact, the only real requirement necessary to become a sports agent, either educational or professional, is that you actually have a client. Other than that, there are very few entry barriers standing in the way. It should not be surprising, therefore, that individuals in the profession range from the unethical or criminal, who are just out to steal their clients' money, to the honest and highly professional, who are actually concerned for their clients' welfare and post-athletic careers and able to provide a valuable service to their clients and their families.

No matter how you look at the industry, however, what is perfectly clear to everyone in the sports industry is that there is little control or regulation of agents and their behavior, especially when it comes to their interaction with professional athletes. The purpose of this article, therefore, is to examine the regulation of sports agents in the United States. The article begins with a brief overview of the history of sports agents and the various attempts to regulate them. Next, the article examines some of the conflict of interests sports agents must face on an almost daily basis. The article then examines conflict resolution procedures available to agents and athletes. And the article concludes by comparing sports agents and attorneys.

2. History and growth of sports agents in the United States

While the creation of the modern sports agent is usually credited to Bob Woolf in the mid-1960s, individuals have been representing athletes as far back as the 1920s. One of the first sports agents was Charles "Cash & Carry" Pyle, who in 1925 reportedly negotiated the contract between Red Grange and the Chicago Bears, guaranteeing Grange at least \$100,00.⁵ In truth, however, it was only the rare and special athlete that even needed an agent before the 1970s. Before the period of free agency in professional sports, most professional athletes were contractually bound to their team through a reserve system, and with no competing professional leagues to look to for employment, the athletes were left with few alternatives but to sign whatever contract the club put in front of them. Athletes and teams had little reason to do otherwise. Contract negotiation in these circumstances for most players was more a matter of taking what was offered or refusing to play.

If the athlete was bold enough to actually use an agent, most teams either refused to deal with the agent or dealt the player to another team. For example, in 1967, Jim Ringo, who at the time was a seven-time all-pro, hired an agent to negotiate his contract with the Green Bay Packers of the NFL. During the negotiations, the general manager of the team excused himself for five minutes and went into another room to use the phone. When he came back he told the agent that if he wanted to negotiate Ringo's contract he was in the wrong city, the Packers had just traded him to Philadelphia.⁶

Beginning in the mid-1970s, however, there was a dramatic shift in the bargaining power of athletes. To begin with, in 1976, Major League Baseball players won the right to become free agents at the conclusion of their contracts. While the players would bargain away this right for all players, the new system allowed those players with six years of major league service to become free agents at the conclusion of their current contracts.

At around this same time, another major occurrence happened, the public's interest in sports dramatically increased. With the public's increased interest, the teams and leagues were able to increase the

value of the television and radio rights they sold to the national network. As a result of the expanded media coverage and escalating rights fees paid by radio and television networks, professional sports became even more popular and profitable. The increased revenues enjoyed by franchise owners also allowed them to meet, albeit grudgingly, the increasing player salary demands.⁷

Finally, professional hockey and baseball players also enjoyed the benefit of having competing professional leagues to improve their bargaining leverage. For example, if the player was unhappy with the offer of his club, the athlete could market his services in the other competing league, thereby ensuring that he received the highest value for his services.

As player salaries skyrocketed and professional sports evolved into a multibillion-dollar industry, the need for professional representation became more and more essential for many athletes seeking to maximize their individual worth. However, while few would argue that the services of a competent agent can be extremely valuable for a professional athlete, the emergence of the sports agent in professional sports has not been without problems. For example, the intense competition for a limited supply of quality athletes has encouraged corruption.⁸ As an example of the competition among agents for athletes, in 1986, the National Football League Players' Association conducted a survey and found that the number of certified agents outnumbered the number of actual players.⁹ With the odds of actually getting a athlete as a client relatively small, it should not be surprising that some agents would seek to bend the rules or provide athletes with cash, drugs, jewelry or women in order to give themselves a professional advantage.

This is especially true in an industry where, unlike the medical or legal profession, there are no professional requirements or standards to prevent unqualified and unethical people from becoming sports agents.¹⁰ Therefore, whether through corruption or incompetence, the abuses of the agent-player relationship, committed by a relative minority of agents, have taken their toll on the profession's reputation and have prompted measures from a variety of sources to regulate sports agents.¹¹

3. Agent abuses / misconduct

Perhaps the most famous case of agent abuse, and the case that first brought the issue of unscrupulous sports agents into the national

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1 Dave Nightingale, Are Agents a Pack of Parasites? Some Gouge, Lie and Cheat Clients; Others do Honest Competent Jobs, *Sporting News*, February 6, 1982.

2 Craig Neff, Den of Vipers - A Sports Scourge: Bad Agents, *Sports Illustrated*, October 19, 1987.

3 Liz Mullen, Sleaze Factor off the charts, agents allege. *Sport Business Journal*, June 24, 2002.

4 T. Andrew Dow, (1990). Out of bounds: Time to revamp Texas sports agent legislation. *Southwestern Law Journal*, 43, 1091-1118.

5 Robert H. Ruxin, (2004). An Athlete's Guide to Agents (4th ed.). Boston, MA: Jones & Bartlett Publishing.

6 Martin J. Greenberg & James T. Gray, (1998). *Sports Law Practice* (2nd ed.)

Charlottesville, VA: Lexis Law Publishing.

7 T. Andrew Dow, (1990). Out of bounds: Time to revamp Texas sports agent legislation. *Southwestern Law Journal*, 43, 1091-1118.

8 Kenneth L. Shropshire, (1989). Athlete agent regulation: Proposed legislative revisions and the need for reforms beyond legislation. *Cardozo Arts & Entertainment Law Journal*, 8, 85-112.

9 Martin J. Greenberg & James T. Gray, (1998). *Sports Law Practice* (2nd ed.) Charlottesville, VA: Lexis Law Publishing.

10 Stacey M. Nahrwold, (1999). Are professional athletes better served by a lawyer-representative than an agent? Ask Grant Hill. *Seton Hall Journal of Sport Law*, 9, 431-462.

11 David L. Dunn, (1988). Regulation of sports agents: Since at first it hasn't succeeded, try federal legislation. *The Hastings Law Journal*, 39, 1031-1078.

news, and prompting the development of agent-specific legislation, is *United States v. Walters*.¹² Norby Walters, who represented a number of entertainers, decided that he wanted to expand his business into sports. As a result, he went out and signed 58 college football players to contracts while they were still playing in college. As an enticement to those who agreed to use him as their agent in dealing with professional teams, Walters offered the athletes cars and money. Since sports agents receive a percentage of the players' income, Walters would profit only to the extent he could negotiate contracts for his clients.

Under NCAA rules, however, any scholarship athlete that signs a contract with an agent is a professional, and is ineligible to play in collegiate teams. To avoid jeopardizing his clients' careers, Walters dated the contracts after the end of their eligibility and locked them in a safe. He promised to lie to the universities in response to any inquiries. Walters inquired of sports lawyers at Shea & Gould whether this plan of operation would be lawful. The firm rendered an opinion that it would violate the NCAA's rules but not any statute.

When it became time to negotiate their professional contracts, only 2 of the 58 players fulfilled their end of the bargain; the other 56 kept the cars and money, and signed with other agents. The athletes believed that, since Walters' business depended on the continued secrecy of the contracts, so he could not very well sue to enforce their promises. When the 56 would neither accept him as their representative nor return the payments, Walters resorted to threats. One player, Maurice Douglass, was told that his legs would be broken before the pro draft unless he repaid Walters' firm.

As a result of the threats, the entire scheme emerged and the Justice Department charged Walters and his partner Lloyd Bloom with conspiracy, RICO violations (the predicate felony was extortion), and mail fraud. The fraud was that he caused the universities to pay scholarship funds to athletes who had become ineligible as a result of the agency contracts.

In 1989, Walters was sentenced to five years in prison; his conviction, however, was overturned and remanded for a new trial by the Seventh Circuit.¹³ Walters subsequently pleaded guilty to federal mail fraud charges to avoid more serious racketeering and conspiracy charges. That conviction, however, was also overturned by the Seventh Circuit.¹⁴

Some more recent examples of agent abuse include: *Hillard v. Black*¹⁵, in which sports agent William "Tank" Black stole up to \$14 million from the 35 professional football and basketball players that he represented for his own personal and business use. While all of his clients lost money, some athletes lost more than others. For example, Black convinced Fred Taylor to invest his entire \$3.4 million signing bonus over to him.¹⁶ When the fraud was discovered, Black was eventually convicted of fraud, conspiracy, and obstruction of justice, and was sentenced to five years in prison. The athletes, as is usually the case, were unable to recover any of their lost money.

Two other cases involving sports agents demonstrate just how serious the issue of agent abuse has become in American sports. In *United States v. Piggie*,¹⁷ Myron Piggie paid elite high school basketball players to play in his summer team. Piggie, in turn, was able to use the high profile of the team and the players to gain access to sports agents, and obtain profitable sponsorship contracts for his team.¹⁸ Piggie paid his players under the table, so that the athletes would be able to retain their college eligibility. Under NCAA rules, once the players accepted money, they would lose their college eligibility. When the scheme was discovered, Piggie was charged with conspiracy to commit wire and mail fraud, and failure to file an income tax return. He eventually pleaded guilty and was ordered to repay the universities \$324,279, and sentenced to 37 months in prison.

The other two cases involved the cut-throat business of agents fighting over clients. In the first case, a New York jury awarded \$4.6 million to one-time NBA super agent Eric Fleisher, who alleged that his former protege Andy Miller stole his All-Star clients and destroyed his business.¹⁹ In the case, Fleisher, who was the agent of a number of top NBA players, claimed that Miller signed 16 of Fleisher's clients to secret deals and took them with him when he left the firm.

The second case, *Steinberg, Moorad & Dunn v. Donald Dunn*,²⁰

involved facts and an outcome similar to the first case. In the largest civil lawsuit ever involving sports agents, a federal district court in Los Angeles awarded Leigh Steinberg and his firm Steinberg, Moorad & Dunn over \$44 million in damages.²¹ The award, which including \$22.6 million in punitive damages, resulted from Steinberg's lawsuit against his former partner David Dunn and Dunn's new company, Athletes First.

In this lawsuit, Steinberg claimed that Dunn obtained and removed trade secrets and confidential client information from the Steinberg firm and used the information to solicit and divert clients, including such high profile athletes as: National Football League stars Reggie White, Drew Bledsoe, Ahman Green Travis Claridge and Eric Davis among others. In the lawsuit, Steinberg also claimed that Brian Murphy, a former vice president with Steinberg and now chief executive officer for Athletes First, plotted to blackmail Steinberg to keep him from filing a lawsuit against Athletes First.

The Court, in addition to ruling that Dunn breached his employment contract with Steinberg, Moorad and Dunn, a five-year agreement worth \$7 million, which included a clause that prohibited Dunn from competing with Steinberg's firm, also found Dunn liable for claims of unfair competition and interference with prospective economic advantage.

As a result of the lawsuit, the National Football League Players Association (NFLPA) suspended Dunn for two years for violating union regulations governing agent conduct.²² Before the penalties could be enforced, however, Dunn, faced with the prospect of being unable to represent athletes and a \$44 million judgment against him, filed for bankruptcy protection. The action, which temporarily suspended the decertification process, also allowed Dunn to continue working as an agent, including representing the top pick in the 2003 NFL draft Carson Palmer.²³ Meanwhile, Steinberg has yet to recover any money from his lawsuit and, as a result of the statements made by Dunn and some clients during the trial, his reputation as one of the most powerful and ethical agents in football was left in tatters. At the trial, "Steinberg was painted as a wild man" who created a dysfunctional work environment by acting inappropriately to female employees, had a drinking problem and generally mistreated all his employees.²⁴

4. Attempts to regulate sports agent industry

While originally sports agents were seen as protecting the rights of athletes, due to the increasing number of scandals involving agents, it became clear, in the early 1980s, that it was the unethical and unscrupulous agents that athletes needed to be protected from. Unfortunately, while there have been numerous attempts to regulate sports agents, due to a variety of reasons, these attempts have mostly failed to stop the unethical, unscrupulous, and illegal conduct of sports agents.

4.1. State legislative efforts

In 1981, California became the first State to pass legislation regulating sports agents when it enacted the California Athlete Agents Act. Twenty-three years later, the number of States regulating the activities of sports agents has grown to 39. The problem with trying to regulate sports agents with State-by-State Agent Legislation, however, is that

12 *United States v. Walters*, 997 F.2d 1219 (1993).

13 *United States v. Walters*, 913 F.2d 388 (1990).

14 *United States v. Walters*, 997 F.2d 1219 (1993).

15 *Hillard et al v. Black*, 125 F.Supp. 2d 1071 (2001).

16 *Hillard et al v. Black*, 125 F.Supp. 2d 1071, 1077 (2001).

17 *United States v. Piggie*, 303 F. 3d 923 (2002).

18 *United States v. Piggie*, 303 F. 3d 923 (2002).

19 Michael O'Keeffe, (October 17, 2002)

Jury Awards Agent \$4.6 Million for Lost Clients. New York Daily News at 86.

20 *Steinberg, Moorad & Dunn v. Donald Dunn*, 2002 U.S. Dist. Lexis 26752

21 *Steinberg, Moorad & Dunn v. Donald Dunn*, 2002 U.S. Dist. Lexis 26752

22 Liz Mullen. NFLPA sets stage for agent feeding frenzy. Sports Business Journal. March 3-9, 2003, p.1.

23 Liz Mullen. Agents: How is Dunn getting college stars? Sports Business Journal, January 13-19, 2003, p.1.

24 Liz Mullen. Steinberg painted as a wild man. Sport Business Journal, November 4-10, 2002, p.1.

the majority of the statutes is vague and varies considerably from State to State. This lack of uniformity, in turn, has had an impact on the number of agents registering with the States. For example, because of the inconsistencies among current State statutes and the lack of provisions for reciprocal registration and reasonable fee structures, an agent intending to do business in a large number of States may be forced to comply with a number of different sets of registration requirements, and be aware of an equal number of different regulatory schemes and pay the registration fees for each State.

In addition, while States have made an attempt to control the corruption of agents, they have made little attempt to stop incompetent sports agents. The only jurisdiction that currently requires agents to pass a competency examination as a prerequisite to being licensed is Florida. The exam tests an agent's knowledge of Florida law and NCAA bylaws.

4.1.1. *The current trend*

From the late 1980s to the present, the focus of State sports agent statutes shifted away from protecting the athlete, to addressing the economic damage an unscrupulous agent could cause for a college or university. This current legislative trend is characterized by provisions requiring notice to school and State before and/or after the signing of a representation contract, waiting periods for valid contracts, the creation of causes of action in favor of colleges and universities for agent misconduct resulting in damages, and an abandonment or modification of the onerous registration requirements common in earlier legislative schemes.²⁵

Agent-specific legislation has not been the panacea many anticipated. States have appeared less than enthusiastic in devoting their limited resources to policing legislative requirements. Not surprisingly, agents prone to abuse have ignored these statutory provisions and continued to conduct business as usual. In addition, differing State requirements have created an administrative nightmare for many honest agents doing business in several States. This, coupled with a perceived lack of enforcement, often encourages the breach of these provisions. State legislation is also criticized as being primarily designed to keep student-athletes eligible and playing for State universities, rather than protecting the athletes and their future professional careers, since many classes of athletes are left unprotected by most legislative schemes.

4.1.2. *Uniform Athlete Agent Act*

The most recent attempt to regulate the sports agent profession began in 1997, when the National Conference of Commissioners on Uniform State Laws (NCCUSL), at the request of several major universities and the NCAA, appointed a drafting committee to develop a uniform statute for regulating sports agents. The NCCUSL is a national association, which endeavors to promote the uniformity of State laws. For example, the NCCUSL is responsible for the drafting and development of the Uniform Commercial Code (UCC).

As a result of their work, the NCCUSL developed the Uniform Athlete Agents Act (UAAA) in the fall of 2000. The stated goal of the UAAA is the protection of student-athletes from unscrupulous agents. To achieve this goal, the UAAA contains a number of important provisions regulating the conduct between athletes and agents. For example, the UAAA requires an agent to provide important information, both professional and criminal in nature. This information enables student-athletes, their parents and family, and university personnel to better evaluate the prospective agent. The UAAA also requires that written notice be provided to institutions when a student-athlete signs an agency contract before their eligibility expires. In addition, the UAAA gives authority to the Secretary of State to issue subpoenas that would enable the State to obtain relevant material that ensures compliance with the Act. Finally, the UAAA provides for criminal, civil and administrative penalties with enforcement at the State level.²⁶

In addition, the UAAA also covers such key areas as agent registration requirement; liability insurance; notice to educational institution; student-athlete's right to cancel, and penalties. Perhaps the most

important part of the UAAA is the section allowing an agent's valid certificate of registration from one State to be honored in all other States that have adopted the Act. The success of the reciprocal registration process is contingent on States establishing a reasonable fee schedule, including lower registration fees for reciprocal applications and renewals. Thus, more agents are likely to register due to the efficiency of this process, its practical cost-saving implications for the agent and the benefits of complying with a single set of regulations.²⁷

As of August 2004, the UAAA had been passed in 29 States and two territories²⁸, with an additional 2 States²⁹ with active UAAA legislation in their legislative chambers. In addition, there are ten States with laws dealing with agent behavior on the books that do no conform to the UAAA.³⁰ In the 13 other States and one territory, there is no existing law regulating athlete agents.³¹

Some critics of the UAAA, however, argue that the Act is more interested in protecting NCAA member institutions than athletes. For example, the UAAA requires agents and student-athletes to notify the institution within 72 hours of the signing of a contract, or before the student-athletes' next scheduled athletics event, whichever occurs first. If a prospective student-athlete has signed a contract, the agent must notify the institution where the agent has reasonable grounds to believe the prospect will enroll. Finally, the Act provides institutions with a right of action against the agent or former student-athlete for any damages caused by a violation of this Act.³²

4.2. *National legislative efforts*

To meet some of the shortcomings of the State's efforts, some people have argued that federal sports agent legislation is needed. The benefits of Federal legislation is that it would address the jurisdictional ambiguities and substantive inconsistencies of existing State regulation, erase multiple application and fee requirements, and eliminate forum shopping by agents who attempt to avoid States that have legislation.

4.2.1. *Federal legislation*

While there have been earlier attempts to formally introduce legislation in Congress, it was not until September 2004 that Congress passed national legislation regulating the conduct of sports agents. Titled the Sports Agent Responsibility and Trust Act, the Act was sponsored by Tom Osborne, a Republican from Nebraska's 3rd District and a former football coach at the University of Nebraska. Scheduled to be signed into law in October 2004, the new law prohibits agents from making false or misleading promises, providing gifts, cash and anything else of monetary value to student-athletes or anyone associated with them. In addition, the Act also requires agents to give students a written disclosure that they could lose their eligibility to play college sports by signing an agency contract and predating or postdating contracts. Finally, the Act requires agents and ath-

25 John Rodgers, (1988-89). States revamp defense against agents. *The Sports Lawyer*, 6, 1-7.

26 John Wolohan, (2003). Sport Agent Legislation. In Cotton, Doyice J. & Wolohan, John T. (Eds.), *Law for Recreation and Sport Managers* (3d ed.). Dubuque, IA: Kendall/Hunt Publishing Co.

27 John Wolohan, (2003). Sport Agent Legislation. In Cotton, Doyice J. & Wolohan, John T. (Eds.), *Law for Recreation and Sport Managers* (3d ed.). Dubuque, IA: Kendall/Hunt Publishing Co.

28 The 29 states and two territories are: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Oklahoma,

Pennsylvania, Rhode Island, Tennessee, Texas, Utah, U.S. Virgin Islands, Washington, West Virginia, Wisconsin.

29 The two states with active UAAA legislation in their legislative chambers: Illinois, South Carolina

30 Those states are California, Colorado, Connecticut, Iowa, Louisiana, Michigan, Missouri, Ohio, Oregon, and South Carolina.

31 Those states include: Alaska, Hawaii, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, Puerto Rico, South Dakota, Vermont, Virginia, and Wyoming.

32 John Wolohan, (2003). Sport Agent Legislation. In Cotton, Doyice J. & Wolohan, John T. (Eds.), *Law for Recreation and Sport Managers* (3d ed.). Dubuque, IA: Kendall/Hunt Publishing Co.



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letes to notify their college athletic director within 72 hours of entering into a contract or before the student's next athletic event, whichever is earlier. Agents who fail to report the contract can be fined as much as \$ 11,000 per day.³³

Violations of the Act are punishable by the Federal Trade Commission as an unfair or deceptive act or practice. Individual States can also bring a civil action if the Attorney General of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by the engagement of any athlete agent.

It should be noted that like the Uniform Athlete Agents Act of 2000, which this Act encourages every State to enact,³⁴ the Sports Agent Responsibility and Trust Act is designed to protect student-athletes and universities from unscrupulous sports agents. The Act does nothing to protect professional athletes from those same unscrupulous sports agents.

4.3. Other regulatory efforts

Agent-specific legislation is not the only legal means used to regulate the conduct of athlete agents. Other common law or statutory remedies, while not specifically directed at agents, have been used to attempt to control their abusive conduct. For example, the common law civil remedies of breach of contract, misrepresentation, fraud, deceit, and negligence have been applied in cases of agent misconduct.³⁵ In addition, various Federal and State criminal statutes have been used, albeit with limited success, to attempt to criminally sanction agent misconduct. Sport agent Jim Abernethy, for example, who had signed and provided illegal payments to an athlete before his eligibility had expired, was indicted and convicted at trial on a charge of tampering with a sports contest in the State of Alabama. Abernethy's conviction was overturned on appeal when the Alabama Court of Criminal Appeals construed the Alabama Tampering Statute in a manner favorable to Abernethy and sports agents in general.³⁶

In addition, such organizations as the NCAA, Professional Team Sports Players' Associations, the Association of Representatives of Professional Athletes, and the American Bar Association have also become involved in regulating this relationship between athletes and agents.

4.3.1. The National Collegiate Athletic Association (NCAA)

By the mid-1970s, repeated instances of agent abuse prompted the NCAA to promulgate regulations in an attempt to limit the likelihood of an unscrupulous agent preying on a talented, young, and financially naive athlete.³⁷ NCAA rules provide that "an individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletic ability or reputation in that sport," or if the student-athlete receives any type of payment or promise of payment.³⁸

In a further attempt to prevent agents from "preying" on student-athletes, the NCAA established a voluntary player-agent registration program in 1984.³⁹ The program required disclosure of an agent's education and background, and imposed notification requirements upon the agent prior to contact with a student-athlete.⁴⁰ The program's primary flaw, however, was its voluntariness. In addition, the NCAA has no jurisdiction over a sports agent. Therefore, the NCAA is powerless to monitor, regulate, or sanction the activities of agents. Further, as with most regulatory efforts aimed at sports agents, the program also failed to require agents to meet any particular competency qualifications prior to registration. Citing these limitations, the NCAA discontinued its program in 1989.⁴¹

The NCAA has not, however, ceased all efforts to control the unscrupulous activities of agents. In 1988, the NCAA began requiring student-athletes participating in the Division I men's basketball tournament and in sanctioned college football bowl games to sign an affidavit certifying that the athlete has not signed with an agent.⁴² Further, the NCAA authorizes and encourages its member institutions to establish professional sports counseling panels for student-athletes. Under NCAA rules, these panels are given authority to assist

student-athletes with career choices and in securing competent agent representation. Such panels may review a professional sports contract, assist an athlete in deciding whether to stay in college or to seek a professional career by ascertaining the athlete's professional market value, and provide advice and guidance in the selection of a reputable agent.

As stated above, the problem with NCAA regulations are that they do not directly apply to sports agents. NCAA rules and regulations are only applicable to student-athletes and the academic institutions in which the athletes are enrolled. Therefore, an agent can violate NCAA regulations without fear of NCAA sanctions, while the student-athlete with whom the agent dealt will likely lose his or her remaining eligibility and the academic institution will be subject to sanctions.⁴³

4.3.2. Professional team sports players' associations

The power of the players' associations of the four major sports leagues to regulate sport agents derives from the National Labor Relations Act and other Federal Labor Law. Essentially, the players' associations regulate agents by requiring their members to only hire union certified agents, and by obtaining the agreement of teams to negotiate with certified agents only.⁴⁴ The first professional team sports players' union to initiate a player-agent certification program was the National Football League Players' Association (NFLPA) in 1983.⁴⁵ The 1982 collective bargaining agreement between the NFL and NFLPA had reserved the exclusive right for the NFLPA or "its agent" to negotiate individual NFL player contracts. The 1983 program was established to certify agents as "NFLPA Contract Advisors," who, under the program, are required to use a standard representation agreement, comply with certain limits on compensation for contractual negotiations, and attend periodic training seminars.⁴⁶ If an agent fails to comply with the program's rules, the union can impose fines, suspensions, and even revoke an agent's certification.

Despite the program's intent to protect athletes from agent incompetence and corruption, several problems still persisted. First, until recently, the NFLPA certification program did not regulate agents negotiating a player's first contract with the league.⁴⁷ Therefore, only agents representing current NFL players were covered. Alerted to the potential for agent abuse of athletes, who had yet to sign their first NFL contract, the program was amended in 1989 to include agents negotiating on behalf of these prospective players.⁴⁸ Second, the plan was limited in that it only regulated "contract advisors" of NFL players, and its rules prohibited the charging of excessive fees for only contract negotiation and money-handling services. Agents providing other services could charge excessive fees and effectively evade the

33 H. R. 361, 108th Cong., 1st Sess. (2004).

34 H. R. 361, Sec. 8 108th Cong., 1st Sess. (2004).

35 Kenneth L. Shropshire, (1989). Athlete agent regulation: Proposed legislative revisions and the need for reforms beyond legislation. *Cardozo Arts & Entertainment Law Journal*, 8, 85-112.

36 Ash Narayanan, (1990). Criminal liability of sports agents: It is time to reline the playing field. *Loyola of Los Angeles Law Review*, 24, 273-316.

37 T. Jesse Wilde, (1992). The regulation of sport agents. *Journal of Legal Aspects of Sport*, 2, 18-29.

38 NCAA Manual, art. 12.3.1

39 Curtis D. Rypma, (1990). Sports agents representing athletes: The need for comprehensive state legislation. *Valparaiso University Law Review*, 24, 481-519.

40 Curtis D. Rypma, (1990). Sports agents representing athletes: The need for comprehensive state legislation. *Valparaiso University Law Review*, 24, 481-519.

41 Curtis D. Rypma, (1990). Sports agents representing athletes: The need for comprehensive state legislation. *Valparaiso University Law Review*, 24, 481-519.

42 David B. Cosgrove, (1990). A survey of state sport agent legislation: Origins and effects. *Journal of College and University Law*, 16, 433-448.

43 Philip N. Fluhr, (1999). The regulation of sports agents and the quest for uniformity. *Sports Lawyers Journal*, 6, 1-25.

44 Philip N. Fluhr, (1999). The regulation of sports agents and the quest for uniformity. *Sports Lawyers Journal*, 6, 1-25.

45 Curtis D. Rypma, (1990). Sports agents representing athletes: The need for comprehensive state legislation. *Valparaiso University Law Review*, 24, 481-519.

46 Bart I. Ring, (1987). An analysis of athlete agent certification and regulation: New incentives with old problems. *Loyola Entertainment Law Journal*, 7, 321-335.

47 David L. Dunn, (1988). Regulation of sports agents: Since at first it hasn't succeeded, try federal legislation. *The Hastings Law Journal*, 39, 1031-1078.

48 Kenneth L. Shropshire, (1989). Athlete agent regulation: Proposed legislative revisions and the need for reforms beyond legislation. *Cardozo Arts & Entertainment Law Journal*, 8, 85-112.

plan's restrictions.⁴⁹ Third, the plan was devoid of any specific criteria for granting or denying agent certification.

Beginning in 1998, the NFLPA has become more active in policing agents. In particular, the union has rolled back the maximum percentage that agents can charge players to negotiate a contract from 4 percent to 3 percent, the lowest percentage in sports.⁵⁰ In 1999, concerned about the quality of the agents representing its players, the NFLPA started testing anyone who registers to become a NFL player's agent. The test covered such areas as the collective bargaining agreement, salary cap issues and free agency. Any agent who fails the test will not be certified.⁵¹ The NFLPA also requires current agents to take that same test every year, and, if they fail, those agents will be suspended and possibly decertified. Any NFL team that negotiates with an agent not sanctioned by the union is subject to a \$10,000 fine from the commissioner.⁵²

The NFLPA's program, not unlike the plans implemented by other players' unions, also expects applicants to disclose their educational, professional, and employment background, yet it does not require any minimum levels of training, education, skill, or knowledge as a condition for representing professional athletes.⁵³

The second union to adopt an agent certification plan was the Major League Baseball Players' Association (MLBPA) in 1985. The National Basketball Players' Association (NBPA) program in 1986, and the National Hockey League (NHL) in 1996, when it drafted its agent certification program, followed the MLBPA certification plan.⁵⁴

The general scheme in the four leagues is that only those agents registered with the unions can negotiate on behalf of the players.⁵⁵ The unions also require annual registration and fees; annual attendance at seminars; a disciplinary system including an arbitration provision; and the ban on specific conflict of interest situations. Unfortunately, sanctions are rarely levied when the above policies are violated either due to lack of knowledge or improper enforcement techniques.⁵⁶

4.3.3. *The American Bar Association (ABA)*

The ABA's Code of Professional Responsibility has some relevance here. The ABA Code proposes standards of integrity and conduct for all attorneys, and has been adopted in some form or another by many State Bar Associations. The obvious deficiency here is that, while many sport agents are attorneys, the Code has no effect on agents who are not lawyers.⁵⁷

4.3.4. *Association of Representatives of Professional Athletes (ARPA)*

Created with the intent of cleaning up negative public image sports agents have, a group of agents decided to develop a uniform code of conduct or standards to provide competent and honest representation to professional athletes. The group, founded in 1978, was called the Association of Representatives of Professional Athletes. The ARPA's Code of Ethics attempted to ensure integrity, competence, dignity, management responsibility, and confidentiality from agents in the representation of their clients (Dunn, 1988). Unfortunately, notwithstanding its laudable intentions, the ARPA did little to address the problems of agent incompetence and corruption. For example, since the ARPA could not compel agents to join the organization, it is unlikely that agents prone to abuse or corruption will be interested in

associating themselves with the ARPA. In addition, even for members of the ARPA, there is no enforcement mechanism for violators of its Code of Ethics (Dunn, 1988). The group is now defunct.⁵⁸

5. Agent or attorney - potential conflicts and benefits

Although there are no educational requirements to becoming a sports agent, it is a fact that "many of those who represent professional athletes are attorneys."⁵⁹ While being an attorney may give agents a certain advantage in dealing with contracts, and other legal agreements, attorneys must also be aware of the limits of their license. The following are just some of the many areas that can lead to an attorney being exposed to such accusations as self-dealing, legal malpractice or breach of fiduciary duties.

5.1. *Fees*

The one area in the agent athlete relationship that raises the greatest conflict of interest risk is an agent's fee. To help reduce some of this conflict, the player unions have set limits on the fees agents can collect on player employment contracts. The fee ranges from 3 - 4 percent, depending on the sport. The unions, however, do not regulate what an agent can charge for other services, such as product endorsement negotiations. Therefore, fees in excess of twenty percent or more may be assessed on the total of product-endorsement contracts negotiated by an agent. In addition, unlike unionized team sports, agents who represent individual sports athletes, particularly golfers and tennis players, can commend a fee of twenty-five percent for money paid to play an exhibition; twenty percent for endorsements; and ten percent of prize money.⁶⁰

5.1.1. *When does the agent get paid?*

Since agents are paid for negotiating contracts, an interesting issue arises over when the agent should be paid for such services. For example, if an agent negotiates a 10-year, \$10 million contract, can he collect his entire fee in year one, when the contract was negotiated, or does he have to wait the entire 10 years? This issue is especially important if the athlete does not play the entire 10 years or receive the entire salary.

For example, in *Brown v. Woolf*,⁶¹ Andrew Brown, a professional hockey player, sued his agent, Bob Woolf, for fraud and breach of fiduciary duty in the negotiation of his contract. In particular, Brown argued Woolf convinced him to reject a two-year contract at \$80,000.00 per year with an NHL team because he could obtain a better, long-term, no-cut contract with a deferred compensation feature with the Indianapolis Racers, which at the time was a new team in a new league. Brown eventually signed a five-year contract with the Indianapolis Racers, of the World Hockey League, but the team and league began having financial difficulties. Woolf, who continued to represent Brown, negotiated two reductions in Brown's compensation including the loss of a retirement fund. Ultimately, the team and the league went bust and Brown only received \$185,000.00 of the total \$800,000.00 compensation under the Racer contract. Woolf, however, received his full \$40,000.00 fee (5% of the contract) from the Racers.⁶²

While the case was embarrassing to Woolf and all sports agents, the issue of when an agent gets paid is now regulated by the unions. All

49 David L. Dunn, (1988). Regulation of sports agents: Since at first it hasn't succeeded, try federal legislation. *The Hastings Law Journal*, 39, 1031-1078.

50 Mike Freeman, (1998, July 26). Protecting players from their agents; Misconduct leaves N.F.L. Union fearful of incompetence and greed. *The New York Times*, sec. 8, p. 1, col. 1.

51 Mike Freeman, (1998, July 26). Protecting players from their agents; Misconduct leaves N.F.L. Union fearful of incompetence and greed. *The New York Times*, sec. 8, p. 1, col. 1.

52 Mike Freeman, (1998, July 26). Protecting

players from their agents; Misconduct leaves N.F.L. Union fearful of incompetence and greed. *The New York Times*, sec. 8, p. 1, col. 1.

53 Curtis D. Rypma, (1990). Sports agents representing athletes: The need for comprehensive state legislation. *Valparaiso University Law Review*, 24, 481-519.

54 Bryan Couch, (2000). How agent competition and corruption affects sports and the athlete-agent relationship and what can be done to control it. *Seton Hall Journal of Sport Law*, 10, 111-137.

55 Philip N. Fluhr, (1999). The regulation of sports agents and the quest for uniformi-

ty. *Sports Lawyers Journal*, 6, 1-25.

56 Bryan Couch, (2000). How agent competition and corruption affects sports and the athlete-agent relationship and what can be done to control it. *Seton Hall Journal of Sport Law*, 10, 111-137.

57 Kenneth L. Shropshire, (1989). Athlete agent regulation: Proposed legislative revisions and the need for reforms beyond legislation. *Cardozo Arts & Entertainment Law Journal*, 8, 85-112.

58 Gary P. Kohn, (1988). Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You're Qualified, *Entertainment & Sports*

Lawyer 6, 4.

59 Martin J. Greenberg & James T. Gray, (1998). *Sports Law Practice* (2nd ed.) Charlottesville, VA: Lexis Law Publishing.

60 Martin J. Greenberg & James T. Gray, (1998). *Sports Law Practice* (2nd ed.) Charlottesville, VA: Lexis Law Publishing.

61 Brown v. Woolf, 554 F.Supp. 1206 (S.D. Ind. 1983).

62 Brown v. Woolf, 554 F.Supp. 1206 (S.D. Ind. 1983).

certified agents can only receive their fee, after the athlete has been paid. Therefore, in the above example, the agent would receive one check each year for the entire 10-years of the contract. The agent would receive this even if the athlete changed agents, since he or she was the one who negotiated the contract.

5.1.2. Agent fees v. hourly rates

As players' salaries have increased over the years, some people have argued that agent compensation has increasingly become disproportionate to the agent's services. For example, in 1994, David Falk estimated that he spent less than 10 hours negotiating Shawn Bradley's contract with the Philadelphia 76ers. Yet, David Falk's fee for negotiating the eight-year, \$45 million contract was close to \$1.8 million or \$180,000 per hour.⁶³

While it is true that agents will perform a variety of other tasks besides contract negotiations, a number of professional athletes have decided that they do not need an agent and have hired lawyers on an hourly basis to negotiate their contracts. For example, in 1999 when Ray Allen signed his six-year, \$70.9 million contract, he hired a lawyer at an hourly fee to scan the agreement's language. Therefore, rather than pay an agent 4 percent of the contract value, Ray Allen was able to save close to \$2.5 million. Using the Shawn Bradley example above, if Bradley had used a lawyer who charged \$500 per hour, the total bill for the same amount of work would have been approximately \$5,000 instead of \$1.8 million.⁶⁴

Under the NBA's CBA, which establishes maximum salaries for players, there is less and less negotiating, which could cause more professional basketball players to begin using lawyers. Agents, however, can still play an important role. Especially with rookies and for players who are borderline; in both those cases the agent can serve as a strong advocate who can market their services.⁶⁵

5.2. Two or more players in same team

While not resulting in any lawsuits, the issue of agents representing more than one athlete on a single team, raises a number potential conflicts for lawyers. For example, the American Bar Association's Model Rules of Professional Conduct states that: "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."⁶⁶

While attorneys may still represent a client without violating the model rules if each affected client gives informed consent, confirmed in writing,⁶⁷ the conflict of interest still exists. For example, if an agent represents two athletes competing for the same job, can the agent/attorney provide competent and diligent representation to each affected client?

5.3. Conflict of interests

While not common, there are three other areas that have caused issues of concern between athletes and agents.

5.3.1. Agent as team owner

In *Detroit Lions v. Jerry Argovitz*, the Sixth Circuit Court upheld the District Court's decision to rescind the contract between Billy Sims and the Houston Gamblers, a United States Football League (USFL) franchise.⁶⁸

In rescinding the contract, the District Court ruled that Argovitz manipulated Sims' contract negotiations with the Detroit Lions during the spring of 1983 in light of Argovitz's own interest in the Gamblers. The Court also found that Argovitz misrepresented the negotiations with the Lions as not progressing when, in fact, they were progressing well.⁶⁹ As a result of Argovitz's actions, the District Court found that Argovitz had breached his fiduciary duty as Sims' agent and confidant. In particular, the Court held that, where an agent has an interest adverse to that of his principal in a transaction in which he purports to act on behalf of his principal, the transaction

is voidable by the principal, unless the agent disclosed all material facts within his knowledge that might affect the principal's judgment.⁷⁰

5.3.2. Agency firms

In addition to the issue of informed consent, another issue of concern for the athletes and unions is also the issue of control. For example, in August 2000, Clear Channel Communications acquired SFX Entertainment Inc. As a result of the acquisition, the new company represented about 15 percent of all Major League Baseball players. However, when Tom Hicks became the merged company's vice chairman, Clear Channel was forced to establish a separate, autonomous company called SFX Baseball Group, in which it has no right to remove directors or officers of the new company, only to receive the profits. The SFX Baseball Group was created in response to the fears of some athletes, team owners and the union that Clear Channel could have a conflict of interest in representing players, since Hicks also owns the Texas Rangers, the NHL's Dallas Stars, and because Clear Channel owns small shares of the Colorado Rockies and Tampa Bay Devil Rays.

In addition to baseball, SFX also has a basketball, hockey and football division. In 2002, the SFX Baseball and SFX Basketball divisions rated as the top firms, both in clients and player salary, in their sports. SFX Baseball had a total of 90 clients with over \$269 million in salaries, while SFX Basketball had 77 Clients with a total of \$283 million in salaries.⁷¹

5.3.3. Agent as Chief Executive Officer

Another area that raises a number of potential conflict of interest questions occurs when an agent is hired by one of the teams in a league. For example, in August 2004, Jeff Moorad, one of the most powerful agents in baseball, was appointed Chief Executive Officer of the Arizona Diamondbacks.

The players union has already expressed concern over Moorad's move to the Diamondbacks citing his access to confidential union information. As a result of the announcement, Moorad resigned from his agency firm, Moorad Sports Management.⁷²

6. The Future

During the past ten years, there has been a growing trend to consolidate small sports agency firms with larger full-service sports agency and marketing firms. Following the lead of industry giant IMG, other large sports marketing firms, like SFX, Assante and Octagon, have bought up a number of the smaller sports agent firms in an attempt to provide athletes with more services. While it is clear that this trend is going to continue, the practice raises a number of legal issues that are worth watching. For example, with reduced competition for athletes and more control of the player market, do such firms raise antitrust issues?⁷³

Additionally, what happens when agents leave the larger firms. For example, in *Steinberg, Moorad & Dunn v. Dunn*, the case sent a clear message that employees cannot destabilize an agency by walking away

63 Stacey M. Nahrwold, (1999). Are professional athletes better served by a lawyer-representative than an agent? Ask Grant Hill. *Seton Hall Journal of Sport Law*, 9, 431-462.

64 Stacey M. Nahrwold, (1999). Are professional athletes better served by a lawyer-representative than an agent? Ask Grant Hill. *Seton Hall Journal of Sport Law*, 9, 431-462.

65 Stacey M. Nahrwold, (1999). Are professional athletes better served by a lawyer-representative than an agent? Ask Grant Hill. *Seton Hall Journal of Sport Law*, 9, 431-462.

66 American Bar Association's Model Rules of Professional Conduct Rule 1.7(a)

67 American Bar Association's Model Rules

of Professional Conduct Rule 1.7(b)(4)
68 *Detroit Lions v. Jerry Argovitz*, 767 F.2d 919 (6th Cir. 1985)

69 *Detroit Lions v. Jerry Argovitz*, 580 F. Supp. 542 (1984).

70 *Detroit Lions v. Jerry Argovitz*, 580 F. Supp. 542 (1984).

71 Special Report, Top 10 agencies ranked by salary represented. *Sport Business Journal*, June 24, 2002.

72 Hal Bodley, (2004, August 9). Agent on D'backs staff worries union. *USA Today*, at p. 3C. 2004.

73 Kenneth Shropshire & Timothy Davis (2003). *The Business of Sport Agents*. Philadelphia, PA: University of Pennsylvania Press

with all the firm's clients. This is especially important when you consider that Assante paid \$120 million for Steinberg, Moorad & Dunn and, if allowed to walk off with half of the firm's clients, Dunn's actions would have crippled the firm.⁷⁴

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74 C.W. Nevius, (2002, Nov.16). Superstar agent's image savaged in court battle; Steinberg wins breach-of-contract suit,

but at high PR cost. The San Francisco Chronicle, at A1.

The Impact of EC Law on Sport in the Czech Republic

by Pavel Hamernik*

1. Introduction

The objective of this article is to introduce the reader to some ad-hoc issues concerning the connection between EC law and Czech sport. First, it will briefly be described how we may expect sport to be regulated by EC law. Secondly, the Czech "regulation" of sport will be described, including popular myths and opinions expressed in the literature concerning the status of Czech professional sportsmen in relation to EC law. The article also deals with internal transfers and issues of free movement, and certain general aspects of EC law which are relevant due to the "legal gymnastics" of the European Court of Justice which has applied these rules to sport, such as the limits of human rights protection in the European Union, Article 230 of the EC Treaty, non-privileged applicants, etc.

2. What to expect from EC law

In order to be able to determine how sport can be affected by EC law, it is first necessary to establish the main goals that are to be regulated by European law, i.e. (mainly) by the EC Treaty. Not only sports organisations often fail to realise that the European Community has some exclusive powers and some mixed powers, and that there are some powers which remain the exclusive competence of the Member States. While the Treaty contains no specific provisions on sport, the Community must nevertheless ensure that initiatives taken by the national State authorities or sporting organisations comply with Community law, including competition law, and that they respect in particular the principles of the internal market (freedom of movement for workers, freedom of establishment and freedom to provide services, etc.).¹ In *Walrave and Koch* the ECJ held that having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.² At the same time the ECJ ruled, as subsequently confirmed in *Dona*,³ *Bosman*,⁴ *Delieges* and *Lehtonen*,⁶ that the free movement provisions of the EC Treaty do not prevent the adoption of rules or of practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.⁷ The ECJ has also admitted 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 the 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.⁸ In *Walrave and Koch* and in *Bosman*, the Court made it clear that the provisions of Article 48 [now Article 39] EC did not only have "vertical" direct effect.⁹ The prohibition of discrimination based on nationality therefore not only applies to acts of public authorities, but also extends to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.¹⁰ One of the objectives of EC competition

law is "to facilitate the creation of a single European market, and to prevent this aspiration from being frustrated by the activities of private undertakings".¹¹ In this context, sport is a special case, but acute difficulty perennially afflicts attempts to trace how "special" sport really is and how that special status is properly reflected in the shaping of the relevant rules of EC law.¹² It can be concluded from the *Italia* case¹³ which was decided by the European Commission that it is possible to regard a sport association as an undertaking. The Commission distinguished between acts which do not come under EC competition rules (e.g. regulations of sport organisations which are inherent and necessary for their competitions, especially the rules of play),¹⁴ acts which are prohibited under EC competition rules and which are common economic activities,¹⁵ and acts likely to be exempted from the competition rules.¹⁶ The ECJ has not yet resolved any sports cases in terms of competition law and sport.

3. The regulation of sport in the Czech Republic

3.1. Law no. 115/2001 Sb.: the Sports Act

Law no. 115/2001 Sb. of 28 February 2001 (the Sports Act) is couched in general and even declaratory terms and determines in Section 1 that sport is a generally beneficial activity to society. The Act assigns duties and responsibilities to Ministries and other government bodies, including regional authorities, in support of sport. In Section 2(2) the Act defines 'sport for all' as both organised and non-organised sport and physical exercise as a recreational activity directed at the population at large. Section 3(1) establishes that the Ministry of Education, Youth and Sport has the task of drafting policy proposals on sport and

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Canada Dry Namur-Braine ASBL v Federation Royale Belge des Societes de Basketball ASBL (FRBSB) [2000] E.C.R. I-2681; [2000] 3 C.M.L.R. 409.

1 Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework - The Helsinki Report on Sport, COM (1999) 644 final, section 4: Clarifying the legal environment of sport.
2 Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405, para 4.
3 Case 13/76 *Dona v Mantero* [1976] ECR 1333, paras 12, 14 and 19.
4 Case C-415/93 *Union Royale Belge des Societes de Football Association and Others v Bosman* [1995] ECR I-4921, paras 76 and 127.
5 Case C-51/96, C-191/97 *Christelle Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL* [2000] ECR I-2549, para. 43.
6 C-176/96 *Jyri Lehtonen and Castors*

7 *Dona v Mantero*, para. 14.

8 *Bosman*, para. 106.

9 Craig P., DeBúrca G., EU Law, Text, Cases and Materials, Oxford University Press, 3rd edition, 2003, pg. 702.

10 *Walrave and Koch*, para. 17 and following.

11 Burca G., Craig P., EU Law, Text, Cases and Materials, p. 937.

12 Weatherill S., Sports under EC Competition law and US Antitrust law, Annual proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy, Fordham Corporate Law Institute, 2000, Juris Publishing, Inc., p. 114.

13 OJ L 326/31 (1992), [1994] 5 CMLRev. 253.

14 The Helsinki Report on Sport, 4.2.1.1.

15 The Helsinki Report on Sport, 4.2.1.2.: These are restrictive practices in the economic activities generated by sport.

to submit these to the government for approval. If approved, the Ministry is further responsible for coordinating the policy, securing financial support for sport from the state budget, creating the necessary conditions for state sport representation, supporting talent, etc. It also manages an anti-doping programme. Similarly, the Ministry of Defence, the Ministry of the Interior and the Ministry of Health are, each in their own field of competence, responsible for creating the necessary conditions for the development of sport, according to Section 4. According to Sections 5 and 6, regional authorities and municipalities are to enhance the activities listed above in terms of securing the availability of sport for all (e.g. by maintaining sports facilities and providing subsidies).

3.2. *The status of professional sportsmen: repeating the myth of the packaged bread?*

There are no express provisions under Czech law concerning "sports relations" to govern the status of professional sportsmen and their relationship with the clubs. The only mention of sporting activity as a business activity appears in Law no. 586/1992 Sb., as amended (the Income Tax Act). According to Section 10(8) this Act also covers the income of athletes who engage in sporting activities as entrepreneurs.

It is difficult to establish which law governs relations between clubs and players in the Czech Republic. However, after the discussions concerning the organisation of football in relation to EC law, it has become clear that in Czech football the vast majority of relations between clubs and players are governed by civil law, as opposed to labour law.¹⁷ This makes the player a provider of services. The relevant provision in this context is usually Section 51 of the Civil Code, which states that parties to a legal relationship may conclude a contract which is not expressly defined by law, but that such a contract may not go against the content and purpose of the Civil Code. In other words: the conclusion of unclassified contracts is allowed and, as Section 2(4) of the Czech Constitution and in Section 2(3) of the Charter of Fundamental Rights and Freedoms (which is annexed to the Constitution) state, everyone may perform any activity which is not prohibited by law and nobody can be compelled to perform an activity, unless this is prescribed by law.¹⁸

For some reason, the Czech media spread scare stories to the effect that EC law imposes the obligation that the relationship between player and club must be an employment relationship.¹⁹ However, in my view this is not the case. Such an obligation could only be imposed by national law. The EC Treaty does not explicitly define the term worker. In *Walrave and Koch* the Court considered it unimportant to decide whether work was performed by an employee (Article 39 (ex 48)) or a self-employed person (Article 43/49 (ex 52/59)), because both work and services are equally covered by the prohibition of discrimination on grounds of nationality deriving from Article 12

[ex 6] EC.²⁰ The ECJ was merely striving to avoid discrimination in a case where a national of one Member State wishes to work or provide services in another Member State.²¹ The Court achieved its objective by bringing persons who wish to be employed or self-employed in another Member State under the scope of the EC Treaty provisions on free movement, as these prohibit discrimination of nationals from one Member State in another Member State. In the same way the Court used the protection offered by the free movement provisions in the case of the footballer Bosman so as to avoid discrimination based on nationality. In order to be able to apply these EC law provisions in the Bosman case, the Court first had to ensure that it had jurisdiction, i.e. it had to conclude that there was an economic activity involved, and for this reason, it regarded Bosman as an employee. Thus, neither the Bosman decision, nor EC law in general expressly provides that athletes must be in an employment relationship with their clubs under national law when the relationship is between an athlete/national of Member State X and a club of Member State X in Member State X. The ECJ decisions instead describe the relationship between athletes/nationals of Member State Y and a club of Member State X in Member State X where the Y national wishes to be employed without discrimination. In *Deliège*, the judoka concerned did not have employee status and the ECJ did not consider this an issue. It was only concerned with avoiding interstate discrimination.

On the other hand, for a comparison at the national level, it does matter whether a player is an employee. Only national law can determine the existence of such a relationship. The distinction is important because the rights and obligations of the parties depend on the classification of the relationship.²² Labour law in the Czech Republic generally favours employees and treats employment contracts as special agreements. The reason that clubs would rather avoid entering into an employment relationship probably is that they cannot afford to pay the health and social insurance premiums that are compulsory under employment law. In his famous opinion to *Bosman* concerning alternatives to the transfer system, Advocate General Lenz considered that "... part of the income obtained by a club from the sale of tickets for its home matches is distributed to the other clubs. Similarly, the income received for awarding the rights to transmit matches on television, for instance, could be divided up between all the clubs." However, in the Czech situation, it would be impossible to balance the budget from these sources. Moreover, another blow to finances in the sport sector was the recent 2004 law on value added tax which imposes disadvantageous rates for sports events in comparison with, for example, the protected category of culture, which resulted in raised prices for tickets to sports events.²³ This approach to sport is not in harmony with the Amsterdam²⁴ and Nice Declarations on Sport.²⁵ It is true that these Declarations are not binding, but the

16 The Helsinki Report on Sport, 4.2.1.3.

17 As observed by sports industry representatives, for example, during the T.M.C. Asser Instituut/EFEC Round Table Session on Promoting the Social Dialogue in European Professional Football on 22 April 2004 in Prague and at the Conference on Sport in the Czech Republic and European Union, organised by the Faculty of Physical Exercises and the Ministry of Education, Youth and Physical Exercises in Prague, on 18 March 2004. Among other things, debates urged for a special law on the status of professional sportsmen.

18 To complete this picture of Czech legal arrangements in this field, it is useful to describe briefly the relationship between the Czech Civil Code and the Czech Commercial Code. The Civil Code (Law no. 40/1964 as amended) regulates general issues of private law. According to its Section 1, it governs the property relations of physical and legal persons, prop-

erty relations between these persons and the State, and other relations arising from the protection of persons, unless these civil law relations are governed by other laws (e.g. the Commercial Code). Section 2 of Civil Code states that in private law relations the parties are all in an equal position. Section 1(1) of the Commercial Code (Law no. 513/1991 as amended) provides that the Commercial Code governs the legal position of entrepreneurs, business obligations and certain other relationships connected with entrepreneurship. Issues that cannot be resolved according to the provisions of Commercial Code shall be resolved in accordance with general private law (i.e. the Civil Code). If this also proves impossible, such disputes must be resolved in accordance with established commercial practice (is there any in the field of football?) or according to general principles on which the law is based. According to Section 262(1) of the

Commercial Code, parties to a contract under private law may agree that their relationship shall be governed by the Commercial Code instead of by the Civil Code. The reason for this is that the parties may prefer the stricter conditions for fulfilling obligation under the Commercial Code.

19 For example: Czech Football Relies on Provisional Measures After Entering EU, Sport Online, 22 January 2004, «www.deniksport.cz», Changes in Players Contracts Are Not Under Preparation Yet, Economy Newspaper (Hospodarske noviny), 23 January 2004.

20 Weatherill S., Beaumont P., EU Law, Penguin books, 3rd ed., 1999, pg.620.

21 For example, concerning part-time employment, the Court held that even for workers with a salary below the national minimum wage, "it constitutes for a large number of persons an effective means of improving their living conditions, the effectiveness of Community

law would be impaired and the achievement of the objectives of the Treaty would be jeopardized" if the right to free movement of workers were reserved only for full-time workers (Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, paras 15-17).

22 Lewis A., Taylor J., Sport: Law and Practice, Butterworths, 2003, pg. 805.

23 Sport Lost Tax Fight, 23.4. 2004, Daily Sport newspaper.

24 "The Conference emphasizes the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the EU to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport."

Czech approach is not in conformity the Sport for All policy of the Council of Europe either, even though it should be, now that the Czech Republic is a member of the Council of Europe and the Council's policy is reflected in the Sports Act described above (Law no. 115/2001 Sb.).

It is difficult to say why the prevailing opinion in the media is that according to EC law there is a compulsory employment relationship between sportsmen and their clubs according to EC law. Similarly, there has recently been a case in which Czech legal rules imposed the obligation that all bread products have to be packaged because the European Union allegedly requires this. When the Commissioner for EU Enlargement, Gunter Verheugen, was asked about this on the news he replied: "No! I always buy my bread unpackaged. It is absolutely not true that the European Union requires this."²⁶

However, the above leaves no doubt that it is necessary to pass new legislation which determines the status of professional sportsmen. One provision in tax law is not enough. A new law would bring more legal certainty to the sport sector. Under the current regime, it is in my view highly debatable whether one can maintain that a player provides a service, now that the coach can always order the player to simply show up and play a match. However, it is for national law to resolve this problem. For example, at the time of writing this article, a Bill has been introduced in Slovakia for a new Sports Act to regulate the status of professional sportsmen by means of provisions on a special sport contract. As Slovakia and the Czech Republic have formed one state for such a long time, this could be a source of inspiration.

There is one more reason why the employment relationship in sports is important from an EU perspective, namely Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.²⁷ The objective of this framework agreement is defined in Article 1(b) as, among other things, "establish[ing] a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships as defined in law, collective agreements or practice in each Member State." It is also necessary to "improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination", according to Article 1(a) of the framework agreement. Article 5 of the Directive imposes an obligation upon the Member States to take measures "to prevent abuse arising from the use of successive fixed-term employment contracts or relationships". It further reads as follows: Member States, after consultation with the social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

- a objective reasons justifying the renewal of such contracts or relationships;
- b the maximum total duration of successive fixed-term employment contracts or relationships;
- c the number of renewals of such contracts or relationships.

3.3. Internal situations

Once again however, as above, it is necessary to realise what the objectives of the EC are. Like all EC Treaty provisions ensuring free movement, Article 48 EC [now 39] EC does not apply to situations which are wholly internal to one Member State.²⁸ Similarly in *Bosman*, "the explicit terms of the ruling deal only with cross-border matters in connection with Article 48 [now 39] EC, so nothing in the explicit terms of the judgment declares a transfer between two clubs located within the same Member State incompatible with Community law."²⁹ The ECJ dealt with the issue of interstate transfers and in *Bosman* held that the EC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.³⁰ After the entry of the Czech Republic into the EU, in

Czech football there seems to have been one similar dispute arising out of the scenario outlined by Weatherill below, although at the time of writing this article the dispute had not yet been resolved. Furthermore, the information was derived from press releases, and the case must therefore be considered no more than hypothetical at this stage.³¹ Weatherill describes a situation where "...club A in State X wishes to acquire an out of contract player from club B also in State X. To avoid paying a transfer fee, club A arranges for its partner club in state Y to acquire the player without paying a transfer fee in line with the *Bosman* ruling and then club A in turn acquires the player, also without paying a fee, from its partner."³² As regards the risk that competition law will clamp down on such deals, it can only be said for now that the ECJ has refused to resolve the issue of competition law in this field in the past.³³

3.4 ECJ case law

3.4.1. Sport as an economic activity is subject to EC law

Given the continental Czech legal tradition, it is in the Czech Republic still quite an adventure to consult ECJ case law and it will take time to get used to the ECJ's style. This is no different in the field of sport. But even another third party, the Court of Arbitration for Sport (CAS) when resolving a case in which a Czech team was involved, had similar problems: "The Panel observes that it is quite difficult to deduce the extent of the "sporting exception" from the mentioned case law of the Court of Justice (...). The Panel wonders whether, applying the European Court of Justice tests, it is really possible to distinguish between sporting questions and economic ones and to find sporting rules clearly falling within the "sporting exception" (besides those expressly indicated by the Court, concerning national teams). For instance, among the examples indicated by the Claimants, the reference to antidoping rules might be misplaced, because to prevent a professional athlete - i.e. an individual who is a worker or a provider of services - from performing his/her professional activity undoubtedly has a lot to do with the economic aspects of sports. The same applies to the size of sporting balls, which is certainly of great concern to the various firms producing them. In conclusion, the Panel is not convinced that existing EC case law provides a workable "sporting exception"..."³⁴ From the *Deliège* and *Lehtonen* judgments it may be derived that: "(1) rules which are inherent in the conduct and/or economic exploitation of sporting events do not, in themselves, infringe Community law; (2) in relation to such rules, it is for the sports federation in question to decide what appropriate measures are."³⁵ The distinction between amateur and professional athletes is not very sharply drawn either. Star athletes, in addition to grants and other assistance, could achieve a higher level of income because of their celebrity status, with the result that they will have provided services of an economic nature.³⁶ But will the *Bosman* ruling affect the composition of chess teams?³⁷

25 Annex IV, Presidency Conclusions, Nice European Council, December 7-9, 2000: "The Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured."

26 Verheugen: Advantages Will Come Immediately, «http://zpravky.idnes.cz», 5 June 2003.

27 For a commentary to this Directive see Kenner J., EU Employment Law, From Rome to Amsterdam and beyond, Hart Publishing, 2002, pg. 285.

28 Beloff M., Kerr T. and Demetriou M., Sports Law, Hart Publishing, 1999, pg. 74. Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629.

29 Comments on *Bosman*, annotation by Weatherill S., 33 CMLRev., 1996, pg. 1019.

30 *Bosman*, para 114.

31 FIFA lets FA decide, Muller and Dort do not belong to Bslany yet, Sport Online, 27 August 2004, «www.deniksport.cz»

32 Comment on *Bosman*, annotation by Weatherill S., 33 CMLRev., 1996, pg. 1020.

33 *Bosman*, para. 138.

34 CAS 98/200 *AEK Athens and Slavia Prague v UEFA*, 20 August 1999, paras 82 and 84.

35 Bell A., Turner-Kerr P., The Place of Sport Within the Rules of Community Law: Clarification from ECJ? The *Deliège* and *Lehtonen* Cases, European Competition Law Review, Vol. 23, 2002, pg. 260.

36 *Deliège*, para. 13, citing the national court referring the preliminary question. See also especially paras 56-57 of the decision.

3.4.2. Stronger protection of human rights?

The Czech Republic has been a party to the Council of Europe's European Convention on Human Rights for some time now. Most cases involving the Czech Republic before the European Court of Human Rights are due to alleged breaches of Article 6 of the Convention. The relevance of Article 6 to sports disciplinary proceedings lies in the possibility, even probability, that in some circumstances sports disciplinary bodies will make a "determination of [the] civil rights and obligations" of players who stand accused before them.³⁷ Another provision of the European Convention which could play a role in the field of sport is, for example, Article 4.³⁸ However, what difference does the EU make in this? It has been argued in the Czech Republic that the EU reinforces the protection of human rights. However, the EC is not a party to the European Convention. The European Court of Justice has "no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community Law".⁴⁰ The ECJ has been prepared to assess the compatibility of Member States' laws with fundamental rights in two contexts: first, when considering the compatibility of national laws with provisions of Community law which reflect certain fundamental principles or rights; and, secondly, where the States are implementing a Community law or scheme, and thus in some sense acting as agents on the Community's behalf. An alternative situation in which the ECJ will assess the compatibility of national law with fundamental rights is provided by De Burca and Craig based on the *ERT* case cited above, namely when Member States derogate from Community law requirements. Thus where national rules "fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights, the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights."⁴¹ It seems that as regards national cases, human rights protection will continue to be provided by the Strasbourg Court. Article 51 of the EU Charter confirms this: "The provisions of this Charter are addressed to the institutions and bodies of the Union...and to the Member States only when they are implementing Union law".

Further, Article 230 of the EC Treaty makes it possible to challenge EC measures by citing fundamental human rights as general principles of EC law, but gaining access to the Court as a non-privileged applicant (natural and legal persons) is extremely difficult. If non-privileged applicants wish to challenge the legality of regulations or decisions of EC institutions which are not addressed to them, but still affect them adversely, they have to show a direct and individual interest in order to be accorded *ius standi* before the Court of First Instance/ECJ. Obtaining legal standing is further complicated by the inconsistent case law of the ECJ and the CFI (Court of First Instance) on the criteria for determining *ius standi* for non-privileged applicants. For the measure in question to be set aside, it has to be regarded as a pseudo-decision in order to be considered capable of being of direct and individual concern to a non-privileged applicant. It must therefore not be a "regulation essentially of a legislative nature... applicable, not to a limited number of persons, defined or identifiable, but to categories viewed abstractly..."⁴² A direct and individual concern is

therefore difficult to prove. Similarly, concerning decisions, the ECJ has held that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed". However, there have been many cases where the ECJ has been inconsistent with its own case law in determining the standing of non-privileged applicants. At times, the Court's focus in determining *ius standi* was on direct concern rather than on whether the regulation in question could be considered a decision.⁴³ In *Piraiki-Patraiki v Commission*⁴⁴ the Court granted standing to applicants contesting the Commission's decision authorising France to limit imports of cotton yarn to France over a certain period of time. The Court's decision was liberal, because the Commission decision as a whole did not apply to a fixed and ascertainable group of persons.⁴⁵ In competition law cases, the Court also focuses on the fact whether the applicant has participated in preliminary investigations of the Commission and in state aid cases it considers whether the applicant is, for example, "significantly affected by the aid."⁴⁶ This issue is too broad to deal with in the context of this article, but I would like to suggest that the case law of the Court of First Instance and the ECJ concerning the standing of non-privileged applicants according to Article 230 should be made the subject of an amendment. Such an amendment is essential if the rule of law in the Union is to be properly secured.⁴⁷

3.5 Some other relevant issues

The Czech Republic has only been a member of the European Union for a short time, and therefore it is difficult to judge what will be the effect of its new relationship with EC law in the field of sport. EC law will probably prove necessary to preserve the institution of sport for the future, as demonstrated by ENIC, which contested multiple ownership rules not only before sport's own Court of Arbitration for Sport, but also at the European Commission.⁴⁸ The Czech Republic will have to keep abreast of all the latest developments in the regulation of sport in the European Union. Again referring to *Bosman*, "neither Mr. Lenz nor the Court specify exactly what may lawfully be done in sport in order to attend to the special demands of the industry, but they open the door to the shaping of permitted arrangements designed to reflect the unusual competitive relationship that prevails between football clubs."⁴⁹ Furthermore, due to the changes in procedural competition law as a result of Regulation no.1/2003, it will no longer be the Commission's monopoly to grant individual exemptions under Article 81(3) EC. This responsibility will also come to rest on national authorities, now that Article 81(3) has direct effect. It will be interesting to see whether sport will benefit from this arrangement, as under existing EC law there is no general exemption for sport now. It has to be stressed that the basic freedoms guaranteed by the Treaty generally speaking do not conflict with the regulatory measures taken by sports associations, provided that these measures are objectively justified, non-discriminatory, necessary and proportional.⁵⁰ Use of the free movement of workers provisions after the enlargement on 1 May 2004 is limited, as there will be transitional periods limiting the free movement of workers from new Member States, as set out in the Accession Treaty.⁵¹ This regime is not much different from the one

37 Question presented by a Czech representative of this sport during the Conference on Sport in the Czech Republic and European Union, organised by the Faculty of Physical Exercises and the Ministry of Education, Youth and Physical Exercises in Prague, 18 March 2004.

38 Beloff M., Kerr T. and Demetriou M., *Sports Law*, Hart Publishing, 1999, pg. 203.

39 In: E.C. Competition Law and the Regulation of Football: Part II., [2000] ECLRev., issue 9, Sweet and Maxwell,

pg. 426, Jens Pelle van den Brink points at the role of Article 4 of the Convention concerning the then Dutch transfer rules.

40 Case C-260/89 *Elliniky Radiophonia Tileorasi AE v Dimotiky Etairia Pliroforiss and Sotirios Kouvelas* [1991] ECR I-2925, para 42.

41 *ERT* case, para 42.

42 Cases 16, 17/62 *Producteurs de Fruits v Council* [1962] ECR 471.

43 Case 333/85 *Mannesmann-Rohrenwerke v Council* [1987] ECR 1381.

44 Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207.

45 Weatherill S., Beaumont P., *EU Law*, Penguin Books, 3rd ed., 1999, pg. 266.

46 Case 169/84 *Cofaz v Commission* [1986] ECR 391.

47 Arnall A., *The Rule of Law in the European Union*, in: Accountability and Legitimacy in the European Union, Arnall, Wincott, OUP, 2002, pg. 249. Similarly, Arnall A., *Private Applicants and the Action for Annulment Since Codorniu*, CMLRev. 38, 2001, Kluwer Law International, pg. 51.

48 Hamernik P., *The Development of Regulation of Sport in EC law*, Pravnik,

issue 4, 2004, pg. 398 (in Czech only, with English summary).

49 Weatherill S., *Sports under EC Competition law and US Antitrust law*, Annual proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy, Fordham Corporate Law Institute, 2000, Juris Publishing, Inc., pg. 120.

50 Helsinki report on Sport, section 'The level of sporting organizations'.

51 MEMO/04/24, 5 February 2004. Free movement of workers after enlargement: Frequently asked questions.

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under the Association Agreements and dealt with in the concrete case of *Maros Kolpak*.⁵² The athlete/worker Kolpak first had to be lawfully employed within the territory of a Member State before he could challenge discrimination on grounds of nationality under EC free movement law with direct effect.⁵³

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52 Case C-438/00 *Deutscher Handballbund*
eV v Maros Kolpak, 8 May 2003.

53 Paras 35 and 49 of *Maros Kolpak*.



Sports, Science and the Law

“An Innocent Abroad”: The Diane Modahl Doping Case 1994-2001

by Hazel J. Hartley*

1. Introduction

This article reflects upon a high profile doping case which began ten years ago. The case, involving the British 800m athlete, Diane Modahl, progressed through the sport disciplinary processes and the courts from 1994 until 2001. This case highlights issues, which are still relevant today, around the “strict liability” rule in doping, the structural arrangements and power relations of the international and national athletics bodies, and the difficulties of using the law of contract in such a case. In addition, it illustrates the application of natural justice principles relating to procedure, challenging relevant evidence, apparent bias and the right to appeal. One of the defining features of this case is the central role played by sports science, as well as the significant financial costs to both the plaintiff and the national sports governing body.

This article sets the scene with a brief reference to the relevant principles of natural justice, the strict liability rule in doping in sport, and the national and international athletics bodies involved. This is followed by a review of the Diane Modahl case from the doping test in Lisbon, Portugal in June 1994, to the Court of Appeal decision in October 2001.

2. Context: natural justice principles, strict liability rule and structural arrangements in international athletics

Sports governing bodies are expected to conduct their disciplinary processes according to the rules of natural justice. This involves a duty to be fair reasonable and impartial, in all aspects of the proceedings, including the conduct of those involved within and outside the formal processes (See Boyes, 2001; Hartley, 2001; Soek, 2001). They are expected to, *inter alia*:

- Follow the relevant rules and procedures (e.g. doping and sample testing procedures, strict liability rules and disciplinary processes of the sports governing bodies);
- Provide the athlete with the opportunity to present their case and answer the charges, either by attending a hearing or having someone present their case. (See *Keighley RFC. And Anor. v. Cunningham* (1960) in Grayson 1994, and *Currie v. Barton* (1988), unreported);

- Systematically examine all relevant evidence. The athlete has the right to access and challenge, all relevant evidence;
- Act in good faith, without apparent bias, in an impartial and thorough manner. *Revie v. FA.* (1979);
- An athlete has a right to appeal against the decision of the disciplinary panel, normally on the grounds that the panel acted unfairly, inappropriately or that new evidence, relevant to the case, came to light, which was not available to the original disciplinary panel.

In 1994, at the time of the alleged doping offence, the I.A.A.F. “Control of Drug Abuse” rule 55.2 (i) stated that “the offence of doping takes place when a prohibited substance is found to be present within an athlete’s body tissue or fluids”. This is a rule of “strict liability”. Strict liability makes no reference to the state of mind or intent of the athlete. The doping authorities do not have to prove fault or awareness on the part of the athlete. They only have to prove, beyond reasonable doubt, that a doping offence had taken place i.e. the sample provided by the athlete contained the substance banned by the rules of the relevant authorities. Such a system, which risks “false positives” for the broader good of the sport and the integrity of the sports contest, has been the subject of criticism

(Wise 1996), including debates and questions raised by delegates at the conference on “International Sport Law and Business in the 21ST Century”, at Marquette University Law School, 25-26 September, 2003.

3. The competition, the sample and the suspension

This very high profile doping case really began in June, 1994, when a urine sample provided by Diane Modahl, a British 800m athlete, at an international athletics competition, in San Antonio, Portugal, on 18 June 1994, tested positive for testosterone, present at a ratio of 42:1. So here was a British athlete, taking part in an European Amateur Athletics Association (E.A.A.A.) competition, under International Amateur Athletics Federation (I.A.A.F.) rules, organised by the Portuguese Athletics Federation (P.A.F.), with urine samples being tested by a Lisbon laboratory, which was accredited by the International Olympic Committee (I.O.C.).

The International Amateur Athletics Federation (I.A.A.F.) governs world athletics. It was not responsible for doping control at the San Antonio Athletics meeting in June 1994. Under I.A.A.F. rule 58, the responsibility for doping control rested with the P.A.F. under the auspices of the E.A.A.A. and the I.A.A.F. rules. The urine samples taken at the competition were sent to the accredited laboratory, the Laboratório de Análises de Doping e Bioquímica (The “LADB”). However, under paragraph 8 of the Procedural Guidelines, the I.A.A.F. is required to inform the athlete’s national federation [the B.A.F.], who shall inform the athlete as soon “as is reasonably practicable” and request an explanation.

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This is then relayed to the I.A.A.F. Once the national federation has been informed, the laboratory "shall arrange a date within 21 days, for the conduct of test on the reserve 'B' sample, where the athlete and national federation have the right to be present or have a representative present" (*Modahl v British Athletics Federation Ltd.* HL 22 July 1999, pp. 3-4). If the "B" test is also positive, it is then the responsibility of the B.A.F. to conduct a disciplinary hearing, as soon as possible and under normal circumstances, not later than three months after the final laboratory report (*ibid.* p. 4).

The threshold for a positive test for testosterone is a ratio of 6:1. It is worth noting that the positive sample of Ben Johnson, which tested positive for another steroid stanozolol, at the 1988 Seoul Olympics, was present in the ratio of 12:1. If a female athlete had been ingesting this amount of steroids, one would certainly expect some adverse effects, but, of course, doping rules and regulations rightly, only refer to evidence relating to the sample and not subjective claims around the appearance and symptoms of athletes. On 28 August, Diane Modahl asks for access to the remainder of the samples. This has never been granted. In September 1994 the "B" test was completed.

However, representatives for Diane Modahl, argued that the test should not proceed, since the sample was invalid on the grounds that the "pH" reading and the absence of metabolites (normally present if testosterone is taken by an athlete), did not fit with a positive test result. They also argued that there were no "chain of custody" documents, contemporaneous with the collection of the urine sample on 18 June, which they argued, raised doubts about the test result and the name of the athlete providing the sample. The laboratory personnel indicated that the contemporaneous chain of custody documents existed, but were not available.

The "B" test went ahead, producing the same positive result as the "A" test. On 6 September 1994, the B.A.F. suspended Diane Modahl, pending a disciplinary hearing. The timing was very significant, as she was informed just as she was warming up to defend her 800m Commonwealth Games Title in Victoria, Canada. Instead of stepping onto the track for the 800m, she left the Games and returned home in disgrace, under the glare of the media. On 23 September 1994, the I.A.A.F. refused Diane Modahl access to the remaining samples. On 27 September 1994, she requested the testing of her samples at another laboratory.

4. Disciplinary Hearing and Independent Appeal Panel (I.A.P.)

4.1. B.A.F. Disciplinary Panel, December 13-14th 1994, London

The B.A.F. disciplinary hearing took place at the Savoy Hotel in London, on 13 and 14 December 1994 (within the three-month deadline). The huge press and media interest, which continued to follow this high profile case, was very visible outside the hearing venue, as they eagerly awaited the outcome. It is important to note that any volunteer, working on the various boards and executive committees of sports governing bodies could be called upon, at any time, to be a member of a disciplinary panel. The B.A.F. panel appeared to have a very logical membership, comprising ex-athletes, police officer/coach, E.A.A. member, GP and ex-athlete, and a solicitor, with a mixture relating to gender, race and age of the panel. This is quite difficult to achieve, when one considers the voluntary nature of governing body membership, resources, as well as the availability of all the members all in one time and place, outside their jobs and the busy athletics calendar.

The expert witness for Diane Modahl, Dr. Honour, put forward a theory that if a urine sample is allowed to bacterially degrade, as a result of incorrect storage, for example, it can convert a perfectly innocent sample of urine to one which contains high levels of testosterone, without the testosterone ever having passed through the athlete's body. At this point in time, there was no empirical, experimental research presented, to prove this probably happened. Three expert witnesses for the B.A.F. argued that the environment of a urine sample was "too hostile" for a such a process to take place. The Modahl legal team were unable to question the director of the L.A.B.D. in Lisbon, or have access to any documentation relating to the custody and testing of Diane Modahl's urine sample.

B.A.F. spokesperson Tony Ward, informed the press that Dr. Barbosa, the technical director of the L.A.B.D. and Professor Lesseps Reys, the scientific director of the LABD, had been invited by the B.A.F. to attend the hearing. "As government employees they needed government permission and we understand that has not been forthcoming" (*Daily Mail*, cited by Grayson, (1995:44). The B.A.F. deliberated and announced their decision to the world press outside the venue on 14 December.

Having heard all the evidence and read all the documents, the committee was satisfied, unanimously, beyond reasonable doubt, that a doping offence had been committed by Mrs. Modahl. Accordingly, she is ineligible to compete in the UK and abroad for four years, from 18 June, 1994.

(Announcement of decision to press and media, by Dr. Martyn Lucking, chair of the BAF Disciplinary Panel, 14 December, 1994).

On 15 December Diane Modahl gave notice of appeal to the B.A.F. Between January and June 1995, the I.A.A.F. refused a request from the B.A.F. to have further tests done at the Lisbon laboratory. Then the I.A.A.F. announced that they would take place on 22 June. On 20 June the A.A.A.F. abandoned the test, citing lack of co-operation from Lisbon.

4.2. Independent Appeal Panel (I.A.P.), 24/25 July 1995, London

The Independent Appeal Panel was constituted under B.A.F. rules and took place on 24 and 25 July 1995, chaired by Robert Reid QC. This panel of three, considered documents which were presented to the B.A.F. disciplinary panel, as well as further documents and oral evidence. Reid (1995:6) listed the key issues for the I.A.P.:

1. "Were they satisfied, as to the chain of custody relating to the sample, from the time it was given by Mrs. Modahl to its final analysis?"
2. Was the laboratory at which the analysis took place properly accredited, and were its procedures acceptable and staff competent?"
3. Were the 'A' and 'B' samples analysed (or tested) those given by Mrs. Modahl and, if so, should they have been analysed?"
4. Were the tests properly carried out in accordance with relevant guidelines, and what ratio of testosterone to epitestosterone did they reveal?"
5. Could the degradation of the sample have given rise to a false result?"

The panel found that, although there were unsatisfactory features relating to the chain of custody documents and the laboratory personnel were "less than frank" at the "B" test, they were satisfied that the sample was sealed and was that of Mrs. Modahl. On the issue of accreditation, despite the laboratory moving premises as rebuilding work took place on the original premises, the accreditation was for the institution, rather than a particular address. There were "departures from best practice" [e.g. failure to take pH readings at the "B" test] but on the whole the procedures were acceptable and the staff were competent (Reid, 1995:6-7). However, the most significant evidence related to the storage of the sample and the new scientific evidence presented to the I.A.P.

The sample "had been stored for a period between the 18 and 20 June, unrefrigerated in the office of the Sports Medicine Centre in the Estadio Universitario" (Reid, 1995:7). In addition, although it is good practice in normal laboratory work not to analyse such samples, due to the remarkably high pH levels and odour (raised by Modahl's representatives and reinforced by expert medical testimony at the I.A.P.), the panel found that the duty imposed on the laboratory was to go ahead and analyse the samples. The important thing was the status of the results. The panel accepted that the low levels of metabolites pointed out by Modahl's representatives, at the "B" sample, were not consistent with the presence of *administered* testosterone. (There should have been higher levels).

The I.A.P. expressed disappointment that the remaining sample

was not available, despite requests to the Lisbon laboratory, as “that analysis might (on the evidence we have heard) have answered definitively, some of the questions we have had to consider” (Reid, 1995:7). New scientific evidence, in the form of experiments carried out by the expert witnesses for Diane Modahl, showed that “bacterial degradation, such as existed in

Mrs. Modahl’s urine, could affect the levels of testosterone in the urine sample” (Reid, 1995:7). Prof. Gaskell’s team had treated the urine samples of two clean female athletes to the same storage conditions as those alleged to have applied in Lisbon to Diane Modahl’s sample. The result was bacterial degradation leading to a vast increase in testosterone. This was crucial. What had been a theoretical possibility presented to the B.A.F. hearing, had now become scientific support for the explanation of the Modahl team, of the 42:1 test result.

“The only basis for the decision at the I.A.P., in the claimant’s favour was the new material giving support to what had previously merely been an assertion as to the possibility that bacterial contamination could have affected the testosterone reading”.

Latham LJ *Modahl v. BAF Ltd.* CA <<http://www.lawreports.co.uk/civocr3.htm>>

The I.A.P. concluded that Diane Modahl was entitled to succeed in her appeal. They could not be sure, beyond reasonable doubt, that she was guilty of a doping offence. Considering all the evidence presented, they had to acknowledge the possibility that the doping test result in Portugal was “not caused by any testosterone being administered,” but “by the samples becoming degraded, owing to them being stored in unrefrigerated conditions, and that bacterial action had resulted in an increase in the amount of testosterone in the samples” (Reid, 1995:8).

The result of the I.A.P. was communicated to the I.A.A.F. On 12 August the I.A.A.F. were not satisfied with B.A.F. Appeal Panel decision and referred the case to the I.A.A.F. Arbitration Panel. On 12 January 1996, the I.A.A.F. announced that arbitrators would meet in the “near future”. On 19 January 1996, the Portuguese government declined an I.A.A.F. request for further tests on Diane Modahl’s 1994 samples. On 6 February 1996, the I.A.A.F. announce that its Doping Commission recommended that the case should be referred back to the I.A.A.F. Council, at its meeting in South Africa on 24/25 March. On 6 February, Diane Modahl served a writ against the B.A.F. Ltd., for compensation for legal and medical costs and loss of earnings.

On 25 March, 1996, the I.A.A.F. abandoned arbitration, stating that Lisbon laboratory analytical data were not satisfactory, and further analysis was impossible. There was serious concern regarding the way in which analysis was handled in the Lisbon laboratory. The I.A.A.F. announced in March that it would not be challenging the I.A.P.’s decision. Finally, Diane Modahl was cleared of all allegations and could compete again in athletics at international level. The I.O.C. withdrew accreditation status from L.A.B.D. in Lisbon, Portugal.

5. Compensation case begins: legal cases in English courts: *Modahl v. BAF Ltd.*

5.1. *Modahl v. The British Athletics Federation Ltd. (1999) 22 July HL (Lords Irvine LC, Nicholls, Hoffman, Clyde, Clyde and Millet)*

Following two unsuccessful attempts by the B.A.F. to strike out proceedings (on 28 June 1996 and 28 July 1997), the House of Lords (HL) heard strike-out proceedings on 22 July 1999. The writ for compensation for loss of earnings (over a year) alleged that her suspension and the initiation of disciplinary proceedings were in breach of contract and that two members of the B.A.F. disciplinary panel were biased and the L.A.B.D. was not officially accredited. The HL did not allow the case to proceed on the grounds that the B.A.F. should not have acted on the findings of the I.O.C. laboratory in Lisbon, since the B.A.F. could not have known that the L.A.D.B. was not an accredited laboratory. In addition, the I.A.A.F.’s procedural guidelines “required the B.A.F. to act upon notification of a positive doping result from a foreign country” (para 3, p.5, *per* L Hoffman). The B.A.F. was not “making as ‘finding’ but

deciding, on the evidence it had been given, that there was evidence that a doping offence had taken place” (*Sports Law Bulletin* September/October, 1999:6).

There were some interesting comments by the HL on the I.A.A.F. rules, their policy of immediate suspension, the status of the L.A.B.D. and the seeking of financial compensation.

“Although the I.A.A.F.’s system for the control of drug abuse was plainly draconian, in the wider interests of sport, it was capricious to construe the Rules to mean that an athlete was entitled to financial compensation if proceedings against her were initiated on the basis of a test (which might well have been accurate) from a laboratory which had moved its premises, but not a test which was wrong on any other ground.” (para 2, p. 6 *per* L Hoffman).

It is worth noting the observations of Foster (2001:196) on the issue of immediate suspension and the case, in 2000, of the British athlete Dougie Walker:

“The rules of some sporting federations provide for automatic suspension as soon as there is a positive test. This mandatory suspension clearly caused the CA some unease in the *Modahl* case. It appears to have been shared by the judge in Dougie Walker’s case in July 2000. Walker tested positive for nandrolone and was suspended according to the I.A.A.F. regulations. He was granted an injunction by Hallet, J., allowing him to compete pending the outcome of the I.A.A.F.’s Arbitration Panel’s hearing. This ruling seems to reinforce the workers’ rights discourse and, moreover, the criminal discourse standard of innocent until proven guilty.”

The HL held that the claim had no reasonable cause and was bound to fail on the grounds submitted and was struck out under Rules of the Supreme Court Order 18 and 19. However, Modahl was still able to proceed on only two grounds, those of an implied contract between Modahl and the B.A.F. and alleged bias on the part of two members of the original panel, which imposed the four-year ban (*Sports Law Bulletin*, September/October, 1999:6).

5.2. *Modahl v .BA.F. Ltd. HC 14 December 2000, Mr. J. Douglas Brown*

Diane Modahl proceeded to the High Court in December 2000 on these two issues, by which time B.A.F. Ltd. were “in administration”. The issues facing the High Court in December 2000 were:

1. Was there a contract between Mrs. Modahl and the B.A.F?
2. If there was a contract was there a duty to act fairly?
3. If there was a contract, with a duty to act fairly, was that duty breached?
4. If there were breaches in the implied term, did these cause loss?

The crucial issue was the contract (Farrell, 2001:110). Several cases¹ were considered but the treatment of earlier cases was far from straightforward, as there were issues of interpretation and relevance. Judge Brown:

“pointed to the exhortations of Lord Denning MR in *Nagle v Fielden* and Scott J. in *Gasser v Stinson*² not to create fictitious contracts, and concluded that it was quite artificial to identify a contract between the athlete and the BAF out of either her membership of Sale Harriers, her participation in other meetings organised by the governing bodies or her submission to doping control at a different event abroad run by a different organisation.” (Lewis, A. Taylor, J., Parkhouse, A. 2003:164).

¹ *Nagle v. Fielden* [1965] 2 QBD 633 CA;
Davis v. Carew-Pole [1956] 2 AER 524;
Mundir v. Singapore Amateur Athletics Association (1992) Singapore Law

Reports 18; *Korda v. ITF*, Times Law Reports 4 February 1999; CA 21 April 1999, unreported.
2 15 June, 1988, unreported.

Judge Brown concluded that no contract existed. This finding:

“was sufficient to dispose of Modahl’s case. However, at the invitation of the parties the court would deal with the other issues, which had been argued. For that purpose the court was prepared to assume that the B.A.F. was under a duty to act fairly throughout the entire disciplinary process” (*Sports Law Bulletin*, January/February, 2001:3).

It was alleged that two members of the original disciplinary panel, Dr. Martyn Lucking and Alan Guy were biased, as was Arthur Gold, in his selection of the members of the disciplinary panel. Modahl’s case was that Martyn Lucking had allegedly made comments to an athlete, Linford Christie, at an athletics competition in Gateshead, in 1990, that “all athletes were guilty until proved innocent”.

“It is more probable than not that in the heat of an argument, Dr. Lucking did say that all athletes were guilty until proven innocent”. He continued: “I also accept his evidence that if he did say that it did not represent his view, which was that all athletes are under suspicion of taking drugs and that was why the testing procedure was in place”. The Judge regarded Dr. Lucking as a responsible and sensible man “rather careless in his phraseology at times, who did not carry into the Disciplinary Committee, a belief that all athletes were guilty until proved innocent”.

(J. Brown, 14 December, unreported, cited, Farrell 2001:21).

It was Alan Guy’s involvement, in an official capacity in relation to the E.A.A.’s doping control, which was cited by counsel for Modahl as “disqualifying him from sitting on the Disciplinary Committee, because to do so would entail him sitting as a judge in his own cause” (Farrell, 2001:114). Arthur Gold was alleged to be biased in his choice of members of the Disciplinary Committee. The claims of bias were not upheld and J. Brown concluded that “the constitution of the disciplinary committee was carefully and fairly chosen to give a balance of skills and representation and provide Mrs. Modahl with a trial by at least some of her peers”, and after all, she won her appeal through an Independent Appeal Tribunal provided by the B.A.F. processes (*Sports Law Bulletin* January/February 2001:3).

5.3. *Modahl v. BAF Ltd. CA 12 October 2001 (LJs Mance, Latham, Parker)*

On 22 February 2001 Diane Modahl won the right to take her claim for damages of £1million to the Court of Appeal. The CA, on 12 October, 2001, upheld the HC ruling of J. Brown that there was no contract and no bias and even if there was, the decision of the disciplinary committee was unaffected and no damages could follow. They concluded that:

...the governing body was not liable for a breach of contract in banning the athlete from competitions as a result of the decision of that tribunal on the ground that a member of the disciplinary panel was alleged to have acted as a result of bias and in breach of natural justice after the finding was overruled by an appeal tribunal that revoked the ban, following the introduction of new evidence by the athlete.

«<http://www.lawreports.co.uk/civot1.3.htm>
24/12/01. Report by Ken Mydeen, barrister.

Obligations to carry out disciplinary tribunals fairly were accepted by the defendants (B.A.F.) even in the absence of a contract. LJ Latham and Parker agreed. LJ Mance agreed, but made an interesting comment on rules, contract and bias:

[...] the rules of the defendant clearly created contractual obligations between the parties and doubted that the chairman of the panel should have been regarded as free from apparent bias, as opposed to actual bias. However, the appeal should be dismissed on the basis that any other tribunal acting without bias, would not

have come to any different conclusion.

«<http://www.lawreports.co.uk/civot1.3.htm>
24/12/01, report by Ken Mydeen, barrister.

On 18 October 2001, in a paper presented to the Annual Conference of the British Association for Sport and Law, Anthony Morton-Hooper, Diane Modahl’s lawyer, commented on LJ Mance’s opinion that the submission to jurisdiction of the federation rules was a “consensual one”, and “the framework of rights and duties” were “of sufficient certainty to give contractual effect, with regard to the athlete’s entitlement and ability to compete”. Morton-Hooper recognises that LJ Mance was in the minority on the contractual issue. However, he considered that did not mean that on different facts, the majority would not have found a contract. He also observed that “there seems to be a judicial reluctance to imply contracts in the sporting context” (*Sports Law Bulletin* November/December, 2001:3).

6. Concluding comments

The difficulties of establishing a contractual relationship in such circumstances and the natural justice principles of access to evidence and apparent bias, have been clearly illustrated by this case. Weaknesses in the structural arrangements and power relations between the I.A.A.F., B.A.F. and the L.A.B.D. appeared to be exposed, in relation to their impact on access to relevant evidence. This sits alongside the ongoing, unsatisfactory situation where national sport governing bodies are handed down the responsibility of dealing with the disciplinary processes resulting from positive doping results abroad, but have no power over the attendance of witnesses or the handing over of relevant documentation.

Commentaries concerning the appropriateness of a national governing body hearing disciplinary cases involving their own athletes, as a result of doping tests abroad, are often only directed at the dangers of potential bias and lack of action of such national bodies. Yet, here was a national governing body, appropriately following international, procedural rules, but with no power over international or scientific bodies, relating to attendance at the hearing. At the close of the B.A.F. disciplinary hearing, on December 1994, key personnel and documents from Lisbon, on evidence central to the handling and storage of the sample were still not available for cross-examination. The B.A.F. had no power to compel witnesses to attend such a hearing.

Grayson (1995:44) observed the difficulties this creates in natural justice rules relating to access to all the relevant evidence. “No explanation so far appears to have surfaced about why the proceedings were not adjourned for further persuasion upon the Portuguese authorities to attend, bearing in mind that “evidence that the test was carried out properly” as explained by Tony Ward...with the right to cross-examine upon it, would be crucial to any judgment” (Grayson, 1995:44). The significance of the absence of such central evidence, still not available to the I.A.P. in July 1995, drew comment from the I.A.P. chair, Robert Reid QC. Surely it is not satisfactory for the *world* governing body in athletics to be unable to require the presence of key personnel or documents, at an I.A.A.F. tribunal or a B.A.F. disciplinary hearing, evidence which is central to a case which has arisen out of doping testing under their own rules?

Sports science and research played *the* key role in the success of the appeal to the I.A.P. in July 1995. The sports science and biochemistry evidence highlighted the challenges that can face voluntary sports administrators on disciplinary panels. “Three-versus-one” and “three-versus-three” expert witnesses presented to the B.A.F. panel and I.A.P. respectively. The future career of athletes can depend on members of the panel grappling with complicated and conflicting scientific evidence. There is a need for contemporary published research on sports science topics, related to doping control and medico-legal discourse with sports authorities, outside the adversarial courtroom. There are excellent examples of such collaboration in rugby research into spinal injuries, positively impacting on rules and practice in the sport (See Haylen, 2004; Silver and Stewart 1994).

Above all, the Diane Modahl case illustrates the human reality of challenging a “false positive” doping result, in a system based on a

“strict liability” rule. This includes the financial costs to both plaintiff and sport governing body. Diane and Vicente Modahl, (who is also her coach and an agent), incurred £1 million costs and were forced to sell both of their homes and move in with her parents. The damage to her reputation, morale and both of their careers, not to mention the irretrievable absence from the 800m race at the 1994 Commonwealth Games, are incalculable.

Although Diane Modahl was reinstated and eligible to compete after being cleared by an I.A.P....her career and finances lay in tatters, as does the now defunct B.A.F. There must surely be a better way to deal with such problems. The Modahl case can be viewed as one involving a colossal waste of time and money (the B.A.F.s and Mrs. Modahl's), particularly as the judge concluded that even if the bias complained of had been proved, in the light of the other evidence, he would have concluded that no loss followed”.

(Farrell, 2001, p. 115, after the decision of J. Brown, in December 2000).

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Sport in EU Documents

by Vasili Kirkilis*

Under the direction of the former French president Valéry Giscard d'Estaing, the European Convention completed its work on the EU Constitution in 2003. The draft Treaty establishing a Constitution for Europe for the first time contains an express provision regarding sports, namely Article 182. This is a new development, as all the Treaties of the European Union and Community to date have not contained a special article on sports. The Council of Europe (CoE), on the other hand, has shown more involvement in the world of sport. Article 2 of the Council of Europe's European Sports Charter defines sport as “all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels”.¹

However, for many years the European Community has dealt with the issue of sports, even though there was no direct reference to sport in the Treaties, so that legally no measures could be taken by the European Community.² Reference was often made to Articles 48-66 on the free movement of persons in relation to sport.³ With the aid of the relevant documents in *The European Union and Sport: Legal and Policy Documents*,⁴ this contribution will describe how the European Communities have dealt with the problem of lacking a legal basis for its sports policy.

The first judgment of the Court of Justice of the European Communities (ECJ) on sport, *Walrave and Koch v. UCI*,⁵ marked a turning point in EU sports policy and legislation. For example, until

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¹ Recommendation no. R (92) 13 Rev of the Committee of Ministers to Member States on the revised European Sports Charter (adopted by the Committee of Ministers on 24 September 1992 at the 480th meeting of the Ministers' Deputies and revised at their 752nd meeting on 16 May 2001).

² Report of the Committee on Culture, Youth, Education and the Media on the Role of the European Union in the field of Sport, 28 May 1997, in Siekmann/Soek 2004, p. 35.

³ See e.g. Report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport on Sport and the Community, 2 April 1984,

in Siekmann/Soek 2004, pp. 2, 6, 7; Report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport on Sport in the European Community and a People's Europe, 1 December 1988, in Siekmann/Soek 2004, p. 13; and Report on the Committee on Culture, Youth, Education and the Media on the European Community and Sport, 27 and 29 April 1994, in Siekmann/Soek 2004, pp. 25, 27.

⁴ R. Siekmann/J. Soek, *The European Union and Sport: Legal and Policy Documents*, The Hague: ASSER International Sports Law Centre 2004, Chapter 1.

⁵ ECJ 12 December 1974, *Walrave and Koch v. UCI*, Case 36/74, Reports 1974, p. 1405; case mentioned in Siekmann/Soek 2004, p. 6.



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then the European Parliament had been convinced that it - as the "spokesman" of the European nations⁶ - should deal with sport. One of its duties is, for instance, to support the coordination of sports policies of the European nations.⁷ In many EU documents sport is mentioned as a social, economic and cultural "phenomenon",⁸ because it is an integral part of European culture, social, economic and political life.⁹ By nature, sport is directly affected by activities of the European Community, such as in the field of freedom of movement, competition and audiovisual policy, and Community policies and actions.¹⁰ Historically speaking, Europe was the birthplace of sport.¹¹ Sport has a symbolic significance and "plays a political role".¹² The principles of European sports are democracy and solidarity.¹³ According to the ECJ, sport can also be an economic activity.¹⁴

All these statements and declarations form the basis for the European Community to take initiatives in the field of sport and use its resources to eliminate obstacles to sport exchanges, which helps to fulfil the objectives of the Treaty of Rome.¹⁵ Many reports were written on the subject, and a particularly significant one was the Adonnino Report on European citizenship of 1988.¹⁶ A "Community approach"¹⁷ for sports policy was considered necessary for several specific branches of sport - a result of the European Councils summits in, for example, Milan in 1985 - although sports organisations were recognised as independent and autonomous bodies. On the other hand, sports clubs and organisations also had a duty to comply with EEC Treaty provisions, for example Articles 48, 85, and 86, as they are considered as carrying out economic activities.¹⁸ Measures to promote sport fall primarily within the jurisdiction of the Member States, according to the Commission.^{19, 20}

The Pack Report of 1997 can be regarded as the origin of the new Article 182. For the first time, a Committee expressly urged that "a reference must be made to sport in Article 128 devoted to culture".²¹ However, the Amsterdam Declaration later that year, although recognising the social role of sport within the Community,²² still did not decide to include a sports provision in the Treaty.²³

The Helsinki Report of 1999 mentioned that, "while the Treaty contains no specific provisions on sport, the Community must nevertheless ensure that the initiatives taken by the national State authorities or sporting organisations comply with Community law, including competition law, and respect in particular the principles of the internal market".²⁴ It further added that: "accompanying, coordination or interpretation measures at Community level might prove to be useful [...]". They would be designed to strengthen the legal certainty of

sporting activities and their social function at Community level. However, as Community powers currently stand, there can be no question of a large-scale intervention or support programme or even of the implementation of a Community sports policy". But "on the other hand, measures have been taken at Community level, in keeping with the principle of subsidiarity, which are strengthening the legal framework while preserving the "common interest" dimension of sport".²⁵ The Helsinki Report still concluded that "the Commission has no direct competence for sport under the Treaty",²⁶ but that the institutions, Member States and sports organisations could work together, respecting each other and EU legislation.

The Commission encourages sport, for example, by means of the European Sports Forum which was set up in 1991. Since 1993, the Commission's Directorate-General for Audiovisual Media, Information, Communication and Culture (more specifically, the Directorate-General's unit X.C.4 for the People's Europe: Information Campaigns, Public Awareness and Sport) has been responsible for sport.²⁷

In 2000, another report mentioned that "the Declaration [annexed to the Treaty of Amsterdam] should be supplemented to enable sport to progress also in economic terms, without losing its authority. A legal basis is therefore essential; without such a basis, all achievements to date could be rendered worthless".²⁸

In 2000 at the Intergovernmental Conference at Nice, the European Council included a declaration on sport in the appendix to the Council conclusions. This "Declaration on the specific characteristics of sport and its social, educational and cultural function in Europe to be taken into consideration in the context of common policies" states that "sporting organisations and Member States have a primary responsibility in the conduct of sporting affairs. Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity to the preservation of its social role may be respected and nurtured".²⁹

The European institutions are convinced that various provisions of the EC Treaties have direct impact on the organisation and development of sport.³⁰ The Commission can only promote and encourage sports initiatives when it is compatible with Community law.³¹

Almost 30 years after the *Walrave* case, the European Union today finally has a legal basis for its sports policy.

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11 *Supra* note 6, p. 2.

12 Report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport on Sport in the European Community and a People's Europe, 1 December 1988, in Siekmann/Soek 2004, p. 13.

13 Conclusions of the First European Union Conference on Sport, Olympia (Greece), 20-23 May 1999, in Siekmann/Soek 2004, p. 58.

14 ECJ 14 July 1976, *Donà v. Mantero*, Case 13/76, Reports 1976, p. 1333; case mentioned in Siekmann/Soek 2004, p. 6-7.

15 *Supra* note 6, p. 8.

16 P. Adonnino, 'A People's Europe', *Bulletin of the European Communities*, Suppl. 7/85, Luxembourg: Office of Official Publications 1985.

17 *Supra* note 12, p. 13.

18 Answer on behalf of the Commission to written question E-0542/96 by Irini Lambraki (PSE), 15 April 1996, in Siekmann/Soek 2004, p. 34.

19 Answer on behalf of the Commission to written question E-245/93 by Mr Freddy Blak (PSE), 28 February 1994, in Siekmann/Soek 2004, p. 23.

20 Answer on behalf of the Commission to

written question E-1269/96 by Antoni Gutiérrez Díaz (GUE/NGL), 5 July 1996, in Siekmann/Soek 2004, p. 34.

21 *Supra* note 2, p. 36.

22 Treaty of Amsterdam, amending the Treaty on European Union, The Treaties establishing the European Communities and certain related acts, Annex, 2 October 1997, in Siekmann/Soek 2004, p. 39. Confirmed in Commission, Consultation Document of DG X, *The European Model of Sport*, para. 1.2.2, in Siekmann/Soek 2004, p. 48.

23 Answer on behalf of the Commission to written question no. P-2424/99 by Roberta Angelilli (UEN), 7 January 2000, in Siekmann/Soek 2004, p. 73.

24 Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community Framework, 1 December 1999 [The Helsinki Report], in Siekmann/Soek 2004, p. 70.

25 *Idem.*, p. 70.

26 *Idem.*, p. 72.

27 Answer on behalf of the Commission to written question no. 2801/92 by Mr Marc Galle (S), 7 July 1993, in Siekmann/Soek

2004, p. 23; Resolution of the European Parliament on the European Community and Sport, 6 May 1994, Siekmann/Soek 2004, p. 33. Nowadays: Directorate General Education and Culture, with Unit Sport.

28 Report of the Committee on Culture, Youth, Education, the Media and Sport on the Commission Report to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community Framework - The Helsinki Report on Sport, 18 July 2000, in Siekmann/Soek 2004, p. 78.

29 Presidency Conclusions of the Nice European Council Meeting, 7-9 December 2000, in Siekmann/Soek 2004, p. 86.

30 Answer on behalf of the Commission to written question E-0512/02 by Theresa Zabell (PPE-DE), 12 April 2002, in Siekmann/Soek 2004, p. 88.

31 Answer on behalf of the Commission to written question E-2897/02 by Margriet Van den Berg (PSE), 27 November 2002, in Siekmann/Soek 2004, p. 94.

Merely Giving the People what They Want or Differentiation Based on Sex?

by Tia Janse van Rensburg*

*"... the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields."*³

1. Introduction

The media had always played a very important role in the portrayal of societal norms and values, and in the era of fundamental rights, it is not surprising that the media is also obligated to comply with the internationally recognised and constitutionally enshrined values of equality.² To what extent, though, would the media be held to this obligation? Differently stated, how can compliance with the constitutionally enunciated right of equal treatment be enforced, against an entity that has specific commercial (and other) interests to consider? Oosthuizen³ notes that the "potential to send and receive communication is ... a social good that should be universally and equally available" is an aspect of equality as a communication value. This means that when people are afforded the right to communicate, "they should be able to lay equal claim to hearing and being heard".⁴

Above and beyond the realisation of the rights and duties of the media, it has to be made clear from the outset, that no form of discrimination or differentiation without a legitimate basis or purpose will (must) be tolerated.⁵ It must further be noted, however, that some instances of differentiation, does not, at first glance, appear to constitute unfair discrimination, but necessitates a closer investigation. The perceived unequal treatment of the media *re* feminine sport activities⁶, as opposed to the masculine sport activities,⁷ necessitates an equality analysis.

The exposure provided by the media to sport activities, has a dual purpose: first, it is regarded to be entertaining (this element cuts to the core of the business of the media, namely to inform, to entertain, and ultimately, to make money!), and secondly, it provides opportunities for sponsors to inform the public of their particular products, whether it be cigarettes, shopping centres, perfume or phone companies, in other words, sport activities become massive advertisements for a particular product, company or interest. This is not an uncommon practice, and is widely practiced throughout the world.⁸ Therefore, the bigger the sports event, the bigger the products, the bigger company's contribution (sponsorship), and the better the exposure (to the company, the product, and ultimately also the athlete). It is at this realisation, that the equality-issue becomes the prickly pear that we know it to be!

This paper will focus on the fundamental rights affected by the perceived unequal treatment afforded to female athletes by the media, in an attempt to determine whether and to what extent the media will be held accountable to enforce the right to equal treatment provided to women (and for that matter all other athletes participating in so-called feminine sport activities). The South African Constitution will be considered as a model in order to address the problems relating to the interpretation and application of the equality-provision. It is hoped that the South African model will prove to be an effective measure to determine whether the actions of the media may justifiably limit the female athletes' right to equal treatment.⁹

2. The South African context

The South African Constitution has proven over the last ten years to be one of the most advanced constitutional systems in the world. The United States Supreme Court, the Canadian Supreme Court, and

many other constitutional states apply it comparatively and authoritatively. Even though it does not have a binding effect on other jurisdictions it may be regarded to be very persuasive in the interpretation of fundamental rights,¹⁰ especially as far as the limitation of fundamental rights are concerned.

2.1. The horizontal application

Quare 1: do the provisions contained in Chapter 2 of Constitution bind the media?

Section 8 of the South African Constitution provides that "(1) [t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural and juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".

It is clear from the quoted section that the provisions contained in the Bill of Rights bind all aspects of the state; this implies a vertical enforcement of the rights. This means that any state-run media endeavour (or an endeavour where the state holds a share in the media company) have to comply with the rights contained in the Bill of Rights, based on the fact that the state (as a whole) is bound by these provisions. Subsection (2) privatises (if you will) the enforcement of the rights, in that it makes it relevant in the private sphere (i.e. horizontal application). In *National Media Ltd v Bogoshi*¹¹ the question was considered whether the media should be held liable for defamatory statements made. Two important aspects, other than the ultimate decision, come to light in this case, namely that the media, in this instance "National Media Ltd", may be sued for contravening the provisions of the Bill of Rights, and secondly, that the same factors (such as for example the fulfilment or the non-fulfilment of a duty imposed by the Constitution¹² and other legislation)¹³ taken into account in consideration of any infringement by any other party (i.e. a natural person for example), are taken into account when the actions of the media are placed under investigation. In other words,

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1 Preamble to the Convention on the Elimination of All Forms of Discrimination Against Women.
2 Section 9 of the Constitution of the Republic of South Africa 108 of 1996 (hereinafter "the South African Constitution").
3 Oosthuizen *Media Ethics in the South African Context: an introduction and overview* (2002) 52.
4 See n 3 *supra*.
5 See section 9 of the South African Constitution.
6 Sport activities such as ballet, ballroom dancing, netball (and to a large extent all the non-contact sport activities).

7 Sport activities such as soccer, cricket, ice hockey, rugby, rugby league (to a large extent so-called "masculine sport activities") can be limited to popular contact sport.
8 The now defunct *gunston 500* is a good example, as well as the Vodacom Super 12 Rugby series, and many more.
9 Please note that it is not the purpose of this paper to necessarily answer the questions posed, but to question certain accepted norms, and hopefully in doing so, determine to what extent and how, the media are bound to the right to equal treatment.
10 One cannot study the application of the Constitution without taking cognisance (at least!) of the decisions of the Constitutional Court, for these decisions assist greatly in the application and interpretation of the provisions encapsulated in the Constitution, such as the right to equal treatment.
11 *National Media Limited v Bogoshi* 4 SA 1196 (SCA).
12 I.e. through section 9 of the South African Constitution.

we deal with the media in exactly the same manner as, for example, sport administrators.

2.2. Factual discrimination

Quare 2: do the actions of the media amount to factual discrimination?

This is the first question that has to be considered when the issue of discrimination is addressed. As was mentioned earlier, one of the primary functions of the media is to entertain, and, as we all know, any media event forms the platform for big corporations to advertise their goods or services. The bigger the sport event, the more money changes hands, and the better the opportunity to advertise. The more money involved, the better the sponsorship of the athletes. The better the sponsorships, the better the ultimate development of the athlete's ability.¹⁴ When the media focuses its attention predominantly on male sports, the sponsors (i.e. big corporations) ultimately sponsor the televised events, for they would get the required exposure. The downside of this state of affairs, is that the female sports are not as readily televised as the male sports, therefore the female athletes do not get the same monetary support as would their male counterparts, and ultimately, not the same development opportunities.

2.3. The affected rights

Quare 3: do the actions of the media amount to unfair discrimination?

As was mentioned *supra* the affected right is the right to equal treatment.¹⁵ The South African Constitutional Court stated time and time again that the enforcement and interpretation of the right to equality, and the other rights contained in the Bill of Rights, must be purposive and value-based, this entails that the right must be interpreted in the light of the constitutionally enshrined values¹⁶ enunciated in the preamble and sections 1 and 2 of the Constitution.

2.3.1. The right to equal treatment

Equality is set out as one of the values upon which our constitutional state is premised. The emphasis on equality is borne out of South Africa's oppressive history and Apartheid legacy.¹⁷ It aims to, not only correct to deep wounds of the past, but also to ensure the continued equal treatment of all the citizens of South Africa. People have equal worth because they have certain inherent human characteristics (such as human dignity, bodily and physical integrity, and privacy) and/or because they are bearers of the rights contained on the Bill of Rights.¹⁸

The right to equal treatment entails that people (as bearers) may not be treated in ways that affect their human worth, that they "should be put in a position to participate fully in society, to develop their full human potential"¹⁹ (in other words the right to substantive equality)²⁰, and not just the assurance or guarantee of formal equality.²¹

All natural persons are the bearers of the right to equality, and the state (and its organs)²², natural persons and juristic persons are bound by these rights and duties.²³ This submission is enforced by subsection 9(3) that states clearly that "the state" and at subsection 9(4) that "no person" may discriminate (either directly or indirectly) on one or more of the grounds listed *infra*. This means that the right may be enforced (by the bearers) horizontally (against one another),²⁴ as well as vertically (against and by the state and/or its organs)²⁵.

The Constitution recognises both direct and indirect discrimination, but subsection 9(3) identifies one further qualification of unequal treatment, namely unfair discrimination. It states clearly that "(3) [t]he state may not unfairly discriminate *directly or indirectly* against anyone on one or more grounds, including race, *gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*" (My emphasis).²⁷ One must take heed of the internal modifier, namely that differentiation on one or more of the listed grounds is regarded to be *unfair discrimination*. This means that, in some circumstances, differential treatment may be fair, for it is found not to impair human dignity nor does it result in a comparable serious consequence, and consequently will not amount to unfair discrimination.

Fairness, in turn, is objectively determined with reference to the purpose²⁸ of the unequal treatment (through the differentiating act), the effect of such treatment on the disadvantaged parties or groups involved, and the existence of a rational connection between the differentiating act and the purpose of the differentiation.²⁹

Fortunately the South African Constitutional Court had in *Harksen v Lane*³⁰ proposed a three-fold test (keep in mind though that this test does not address fairness)³¹. This test assist in determining whether a differentiating act constitutes discrimination. This test is posed in the form of questions, namely:

"Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). If it does bear a rational connection, it might nevertheless amount to discrimination."

¹³ The *Ethical Code and Editorial Guidelines for Editorial Staff* (1994) reinforces the obligation of the media to comply with the provisions contained in the Constitution, more expressly, the provisions contained in the Bill of Rights, and states as one of its duties the awareness of discrimination and the avoidance of the perpetuation of discriminatory conduct based on race, sex, gender, pregnancy, *et cetera*. See Oosthuizen *Media Ethics* 65 *et seq.* See also the provisions of the Independent Broadcasting Authority Act 153 of 1993 (especially the preamble to the Act), and the ANC's Media Charter (more expressly section 2 thereof), amongst others.

¹⁴ We just have to take a good look at international golf, tennis, and soccer, to know this statement to be a fact.

¹⁵ Section 9 of the Constitution states clearly that "(1) [e]veryone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination

may be taken. (3) The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, *pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.* (4) No person may discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more grounds listed in subsection (3) is *unfair* unless it is established that the discrimination is *fair*." (My emphasis).

¹⁶ Human dignity, equality, non-racialism, integrity and non-sexism.

¹⁷ In which the media had a very large role to play, as part of the disinformation strategy.

¹⁸ Chapter 2 of the Constitution.

¹⁹ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 57.

²⁰ Substantive equality entail that all arbitrary barriers to the participation in society must be removed.

²¹ Formal equality, in contrast to substantive equality, ignores the social, economic

and cultural circumstances of the bearer of the right, and "judges them by standards that appear to be neutral but which, in truth, embody the interests and experiences of socially privileged groups". (Cheadle *et al Constitutional Law* 57).

²² Subsections 9(2) and 9(3) of the Constitution.

²³ Subsection 9(3) and 9(4) of the Constitution.

²⁴ Horizontal application of the Bill of Rights entail that the rights are enforceable between ordinary people. This is enforced directly by section 8 of the Constitution. See *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) and *Pretoria City Council v Walker* 1998 2 SA 363 (CC).

²⁵ Vertical application of the Bill of Rights entail that the rights are enforceable between ordinary people and the state. See *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC). In this case the exercise of presidential prerogative was questioned.

²⁶ One aspect of the above-quoted subsection must, however, be clarified for direct discrimination refers to express discriminatory treatment by means of a differentiating measure, based on one or more of

the listed grounds in subsection (3) and indirect discrimination refers to unequal treatment by means of a measure that has a discriminatory effect with or without differentiating expressly.

²⁷ This list must by no means be seen as a *locus classicus*, and therefore that the grounds for unfair discrimination are not limited to those listed in subsection (3).

²⁸ Such as a legitimate government purpose. See *Prinsloo v Van der Linde* (n 18) at para [23]. See also Cheadle *Constitutional Law* 67, 85-111 *et seq.*

²⁹ When a pregnant woman is required not to work near or with radiographic instruments, it might look, at first glance, like unfair discrimination based on a listed ground, namely pregnancy, but upon further investigation it becomes apparent that the differentiation was indeed *fair*, for there is a rational connection between the differentiating treatment and the ultimate purpose of the treatment, namely the protection of the foetus, for the continued pregnancy would be endangered.

³⁰ *Harksen v Lane* 1998 1 SA 300 (CC) at para [54].

³¹ The fairness-enquiry will be addressed *infra*.

Unfortunately this test only refers to the first leg of the differentiation-enquiry and does not include the fairness-enquiry. After you have considered the questions posed in the *Harksen*-decision (relating to the question whether or not the differentiation amounts to discrimination), one can attempt the second leg of the two-stage analysis (namely the determination whether the discrimination is fair or unfair). If the discrimination is regarded to be unfair, then the section 36 limitation-analysis will be considered. (This analysis will be addressed *infra*).

2.3.2. *Unfair discrimination or fair differentiation?*

No clear government purpose, other than possibly indirectly (i.e. through the protection of economic considerations), can be distilled from such a differentiation. There appears to be no rational connection between the differentiating treatment and purpose (other than, possible the likes and dislikes of society)³². It can be, therefore, said that the differentiating act contravenes section 9(1).

It is clear from the statements *supra* that the actions of the media amounts to differentiation based on gender or sex. "Sex" is a listed ground in terms of subsection (3), and any differentiation, based on a listed ground, is regarded to be *prima facie* unfair discrimination.

We are now faced with the question of fairness: as far as the purpose of the differential treatment is concerned, we may determine that the purpose is to ensure profit. In *Woolworths (Pty) Ltd v Whitehead*³³ the South African Labour Appeal Court had considered economic factors to address the question of fairness, and found that such factors, i.e. economic consideration and moral considerations, may be taken into account to render discrimination fair. The Constitutional Court, however, had taken the same factors into account, and found that one must be mindful not to disguise economic considerations to hide unfair discrimination.³⁴

Above and beyond possible economic considerations, one may never lose sight of the fact that the media has the right to freedom of expression. This right is encapsulated in section 16 of the South African Constitution.

Quare 4: how free is the media to express?

The two competing rights, in this instance equality³⁵ and freedom of expression³⁶, have to be weighed up against one another (taking into account all relevant considerations), in order to determine which right will justifiably be allowed to limit a constitutionally enshrined right.

2.4. *The limitation of fundamental rights in terms of Section 36*

Section 36(1) states that "[t]he rights in the Bill of Rights may be limited only in terms of law³⁷ of general application³⁸ to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - (a) the nature of the right;³⁹ (b) the importance of the purpose of the limitation;⁴⁰ (c) the nature and extent of the limitation;⁴¹ (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose⁴²."

Before the actual limitation is discussed we have to take a closer look at the exact wording of the quoted subsection. The phrase "in terms of" means that persons (whom are not legislatures) may limit a

right, if such a limitation is done in accordance with and authorised by a legal rule. It appears that at this instance the legal rule would be the provision contained in section 16, but the clear conflict between the rights necessitates a balancing exercise, and does not necessarily mean that the media's rights may not be limited by an athlete's claim to equal treatment.

Section 36 provides a general test, namely that the rights contained in the Bill of Rights may be limited "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".⁴³ One has to take note of the fact that these are by no means strange concepts in international law, and are in one form or the other encapsulated in a number of international instruments, and for that matter, the common law.

Subsection (1) lists a number of factors that may be taken into account when determining reasonableness. These are not the only factors that may be taken into account when determining reasonableness or whether a limitation can be justified. It is at this particular juncture that the duties of the media, such as the duty to protect and enforce the right to equal treatment, towards their athletes become more and more relevant, for these duties will assist in the determination of reasonableness and justifiability.⁴⁴

Quare 5: how reasonable is the discrimination?

No other reason other than possible the weaker sex argument can be presented in order to justify the differentiating treatment between the masculine and feminine sport activities. It is submitted that in the event that society is trained to watch feminine sport activities, society would demand more such presentations. Unfortunately this particular argument does not hold much water until it is actually found to be true. But surely, the fact that masculine sport activities are televised reinforces some of the stereotypical perceptions of women, and at most, this *must* be addressed!

3. The international context

Just like any other country, South Africa may be regarded as a microcosm; a world in one country ("*n wereld in die kleinere*"), mirroring the universal needs and dilemmas faced by the rest of the international community.

3.1. *Horizontal enforcement*

Quare 6: are the media and its subsidiaries bound by international instruments?

This question was initially very difficult to consider, for the international law did not provide a similar provision to that contained in the South African Constitution, spelling out the vertical and horizontal application of the rights contained in the Bill of Rights. Fortunately the United Nations had addressed the horizontal application of fundamental rights, or as it terms it, civil responsibility towards the promotion and protection of human rights, with the adoption of the Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognised Human Rights and Internationally Recognised Freedoms.⁴⁵ This document places a number of duties on the signatory states to realise the rights and freedoms enjoyed by all citizens, but it also states unequivocally that the individual is also a subject of the international law.⁴⁶

32 It is submitted that the likes and dislikes of society are very much determined by the media, in that the media dictates what we see and when we see it.

33 *Woolworths (Pty) Ltd v Whitehead* 2000 (12) BCLR 1340 (LAC).

34 *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) at para [34].

35 Protected by section 9 of the South African Constitution.

36 Protected by section 16 of the South African Constitution.

37 The term, "law" denotes legislation, the common law and customary law. See *Shabalala v Attorney-General of the*

Transvaal 1996 1 SA 725 (CC).

38 "General" means applicable to all people.

39 The nature of the right refers to the importance of the right. The more important the right within the context, the more weight will be given to the right when the justification of the limitation is considered. The right to equal treatment is very important in the South African context, especially when the history of the country is taken into account. Equal treatment is also a constitutional value that needs to be taken into account when the rights contained in the Bill of Rights are interpreted.

40 It must be noted that the limitation must serve a lawful purpose. In the instance of the prohibition of pregnant athletes to participate in sport activities, one may construct the protection of the life and health of the foetus to be a lawful purpose, and consequently also the life and health of the mother-to-be.

41 The limitation must be clear. This means that there may be no uncertainty surrounding the limitation, the effect of the limitation, the bearer of the infringed right and the consequences of the limitation.

42 This factor relates to the effectiveness of

the limitation. If there is a less restrictive means, it must be equally effective.

43 Human dignity, equality and freedom are the values upon which the Constitution is premised.

44 The question that ultimately has to be addressed is whether the administrator had acted reasonably in exercising his or her duty to the effect of prohibiting the athlete from participating in a sport activity.

45 This document was adopted on the 5th of March 1995 (ECOSOC Doc 4/1995/93).

3.2. The right to equal treatment: a duty on all

The recognition of equal rights and the requirement of equal treatment are not unique to South Africa, and a number of international instruments recognise the value of equality and the protection it affords to the citizens (and other inhabitants)⁴⁷ of signatory states.

The Vienna Declaration⁴⁸ at Article 36, not only recognises the equal rights of women, but also states unequivocally that the protection and realisation of this right must be regarded to be a priority by the signatory states. In the same breath the Convention on the Elimination of All Forms of Discrimination Against Women⁴⁹ states as its sole purpose the elimination of discriminatory behaviour that is adverse to women. This Convention defines "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms, in the political, economic, social, cultural, civil or any other field."⁵⁰ The Convention goes further, at Article 11, to recognise the inalienable right of women to work, and to have access to equal (equal to that of their male counterparts) opportunities. This Convention is not alone in its protection of women, their opportunities and their rights, for the Beijing Declaration⁵¹, amongst others,⁵² not only, reconfirms the equal status of women, but also protects and recognises their human rights.⁵³

The Beijing Declaration at article 234 *et seq.* makes specific provision for women and the media, and spells out in great detail the duty of the media towards the promotion of equal rights. One of the strategic objectives identified was the promotion of a balanced and non-stereotyped portrayal of women in the media. Despite the fact that this objectives directly cuts to the status of women and society and their perceptions, one cannot deny the fact that the stereotypical weaker sex label constantly placed one women, especially in the sports arena, falls squarely within this objective. Article 243(b) states that the governments and international organisations must "[e]ncourage the media to refrain from presenting women as inferior beings and exploiting them as sexual objects and commodities, rather than representing them as creative human beings, key actors and contributors to and beneficiaries of the process of development".⁵⁴

It is at this juncture that we consider the limitation of the rights. The South African Constitution, however, is unique, for no other constitution or international instrument contain such a detailed and descriptive limitation-clause (section 36).⁵⁵ Fortunately the Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognised Human Rights and Internationally Recognised Freedoms had addressed the limitations issue through the insertion of Article 29. It provides that the exercise of rights and freedoms referred to in the Declaration shall be subject only to limitations determined by law; which protects the rights and freedoms of others; and satisfy the just requirements of morality, public order and the general welfare.⁵⁶

As will become apparent from the following cited cases, the courts

took similar considerations (to those contained in section 36), if not the same, into account when effecting the limitation of a right.

3.3. Factual discrimination and the right to equal treatment: universal ideas and principles

In 1999 the Chalons en Champagne Administrative Court in cases 98-711 and 98-1034, found that there was a rational connection between the delimiting act, on the one hand, and the purpose of the act, on the other hand. The court had to determine whether the allotment of different prizes to the men and women marathon were discriminatory; it found that such a differentiation did not amount to discrimination based on sex or gender, for the prize money could not be regarded to be remuneration for equal work by men or women for female athletes do not have the same physical capacity as their male counterparts.⁵⁷

The Court of Justice of the European Communities took the same considerations into account, albeit implicitly,⁵⁸ when it was faced with a number of equality concerns.⁵⁹ It found that it is discriminatory to dismiss an employee based on her pregnancy or based on absences or illnesses related to her pregnancy, even if she had failed to inform her employer of her pregnancy.⁶⁰ In this instance it is clear that the purpose of the limitation is not legitimate, that there is no rational connection between the limitation and the purpose, and that it is purely based on the pregnancy, and therefore discriminatory. The court further found that the non-renewal of a contract based on pregnancy,⁶¹ or a loss of remuneration based on, nothing other than absence from work as a result of the pregnancy,⁶² constituted discrimination based on sex. The reasoning behind these findings are similar to the one proposed *supra*.

Quare 7: do the actions of the media amount to unreasonable treatment of women?

This is possibly the most difficult question to answer, just as was the case in the South African context, for the balancing of the rights necessitates a clear understanding of the infringement, and also if the infringement constitutes an actionable act. It is reasonable for the media to focus on what society demands? It is reasonable to, in doing so, limit rights? Is it indeed a limitation, or is it an exercise in freedom of advancement of commercial interests?

It is submitted that that the methods of interpretation of equality-clauses and the determination of discrimination are universally accepted and applied. The mere fact that the principles underlying the *Harksen*-decision was "borrowed" from the Canadian Supreme Court by the South African Constitutional Court, should serve as an example of this universality and cross-pollination of ideas.

4. Concluding comments

It is clear from the discussion *supra* that the media is bound by the provisions contained in the Bill of Rights, and the value of equality protected in numerous international law instruments. It is also clear that the rights contained in these instruments may be limited, but a number of considerations have to be taken into account. What is

46 Strydom "The Right and Responsibility of Civil Society to Promote and Protect Human Rights" 1995(2) *South African Yearbook of International Law* 67.

47 Such as refugees and illegal immigrants.

48 Vienna Declaration and Programme of Action adopted following "United Nations World Conference on Human Rights", Vienna, June 1993.

49 General Assembly Resolution 34/180 (1980).

50 Article 1 of the Convention.

51 A/CONF. 177/20 of 1995.

52 Article 1 of the Universal Declaration of Human Rights (December 1948); Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (December 1966); the International Covenant on Civil and Political Rights

(December 1966) (in article 26) recognises everyone's equality before the law, and their entitlement not to be subjected to discrimination. See also the Council's Directive on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion (February 1976) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) at article 14.

53 Articles 210 *et seq.*

54 The Council of Europe had, in 1984, adopted a document recognising the differentiated representation of men and women in the media (*Equality Between Men and Women in the Media*, 1984). See also the *Jakarta Plan of Action for the*

Advancement of Women in Asia and the Pacific (ESCAP, 1994), in which the duty of the media to portray women positively in the media was underlined.

55 It is submitted that the section-36-like provision was up and until 1995 not considered because individuals were not directly regarded to be subjects under the international law.

56 "Strydom *South African Yearbook of International Law* 77.

57 Clearly in this instance the court took into account the fact that the nature of the athletic activity of the men and women were in essence different, for no matter what effort the females put into the race, they do not have the same physical capacity as the males and could therefore not compete against and with them.

58 It is submitted that the courts go through the same motions when determining whether a differentiating act constitutes discrimination, even though it does not expressly "label" it as it is "labelled" in or by the South African Constitution.

59 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark* (HK) 2001 ECR I-6993 March 23, 2000; *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios* 2001 ECR I-6915 November 17, 1999; *Reference for a preliminary ruling: So- og Handelsretten - Denmark* 1998 ECR I-7327 November 19, 1998; *Margaret Boyle and Others v Equal Opportunities Commission* 1998 ECR I-6401 December 23, 1996

abundantly clear, is that the media do differentiate between male and female athletes. What is unfortunately not clear is if such differentiating treatment amount to unfair discrimination, and therefore actionable, as was indicated supra, under both the South African Constitution and in the international law.

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60 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark* (HK) 2001 ECR I-6993 March 23, 2000; *Mary Brown v Rentokil Ltd.* 1998 ECR I-4185 June 30, 1998; *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Fotex*

Supermarked A/S. 1997 ECR I-2757 May 29, 1997.

61 *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios* 2001 ECR I-6915 November 17, 1999

62 *Reference for a preliminary ruling: So- og Handelsretten - Denmark* 1998 ECR I-7327 November 19, 1998.



Women Participating in Men's Events

Affirmation of (In)Equality?

by Steve Cornelius*

1. Introduction

"[E]ven the most uncompromising champion of the rights and capacities of women must admit that in contests of physical skill, speed and endurance, they must remain forever the weaker sex."

On a day in 1926 when the *Daily Mail* published this opinion, American swimmer Gertrude Ederle became the first woman to swim the English Channel. More significant, though, is that Ederle swam the Channel in a time which was two hours less than any man had done before her!¹

The Twentieth Century will probably be remembered as the bloodiest century in human history. It was a century riddled with multinational conflicts in which more than 100 million people lost their lives. However, the Twentieth Century was also the time in which the struggle for greater equality began to gain momentum - the struggle for racial equality, but also for gender equality. Often, the latter has been overshadowed by the fight against racial intolerance. Yet the struggle for greater equality between men and women have been just as significant. And it is a struggle which is far from over. In many parts of the world, women are still being oppressed; in many spheres of life, women still suffer inequality.

Sport represents a microcosm of society,² with the result that inequalities and injustices that are prevalent in society will be reflected in the world of sport as well. In many ways, women are still struggling to reach some measure of equality in a world of sports dominated by men. In fact, they are fighting for their rightful place in a world of sport created by men, run by men, dominated by men.

Until 1928, women were only allowed to participate in swimming events at the Olympic Games. Since then, it has been a long, slow march to full and equal inclusion in the Olympic program.³ Indeed, for many years, women have been excluded from any form of participation. But this position has gradually been changing, with more and more opportunities being created for women to show their athletic skills at the highest level. In recent times, the quest for equality between men and women have been highlighted by the participation of some of the best female golfers in men's tournaments. While this seems to be a bold new statement in favour of equality, it is by no means a new trend. In a sense, it is a trend started centuries earlier when, in 1563, Mary, Queen of Scots dared to enter the hallowed turf of the Royal and Ancient Club at St Andrews to play golf. Sadly, though, this turned out to be one of the misdemeanours with which she would be charged and for which she would eventually lose her life.⁴ It is a trend continued in the Twentieth Century by pioneers such as Tiny Broadwick,⁵ Lilian Gatlin,⁶ Amy Johnson,⁷ Babe Didrikson,⁸ Amelia Earhard,⁹ Helen Wills Moody,¹⁰ Suzanne Lenglen,¹¹ South African Billie Tapscott,¹² the great female tennis stars of the 1970s and 1980s, Billy Jean King and Martina Navratilova.

For a while it seemed as if this trend had ended there. But the recent events in golf showed that it was just dormant, waiting for the next opportunity where women would again endeavour to assert themselves against their male counterparts. However, this has raised a number of contentious issues and questions. Firstly, to what extent is gender discrimination still taking place in sport today? Secondly, whether or not women are even marginally successful at competing directly with their male counterparts, can separate events for men and women still be justified in the modern context of greater equality between the genders? Thirdly, two of the world's greatest men's golf players questioned whether it was fair that a woman should be given a place in a men's tournament at the expense of a man who is trying to earn an income from his chosen profession.¹³ Fourthly, what is the real underlying intention with the inclusion of women in men's events? Is it motivated by an honest and sincere urge to promote greater equality between the world's male and female athletes, or are there other, more sinister hidden motives behind these decisions? And lastly, if women are allowed to participate in men's events, should men not be allowed to participate in women's events. This latter question becomes especially pertinent when the issue of transsexualism and sex change are explored. But it also relevant with regard to the third question, irrespective of the motive behind the invitation of women to participate in mens events.

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1 Gould (1997) 100.
2 KL Shropshire "Merit, Ol' Boy Networks, and the Black-Bottomed Pyramid" 1996 *Hastings Law Review* 455 at 456
3 Gould (1997) 107.
4 *Player The Complete Golfer's Handbook* (1999) 13.
5 The first woman do make a parachute jump. Gould (ed) *The Guinness Book of the 20th Century* (1997) 48.
6 The first woman to fly across the USA. Gould (1997) 86.

7 The first woman to fly from Britain to Australia. Gould (1997) 110.
8 Won two gold medals and one silver medal at the 1932 Olympics in Los Angeles. Gould (1997) 121.
9 The first woman to fly solo across the Atlantic Ocean. Gould (1997) 139.
10 Won eight All England Lawn Tennis ladies' singles titles at Wimbledon.
11 The first international superstar of tennis. She hardly ever lost a match and notched up five consecutive All England Lawn Tennis titles. Because of her popularity, she became the first woman to have all of her matches played on Centre Court at Wimbledon. She brought a sense of style to the sport, but was faulted for her frock that was shockingly above her knees! Gould (1997) 129.
12 The first woman who dared to wear shorts without stockings at Wimbledon. Gould (1997) 129.
13 McLean "Local Ladies Jilt Dave" April 2004 *South Africa Golf Digest* 8.

2. Gender discrimination

Because of the inherent gender inequalities that have been perceived in the world of sport, authorities in some jurisdictions have imposed legal measures to promote a greater measure of equality. Most notable in this regard is Title IX of the Education Amendments of 1972 in the United States of America. Title IX was designed to prohibit gender based discrimination in educational activities receiving federal funding. These measures have been lauded as the law that would open up new opportunities for women to participate in sport. It is seen by many as the primary mechanism responsible for creating opportunities for women to participate in sports which they would not otherwise have had. In this way, a greater degree of parity seems to have been achieved between opportunities to participate in sport available for men and those available for women. However, it has been argued that this parity is only a statistical illusion. It is argued that statistical parity has been achieved in many instances, not by creating more opportunities for women, but by reducing the number of opportunities available for men. However, because there are countless factors which may have led to more women taking to sport or certain men's programs being cut, it may never be possible to determine the precise impact which it may have had on fostering some measure of gender equality.¹⁴ In all likelihood, both views of Title IX are correct to some extent - in certain cases, there may indeed have been a concerted drive to provide more opportunities for women to participate in sport. But there can also be little doubt that certain institutions would have opted for the easy (and less expensive) way out by simply reducing the number of mens sports programs to create statistical parity between the opportunities available to the different genders. Such action would amount to a total disregard for the plight of women to achieve a greater measure of equality and would fly in the face of the purpose with which Title IX had been enacted. Whatever the actual effect of Title IX may have been, one thing which is certain is that it has provided a platform from which women could assert their demands for greater equality in the world of sport. During the first three years of its application to collegiate sport in the United States, more than 100 complaints of gender discrimination was received by the United States Department of Education.¹⁵

Some of the major sports bodies in the world have also taken definitive measures in an attempt to eradicate the inequalities that have plagued their individual sports. In this regard, the IAAF have eradicated almost all the differences between the men's and women's Olympic and World Championship programs. At last, women can also participate in long distance running, pole vault, triple jump and hammer throw, just as the men have been doing for decades already. FIFA is another sports federation which have taken admirable steps to improve the fate of women.

However, the issue of discrimination against women in sport is not merely one of reduced or unequal opportunities or lack of proper recognition for their achievements. Most sports are in themselves fundamentally chauvinist and, as a result, inherently discriminatory against women. Modern sport evolved during Victorian times when women were expected to stay at home and tend the family. The sports that developed during these times, were designed by men for men. Most modern sports developed from physical attributes required by soldiers in battle and the nature of most sports reflects the predominantly male traits of strength, size and shape.¹⁶ Other sports, that require little aggression or muscular strength, developed as typical male leisure preserves and important sites for collective male behaviour.

Sport is also a powerful means to promote a sense of belonging and identity.¹⁷ But unity and identity are also connected to power and social relations.¹⁸ It has been suggested that sport stabilises the power structures of modern societies by producing technical and disciplined behaviour. In terms of this view, sport legitimises the technocratic capitalist practises and uses them as a repressive method of general socialisation.¹⁹ Sport is used as an aid to protect certain class interests and to regulate the use of free time.²⁰ In doing so, sport also fulfils a vital educational role in modern societies. It fosters a certain ethic and moral consciousness that are commended in society. It is for this par-

ticular reason that much emphasis was once placed on school sports. Sport was seen as an important medium to instill young participants with common modes of thought, cooperation and social cohesion.²¹ As such, sport reinforces traditional male and female gender identities by supporting the idea that the existing division of labour - at work and at home - is the natural state of affairs.²² The behaviour of an individual is, to a substantial extent determined by the social practises, such as sport, through which social and gender relations are established. For this reason, sport continues to play a vital role in the maintenance of repressive forms of social and sexual control, with the result that it is a significant tool to reinforce distinctions based on gender.²³

This institutionalised inequality is highlighted in s 44 of the British Sex Discrimination Act 1975, which provides that

"[n]othing [...] shall, in relation to any sport, game or other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man, render unlawful any act related to the participation of a person as a competitor in events involving that activity which are confined to competitors of one sex."

While more and more opportunities are created for women to participate in sport, these opportunities merely reflect extensions of male sports. Rarely, if ever, are opportunities created based on female attributes that would suit women, rather than men, in their search for physical perfection.²⁴ Admittedly, some sports, such as rhythmic gymnastics, ballroom dancing and synchronised swimming seem to be more conducive to promotion of female qualities such as poise, style, grace and aesthetics. But these sports, if they are indeed female oriented sports, are few and far between and do not generate a fraction of the revenues generated by many of the traditional male oriented sports such as football, golf, tennis and motor racing. As a result of this, no measure of equal opportunities in sport as it exists today, will ever create a situation of equality between men and women. On the contrary, the chauvinist foundations of modern sports must inevitably perpetuate inequality and injustice towards women.

3. Separate events

The vast majority of sports provide different competitions for female and male competitors. Surely equal treatment would mean that men and women should always compete in the same event against each other. It is important to keep in mind that not all discrimination is objectionable. In all aspects of life we discriminate on a daily basis. If we support one team as our favourite, we discriminate against the others, if we select one player above another, we discriminate, if a certain sport is our favourite, we discriminate, if we select the events in which we wish to participate, we discriminate. However, in all these cases, the discrimination is not unfair, but can be justified on some rational ground or another.

One should, however, guard against the common misconception that unfair discrimination generally means unfair inequality. Equal treatment may also, in appropriate circumstances, amount to unfair discrimination. Consequently, in cases where it would be unfair to treat people on an equal basis, such equal treatment may, in fact, amount to unfair discrimination. In *Regents of the University of California v. Bakke*²⁵ Blackmun J stated that 'in order to treat some persons equally, we must treat them differently'. Similarly, Devenish²⁶ states

"[e]quality in a substantive sense [...] is not merely a matter of likeness; indeed, in certain circumstances it must be a matter of differ-

14 Reich "Title IX Through the Eyes of an Independent Observer" in Le Roux and Cornelius *Sport: The Right to Participate and Other Legal Issues* (2003) 69 et seq.

15 Reich (2003) 73.

16 Grayson and Hill *Sport and the Law* (2000) 326.

17 Houlihan in Coackley and Dunning (2000) 215 - 216.

18 Coackley (1997) 408.

19 Rigauer 42.

20 Houlihan in Coackley and Dunning (2000) 215.

21 Sage in Coackley and Dunning (2000) 264.

22 McArdle *From Boot Money to Bosman: Football, Society and the Law* (2000) 187.

23 McArdle (2000) 187 - 189.

24 Grayson and Hill (2000) 326.

25 438 US 265 407.

26 (note 17 above) 43.

ence. It is just as important that those who are different should be treated as such, and those who are alike should be treated in a like manner. Furthermore, in certain circumstances, it may be essential for substantive equality to draw distinctions between individuals and groups to accommodate their specific interests and needs.”

This may all seem contradictory at first, but closer scrutiny will reveal that it is actually a very accurate summation of the situation. If the Department of Home Affairs were, for instance, to require that all persons should complete applications for identity documents or passports in their own handwriting and provide only ordinary printed forms, it would be impossible for blind people to comply with this requirement. It would also be impossible for illiterate people to comply with the requirement. Although both these categories of people are treated on the exact same footing as everybody else, it is precisely this equal treatment which excludes them from participation in the activity concerned.

The concept of unfair equality has long since been recognised in sport. Most sports provide different competitions for various age groups. Obviously, few young people would become interested in sport if they had to compete with adults from the start. Certain sports, such as power lifting, weightlifting, wrestling and boxing, differentiate on body weight because it is recognised that a smaller person would be at an unfair disadvantage if he or she had to compete against a larger person. Some sports, such as golf and polo, have taken the concept of unfair equality further by providing for a handicap system in terms of which novice participants can, at least in theory, compete on an equal footing with experts.

The vast majority of sports provide different competitions for female and male competitors because of the inherent inequalities that modern sport perpetrates against women. It is glaringly obvious that women in general would be excluded from participation in most sports if they had to compete directly with their male counterparts. One only has to refer to the difference between men's and women's world and national records in sports such as athletics, swimming, cycling, weightlifting, etcetera, to appreciate the point. Even though we provide separate competitions for women and thereby treat them on a different basis from male competitors, we should accept this differentiation, as equal treatment will inevitably lead to the general exclusion of female competitors from most sports. Equal treatment will then result in unfair discrimination. But the question then arises, to what extent should this differentiation be tolerated? Should there always be a distinction between men's and women's events, or should there be some penumbra in which the divide is blurred and some measure of cross-movement can be allowed. And this is exactly the question begged by the participation of some of the best women golfers in men's tournaments.²⁷ If some of the best female athletes are able to qualify for men's events, why should they not be allowed to participate? Similarly, why should organisers not be allowed to invite women to take part in men's events? The answers to these questions are complex and I will refer back to these issues below.

However, there is one matter which, in itself, already provides one argument to support some answer to these questions. A major concern which I have with women participating in men's events, is that, thus far, none of them seem to have achieved any measure of success. Apart from the fact that they have time and again been resoundingly beaten by their male counterparts, they also seem to have, compared to their own previous standards, underperformed in doing so. The reasons for this can be varied. It could be that the additional demands of teeing off from the championship tees, rather than the ladies tees, took its toll; or it may be ascribed to added pressure because of the higher level of competition and increased attention; it could also be that the pace of the men's game is just too fast.

Whatever the reason, I believe that the participation of women in men's events creates a catch-22 situation which can, in the long run, only be detrimental to women's sport in general. Whenever women take part in men's events and fail to achieve some measure of success, they are perpetuating traditional male and female gender stereotyping by lending credence to the idea that the existing inequality is the natural state of affairs.²⁸ For this reason, rather than assert their equality,

women who participate in men's events actually participate in the maintenance of repressive forms of social and sexual control, which tends to reinforce distinctions based on gender.²⁹ On the other hand, if some of the top women were able to achieve some measure of success in men's events, that would indicate that any gender inequalities which may have been perceived in the particular sport, have been overrated. The principles on which differentiation between men and women in that sport has been based, would then be invalidated. As a consequence, the provision of separate events for men and women would indeed amount to unfair discrimination on the grounds of gender so that only combined events would be justified in future. While this may be fine for the very best female athletes, it will in all likelihood make participation for the majority of women, who are not at the elite level, extremely difficult.

4. Denying opportunities for men

As I have indicated above, one of the reasons why certain men oppose the participation of women in men's events, is that it takes place at the expense of some men who are excluded to make room for the women.³⁰ While this will always be a factual reality, one has to question whether it is, from a legal point of view, a valid argument against inclusion of women in men's events. If a male athlete has a legitimate expectation to participate in a particular event, the exclusion of such a male, for whatever reason, will always be problematic from a legal point of view. But participation in sport is largely based on contractual relationships between the organisers of the event and the athletes who participate in it. Contracts provide

“the ultimate source of the regulatory jurisdiction of referees and governing bodies in sport, enabling the latter to determine the laws according to which sport is played [...] and the former to implement those laws on the field of play.”³¹

Basically any legal system today recognises the principles of contractual freedom, which means that no person can generally be compelled to enter into a contractual relationship with another person. Secondly, most legal systems today also recognise the principles of privity of contract, which means that no person can acquire rights and duties under a contract if that person is not party to the contract. The result is that organisers of events are generally at liberty to elect who they wish to participate in their event, while individual athletes generally have no recourse to compel an organiser to accept their entry into the event concerned.

A legitimate expectation may be found to exist where the rules of access to the event, for instance, provide that all players at a certain level on the official world rankings at a certain date, gain entry to the event. On the one hand, the legitimate expectation may be based on membership of a federation to which both the organiser and athlete belongs. In such a case, the mutual membership of the federation constitutes contract between the organiser and athlete which may bind the organiser to provide participation. On the other hand, the rules of access may be construed as an offer to the athletes, which they accept by complying with the prerequisites (such as being at the required level by the set date).

In any event, none of the arguments above has any relevance to the women who have participated in men's golf recently. Apart from the usual number of professional players who participate in a golf tournament, the sponsors are usually allowed, at their sole discretion, to invite a few players (such as promising young amateurs or celebrities), to also participate in the event. The women who have thus far participated in men's golf events, have done so based on sponsor invitations. As a result, no man can claim to have been unfairly excluded due to the inclusion of a woman in the golf tournaments concerned.³²

27 Anonymous “Davies Follows the Trend [...] While Wie Wows the Stars” February 2004 *Tee to Green* 11.

28 McArdle *From Boot Money to Bosman: Football, Society and the Law* (2000) 187.

29 McArdle (2000) 187 - 189.

30 McLean April 2004 *South Africa Golf Digest* 8.

31 Beloff, Kerr and Demetriou *Sports Law* (1999) 22.

32 Van Heerden “Women in Men's Competitions - Is It Just a Phase?” February 2004 *Tee to Green* 2.

5. Why are women invited to participate in men's events?

If the women are invited to participate in events, one has to question what motivates the decision to have them play in the men's events. The South African Golf Association announced that 14 year old Ashleigh Simon³³ had been allowed to participate in a men's tournament because it would go a long way to promote women's golf as well as junior golf. It has been said that women participating in mens golf events, have done more good for golf by raising the profile of the game, than harm.³⁴

But I am not certain that I can agree with these sentiments without qualification. In a world ruled by Mammon, few sports events would ever take place without some measure of financial assistance. This opens the door for the participation of sponsors who provide the vast amounts of funds that are consumed annually by professional and amateur sports alike. But nothing in this world is free and sponsors want some return on their investment. They certainly do not wish to limit their participation only to the payment of bills - they seek to participate in various other ways that would maximise their exposure to potential customers or clients. Against this background, there can be little doubt that the initial and subsequent decisions to invite women to participate in mens golf events, were driven by financial concerns as the novelty factor of women participating in men's events, were sure to attract strong media attention. And that is what the sponsors wish for above all else. In this regard, McLean³⁵ stated that

"it struck me as gimmicky that 14-year-old Ashleigh Simon should tee off in the Sunshine Tour Championship [...] she was essentially at Leopard Creek as a media sideshow. [...] Which brings me to the fact that Woodhill Golf Director Dave Usendorff failed in an attempt to play on the current Nedbank Women's Golf Tour. [...] Not that he was after the prizemoney - he just wanted to add another circus element to this whole business."

The same could probably be said of the recent participation by other women in men's events. As a result, I have serious doubts about the sincerity of these moves. By including women in men's golf tournaments, very little is done to promote women's golf, particularly in view of the fact that none of the women have thus far achieved any notable results against the men. Indeed, the only parties who benefit from these sideshows are the mens golf tours and their sponsors, both of which enjoy the additional media interest generated by the participation of women against men. For this reason also, rather than assert their equality, women who participate in men's events actually participate in the maintenance of repressive forms of social and sexual control, which tends to reinforce distinctions based on gender.³⁶

6. Men in women's events?

If women are allowed to participate in men's events, should the principles of equality not demand that men be allowed to participate in women's events as well. As I have indicated above, equality does not necessarily imply equal treatment. In certain cases, equality may indeed demand unequal treatment. But the problem of men participating in women's events is not clear cut. It is compounded by the issue of transsexualism and sex change. Where do people, genetically born as males, who undergo a sex change to become female, fit into the equation? Many women's sports require participants to be born female or to undergo a sex-chromatin test to ensure that men are excluded. However, in *Richards v. US Tennis Association and others*³⁷ the Court in New York ruled that

"when an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of

defendants must surely give way to the overwhelming medical evidence that the person before him is now female."

In Australia, transsexual golfer Mianne Bagger, who had a sex change in 1995, have been allowed to play in the Australian Women's Open Golf tournament. In explaining her own participation, she stated that

"[g]ender-reassignment is a long process. After surgery there's nothing left in our bodies that produces testosterone [...] Now I have less testosterone than the average levels for women in society and (because of that) I also have a decrease in muscle-mass and a loss of strength."³⁸

The participation of a man in a women's event is, however, not a new phenomenon. During the 1930s and 1940s, the world of sprinting in athletics was dominated by Helen Stevens and Stella Walsh. Walsh eventually won gold in the 1932 Olympic 100m, silver at the 1936 Olympic 100m and 41 AAU titles. When Walsh was killed during a bank robbery, the autopsy revealed that she had been a man.³⁹

In 1966, Olympic sprint medallist, Ewa Klobukowska became the first person to pass a visual sex examination, but fail a genetic test. Medical examiners concluded that she had one chromosome too many to be declared a woman for the purposes of athletic competition. As a result, she was stripped of all her medals and records and barred from participation in women's events. It is estimated, though, that as many as 6 women out of every 1,000 would fail a genetic sex test. While they may consider themselves to be female and live happy and ordinary lives as such, genetically, their gender is in doubt.⁴⁰

The downhill ski racer, Erika Schinegger had her male identity revealed through a genetic test in 1967. It was alleged that her male sex organs had been hidden inside her body. Subsequently, she changed her name to Erik, married a woman and fathered children.⁴¹

Another twist to this matter occurred in 1938, when Dora Ratjen, a hermaphrodite by birth, who set a new world record in the women's high jump, was banned from participating in women's events.⁴²

With the amounts of money involved in modern sport, there can be little doubt that there can be a tremendous amount of incentive for men to try and pose as women and participate in women's events. I have little doubt that there may be individuals who would go so far as to have sex changes to facilitate these transitions. As a result, the question of transsexualism is fraught with difficulty. While one would not wish to discriminate unfairly against individuals who have a legitimate physiological and psychological condition which prompts the decision to undergo gender-reassignment, one should also guard against abuse. However, a complete analysis of the issues involved, falls beyond the scope of this paper.

7. Conclusion

While the participation of women in men's events may seem to be a definitive statement in favour of equality, looks can be deceiving. As I have indicated above, such participation can actually have the effect of maintaining repressive forms of social and sexual control, which tends to reinforce distinctions based on gender. Furthermore, the inherent chauvinist nature of most modern sports mean that women will always be at a distinct disadvantage whenever they participate in these sports. Equality, it seems, is an impossible dream.

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33 South African Women's Open Golf Champion in 2004.

34 Editorial comment February 2004 *Tee to Green* 2.

35 April 2004 *South Africa Golf Digest* 8.

36 McArdle (2000) 187 - 189.

37 400 NYS (2nd) 267.

38 Anonymous "Now for a 'Man' in a

Women's Tournament" March 2004 *Tee to Green* 18.

39 Donohoe and Johnson *Foul Play: Drug Abuse in Sports* (1986) 76.

40 Donohoe and Johnson (1986) 77.

41 Donohoe and Johnson (1986) 74.

42 Donohoe and Johnson (1986) 76.

Sports Merchandising: Fighting the Fakes

Whether "ambush marketing" is a form of stealing or just a clever kind of creative marketing and, therefore, "fair game", the jury still seems to be out. But fake merchandise, masquerading as "the real thing", is an entirely different matter. Even though, it is said, that "copying is the best form of flattery", fake merchandise in general is costing the European Union economy a staggering £250 billion a year. And it is also a problem at the global level, where the costs are even higher; estimated at between 5% & 7% of world trade. These are mega sums and not to be taken lightly!

The production and sale of fake sports merchandise is also big business. And a growing problem for sports rights owners and their commercial partners, especially licensees and merchandisers. On the day last year that Real Madrid "unveiled" their star acquisition David Beckham, his official replica shirts bearing his name and new number 23 were sold out within hours of going on sale. And, at the same time, it was reported that, in the Far East, counterfeiters were also busily making and putting on sale counterfeit copies of them - for which there is also a growing market.

So, what is counterfeiting? It is the unauthorised use of registered trademarks in connection with the production and/or distribution of goods. And it may also involve the production and/or distribution of "pirated" goods, that is copies of goods produced and/or distributed without the consent of the copyright holders.

A sports logo, such as an event mark, can be registered as a trade mark for a range of consumer goods, if it satisfies certain legal requirements. Basically, the mark must be distinctive and indicative of the origin of the goods. The legal rights arise from registration at the Trade Marks Registry.

A sports logo can also be legally protected by copyright as a "protected work" - that is, an "artistic work", irrespective of its intrinsic artist merit. And, generally speaking, the rights arise without registration. However, it is advisable to claim copyright by marking the goods - and their packaging - with the international copyright symbol: "C" in a circle, followed by the copyright holder's name and the year. The words "*all rights reserved*" should also be added to cover the sale of copyright goods in countries not recognising the international copyright symbol under the Universal Copyright Convention.

So, what can be done about the production and sale of fake merchandise? It can be attacked in the Courts as a trade mark or copyright infringement. Apart from damages, the Courts can also award injunctions stopping the sale of the merchandise concerned and, in certain cases, ordering its confiscation and destruction.

However, the production and sale of fake merchandise is not only a civil matter; it may also be a criminal offence.

For example, under section 92 of the UK Trade Marks Act 1994, fraudulent application or use of a trade mark constitutes a criminal offence; and the offender can be fined and/or imprisoned, if the required criminal intent ("*mens rea*") is proved. In other words, the application or use of the mark must be either with the intention of the infringer gaining, or causing loss to someone else; and, in either case, must be without the consent of the trade mark owner.

Likewise, under section 107(1) of the UK Copyright, Designs and Patents Act 1988, there are similar criminal consequences where the copyright infringer knows, or has reason to believe, that an infringement is taking place.

Before resorting to legal proceedings, however, "cease and desist letters" may be sent to infringers. But beware: to claim trade mark rights falsely and threaten legal action can, under section 21 of the 1994 Act, produce a counterclaim for a declaration that the threats are unjustified; and, in turn, this can lead to claims for damages and/or injunctions.

As for legal protection in the rest of Europe and other major sports markets, like the US and Australia, the position is very similar.

In Spain, for example, there is strong copyright and trade mark protection available - and the Customs Authorities have wide powers to detain counterfeit merchandise at the ports of entry. As for any such merchandise that is already in circulation in the country, the services of the Police can also be invoked to seize the offending items. Based on my own professional experience, I can confirm that these measures work very well in practice.

In the United States, the Lanham Act provides comprehensive legal protection against trade mark infringements and is widely used to protect sporting trade marks and logos against their unauthorised exploitation.

And, in Australia, apart from statutory protection, the Common Law doctrine of "Passing Off" is well developed and less stringently applied in practice against those who unlawfully "pass off" their merchandise as being "the real thing".

In South Africa too, there is a tough legal regime in force to deter and punish counterfeiting in its various forms. Witness the draconian measures put in place for last year's Cricket World Cup!

Also, in the European Union, Regulation No. 3295 of 1994 enables copyright holders to ask their Customs Authorities to stop counterfeit or "pirated" goods entering their country. This is a very valuable and practical tool for fighting counterfeiting on a transnational scale.

As for merchandising programmes associated with major international sporting events, such as the Olympics or the European Football Championships, the organisers of these events have developed very effective "Brand Protection Programmes" - usually with statutory backing - and other measures, including special labelling and "water marking" of goods - to prevent, identify and deal with cases of counterfeit merchandise.

But, licensors and licensees also need to be vigilant and pro-active - they also have an important role to play in fighting the fakes. By collaborating closely with one another to nip any counterfeiting in the bud; or undertaking a pre-agreed damage limitation exercise to prevent its spreading.

All of this can be helped by including specific provisions in sports merchandising and licensing agreements. A typical clause of this kind runs as follows:

"The Licensee shall promptly bring to the attention of the Licensor any unauthorised representation or imitation, wrongful use or any other infringement of the Licensed Product(s) in the Territory or any threat to do any of those things which may come to its notice; and shall assist the Licensor in taking any and all steps which the Licensor may deem necessary to protect and defend its rights; but the Licensee shall not take any such action, including any legal action, without the prior written consent of the Licensor."

The following general clause may also be used:

"The Licensee agrees to co-operate fully, in good faith and in a timely manner with the Licensor for the purpose of securing and/or preserving the intellectual property and any and all other rights of the Licensor in respect of and in relation to the Licensed Product(s) under and for the purposes of this Agreement."

There is plenty of ammunition, therefore, in a sports merchandiser's legal armoury for fighting the fakes. So, counterfeiters beware!

Ian Blackshaw

Article III-282 of the Constitution for Europe and an EU Policy For Sport

The inclusion by the European Union of a special provision on sport in the Treaty (the Provisional consolidated version of the draft Treaty establishing a Constitution for Europe, which was solemnly signed by the heads of state and government leaders of the EU Member States on 29 October 2004 in Rome and is to be ratified after national parliamentary approval and/or referendum, paves the way for the establishment of a truly European sport policy Brussels style. The Dutch Presidency in the second half of this year offered a fine opportunity to provide the first impetus. As is known, the involvement in sport of the EEC/EC/EU has so far always been based on special, thematic Treaty provisions (e.g., the Chapter on Public health for doping issues) instead of on a general provision concerning sport. What was lacking in fact was a solid, constitutional basis for creating an independent sport policy by means of, for example, the issuing of "Calls for proposals" by the European Commission, which would lead to subsidised research, etc., or by means of decision making to this end. Curious in this respect was therefore the Call for proposals for preparatory measures for a Community policy in the field of sport of 11 July 2002, which incidentally was only directed at the fight against doping and youth policy!

What exactly does the provision on sport entail? In the first place, it must be established that Article 282 is part of Part III of the Treaty concerning Internal Policies and Action, more especially, Chapter V of Part III, concerning Areas where the Union may take coordinating, complementary or supporting action. In this context, Article 282 is part of Section 4 concerning Education, Youth, Sport and Vocational Training. Article 282 is therefore "soft" by nature and this is reflected by its paragraph 4 which determines that "in order to contribute to the achievement of the objectives referred to in this Article ... (a) European laws or framework laws shall establish incentive actions, excluding any harmonization of the laws and regulations of the Member States" and "(b) The Council, on a proposal from the Commission, shall adopt recommendations." Although therefore regulations (European laws) and directives (framework laws) may be adopted in the field of sport, this can only be the case for the purpose of establishing "incentive actions" and moreover with the exclusion of harmonisation of national legislation. This means, for instance, that there will be no harmonisation of national public doping laws, which are expressly enacted in countries such as Belgium, France and Italy, but which are rare or completely lacking in countries where the problem of doping has been left (almost) entirely to the autonomy of the sports federations.

Despite the soft-law character of Article 282, at least there is now a direct, constitutional basis with (legal) instruments which offer sufficient handles for an independent EU policy on sport, based, however, on subsidiarity. This leaves the possibility intact to take action based on or in conjunction with other, specific Treaty provisions (cf. public health). Aside from this, EU competition policy, for example, will continue to apply to sport as an economic activity without having to rely on Article 282, although it seems advisable to coordinate action in the field of competition and EU sport policy. This aspect also touches upon the question of the implications of Article 282 for professional sports (but see below concerning the object and purport of Article 282). It must further be remarked that, as appears from paragraph 3 of Article 282, the EU and the Member States shall foster cooperation with third countries (non-Member States) and the competent international organisations in the field of sport, especially the Council of Europe (which has been active in the field of sport much longer than the EEC/EC/EU, see in particular the Convention concerning sport and football hooliganism of 1985 and the Convention concerning doping of 1989).

What are the objectives of the EU in the field of sport? These would, after all, have to form the cornerstones of any EU sport policy! Paragraph 1, second sentence, of Article 282 indicates that "the Union shall contribute to the promotion of European sporting issues, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function." Paragraph 2 adds that "the Union action shall be aimed at: (g) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen." Here, respect for the specific nature of sport is expressed, and for the volunteer work and the social and educational role of sport as preconditions for a sporting policy. The EU has to concern itself with European sports matters or: the European dimension of sport. This may concern both the contrast with national sports matters and the national dimension of sport (ruled by subsidiarity) and with non-European sports matters and the international dimension of sports (e.g. the Olympic Games, concerning which the European Parliament adopted a resolution as far back as 13 October 1981 which among other things supported the Greek proposal to make Greece the permanent residence of the Games). Fair competition and youth policy are specific objectives of the policy.

Article 282 clearly addresses organised sport. What exactly is its relationship with professional/top sport on the one hand and amateur/recreational sport on the other? With its emphasis on volunteer work and the social and educational function of sport, Article 282 appears to have been written from the perspective of the second category of sport, i.e. recreational sport. This makes sense, as this is why sport deserves to have a special Article of the Treaty devoted to it, not because of that narrow category of sport, top sport, which is moreover a mainly economic activity to which the social and educational function takes second place. Issues like the freedom of movement of workers and competition do not require the inclusion of a separate Article 282 in the Treaty. However, it is important that it has now been expressly established that account must be taken of the specific nature of sport, and this also impacts professional sport! For instance, "transfer windows" in European professional sport (cf. the Lehtonen case) can only be defended by invoking fair competition (in the sporting sense of the word), which is another aspect expressly mentioned by Article 282 which is equally relevant for professional sport.

Article 282 provides reference points for the direction and theme of a European sporting policy, but there is also considerable previous history. The ASSER International Sports Law Centre has recently published the book "The European Union and Sport: Legal and Policy Documents" with T.M.C. Asser Press, which includes all policy and decision making by the EEC/EC/EU Community organs (Court, Council, Commission and Parliament) since the Walrave/Koch case in 1974. The book consists of some twenty Chapters, starting with "General" and ending with "Vandalism and Violence" (there is also a Chapter entitled "Miscellaneous"). The remaining Chapters are the following: Boycott, Broadcasting, Community Aid and Sport Funding, Competition, Customs, Diplomas, Discrimination, Doping, Education/Youth, Free Movement of Workers, Freedom of Establishment, Freedom to Provide Services, Olympic Games, State Aid, Tax, Tobacco Advertising and Trademark. A distinction can be made between Chapters dealing with "hard" and "soft" issues. "Broadcasting" (TV without Boundaries Directive), "Free movement of workers" (Bosman, Lehtonen), "Competition" (among other things, the collective selling of TV rights), "Discrimination" (Kolpak) and "Freedom to Provide Services" (Deliège) obviously belong to the

"hard core" of European sports law, while subjects like "Community Aid and Sport Funding" (Eurathlon Programme), "Doping" and "Education/Youth" (European Year of Education through Sport 2004 plus Call for Proposals of 28 May 2003 concerning this matter) belong to the soft part (policy, rather than law). The drafters of any EU sport policy plan should first carefully study this history before outlining such a policy. Which building blocks are already available? In a *general* sense ("General"), one could think of documents like the Declaration on sport to the Treaty of Amsterdam of October 1997: "The Conference (IGC; RS) emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport." Further, the Commission Staff Working Paper concerning "The Development and Prospects for Community Action in the Field of Sport" of 29 September 1998, and "The European Model of Sport", a Consultation Document from DG X (Education and Culture) of the Commission of the same date. Besides the Declaration on sport (Treaty of Amsterdam), this is one of the most frequently cited documents in the field of sport. The same is true for what is known as the Helsinki Report of 1 December 1999 (Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework). Finally, the European Council of Nice on 7-9 December 2000 adopted a Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies. With respect to sub-topics the following documents have a wider meaning:

"Orientations préliminaires sur l'application des règles de concurrence au secteur du sport" of 15 February 1999 (Note d'information from Commissioner Karel van Miert in agreement with Commissioners Marcelino Oreja and Pádraig Flynn), the Community Support Plan to Combat Doping in Sport of 1 December 1999 (Communication from the Commission to the Council, etc.) and the Handbook for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one member state is involved, which was an Annex to a Resolution of the Council of 6 December 2001. In the field of doping, a remarkable fact is that the Commission issued two separate Calls for proposals in the framework of the Pilot Project for Campaigns to Combat Doping in Sport in Europe, namely on 16 April 2000 and on 1 May 2001. The Commission as therefore issued a total of four special Calls for Proposals in the field of sport (see also above). Not included in "The European Union and Sport: Legal and Policy Documents" is the Social Dialogue in sport and especially football. The reason for this is that, although research grants have recently been awarded (among others to FIFPro in 2002 and to EFFC in 2003), these were not based on special Calls for Proposals. However, in formulating an EU sporting policy plan, this topic should definitely not be overlooked!

One intriguing question deserving further study is which ideology emerges from the documents collected in "The European Union and Sport: Legal and Policy Documents".

What is Brussels's view of sport, which ideas have been developed in general and for sub-topics? What kind of action was taken? What is part of incidental politics and what of general policy? And more questions like these.

Robert Siekmann

4th ASSER / CLINGENDAEL INTERNATIONAL SPORTS LECTURE

Friday 19 November 2004

Venue: Instituut "Clingendael"

Opening: 16.00 hours

"The role of Sport in development and peace promotion"



Speaker:

Mr Adolf Ogi, Special Advisor to the United Nations Secretary-General on Sport for Development and Peace, Geneva

In the second part of the meeting attention will be paid by a Dutch panel of experts - Humberto Tan, Diederik Samwel and Will van Rhee - to the Netherlands-Surinam "football relations" in the perspective of sport and development cooperation.

This event is a follow-up to the 2002 Lecture on "Sport and Development Cooperation" that was delivered by The Prince of Orange, Member of the IOC and its Solidarity Commission, and Johan Cruyff, Chairman of the Johan Cruyff Welfare Foundation.

Participation is by invitation only

International Sports Law

By James A.R. Nafziger

2nd Edition 2004, Transnational Publishers Inc, Ardsley New York
USA, ISBN 1-57105-137-6, pp. 376, Price US\$115

According to the author, who is Thomas B. Stoel Professor of Law, Salem, Oregon, and Director of International Programs at Willamette University College of Law, USA and President of the American Branch of the International Law Association, the international sports arena today faces five "critical" issues. They are: doping; the rights of athletes (especially their Human Rights) and eligibility requirements; dispute resolution; corruption and subjectivity of judges and referees; and last (but by no means least) commercial matters, such as ambush marketing, broadcasting rights and intellectual property (the legal basis of all sports marketing).

Sport is now a global phenomenon - we have just witnessed the successful Olympic and Paralympic Summer Games in Athens despite all the pronouncements of the doomsayers in the run up to them - and a growing body of international sports law is emerging to ensure fair play amongst all the stakeholders in international sport. So much so, according to Nafziger, as to make the old discussion - amongst academics - about whether there is such a thing as 'sports law' or whether one should better refer to 'sport and the law' a sterile debate. In this Book, he provides ample examples in support of his thesis that "international sports law is on track [...] still young and growing, but capable of going the distance."

This is particularly true in the field of dispute resolution and the emergence of a so-called '*lex sportiva*' as a result of the increasing activities and influence of the Court of Arbitration for Sport (CAS), which this year celebrates its twentieth birthday! The author deals with this subject - of particular interest to your reviewer as a CAS member - in great detail and concludes that: "[t]he CAS deserves acclaim for two decades of high quality, productive arbitration of sports-related disputes. Among its accomplishments is the gradual development of a new and useful jurisprudence derived from its awards." And adds: "Principles and rules derived from CAS awards are becoming more clear on such issues as the jurisdiction and review

powers of the CAS, eligibility of athletes, and the scope of strict liability in doping cases."

The author also examines the important subject of dispute resolution during domestic and international competitions. And, in particular, the increasing use of cameras and computers - facilitated by advances in technology (for example, ball-tracking technology in tennis) - by international sports federations and their constituent national bodies for determining results and reviewing controversial decisions on the sports track and field. He also deals with the corruption of officials during competition, including the so-called 'Skategate' judging scandal at the 2002 Salt Lake City Winter Olympics.

The Book also deals with the thorny issues of international legal regulation of politics in sport; boycotts; and the ever-growing commercialisation of sport (now worth more than 3% of world trade) and its impact on sponsors and athletes - in particular, the complaint of many athletes that they have become "pawns in the commodification of the sports arena." The increasing financial gains enjoyed by elite athletes competing on the world stage of sport also raise significant national and transnational tax questions, which the author discusses.

There is also a very interesting Chapter on the institutional framework of international sports law and organisations, which, *inter alia*, looks at the important issue of the legal status and personality of the International Olympic Committee, described by the US Supreme Court as "a highly visible and influential international body."

This fascinating, thought-provoking and well researched Book is rounded off with a List of Olympic Sports Federations and their Abbreviations and a Table of Cases, as well as two very useful Appendices - one dealing with the US Amateur Sports Act, passed in 1978 and amended in 1998; and the other with the new China Sports Law, promulgated in 1995 and described as a "significant foundation" for the staging by Beijing of the Summer Olympics in 2008.

All in all, this is an excellent Book and one that I can wholeheartedly recommend to all those who, in any way, are involved and interested in international sport in all its fascinating and kaleidoscopic aspects and dimensions.

Ian Blackshaw

European Sports Law

A Comparative Analysis of the European and American Models of Sport

By Lars Halgreen

Forlaget Thomson A/S, Copenhagen, 2004, ISBN 87-619-0883-5

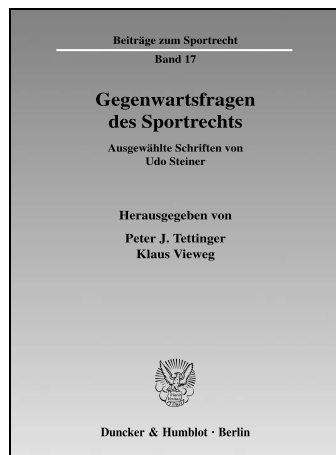
The latest addition to the sports law literature is Lars Halgreen's "European Sports Law" (432 pages). The author is a partner in a law firm in Copenhagen and is an associate professor in International Sports Law at the Copenhagen University. He is also a member of the Court of Arbitration for Sport. Consequently, the author is in a strong position to bridge the traditional divide in sports law writing between the practitioners on one side and the academics on the other.

The first chapter offers some definitional thoughts on what constitutes sport and sports law. It is now common place for "sports law" texts to justify the claim that such a jurisprudential category of law exists. Some authors offer empirical support for this claim whilst others attempt more theoretical justifications. This text leans on an empirical and comparative approach. In doing so the author lays down important methodological signposts particularly by suggesting that "*sports law could therefore qualify as a legal discipline in its own right provided considerations specific to the sporting community would lead to a result that would otherwise not likely be achieved outside the sporting community*". This approach suggests that if "sports law" exists (as opposed to "sport and the law"), then sport is considered "special"

by the courts and the legislators. Empirical observations can support or undermine this claim; yet without more analytical investigations into why sport is special and how such specificity entrenches itself in law, the initial observation quickly loses its force. I wonder whether a greater theoretical component within this otherwise fascinating text would have helped shed greater light on this challenging issue.

Chapter 2 establishes the methodology of the text by examining the question of specificity through a comparative analysis of EU and US sports law. This methodology is a very welcome addition to the European sports law literature as it broadens the very Europeanist approach which naturally dominates in Europe. With the US having already trodden much of the terrain currently under discussion in Europe, such a comparative approach has much to offer. It is in this context that the author establishes his central argument - that the concept of a European model of sport is increasingly an illusory one as the most professionalized sports have distanced themselves from it. This does not imply an Americanisation of sport in Europe (as is often suggested) as the business strategy of revenue sharing, deeply entrenched in the US, has failed to establish itself in Europe. By contrast, European sport is increasingly characterised by a "winner takes all" mentality. Consequently, European sport is stepping into an uncertain regulatory world in which European regulators are being

Beiträge zum Sportrecht



Band 17

Udo Steiner

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Hrsg. von Peter J. Tettinger / Klaus Vieweg

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■ Frank Oschütz

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(3-428-11608-9)

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asked (by sport and by politicians) to protect the European model against the encroachment of commercial forces. This requires a recognition that sport is indeed "special". Yet sport does not behave as if it were special and thus far the EU has not enshrined the concept of specificity within its Treaty. Furthermore, it is entirely possible that in seeking to protect the European model, the EU may be conceding too much ground to sport. The author thus implies that both parties have some work to do.

Chapter 3 reviews the sports law and policy developments in the EU to date, including an informative comparison of the European and American models of sport. The chapter briefly touches upon the new sports article contained in the Constitutional Treaty even though (through no fault of the author) an old draft of Article 182 is consulted. The new version includes reference to sports "specific nature" - an important addition and one which partly addresses the authors' concerns regarding the legal basis for the EU's interventions in sport.

The central arguments developed in chapter 2 are explored in greater detail in the remaining chapters of the book. Chapters 4 and 5 present a strong and comprehensive comparative analysis of US and EU competition law and labour mobility issues in sport. It is here that the author's arguments are given greatest empirical credence. Chapters 6-8 complete the substantive analysis of legal issues in sport by examining the regulation of sports agents (chapter 6), broadcasting rights (chapter 7) and intellectual property rights / sports marketing (chapter 8). Whilst very strong in their own right they remain a little detached from the author's central thesis which appears most applicable to competition law and labour mobility issues. Nevertheless, chapters 4-8 represent the heart of this text and should be considered essential reading for those interested in comparing the EU and US models of sport.

Chapter 9 offers some conclusions. Throughout the work, the author identifies a certain paradox at the heart of sports regulation in Europe. This is perhaps best illustrated in the European Commission's approach in applying the competition regime to sport. The author suggests that their approach, guided by adherence to a European model of sport has largely failed to recognise that high level professional in sport in Europe no longer resembles such a model. A gap has thus emerged between the rhetoric and the reality of the European model. This clearly has implications for the future of sports regulation in the EU. Whilst the author expresses deep concern about the direction European sport is taking, he does not appear sentimental about the possible passing of the European model of sport. Nor does he view the American model as an anathema. In fact, Europe has much to learn from the revenue sharing strategies that populate US sports. The difficulty lies in cherry picking the best features of the US model and transposing them into a very different European environment. Here

the author indicates that a compromise between the EU and sport could be struck in which the specificity of sport is afforded greater protection from EU law in return for a commitment from sport to behave in such a way as not to undermine the European model. The difficulty with this approach is twofold. First, is this offer within the gift of the EU? In other words does a sufficiently robust legal base exist within the Treaty which can safeguard the European model? Furthermore, one may see the EU's role as to merely supervise the choices made by sport and not to impose a governance regime upon it. Second, does there exist a unified sports community willing to respond to such an offer? In European football for instance, UEFA's redistribution strategies need to be sensitive to the wishes of the big clubs, many of whom have little to fear from European law. In fact, the further encroachment of law into sport can help many of these big players realise the full economic potential of the game.

The strengths of this work lie in the development of a coherent, accessible and well put argument supported by well selected empirical observations. Furthermore the EU/US comparative analysis sets this book apart from many of its contemporaries. Consequently this book adds to our understanding of sports law and it is for this reason that I thoroughly recommend this text to students of this relatively new and growing field. It is therefore somewhat surprising that having successfully argued that European scholars should look beyond the European arena, the author then locates many of his illustrative examples within the Danish context. This occasionally became distracting although generally it does not detract greatly from the work. The examples are well selected and benefit from undoubted expertise. The main criticism (if indeed it is such) is that the work lacks a sufficiently rigorous theoretical base. The author was well placed to fill this striking void in the sports law literature. His decision to concentrate purely on a comparative analysis of EU / US sports law, supported the development of a coherent line of reasoning, is perhaps understandable. After all, within sports law texts the theoretical chapters are all too frequently skipped over by readers thirsty only for the nuts and bolts of sports law. This text certainly quenches that thirst but leaves the more theoretical issues somewhat under-explored. If sports law is ever to establish itself as a mainstream and strong academic discipline, such analytical questions must come to the fore. Finally and rather frustratingly, the bibliography neglected to mention book publishers or journal page numbers.

Richard Parrish*

* Senior Lecturer in Law at Edge Hill College of Higher Education, Lancaster University, Preston, United Kingdom. He is the author of *Sports Law and Policy in the European Union*, Manchester University Press, 2003.

Grenzwerte im Doping - Naturwissenschaftliche Grundlagen und rechtliche Bedeutung

(Cut-off Limits in Doping - Foundations in Natural Science and their Legal Significance)

By Christian Paul

Beiträge zum Sportrecht, Band 14 (edited by Kristian Kühl, Peter J. Tettinger and Klaus Vieweg), Duncker & Humblot, Berlin 2004, pp. 358, ISBN 3-428-11299-7, ISSN 1435-7925

Cut-off limits for doping substances are often an important aspect in determining the future career of sportsmen and women. They constitute the dividing line between lawful and unlawful behaviour concerning doping. However, both the scientific basis for cut-off limits and their legal significance are often unclear. Contamination from products which are *prima facie* harmless may lead to positive doping results. The problem of cut-off limits is also regularly discussed in the media.

The use of cut-off limits in doping regulations only goes back about twenty years. In 1983 the first cut-off limit (concerning testosterone) was introduced in IOC regulations. From 1998 the amount of cut-off limits grew considerably. The cut-off limits which were used by the IOC were taken over by WADA, and several cut-off limits concerning alcohol were added.

In his book on cut-off limits in doping, Paul, who is a lawyer as well as a chemist, uses an interdisciplinary approach in examining the pertinent problems: he discusses the background of cut-off limits in doping both from the perspective of the natural sciences and from a legal perspective.

The book is divided into three parts. The first part deals with the scientific foundation for cut-off limits, while the second part discusses the legal basis of cut-off limits. The third and final part concerns

the legal appreciation of the cut-off limits system. Before examining the scientific basis for cut-off limits deriving from the natural sciences, Paul gives an overview of the present anti-doping regulations (the Olympic Movement Anti-Doping Code and WADA's World Anti Doping Code).

Paul starts his discussion of the scientific foundation for cut-off limits with a description of the behaviour of pharmaceuticals within the human body. This is followed by a detailed discussion of prohibited doping substances and doping substances with cut-off limits. Then, Paul deals with the analysis of doping and methods used during this analysis. Finally, the necessity of cut-off limits is discussed. In this context, Paul describes the problem of unintended contamination from food supplements and other contamination sources and the principle of 'strict liability' related to this issue.

The second part of the book deals with the legal basis of cut-off limits. This part starts with a general analysis of cut-off limits as a method of regulation. Paul describes other fields in which cut-off limits are used (environmental policy, food policy and alcohol and drug tests in road traffic regulations) and lists the different kinds of cut-off limits which are used. In this, he also examines the possibility of using what are known as effect-based cut-off limits (which are used in environmental policy and food policy) rather than normative or norm-based cut-off limits (like the ones used in doping controls). Effect-based cut-off limits focus on the useful effect of certain substances for the athlete.

Part two of the book continues with a discussion of cut-off limits as a model for regulating doping, with the idea of effect-based cut-off limits in mind. Finally, Paul deals with the contents of doping regulations and with judicial control by national tribunals and by the CAS.

Finally, Paul analyses the system of cut-off limits in doping from a legal perspective. First, he examines some general aspects of the legal system concerning cut-off limits and discusses the burden of proof in case an athlete tests positive in doping controls. He further discusses the appropriateness of doping prohibitions and the legal effects of doping regulations. Then Paul discusses the need for doping prohibitions from several perspectives (equality of chances, health protection and the image of the sport). Another aspect of a legal appreciation of the system of cut-off limits concerns the formal requirements for cut-off limits and possible problems with these limits. Finally, Paul discusses some alternative models for regulating sport.

Paul's interdisciplinary study is a unique and very useful contribution to the study of the law on doping.

*Hans Mojet**

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Arbitration in the America's Cup - The XXXI America's Cup Arbitration Panel and its Decisions

Henry Peter (Editor), September 2003, Kluwer Law International, The Hague, ISBN 9041121994, pp. 265, Price Euro 80 / GBP 56 / USD 90.40

With sport now a major global industry, it is not surprising that sports disputes are on the increase. And the question - quite naturally - arises: how best to resolve them? By traditional or modern means? Through the courts or by alternative dispute resolution (ADR)? Such as arbitration and mediation? ADR has proved to be an effective and relatively speedy and inexpensive method of settling disputes - especially international ones - in the commercial world. And it is also proving popular in the sporting world. Not least, because sports bodies and persons prefer to settle their differences without external interference - in other words, "within the family of sport".

This new Book is a welcome addition to the growing literature on sports disputes resolution by specialist sports bodies. The Book, edited by Professor Henry Peter of the Law Faculty of Geneva University, deals with the work of the Arbitration Panel (known as the "America's Cup Arbitration Panel" - "ACAP") set up to settle disputes arising out of the XXXI America's Cup covering the period 2000 - 2003. And contains all 22 decisions issued by the ACAP. These decisions cover a wide range of disputes from eligibility - whether the use of centreboards and sliding keels are allowed - to the legality of the transfer of technology from one syndicate (club) to another by the same designer. As a matter of principle, the decisions of the ACAP are published, subject to any restrictions on publication the ACAP may see fit to impose, for reasons of confidentiality or otherwise. None of the 22 decisions in the Book have been subject to any such restrictions.

The ACAP consists of five members, all of whom are or have been

active yacht racing sailors and are "known to be fair minded and possess good judgment."

Their decisions need not be unanimous, in which case, only the ACAP members supporting the decision sign it. All 22 decisions reported in the Book were, in fact, unanimous. The ACAP members are not paid, and the costs of the proceedings are usually borne equally by the parties in dispute.

The ACAP decisions are final. And, indeed, it is a specific condition of entry as a challenger in the America's Cup not to question the rulings of the ACAP in the ordinary courts. Incidentally, there is a similar provision in the Racing Rules of Sailing enacted by the International Sailing Federation. Although it appears that the ACAP rule has not yet been tested, in the reviewer's opinion, it is doubtful, in the case, for example, of any breach by the ACAP of the "rules of natural justice" in reaching their decision, whether this rule would preclude a request for judicial review by the courts. However, by specific exception, any disputes involving claims for property damage or personal injury may ultimately be referred to the courts.

Similar dispute resolution arrangements have been agreed and are in place for the XXXII America's Cup. And the Book usefully contains the provisions of the corresponding Protocol of 2 March 2003.

As the decisions of the ACAP are published, a useful body of law is being built up in the fascinating and sophisticated world of the America's Cup, and this can only be for the advantage of the competitors and the competition itself, which, since its inception in 1851, has been no stranger to controversy.

As I already said, this is an interesting and welcome Book.

Ian Blackshaw

Inside The Olympics: A Behind-the-Scenes Look at the Politics, the Scandals, and the Glory of the Games

By Richard W. Pound

John Wiley & Sons Canada Ltd, July 2004, pp. 288, price £16.99,

ISBN: 0-470-83454-4

This Book, subtitled "A behind-the-scenes look at the politics, the scandals, and the glory of the Games", largely lives up to its claims. Written by Dick Pound, a swimming Olympian and a senior member of the IOC, the author could, however, have been more forthcoming about his bitter disappointment of not succeeding Juan Antonio Samaranch as IOC President in 2001, losing to Dr Jacques Rogge and getting fewer votes than Kim Un Yong, the now discredited former IOC Vice President. However, Pound's consolation prize, as the first Chairman of the World Anti-Doping Agency (WADA), gives him a great deal of influence over the Olympic movement, as Rogge is absolutely determined to eradicate drugs from sport in general and the Games in particular. Thus, the 2004 Athens Summer Games, which produced quite a crop of drugs cheats, were probably the most drug-tested Games in Olympic history.

Running through the Book is the politics of the IOC - an unelected international body with a budget of some US\$ 7 billion. Pound deals with a number of scandals and controversial issues, including the 2002 Salt Lake City bribery scandal, which has been the subject of a recent BBC Panorama programme. This programme claimed that some IOC members' votes can still be bought by Host City Bidding Committees, despite the work of the Ethics Commission set up immediately following the Salt Lake City Games to stamp out corruption.

Needless to say, Pound also covers doping scandals - indeed the Book is dedicated to "athletes who play fair, to those who teach them, and to those who ensure the playing field is level". Pound considers that the single greatest danger facing sport today is the fight against doping. And it is this fight, he writes, that "distinguishes Olympic sport from entertainment sport and, if we do not pursue this fight and win the war, I do not believe that true sport can survive." And Pound has a lot to say too about the marketing - and the related broadcast-

ing of the Games - having set up the successful TOP Sponsorship Programme in 1985, with the help of Horst Dassler of ADIDAS and the founder of ISL, the former Swiss-based international sports marketing company.

In a chapter appropriately entitled, "Who Guards the Guards: Judging", Pound also covers the pairs figure skating judging fiasco of the 2002 Winter Games, as a result of which the International Skating Union, under pressure from the IOC, awarded a second set of gold medals to the Canadians along side the Russian gold medallists! Mention should also be made of the Chapter on "Playing Fair: Human Rights". According to Pound: "One of the principal objectives of the Olympic movement is a commitment to universality and the concept of human dignity, including freedom from all forms of discrimination, whether based on race, religion, color or gender." In this connection, he deals - at some length - with the South African apartheid regime, which kept South Africa out of the Games for more than thirty years from 1960. And includes a photograph of a smiling Nelson Mandela at the 1992 Barcelona Summer Games, which saw the return of South African athletes to the Games after their many years of sporting isolation.

Finally, the Book also deals with the threat of terrorism to the Games. And, in particular, the terrorist attack on the Israeli team at the 1972 Munich Olympics. As Pound remarks on this tragic event: "Within the Olympic world, the shock was comparable to that to be experienced by the rest of the world on September 11, twenty-nine years later." Securing the Games is now probably the biggest concern of the IOC and the organisers of the Games. Athens has spent a staggering US\$ 1.4 billion on security and other host cities in the future will face similar - if not bigger - bills.

This Book is full of insights and information. And anyone wishing to understand the Olympic movement and Olympism, which are easier to describe than to define, will not be disappointed. Apart from that, Dick Pound's Book is well written and most interesting to read. And one your reviewer can wholeheartedly recommend.

Ian Blackshaw

Enter the rough and tumble of today's sports world. At 3% of world trade, it's truly big business. A Graduate Certificate or Masters in Sports Law will give you the skills to become a key player in this exciting field. Sharpen your skills to negotiate player and sponsorship contracts and tackle the big issues like litigation, drug abuse, discrimination and club mismanagement. You'll gain unique qualifications from the only degree program of its kind linked to the prestigious TMC Asser Institute in The Hague. For more details contact Andy Gibson on +61 7 5552 8758 or email a.gibson@mailbox.gu.edu.au



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Publication of CAS Awards

(per June 2004)

*The International Council of Arbitration for Sport (ICAS) has given its consent to the publication of summaries of major and non-confidential Court of Arbitration for Sport (CAS) awards in specialised journals like The International Sports Law Journal (ISLJ), while CAS will keep on publishing its awards in its official Digest (Eds.).**

Arbitration CAS 2002/A/464 International Cycling Union (UCI) v. L., R., Federação Portuguesa de Ciclismo (FPC)
Award of 7 October 2003
(Translation)

Panel: Mr Bernard Foucher (France), President; Mr Olivier Carrard (Switzerland); Mr Alfredo Florez Plaza (Spain)

The Court of Arbitration for Sport (CAS) upheld the appeal filed by the International Cycling Union (UCI) against the decision of the Disciplinary Council of the Portuguese Cycling Federation (FPC) of 14 April 2003, which terminated proceedings against the rider L. and imposed a fine of CHF 3,000 against Dr R.

L. is an elite category professional cyclist. R. is his team's doctor. Between 9 and 16 March 2003, L. participated in the Paris-Nice cycle race, which is part of the UCI international calendar. On 14 March 2003, he underwent a doping test. The urine samples taken and analysed at the National Drug Screening Laboratory in Paris (Châtenay-Malabry) on 21 March 2003 showed the presence of betamethasone, a substance banned under certain conditions and belonging to the glucocorticosteroid class. In a letter of 4 April 2003, the UCI asked the FPC to instigate a disciplinary procedure against L. in accordance with Art. 66 et seq. of the AER. In a decision dated 14 April 2003, the FPC Disciplinary Council terminated proceedings against the rider and imposed a fine of CHF 3,000 against R., as well as a verbal warning, in accordance with Art. 128 AER. On 21 May 2003, the UCI appealed against this decision.

The decision taken reflected the fact that the rider was acting on good faith inasmuch as the treatment he had followed had been prescribed by a doctor and that he had not been given any specific order to declare it at the time of the doping test. Therefore, in compliance with Articles 8 and 64 AER, concerning medical justification and the exceptional circumstances in which failure to have something noted in the medical record may be excusable, R. was deemed entirely responsible for the positive test on the grounds that he must have been aware of the restrictions laid down in the UCI regulations.

The UCI disagreed with this argument, deeming the rider to be guilty not only of failing to mention the prescribed medication in his medical record, but also of failing to declare the treatment he was undergoing on the testing form, thus committing an offence under the terms of Art. 64.1 AER. The offence could not be disguised by the written statement submitted by Dr Matos on 7 April 2003 that medication had been prescribed for the treatment of eczema.

The UCI eventually called for the parties concerned to be punished in accordance with the AER. It explained its request to the Panel, demanding that the rider and R. be suspended for at least 6 months and one year respectively for doping and for contributing to the doping of a rider.

L. has always defended his use of diprosone to treat eczema on his scrotum, which was preventing him from sitting on the saddle. It was prescribed by Dr Matos, to whom he had been referred by his team doctor, R. He has consistently denied the allegation of cheating, blaming the failure to declare the treatment in his medical record on

a simple administrative error.

R. said he had acted correctly by referring the rider to a specialist. He also claimed that the failure to declare the treatment was due to an administrative error, aggravated by the absence of any mention of the medication on the testing form and the discrepancies between the relevant UCI and FPC rules.

The Panel considered that the doping offence was established simply on the ground that the rider had failed to meet the conditions required for medical justification, i.e. mention in the medical record of the prohibited substance and method of treatment: Art. 64.3 AER. The circumstances surrounding the offence (error, ignorance, etc.) must be disregarded at this level, since according to the UCI regulations, a rider who fails to have something noted in his medical record may be excused by the antidoping commission in exceptional circumstances, which are to be assessed at the discretion of the commission members (Art. 64.3 AER). The Panel may only take these elements into account in order to fix the sanction.

The Panel also thought that neither the rider nor the doctor could be exonerated on the grounds of negligence, a mistake by the team doctor or the administrative difficulties mentioned by the said doctor relating to the rider's medical record and the possibility of declaring the treatment concerned. The UCI regulations imposed a personal obligation of vigilance on both the rider and the doctor.

Finally, the Panel considered that the circumstances surrounding the offence showed that the rider had not deliberately committed a doping offence, since it was established that the rider had taken a prescribed medication in order to treat pain that was preventing him from riding. The Panel thought that, in light of the above, the rider could be granted mitigating circumstances under which the sanction could be reduced to one-quarter of the minimum laid down in Art. 130 AER, i.e. suspension for 6 months, in accordance with the provisions of Art. 124, 125, 130 AER. The Panel concluded that the team doctor could also be granted mitigating circumstances, bearing in mind that the product itself was not prohibited, but only its method of use, and fixed his suspension at one year.

Arbitration CAS 2003/A/503 B. v. Real Federacion Española de Ciclismo (RFEC), award of 8 October 2003
(Translation)

Panel: Mr Alfredo Florez Plaza, sole arbitrator (Spain)

The Court of Arbitration for Sport (CAS) upheld the appeal filed by the cyclist B. on 18 August 2003 against the decision of the Disciplinary Council of the Real Federation Española de Ciclismo (RFEC) of 18 July 2003, suspending the rider for one year and fining him CHF 2,000 for doping. The CAS also partially annulled the RFEC's decision concerning the applicable sanction.

B. is an elite category professional cyclist (category GS II). He is a member of the Portuguese sports organisation Milaneza/MSS.

Between 9 and 16 March 2003, B. participated in the Paris-Nice cycle race, which is part of the UCI international calendar.

During this race, he underwent a doping test. The urine samples taken and analysed at the National Drug Screening Laboratory in Paris (Châtenay-Malabry) showed the presence of betamethasone, a substance banned under certain conditions and belonging to the glucocorticosteroid class.

* See: Recueil des sentences du TAS / Digest of CAS Awards 1986-1998: II - 1998-2000; III - 2000-2003, Edité

par/Edited by Matthieu Reeb, Staempfli Editions SA Berne (1998: I) / Kluwer Law International (2002/2004: II/III).

In a decision dated 18 July 2003, the Disciplinary Council of the RFEC suspended the rider for one year and fined him CHF 2,000.

On 18 August 2003, B. appealed against this decision.

In its written decision, the Panel stated that:

- The doping offence in this case was established simply on the ground that the rider had failed to meet the conditions required, i.e. mention in the medical record of the prohibited substance and method of treatment: Art. 64.3 AER. The circumstances surrounding the offence (error, ignorance, etc.) must be disregarded at this level, since according to the UCI regulations, a rider who fails to have something noted in his medical record may be excused by the antidoping commission in exceptional circumstances, which are to be assessed at the discretion of the commission members (Art. 64.3 AER). The Panel may only take these elements into account in order to fix the sanction.
- The rider could not be exonerated on the grounds of negligence or a mistake by the prescribing doctor, since the UCI regulations imposed on him a personal obligation of vigilance. A professional rider could not therefore claim to be unaware of this warning, which forms an integral part of the AER.
- The circumstances surrounding the offence showed that the rider had not deliberately committed a doping offence, since it was established that the rider had taken a prescribed medication in order to treat pain caused by eczema on his scrotum that was preventing him from riding. The Panel thought that, in light of the above, the rider could be granted mitigating circumstances under which the sanction could be reduced to one-quarter of the minimum laid down in Art. 130 AER, i.e. suspension for 6 months, in accordance with the provisions of Art. 124, 125, 130 AER.

In conclusion, the Panel decided to partially annul the decision of the RFCE, suspending B. for 6 months.

Arbitration CAS 2003/A/505 Union Cycliste Internationale (UCI) v. P., USA Cycling Inc (USA Cycling) & United States Anti-Doping Agency (USADA), award of 19 December 2003

Panel: Prof. Michael Geistlinger (Austria), President; Mr Beat Hodler (Switzerland); Mrs Anita L. DeFrantz (USA)

The Court of Arbitration for Sport decided to uphold the appeal filed by the UCI on 21 August 2003 against the decision of the USADA acting on behalf of USA Cycling, which was taken by the USADA Anti-Doping Review Board on 29th May 2003 and 1st July 2003. In its Statement of Appeal UCI states that P.'s offence is proved and asks P. to be sanctioned.

On 28th March 2003 P. participated in the cycling race "Track World Cup Qualifier" in Hollywood, Florida, USA, a race that was included on the USA Cycling's national calendar. P. was drawn by lot for drug test.

On 9th April 2003 the IOC accredited UCLA Olympic Analytical Laboratory informed USADA by confidential letter that P.'s sample contained the IOC and UCI banned narcotic analgesic methadone. This result was confirmed by the analysis of the B sample.

By letter fax dated 10th July 2003 the Chief Executive Officer of the USADA informed USA Cycling, Inc., that the Panel of the USADA Anti-Doping Review held that P. had prior to her doping control and continued to have a "legitimate medical condition well documented by her physician that required her use of methadone." The Review Panel concluded that P.'s treating physician "acted within standards of medical care and in the interest of the health and safety of the athlete in administering methadone". The Review Panel considered P. having declared "the fact that she had administered two similar prescription medications and based on the evidence presented [...]" and found that P. did not "list methadone because she had not taken it in the preceding three (3) days as requested at the collection." The Review Panel further accepted that P. "would have sought a medical exemption for methadone if she had known about such a process ..." and that "such a request would

have been granted given her well documented medical condition". Based on Articles 8, 64 and 89 of the UCI Anti-doping Examination Regulations the Review Panel found "in this specific case of a narcotic [...] no doping violation occurred".

As a consequence no hearing was recommended by the USADA Anti-Doping Review Panel and the matter was neither followed on nor any sanction recommended.

The UCI Anti-Doping Services held that the USADA Anti-Doping Review Panel had wrongfully applied Articles 8, 64 and 89 of the UCI Anti-doping Examination Regulations.

On 21st August 2003 the UCI lodged an appeal against the decision of the USADA.

In its written decision, the Panel considered that:

- the presence of the prohibited substance of methadone in the body of P. is clear evidence that she committed a doping offence. It does not matter whether the substance of methadone can be considered a performance enhancing substance or not. It is also not relevant for this fact whether P. ingested any methadone in the three days prior to the event or during an unknown period before.
- Part I.B of Chapter "Examples and Explanations" of UCI Cycling Regulations lists methadone as a substance without any specification for medical treatment. Methadone, therefore, is not allowed to be used for medical treatment under the UCI AER. The Panel, therefore, finds that under art. 8 UCI AER P. was not allowed to use methadone for medical treatment and that there is no legal basis for any authority which has to apply the UCI AER of allowing her to use methadone for medical treatment. As a consequence the further dispositions of art. 8 UCI AER dealing with the burden of proof do not apply. The same goes for art. 64 UCI AER which is not applicable because P. was no rider authorised to use a banned substance and because she even could not be authorised to do so.
- considering the gravity of medical condition of P., the well-documented prescription of methadone as pain reliever in her condition, her advanced age and the specific circumstances of the aims why she participated at the Track World Cup in Hollywood, which obviously were more for fun and training as well as for physical well-being than for qualification or competition results, her role model for youths in the fight against doping in sports over years and her honesty and personal integrity, finds sufficient elements under art. 124 UCI AER to reduce the two-year duration of suspension to the minimum under art. 125 UCI AER, which is half a year.

Arbitration CAS 2003/A/510 A./Confederação Brasileira de Desportos Aquáticos (CBDA) & CAS 2003/A/514 Fédération Internationale de Natation (FINA) v. A., award of 15 January 2004

Panel: Mr Peter Leaver QC (United Kingdom), President; Prof. Dr Ulrich Haas (Germany); Dr François Carrard (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal of A. against a decision of the Confederação Brasileira de Desportos Aquáticos (CBDA) whereby A. was suspended for two years in accordance with the new FINA Doping Control Rules which came into force on the 11th September 2003.

A. competed in the Pan-American Games Swimming Trials on the first May 2003. Having achieved the qualifying time in a race she underwent a doping test. The test revealed the presence of three Prohibited Substances, namely, three anabolic steroids, stanozolol, nortestosterone and methytestosterone.

A. contends that the sample was not taken in accordance with the FINA Doping Control Rules, and, therefore, cannot be relied upon. It is asserted in A.'s statement of appeal that there was a failure to comply, in particular with Rule DC 8.1.3, in that when A. left the bathroom where she was standing to be able to complete the provision of the sample, first, to talk to her coach, and, secondly to get some water, the specimen bottle was not sealed. Alternatively, A. contends that the sample analysed was not her urine.

A. immediately applied to the Civil Chamber of the Rio de Janeiro High Court (the High Court) for relief against the suspension, and on the evening of the 15th September 2003 the High Court ordered that the suspension should be lifted.

A. filed an appeal against the CBDA decision with the CAS.

FINA supported the CBDA in its opposition to A.'s appeal and sought an order that the provisional suspension was in accordance with the anti-doping rules.

These two appeals arose out of the same basic facts. They have been heard together by the same Panel. Although they have been heard together, the Panel has considered each case separately, and has come to a decision on the facts of that appeal. For the sake of convenience and simplicity, the Panel has published one Award in relation to the two appeals.

In its written decision the Panel considered that the failures contended by A. would not invalidate the testing procedures, unless there was evidence that a person or persons had entered the bathroom during A.'s absences. Indeed, no submissions on this point were made to the Panel. As has been stated above, the evidence was that nobody had entered the bathroom while A. was talking to her coach and when she went to get some water.

Under the circumstances of the case, the Panel was left in no doubt that the chain of custody had not been broken. There was no evidence that there had been any break in the chain of custody at any time from the point at which A. provided the first part of the sample to the time when the containers were opened.

Accordingly, as there was no challenge to the analysis of the sample provided by A., and as that sample contained three Prohibited Substances, the Panel concluded that A. has committed a violation of FINA's Doping Control Rules for which the appropriate sanction is a suspension for 2 years from the 1st May 2003, the day upon which the sample was given which led to the finding of Prohibited Substances in A.'s urine.

Arbitration CAS 2003/A/490 Fédération Française d'Équitation (FFE) v. International Equestrian Federation (FEI), award of 5 February 2004
(Translation)

Panel: Mr Gérard Rasquin, President (Luxembourg); Prof. Jean-Pierre Karaquillo (France); Mr Denis Oswald (Switzerland)

The Court of Arbitration for Sport (CAS) dismissed the objection to jurisdiction raised by the International Equestrian Federation (FEI) and declared admissible the appeal filed by the Fédération Française d'Équitation (FFE). Ruling on the merits, the CAS dismissed this appeal against the decision of the Judicial Committee of the International Equestrian Federation (FEI) of 16 June 2003 confirming the Ground Jury's decision to disqualify a rider affiliated to the FFE, a decision which resulted in the demotion of the French team in the final standings at the World Singles Driving Championship.

At the World Singles Driving Championship held in Conty (France) from 28 August to 1 September 2002, following the cone competition, B., a French competitor, was placed first in the competition and France was the top-ranked team. Approximately one and a half hours after the results were declared, the Ground Jury, following protests from several Chefs d'Equipe, viewed a video tape of the event which, in its opinion, showed that the French competitor's groom had, in contravention of Article 965.16.1 of the Rules for Driving Events, interfered in the course by using the reins before the leader had crossed the finish line. It therefore decided, referring to Article 965.16.1, to eliminate B. and, consequently, to demote the French team.

Responding to the announcement by the FEI on 25 June 2003 that the FFE's appeal against the Ground Jury's decision was inadmissible under the terms of Articles 170.2.1 and 163.6.1 GR, the FFE appealed to the CAS.

The FEI then challenged the jurisdiction of the CAS which, under Articles 163.6, 163-6.1, 170.2, 170-2.1 GR and Article 059 of the FEI

Statutes, had no jurisdiction to hear an appeal against a Ground Jury decision, since such decisions could not be appealed before the FEI Appeal Committee.

The Panel considered that the Ground Jury's decision to amend the competition result by eliminating B. was, in principle, not subject to appeal under the terms of the FEI rules. However, such a decision could, exceptionally, be appealed if it was taken in unfair, arbitrary procedural conditions contrary to the general principles of the law.

In this case, the Ground Jury, in taking the decision to impose the sanction, had ignored the fundamental right to a fair hearing. In such circumstances, an appeal was justifiable.

The Panel thought that the Judicial Committee's decision adopted on 16 June 2003 and communicated to the FFE on 25 June 2003 was ambiguous. However, it could be appealed against since it reinforced and confirmed the Ground Jury's decision to disqualify a competitor. The CAS therefore had jurisdiction to hear the appeal.

Although, according to Art. R57 of the Code, the Panel in an appeal procedure has full power to review the facts and the law, it is true that the CAS has always exercised its powers with a degree of restraint in relation to decisions of a technical nature. However, that restraint which the CAS must show with regard to technical decisions is not necessary if the decision concerned was unfair, clearly erroneous, unlawful or contrary to the general principles of the law. In the present case, the competitor admitted that the groom had committed a punishable act according to the Rules for Driving Events which applied at the time. It is not the Panel's task to determine the consequences of such an act as set out in the rules. That was the Ground Jury's responsibility.

The Panel therefore dismissed the FFE's appeal, since the latter had failed to prove that the FEI had interpreted and applied a technical provision of its Rules for Driving Events in a clearly incorrect or improper manner.

Arbitration CAS 2003/A/507 S. v. Fédération Internationale de Natation (FINA), award of 9 February 2004

Panel: Prof. Dr. Ulrich Haas (Germany), President; Prof. Richard H. McLaren (Canada); Dr. Denis Oswald (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by S. against the decision of the FINA Doping Panel dated 15 July 2003 whereby the Appellant has been suspended for two years according to the new FINA Doping Control Rules.

On 26 March 2002, the Appellant underwent an out-of-competition doping test organised by FINA which revealed the presence of human chorionic gonadotropin ("hCG") in a concentration exceeding the range of values normally found in males. Appendix B, Section I C of FINA's Doping Control Rules in force at that time ("DC Rules 2002") provide that the presence of an abnormal concentration of hCG in the urine of a competitor constitutes a doping offence unless it has been proven to be due to a physiological or pathological condition.

After receiving the result of the A-sample of the March 26 Test, FINA's Executive consulted FINA's Doping Control Review Board ("DCRB"), which recommended

"1. These results constitute 'an adverse analytical finding' not necessarily a positive doping violation. In order to further investigate the case, the DCRB would like additional laboratory information, specifically the testosterone and epitestosterone concentrations of the A-sample.

On 11 July 2002 and 22 July 2002 the Appellant underwent two further out-of-competition tests. The analysis of the 11 July 2002 sample provided a negative result. The sample of the 22 July 2002 test provided a positive result. The analysis report stated that the integrity of the sample at reception was correct and that the sample showed "the presence of an abnormally elevated concentration of chorionic gonadotrophin (β -hCG)".

The FINA DP issued its decision on the day of the hearing (15 July

2003) and imposed a suspension of four years on the Appellant, starting 27 November 2002 and expiring on 26 November 2006. On 8 October 2003 the Appellant was informed by the Respondent that his suspension would be reduced to a period of two years (expiring 26 November 2004) as a result of the new DC rules ("DC Rules 2003") coming into force on 11 September 2003.

On 11 August 2003 the Appellant filed a Statement of Appeal with the CAS against the decision issued by the FINA DP on 15 July 2003.

The hearing took place in Lausanne, Switzerland on 16 December 2003 at the office of the CAS.

The Appellant alleged that FINA cannot meet its burden of proof that an anti-doping violation has been committed. The Appellant alleged that FINA's failure to present the results of the March 26 Test violated FINA's DC Rules, CAS jurisprudence and general principles of law. The Appellant alleges that this failure results in FINA failing to meet its required burden of proof to establish that the Appellant has committed a doping offence.

The Appellant also alleged that the Respondent could not meet its burden of proof in respect of the integrity and validity of the laboratory testing results.

The Appellant argued that FINA DC 10.3 (DC Rules 2003) should apply instead of the automatic suspension under FINA DC 10.2 (DC Rules 2003) because there was no scientific data regarding the performance enhancing effect of hCG itself, its ability to stimulate the endogenous production of testosterone or its capacity as a masking agent. It has been argued that hCG falls within the list of prohibited substances "which are less likely to be successfully abused as doping agents". Therefore, the Respondent should have applied DC 10.3 (DC Rules 2003) and warned or reprimanded the Appellant, with no period of ineligibility from future competitions.

The Respondent asserted that the Respondent met the burden of proof that an anti-doping violation has occurred. The doping control test of 22 July 2002 resulted in the positive A and B-sample analysis. All the elements necessary to properly establish a doping offence were present: The Respondent argued that hCG is clearly set on the Prohibited List as a "regular" fully prohibited substance. Therefore, DC 10.3 (DC Rules 2003) could not be applicable in this case.

In its written decision, the Panel considered that:

Not only was the prescribed screening and confirmation procedure complied with by the laboratory in charge of the testing, there was also no derogation from the recommendations of the IOC Medical Commission as regards reporting results.

According to the list of Prohibited Substances in Appendix B, Section I C (DC Rules 2002), hCG is a substance that is also prohibited "out-of-competition". The Appendix does not state a precise threshold for a positive test. It requires "the presence of an abnormal concentration". However, by way of an exception, an abnormal concentration does not constitute a doping offence if it "has been proven to be due to a physiological or pathological condition". The Appellant himself rules out the possibility of his hCG values being increased due to a physiological or pathological condition. The values measured in the Appellant's case still exceed 20 mIU/ml. It is therefore beyond any doubt that the values measured in the Appellant's urine are completely outside the values normally found in the male population. The Respondent was therefore right to draw the conclusion that the values measured in the Appellant's urine are "abnormal" for the purposes of Appendix B Section I C.

The *lex mitior* principle applies in this case. The DC Rules which are more favourable sanctions for the Athlete must be applied in this case. Therefore, the sanctions under DC Rules 2003 will be applied in this case, as they are more favourable to the Athlete than those in DC Rules 2002 which provide for a four (4) year suspension. Under DC 10.2 (DC Rules 2003), the penalty for a first anti-doping violation is two (2) years of ineligibility.

Arbitration CAS 2003/A/522 C. v. La Royale Ligue Vélocipédique Belge (RLVB), award of 5 March 2004
(Translation)

Panel: Mr Gérard Rasquin, President (Luxembourg); Mr Guido De Croock (Belgium); Mr Olivier Carrard (Switzerland)

The Court of Arbitration for Sport (CAS) declared admissible the appeal filed by Belgian amateur cyclist C. against the decision of the RLVB of 22 October 2003, suspending him for the use of ephedrine. The CAS partially upheld the appeal, annulled the decision and reduced the sanction against the claimant.

C. tested positive for ephedrine on 25 June 2003 following a race for elite amateur riders held in Bazel (Belgium). Ephedrine is a stimulant prohibited under the Antidoping Examination Regulations (AER) of the International Cycling Union (UCI) and by the Ministry of the Flemish-speaking Community.

In a letter dated 16 September 2003, the rider was summoned by the federal prosecutor to appear on 1 October 2003 before the RLVB Disciplinary Commission. Following the proceedings, in which he was given the opportunity to speak, he was sentenced to a 24-month suspension, with nine months deferred for three years from 1 February 2004, and a fine of CHF 750.

On 17 November 2003, he appealed to the Court of Arbitration for Sport (CAS), asking for the sanction to be deferred.

The claimant argued in particular that Art. 129.1 AER provided for a suspension of between one and six months, but stated that a warning could be issued instead if it was demonstrated that the offence was caused by simple inattention. He said that the medical certificates he had produced proved that he had been prescribed the ephedrine-based medicines for purely therapeutic reasons. Consequently, he should simply be given a warning. In conclusion, the claimant argued that, as a result of the disputed decision, he had suffered pecuniary and non-pecuniary damage and asked the RLVB to contribute CHF 6,000 towards his costs.

The RLVB, for its part, stressed that, under the terms of Art. 8 and 64 AER, which governed the question of medical treatment, no prohibited substance could, in principle, be used; however, in exceptional circumstances where such use was authorised, the burden of proof of medical treatment and use for the needs of such treatment lay with the rider. It should be proved that such medical justification existed and that the use of the substance occurred to this end and prior to the test. A rider who had used a prohibited substance, but who was authorised to do so under the conditions specified had to indicate the fact on the testing form or risked a fine. Ephedrine, a stimulant prohibited by the Flemish-speaking Community as well as by the UCI at concentrations of more than 10 mg/ml, was not on the list of products authorised in cases of medical justification. In any case, the fact that a rider did not know he was taking a prohibited substance certainly did not mean he had not breached the antidoping regulations.

In its written decision, the Panel considered that:

- the rider had decided to take medication with the tacit approval of his doctors, but failed to indicate this on the testing form, although he admitted at the hearing that he had taken the medicines concerned.
- Art. 7 of the Antidoping Examination Regulations (AER) of the International Cycling Union (UCI) stated that it was the responsibility of every rider to ensure that they did not use any prohibited substance or prohibited method. The claimant did breach this provision. The use of high doses of ephedrine, which was considered a "soft" substance and was allowed under the AER if the concentration found in the urine did not exceed 10 mg/ml (the concentration detected in the antidoping analysis in question was higher than 20 mg/ml), to treat problems with the senses of taste and smell following brain injuries caused by a fall, constituted a much more serious error than simple inattention and amounted to the offence of intentional doping in the sense of Art. 129.2 AER.
- Art. 129.2 AER punished intentional doping with a suspension of between two and eight years. However, under Art. 124 and 125, it was possible to take into account all the specific aspects of the case, in particular the gravity of the consequences of the penalty for the social, sporting and economic position of the rider, and to reduce the sanction below the minimum, as long as it was not reduced to less than one-

quarter of the minimum laid down (6 months). In this case, the rider was nearing the end of his career and was not part of a team. Moreover, it was established that he had been suffering from problems with his senses of taste and smell, against which the medicines concerned had a certain degree of effect, even if he had clearly misused them.

- Consequently, the Panel imposed a suspension of one year, with six months deferred for a period of three years.

Arbitration CAS 2003/A/521 P. v. Royale Ligue Vélocipédique Belge (RLVB), award of 18 March 2004
(Translation)

Panel: Mr André Gossin, President (Switzerland); Mr Olivier Carrard (Switzerland); Mr Lucas Anderes (Switzerland)

The Court of Arbitration for Sport (CAS) declared admissible and partially upheld the appeal filed by Belgian amateur cyclist P. against the decision of the RLVB Disciplinary Commission of 29.10.03, suspending him for 24 months, including nine months deferred for three years, under the terms in particular of Article 130 para. 2 of the Antidoping Examination Regulations (AER) of the International Cycling Union (UCI).

The suspension was imposed after a drug test taken on 11 June 2003 during a race for elite amateur riders in Oosterzele (Belgium). The analysis carried out by the laboratory of the Merelbeke veterinary faculty (Belgium) showed the presence of corticosteroids, specifically betamethasone. This product appears on the list of banned substances of the UCI and the Ministry of the Flemish-speaking Community.

On 28 November 2003, P. filed an appeal with the CAS, which he explained in a statement submitted on 8 December 2003.

In his appeal of 28 November 2003, P. argued, in substance, that he had been seriously injured in a road accident on 27 July 2002, causing him to be unfit to work for a long period. Since the accident, he had continued to suffer pain in his right shoulder. Following a serious inflammation of his right shoulder during the competition period, his doctor had prescribed him Diprophos. He concluded that the disputed decision should be annulled and all sanctions lifted, or at least reduced to the absolute minimum and, if possible, deferred, with costs to be paid by the respondent.

For its part, the RLVB submitted its reply on 29 December 2003,

concluding that the appeal was admissible but that it should be dismissed on the merits. Essentially, it had decided that this was a case of intentional doping under the terms of the regulations of the Flemish-speaking Community and of the UCI. It stressed in particular that medical justification should have been provided before the drug test was taken.

In its written decision, the Panel considered that a prohibited substance, betamethasone, had been found in P.'s urine. Its presence constituted an objective doping offence. The rider did not mention during the drug test that he had taken this substance. However, the rider's claim, not made until after the test, that the prohibited substance had been prescribed by his doctor following an accident was plausible. The Panel therefore decided that the medical justification was sufficient to take into consideration the claimant's good faith. Moreover, bearing in mind the medical circumstances involved, the Panel thought that the doping offence did not constitute gross negligence in the sense of Art. 1 AER and that this was not a case of intentional doping.

The Panel also thought that P. could be granted mitigating circumstances in view of the fact that the product in question was not itself prohibited, but only in accordance with the way it was used and its medical justification. There was good reason to take into account the circumstances in which the offence had been committed, since the rider had plausibly argued that the betamethasone had been medically prescribed in order to alleviate pain caused by a shoulder injury which had particularly resulted in 50% work disablement from 16 to 30 September 2002, then 25% from 1 October 2002 to 2 March 2003, then 5% since 3 March 2003.

Finally, the Panel considered that, under the terms of Article 126 AER, deferment could be granted for the part of the suspension exceeding the minimum duration imposed under these regulations, where appropriate following application of a reduction under Article 125 AER. The Panel thought the suspension should be fixed at 24 months (Art. 130 para. 1 AER), with 15 months deferred (Art. 124, 125, 126, 130 para. 1 AER), bearing in mind the above, as well as the consequences for the athlete's career in view of his age, the medical circumstances of the case and the personal situation of the rider, who was not a professional cyclist. The Panel also decided not to fine the rider, since he was an amateur cyclist who, as a manual worker, was likely to have only a small income.

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